Application of Physical Ability Testing to Current Workforce of Transit Employees

DETAILS

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AUTHORS

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APPLICATION OF PHYSICAL ABILITY TESTING TO CURRENT WORKFORCE OF TRANSIT EMPLOYEES

This report was prepared under TCRP Project J-5, "Legal Aspects of Transit and Intermodal Transportation Programs," for which the Transportation Research Board is the agency coordinating the research. The report was prepared by Jocelyn K. Waite, Waite & Associates. James B. McDaniel, TRB Counsel for Legal Research Projects, was the principal investigator and content editor.

The Problem and Its Solution

The nation's 6,000 plus transit agencies need to have access to a program that can provide authoritatively researched, specific, limited-scope studies of legal issues and problems having national significance and application to their business. Some transit programs involve legal problems and issues that are not shared with other modes; as, for example, compliance with transit-equipment and operations guidelines, FTA financing initiatives, private-sector programs, and labor or environmental standards relating to transit operations. Also, much of the information that is needed by transit attorneys to address legal concerns is scattered and fragmented. Consequently, it would be helpful to the transit lawyer to have well-resourced and well-documented reports on specific legal topics available to the transit legal community.

The *Legal Research Digests* (LRDs) are developed to assist transit attorneys in dealing with the myriad of initiatives and problems associated with transit start-up and operations, as well as with day-to-day legal work. The LRDs address such issues as eminent domain, civil rights, constitutional rights, contracting, environmental concerns, labor, procurement, risk management, security, tort liability, and zoning. The transit legal research, when conducted through the TRB's legal studies process, either collects primary data that generally are not available elsewhere or performs analysis of existing literature.

Applications

Physical assessments are accepted as a prerequisite to employment in the transit industry, particularly for safety-sensitive job positions. Such assessments routinely include vision and hearing tests for employees required to hold a commercial driver's license (CDL), drug and alcohol testing as mandated by federal regulations, and hearing and spirometry tests required to meet health and safety standards. Transit employees' ability to perform physical portions of essential job functions may also be assessed through physical ability testing. Moreover, transit agencies may have concerns about their employees' health and overall physical fitness as those factors affect productivity, health care costs, and workers' compensation costs, which may lead transit agencies to consider imposing lifestyle restrictions related to employee weight and off-duty use of tobacco, including instituting physical testing to measure compliance with those restrictions. Finally, employers may wish to require assessments of physical ability when employees return to work after an injury or prolonged absence.

The purpose of this report is to address the legal ramifications of instituting physical ability testing, and of exceeding government requirements related to physical ability (such as visual acuity requirements for a CDL). The report also addresses the relationship between such testing and medical inquiries and examinations. Legal issues discussed include Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, the Age Discrimination in Employment Act, the Family and Medical Leave Act of 1993, and related state requirements.

This report should be useful to transit administrators, human resources officials, labor officials, unions, employee relations specialists, employees, policy makers, and others.

TRANSPORTATION RESEARCH BOARD
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APPLICATION OF PHYSICAL ABILITY TESTING TO CURRENT WORKFORCE OF TRANSIT EMPLOYEES

By Jocelyn K. Waite
Waite & Associates, Reno, Nevada

I. INTRODUCTION

A. Statement of the Problem

Physical assessments are accepted as a prerequisite to employment in the transit industry, particularly for safety-sensitive job positions. Such assessments routinely include vision and hearing tests for employees required to hold a commercial driver's license (CDL), drug and alcohol testing as mandated by federal regulations, and hearing and spirometry tests required to meet health and safety standards. Less routine perhaps are physical agility and work tests—whether to assess compliance with federal standards or meet the requirements of a given job description—akin to those commonly required for law enforcement officers and firefighters, and tests to measure an employee's ability to perform movements required to carry out essential job functions. In addition, concerns about employee health may lead transit agencies to consider imposing lifestyle restrictions related to employee weight and off-duty use of tobacco, including instituting physical testing to measure compliance with those restrictions. Finally, employers may wish to require assessments of physical ability, either through inquiries or actual testing, when employees return to work after an injury or prolonged absence.

Any tests conducted to assess physical ability—as well as inquiries related to physical ability—are subject to limitations under federal and state law; violations of those requirements may result in liability under civil rights and nondiscrimination statutes. Testing policies must be structured to take such requirements into account.

1. Purpose

Developing a physical ability testing[1] policy requires determining whether to test job applicants, incumbent employees, or both; which positions to include under the testing policy; which abilities to test in covered positions; whether to utilize work sample tests or tests that measure the ability to perform required physical movements, based on job analysis of required movements; whether to test broadly for the physical ability to carry out essential functions of the job or to focus on the physical ability to perform particular essential maneuvers that have been tied to workplace injuries; whether to test general physical fitness; and whether to set standards that exceed those that are required under federal regulations or to extend required standards to employees not covered by federal regulations. These issues arise in both a legal context and an operational context. This digest addresses the legal context.

The digest is meant to provide transit agencies with a solid foundation for conducting more jurisdiction-specific research and analyzing the legal risks and benefits of various approaches to physical ability testing. The digest also provides examples of physical ability testing, reported by transit agencies to the author or described in secondary sources, that may be of particular interest given the apparent absence of industry-wide efforts to develop physical ability testing standards.[2] The intent is to allow other transit agencies to apply the legal principles identified in the report to assess the benefits and costs of instituting such testing, based on the transit agencies' own legal analysis and operational considerations.

[1] The term "physical ability testing" is used in this report to refer to any testing that purports to measure an individual's ability to perform the essential physical requirements of a job. The term is meant to incorporate both physical agility/work tests (which the EEOC considers to measure the individual's ability to perform actual or simulated job tasks) and physical fitness tests (which the EEOC considers to measure an individual's performance of physical tasks such as running or lifting), as well as tests designed to test an individual's ability to carry out discrete physical requirements as measured by a job analysis of essential functions of the job. This definition differs from the terminology of some industrial medicine professionals. *See e.g.*, Andrew S. Jackson, *Types of Physical Performance Tests, in* THE PROCESS OF PHYSICAL FITNESS STANDARDS DEVELOPMENT 101–02 (Stefan Constable, Barbara Palmer eds., 2000), www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA495349&Location=U2&doc=GetTRDoc.pdf (accessed Oct. 27, 2009) (referring to "physical ability tests" as measuring "basic fitness components of aerobic capacity, body composition, strength, muscular endurance, and flexibility" to evaluate the individual's capacity to perform demanding work tasks and their physical fitness, and to "work sample tests" as evaluating the individual's ability to perform specific work tasks).

[2] *Cf.*, Efforts of firefighter associations to develop physical ability standards. *See* I.B.2., *Examples of Physical Ability Testing*, *infra* this digest.

2. Focus

The balance of the Introduction presents background information concerning the reasons for conducting physical assessments—such as testing an applicant or employee's physical ability to perform a specific job task, testing for drug use, or testing visual acuity—and describes examples of physical ability testing conducted by law enforcement and fire departments, nontransit commercial drivers, and non-transit maintenance workers. Section II of the digest reviews statutory and regulatory requirements that relate to physical assessments of transit employees, including drug and alcohol testing requirements, CDL medical requirements, occupational safety and health requirements, and requirements for school bus drivers. Section III then examines legal restrictions on physical ability testing, including prohibitions on discrimination in employment based on race, gender, age, and disability; medical leave requirements; and constitutional limitations on government-mandated searches. Section IV reviews tort and workers' compensation liability for injuries suffered during physical ability tests, as well as the legal ramifications of lifestyle restrictions on obesity and off-duty use of tobacco. Section V of the digest summarizes highlights of responses to the study questionnaire and describes several specific examples of physical ability testing in the transit industry. Finally, while it is beyond the scope of this report to render a legal opinion or recommend a specific physical ability testing policy, section VI does examine issues to be considered in structuring a physical ability testing policy. The report includes citations to state family and medical leave statutes (Appendix A); a list of state equal employment opportunity statutes, regulations, and agencies (Appendix B); and a list of the transit agencies that responded to the report questionnaire (Appendix C). As is the case throughout the report, links to citations are provided for convenience; transit agencies should verify statutory language from official sources.

3. Scope

The legal ramifications of employment testing are extensive, and in their entirety are beyond the scope of the report. The report addresses or references relevant federal statutes and cases to the extent that they affect physical ability testing, as well as examples of state authority that advances or differs from federal law. As with all such reviews, however, the report provides a starting point for, not the final word on, legal evaluation of a specific policy in a given jurisdiction, particularly in terms of state authority. The report does not cover all state statutes and cases. In evaluating the legality of a physical ability testing policy in a specific jurisdiction, further research is advisable.

A number of ancillary issues are discussed briefly, including the ramifications of test results, such as reinstatement following drug tests; the need for operational guidance on how to devise and administer tests; the ramifications of collective bargaining agreements;[3] CDL requirements for diabetes and epilepsy;[4] and fitness for duty certifications required after returning from sick leave and after injuries.[5] Issues beyond the scope of the digest include mental health testing, medical status due to medications,[6] medical testing for common acute or chronic infectious diseases, requirements for nonoperational personnel (office personnel), and operational guidance on devising and administering physical ability tests.[7] An analysis of requirements for process and litigation issues applying to all cases brought under federal statutes, such as standards for awarding back pay, is also beyond the scope of the digest.

B. Background

This section describes several discrete reasons for conducting testing of physical ability, such as testing an applicant or employee's ability to perform physical tasks; physical status, such as drug and alcohol use, tobacco use, or body weight; and physical capacity, such as vision. Also discussed are examples of physical ability testing that are relevant either because the category of testing is sufficiently well-established to have developed legal principles that would apply to transit testing, or because the testing occurs in job categories analogous to transit job categories.

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[3] *E.g.* In the Matter of New Jersey Transit Corporation, P.E.R.C. No. 2007-63, May 31, 2007 (labor dispute arising from fitness for duty issues), www.perc.state.nj.us/perc decisions.nsf/IssuedDecisions/7804E54E7B44EE64852572ED 007136B9/$File/PERC%202007%2063.pdf?OpenElement; Metro/King County New Sick Leave Agreement (agreement covers medical verification of sick leave, including self-verification), www.atu587.com/documents/PDFofSickleave letter.pdf.

[4] FMCSA standards generally provide that a person is physically fit to drive a commercial motor vehicle if the person "has no established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin for control" (49 C.F.R. 391.41(b)(3)) and "has no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause the loss of consciousness, or any loss of ability to control a commercial motor vehicle." (49 C.F.R. 391.41(b)(8)). However, based on 49 U.S.C. 31315 and 31136(e), FMCSA has an exemption procedure for persons with insulin-treated diabetes (70 Fed. Reg. 67777, Nov. 8, 2005) and epilepsy.

[5] *E.g.,* Martin v. Town of Westport, 329 F. Supp. 2d 318 (D. Conn. 2004).

[6] *E.g.*, Giordano v. City of N.Y., 274 F.3d 740 (2d Cir. 2001) (police officer recommended for retirement because of required use of anticoagulant); Burton v. Metro. Transp. Auth., 244 F. Supp. 2d 252 (S.D.N.Y. 2003) (employee deemed not qualified as bus driver because of use of anticoagulant).

[7] For a thorough discussion of conducting a physical demands analysis in order to develop physical ability tests, *see* Mark Rayson, *Job Analysis, in* THE PROCESS OF PHYSICAL FITNESS STANDARDS DEVELOPMENT (Stefan Constable, Barbara Palmer eds., 2000), www.dtic.mil/cgi-bin/GetTRDoc?AD= ADA495349&Location=U2&doc=GetTRDoc.pdf (accessed Oct. 27, 2009).

1. Reasons for Physical Testing

The use of employment testing to make decisions about employee selection and promotion is widespread and increasing.[8] Clearly it is important that employees be physically fit for their jobs: it is important that employees be able to safely carry out specific physical requirements.[9] Thus, employers conduct various types of physical ability tests to ensure that employees have sufficient strength to safely perform required job tasks. In the case of the transit industry, such testing may serve to provide a higher level of safety to the employees and members of the public and to reduce on-the-job injuries and their attendant costs, both in terms of productivity and workers' compensation costs.[10] Depending on the job in question, physical abilities tested for transit positions may include grasping strength, lifting strength, eye/foot coordination, and manual dexterity. Generally the physical ability to perform essential functions of the job is tested with physical agility tests or work sample tests. The most significant advantage of a test that replicates work tasks is the high content validity of the test. However, depending on the work tasks, such tests may be expensive to create and may pose safety issues.[11] In addition to preemployment testing, employers may wish to assess functional capacity when employees return to work following illness or injury.[12] Generally fitness for duty after an illness or accident, whether work-related or not, is determined by medical certification,[13] but can be the subject of physical ability testing.

In addition to testing to ensure that employees are physically able to perform essential job functions, physical testing in the transit industry may be required to assess whether employees meet legally specified standards, such as requirements specified by departments of transportation for visual acuity, color blindness, and night vision; for absence of substance abuse;[14] or to assess whether health and safety standards are being complied with, such as when employees are required to use respiratory devices, when they are ex-

[8] EEOC Commission Meeting of May 16, 2007, www.eeoc.gov/abouteeoc/meetings/5-16-07/transcript.html. For example, there has been an increase in employee testing as a way to screen the high volume of responses to online applications in a nonsubjective way. EEOC, Employment Tests and Selection Procedures, www.eeoc.gov/policy/docs/factemployment_procedures.html. Testing has also increased due to security concerns, but it is unlikely that physical ability testing has increased for that reason.

[9] For example, a bus driver can be expected to have the following physical abilities:

- *Near Vision*—The ability to see details at close range (within a few feet of the observer).
- *Depth Perception*—The ability to judge which of several objects is closer or farther away from you, or to judge the distance between you and an object.
- *Far Vision*— The ability to see details at a distance.
- *Reaction Time*—The ability to quickly respond (with the hand, finger, or foot) to a signal (sound, light, picture) when it appears.
- *Response Orientation*—The ability to choose quickly between two or more movements in response to two or more different signals (lights, sounds, pictures). It includes the speed with which the correct response is started with the hand, foot, or other body part.
- *Spatial Orientation*—The ability to know your location in relation to the environment or to know where other objects are in relation to you.
- *Night Vision*—The ability to see under low light conditions.

Occupational Information Network, Summary Report for: 53-3021.00–Bus Drivers, Transit and Intercity, http://online.onetcenter.org/link/summary/53-3021.00#Abilities.

[10] *E.g.*, Thomas B. Gilliam, Gary Kohn, Suzanne J. Lund, & Maggie Hoffman, *Physical Ability Tests: Injury Reduction in Airline Workers Through a New Hire Physical Capability Screening Program*, Presented to Annual Meeting of the American College of Sports Medicine, May 31, 2002, St. Louis, Mo., http://ipcs-inc.com/uploads/ACSM%20Speech-UAL-02-combined.pdf. A plethora of companies offer various testing services on the premise that the use of their testing services will lead to hiring employees with the physical capability to perform required job tasks, thereby reducing workplace injuries. *E.g.,* www.med-tox.com/quicktest.htm. Neither the author nor the Transportation Research Board (TRB) in any way endorses this nor any other commercial source cited as an example of available resources, nor their approaches to testing.

[11] Jackson, supra note 1, at 121–22, www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA495349&Location=U2&doc=GetTRDoc.pdf (accessed Oct. 27, 2009). Content validity is discussed in III.A.1, *Title VII*, *infra* this digest.

[12] A PRACTICAL APPROACH TO OCCUPATIONAL AND ENVIRONMENTAL MEDICINE 5 (Robert J. McCunney, ed., 3d ed. 2003). *See also* American Physical Therapy Association, Occupational Health Guidelines: Evaluating Functional Capacity, www.apta.org/AM/Template.cfm?Section=Policies_and_Bylaws&Template=/CM/ContentDisplay.cfm&ContentID=62842 (accessed Oct. 27, 2009); Division of Workers' Compensation, Rhode Island Department of Labor and Training, Donley Center Functional Capacity Evaluations, www.dlt.state.ri.us/donley/fce.htm (accessed Oct. 27, 2009).

[13] *E.g.,* Spokane Transit Authority Family and Medical Leave Policy, at 6, www.spokanetransit.com/employment/documents/FMLA_Policy_2003.pdf.

[14] Although percentages appear to have peaked, large numbers of private employers still require drug testing of job applicants and employees as a matter of company policy. Diane Cadrain, *Drug Testing Falls Out of Employers' Favor*, HR MAGAZINE, June 2006, at 38, http://findarticles.com/p/articles/mi_m3495/is_6_51/ai_n26909315/ (accessed Oct. 26, 2009). The American Management Association found that drug testing peaked at 81 percent in 1986, and declined steadily to 62 percent in 2004. *Id.* at 39. Questions have been raised about the effectiveness of drug testing. Lewis L. Maltby, *Drug Testing: A Bad Investment*, Sept. 1999, www.workrights.org/issue_drugtest/dt_drugtesting.pdf (accessed Oct. 26, 2009). Transit agencies, of course, must conduct drug testing as required by federal regulations. *See* II.A., *Drug and Alcohol Testing*, *infra* this digest.

posed to certain toxic chemicals, and when they are exposed to certain noise levels. While these legal requirements are generally met through medical testing, in some circumstances physical ability tests could be conducted. For example, the Federal Motor Carrier Safety Administration (FMCSA) standards establish a variety of physical benchmarks[15] that are generally measured through medical tests and clinical diagnoses, not physical ability tests. However, certain of these requirements—such as the absence of rheumatic, arthritic, orthopedic, muscular, neuromuscular, or vascular disease that interferes with the employee's ability to control and operate a commercial motor vehicle (CMV) safely—could be assessed by physical ability tests measuring grasping strength, based on job analyses of the strength required to carry out various tasks needed for safe operation of a bus or rail car. Moreover, the legal restrictions on physical ability testing may also apply to tests conducted to measure physical capacities (such as vision and hearing) and status (such as substance abuse).

A third area where employers may consider physical ability testing is to enforce requirements concerning lifestyle choices that can affect employee productivity and costs. Growing numbers of employers are interested in controlling healthcare costs through wellness programs and increased insurance premiums for employees with characteristics that put their health at risk.[16] The transit industry certainly faces concerns about employee health, particularly given the effects of scheduling pressure on operators' diet, sleeping patterns, and exercise.[17] The cost-raising effects of unhealthy employees include absenteeism, medical expenses, stress on other employees who must cover for them, and recruitment/hiring/training costs for replacements.[18] Employers may be particularly concerned about the health risks posed by obesity and smoking, because of the effect those risks may have on productivity—in terms of the employee's ability to perform job functions and to maintain appropriate work attendance—and on health care costs to the employer.[19]

In the case of bus and rail operators, obesity may have very specific safety implications because of the connection between body mass and obstructive sleep apnea[20] and because of the effect of body mass on the ability to safely perform maneuvers such as steering a bus.[21] In July of 2009, The National Transportation Safety Board (NTSB) found that a train operator's high body mass index (BMI) was a likely contributing factor in a crash of a Massachusetts Bay Transportation Authority (MBTA) Green Line train that killed the operator, caused crew and passenger injuries, and caused estimated damages of $8.6 million. In its report to the Federal Transit Administration (FTA) on the accident, the NTSB stated:

> Obstructive sleep apnea is associated with fatigue and significant cognitive and psychomotor deficits that are at least partially reversible with appropriate treatment. Accident rates have been shown to be considerably higher in drivers with obstructive sleep apnea than in those without the disorder. The Federal Motor Carrier Safety Administration (FMCSA) medical review board recently recommended that the FMCSA require screening for obstructive sleep apnea in all drivers with a BMI over 30. The NTSB concludes that the operator of the striking train was at a high risk for having undiagnosed sleep apnea, and she may have been chronically fatigued as a result of the condition. (footnotes omitted)[22]

Based on its investigation and finding concerning MBTA's accident, NTSB recommended that FTA develop guidance regarding identification and treatment

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[15] 49 C.F.R. § 391.41, Physical qualifications for drivers, http://edocket.access.gpo.gov/cfr_2008/octqtr/pdf/49cfr391.41.pdf.

[16] Michelle M. Mello & Meredith B. Rosenthal, *Wellness Programs and Lifestyle Discrimination—The Legal Limits*, NEW ENG. J. MED. 359(2):192-9 (2008).

[17] *See* MARY J. DAVIS, TRANSIT OPERATOR HEALTH AND WELLNESS PROGRAMS, A SYNTHESIS OF TRANSIT PRACTICE (Transit Cooperative Research Program, TCRP Synthesis No. 52, 2004); GERALD P. KRUEGER, REBECCA M. BREWSTER, VIRGINIA R. DICK, ROBERT E. INDERBITZEN, & LOREN STAPLIN, HEALTH AND WELLNESS PROGRAMS FOR COMMERCIAL DRIVERS, 7-16 (Commercial Truck and Bus Safety Synthesis Program, Synthesis No. 15, 2007).

[18] DAVIS, *supra* note 17. *See also* McCunney, *supra* note 12, at 154–57 (employers' concerns in general about health care costs and absenteeism).

[19] Edelman, *Finding Wealth Through Wellness: How Engaging Employees in Preventive Care Can Reduce Healthcare Costs*, *An Executive Guide to Corporate Wellness Programs*, at 7, 18–19 (2006), www.edelman.com/image/insights/content/Wellness_White_Paper.pdf; Susan E. Lessack, *More Employers Trying to Regulate Employee Off-Duty Behavior*, LABOR AND EMPLOYMENT LAW UPDATE, Pepper Hamilton LLP, Dec. 12, 2007, www.pepperlaw.com/publications_update.aspx?ArticleKey=1037. One study found that smokers had 18 percent higher medical claims. McCunney, *supra* note 12, at 155.

[20] Alan Levin, *Transit Accidents Linked to Sleep Disorders*, USA TODAY, July 23, 2009, www.usatoday.com/news/nation/2009-07-23-sleepypilots_N.htm (accessed Oct. 3, 2009); JoNel Aleccia, *Heavy, Drowsy Truckers Pose Risk on the Road*, June 14, 2009, www.msnbc.msn.com/id/31066019/ (accessed Oct. 29, 2009); Obstructive Sleep Apnea and Commercial Motor Vehicle Driver Safety (Executive Summary), Presented to Federal Motor Carrier Safety Administration, July 12, 2007, www.fmcsa.dot.gov/rules-regulations/TOPICS/mep/report/Sleep-Apnea-Final-Executive-Summary-prot.pdf.

[21] See V., *Transit Agency Practices*, *infra* this digest.

[22] National Transportation Safety Board, Safety Recommendation R-09-9, July 23, 2009, at 3–4, citing O. Resta and others, *Sleep-Related Breathing Disorders, Loud Snoring and Excessive Daytime Sleepiness in Obese Subjects*, INTERNATIONAL JOURNAL OF OBESITY-RELATED METABOLIC DISORDERS, 25(5), at 669–75 (2001); L. Ferini-Strambi and others, *Cognitive Dysfunction in Patients with Obstructive Sleep Apnea (OSA): Partial Reversibility After Continuous Positive Airway Pressure (CPAP)*, BRAIN RESEARCH BULLETIN, June 30, 2003, 61(1), at 87–92, www.ntsb.gov/recs/letters/2009/R09_8_9.pdf.

of individuals at high risk for obstructive sleep apnea and other sleep disorders.[23]

While employers may have concerns about other lifestyle choices, the focus in this report is on tobacco use and obesity,[24] given that those are the two leading causes of preventable death in the United States,[25] and because if employers choose to institute requirements concerning tobacco use and obesity, physical testing is one of the options for enforcing such requirements.

2. Examples of Physical Ability Testing

Police and firefighters are frequently subject to physical ability testing. The extensive body of case law surrounding such testing sets forth principles applicable to physical ability testing of safety-sensitive transit employees. Moreover, for transit agencies that employ their own police officers, police standards are not merely analogous, but directly relevant, should the agencies require those officers to undergo physical ability testing. In addition, testing for employees in analogous job categories, such as commercial drivers and maintenance workers, provides examples of approaches to testing relevant to transit testing. This section describes several examples of physical ability tests to provide context for the legal analysis that follows.

Firefighters/law enforcement.—Candidate physical ability tests are common for fire departments. The National Fire Protection Association Standard 1583 provides general concepts for firefighter fitness, recommending that firefighters involved in emergency operations participate in periodic fitness assessments.[26] A widely used test is the Candidate Physical Ability Test (CPAT), a standardized pass/fail test developed by a task force made up of two major firefighting associations and 10 major North American fire departments that is used by fire departments throughout the United States.[27]

The test consists of eight events that candidates must complete within 10 minutes, 20 seconds, wearing a weighted vest to simulate the firefighter's protective gear. The task force developed the test based on its review of actual job functions of member fire departments. The group first reviewed task force members' job analysis, job task surveys, and then-current performance tests and job descriptions to come up with a list of tasks to analyze in more detail. The task force then developed the test based on survey responses about the identified tasks. Orientation and pre-test procedures were adopted in 2006 after a conciliation agreement was reached with the U.S. Equal Employment Opportunity Commission (EEOC).[28] An Orientation Guide describes the specific tasks and standards for passing each event.[29] Applicants may prepare using an exercise program designed specifically for the CPAT.[30]

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[23] National Transportation Safety Board, Safety Recommendation R-09-9, July 23, 2009, at 5.

[24] There is a legal distinction between obesity that is caused by a physiological condition and obesity that is not so caused. See II.B., *ADA* and III.A.2., *Prohibitions Against Discrimination Based on Physical Disability*, *infra* this digest.

[25] Between 2000 and 2004, tobacco use was responsible for an estimated 443,600 early deaths annually and more than $196 billion annually in health-related costs (including both medical costs attributable to smoking and productivity losses). *Tobacco-Related Cancers Fact Sheet*, American Cancer Society. www.cancer.org/docroots/PED/content/PED_10_2x_Tobacco-Related_Cancers_Fact_Sheet.asp?sitearea=ped. Obesity is associated with "high risk for and prevalence of hypertension, type II and gestational diabetes, cardiovascular disease," and other ailments, McCunney, *supra* note 12, at 163.

[26] NFPA 1583, Standard on Health-Related Fitness Programs for Fire Department Members, www.nfpa.org/aboutthecodes/AboutTheCodes.asp?DocNum=1583.

[27] *See* Candidate Physical Ability Test Manual, www.publicsafetymed.com/Redmond%20docs/CPAT%20Manual.PDF (accessed Nov. 17, 2009).

[28] Fire Service Joint Labor Management Wellness-Fitness Task Force Candidate Physical Ability Test (CPAT) Program Summary, www.iaff.org/HS/CPAT/cpat_index.html. Examples of other fire departments requiring candidates to pass the CPAT include Raleigh, N.C., www.raleighnc.gov/portal/server.pt/gateway/PTARGS_0_2_306_202_0_43/http%3B/pt03/DIG_Web_Content/category/Resident/Fire/Recruitment/Cat-1C-2007404-133139-Candidate_Physical_Abili.html (accessed Oct. 21, 2009) and San Francisco, www.jobaps.com/SF/sup/BulPreview.asp?R1=cbt&R2=00H2&R3=053650 (accessed Oct. 21, 2009).

[29] The eight events, the tasks they simulate, and the actual equipment used for the simulation are as follows:

- Stair Climb: climbing stairs wearing protective clothing and carrying equipment; stair machine and shoulder weights.
- Hose Drag: dragging an uncharged hoseline from the fire apparatus to the fire occupancy and pulling an uncharged hoseline around obstacles while remaining stationary; actual uncharged fire hose with hoseline nozzle.
- Equipment Carry: removing power tools from a fire apparatus, carrying them to the emergency scene, and returning the equipment to the fire apparatus; two saws and a tool cabinet.
- Ladder Raise and Extension: placing a ground ladder at a fire structure and extending the ladder to the roof or window; two 24-ft fire department ladders.
- Forcible Entry: using force to open a locked door or to breach a wall; mechanized device that measures cumulative force and a 10-lb sledgehammer.
- Search: searching for a fire victim with limited visibility in an unfamiliar area; closed search maze with obstacles and narrowed spaces.
- Rescue: removing a victim or injured partner from a fire scene; weighted mannequin.
- Ceiling Breach and Pull: breaching and pulling down a ceiling to check for fire extension; mechanized device that measures overhead push and pull forces and a 6-ft pole commonly used in firefighting.

CPAT Orientation Guide. This guide is available from the International Association of Fire Fighters, www.iaff.org/ (membership required).

[30] CPAT Preparation Guide. This guide is available from the International Association of Fire Fighters, www.iaff.org/ (membership required).

Physical ability testing is also common for police departments. A number of departments use a common term, POPAT (Police Officer Physical Agility Test), but the content of POPATs can vary significantly. Various statewide law enforcement organizations develop physical ability/agility standards that are either used throughout the state or used as a basis for police departments to develop their own standards.[31] For example, the Police Officer Standards and Training Council of Connecticut has adopted a Physical Ability Assessment that is used statewide. This test consists of four elements: sit-ups (measuring muscular endurance, related to use of force tasks); sit-and-reach (measuring flexibility); bench press (measuring absolute strength); and a 1.5-mi run (measuring cardiovascular capacity).[32] Each Connecticut police department sets its own criteria, that is, its own passing rates. The Maine Criminal Justice Academy has developed a physical agility preentrance test that police departments within the state use to create their own physical assessment tests.[33] The Wyoming Law Enforcement Academy has a physical agility entrance exam,[34] which police departments in the state use as a basis for their preemployment physical agility assessment.[35]

The Maryland Transportation Authority requires its applicants to pass a preemployment physical agility assessment test consisting of six components that measure general fitness needed to perform job functions, rather than simulating specific job functions.[36]

Other police departments use more content-oriented physical agility assessments. For example, the University of Arizona Police Department requires the following assessment: "a 500 yard run, 99 yard obstacle course, 165 lb body drag (32 feet), climb over a 6 foot chain link fence, and a climb over a 6 foot solid wall."[37] The Hickory, North Carolina, POPAT combines fitness exercises with task simulations that use a police cruiser, a body, and a staircase.[38]

Similarities between the actual requirements in law enforcement/firefighter tests and transit tests include firefighter respirator requirements, which may be relevant to respirator requirements for mechanics, and certain elements of tests used for police departments, such as sit-and-reach, which may also be used in the transit context. However, other specific elements of law enforcement/firefighter testing may differ substantially from what would relate to transit job functions other than transit police. For example, anaerobic requirements may be greater for law enforcement/firefighters than for most transit positions. Strength requirements may also vary considerably. Candidates for these law enforcement/firefighter positions are often put on notice of the physical ability requirements in advance and advised to train to meet the requirements.[39] Where departments use statewide tests to screen applicants, ap-

[31] Alan Andrews & Julie Risher, *What does THAT have to do with being a cop? Employment Standards in Law Enforcement*. Presented at International Association of Chiefs of Police 2006 Conference, Boston, Mass., Oct. 14, 2006, at 13, www.aele.org/andrews2006.pdf. Numerous validation studies have been performed to relate physical fitness abilities such as aerobic and anaerobic power, strength, flexibility, explosive power, and agility to the ability to perform specific policy officer job tasks. Thomas R. Collingwood, Robert Hoffman & Jay Smith, *Underlying Physical Fitness Factors for Performing Police Officer Physical Tasks*, POLICE CHIEF MAGAZINE, vol. 71, no. 3, March 2004, http://policchiefmagazine.org/magazine /index.cfm?fuseaction=display_arch&article_id=251&issue_id= 32004 (accessed Oct. 23, 2009). One source of standards is the Cooper Institute, www.cooperinst.org/. *E.g.*, City of Ottowa (Kan.), http://www.ottawakansasnet/hrforms/2010%20Police %20Application%20Packet.pdf; City of Rockwall (Tex.) Police Department, www.rockwall.com/HR/Documents/PDGuidelines .pdf (accessed Oct. 22, 2009); Rowlett Police Department, http://www.rowlett.com/index.aspx?nid=186.

[32] The Physical Ability Assessment, Complete Health & Injury Prevention, www.chip-inc.com/test/ (accessed Oct. 22, 2009).

[33] Town of Falmouth, www.town.falmouth.me.us/Pages/ FalmouthME_Police/hiringprocess (accessed Oct. 22, 2009).

[34] General Information, Wyoming Law Enforcement Academy, www.wleacademy.com/Basic/physassess.htm (accessed Oct. 22, 2009).

[35] www.casperwy.gov/PoliceJobs/tabid/584/Default.aspx.

[36] Maryland Transportation Authority Police, Police Officer/Police Cadet Orientation, www.mdfop34.org/flyers/orientation.pdf (accessed Oct. 22, 2009). Specific abilities tested are:

- Push–Ups: measures muscular endurance, 24 in 1 minute required to pass.
- Sit–Ups: measures muscular endurance, 28 in 1 minute required to pass.
- Flexibility: measures range of motion of lower back and hamstrings, must reach 16 in. to pass.
- 1.5-mi Run: measures cardiovascular capacity, must be completed in 15.55 minutes or less to pass.
- Vertical Jump: must reach 15 in. to pass.
- 300 Meter: measures cardiovascular capacity, must be completed in 70.1 seconds or less to pass.

[37] Police Officer/Police Officer Recruit, www.uapd.arizona.edu/police%20officer%20recruit.htm (accessed Oct. 22, 2009). *See also* Pre-employment/Post Offer Physical Abilities Test Rationale for Corrections Officers and Correctional Program Officers, www.mass.gov/Eeops/docs/doc/physical_abilities_test_rationale .pdf (accessed Nov. 6, 2009).

[38] Police Officer Physical Agility Test (POPAT), Date of Record: Dec. 23, 2008, www.hickorygov.com/egov/docs/1230062920702.htm (accessed Oct. 23, 2009). *See also* Become an El Cerrito Police Officer: Physical Agility/Abilities Test, www.el-cerrito.org/employee_services/jobop_policeofficer.html (accessed Nov. 30, 2009).

[39] *E.g.*, Police Officer Physical Agility Test Training Manual, City of Miami, www.miamigov.com/employeerel/pages/PORecruitment/Police %20Officer%20(Basic%20Recruit)%20Physical%20Agility%20T est%20Training%20Manual.PDF.

plicants may take the test and rely on the result for a fixed period of time.[40]

Commercial drivers.—Except for the requirement of a passenger endorsement, other commercial drivers are subject to the same CDL physical requirements as transit bus operators.[41] Some employers of such commercial drivers impose standards beyond those required by the FMCSA, for example, requiring drivers of vehicles with gross vehicle weight (GVW) of 10,000 lb or less to meet the FMCSA CDL standards for drivers of vehicles with a GVW of more than 10,000 lb.[42] Employers of commercial drivers may require strength testing as part of the hiring process[43] or under other circumstances, such as upon return to work from an injury. Questions about assessing the physical capacity of commercial drivers are relevant for transit operators as well. For example, the issue of whether a municipal sanitation driver with night blindness was considered disabled under the Americans With Disabilities Act of 1990 (ADA)[44] would also be relevant to transit bus drivers. The Second Circuit held that such a worker was covered by the ADA.[45]

Maintenance workers.—Employers may require physical ability testing for applicants and/or employees in other maintenance-related jobs. For example, the Ohio Department of Transportation requires applicants for the position of Highway Technician 1 to pass a physical ability test as part of the interview process. Employees in this position operate basic equipment and perform seasonal highway maintenance activities, including minor repairs and maintenance on equipment. The test, which is meant to demonstrate that candidates can perform the essential physical duties of the job, requires candidates to "physically demonstrate the ability to lift, pull, drag, and/or maneuver between 50-100 pounds." The test course uses on-the-job equipment and materials. Candidates must successfully complete each of six events to proceed with the interview process.[46]

Western State College of Colorado includes vehicle mechanics in the job classifications for which new hires must pass a post-job offer, preemployment physical ability test. The purpose of the test is "to ensure the prospective employee possesses the physical capabilities necessary to safely perform the essential functions of the job."[47]

II. STATUTORY AND REGULATORY REQUIREMENTS THAT RELATE TO PHYSICAL ABILITY TESTING OF TRANSIT EMPLOYEES

Transit agencies should be familiar with the regulatory requirements associated with CDLs, drug testing, and Occupational Safety and Health Administration (OSHA) requirements (or the state equivalent, as applicable). This section reviews those statutory and regulatory requirements that either directly require physical ability testing of transit employees or that could be cited in support of such testing to provide context for two legal issues that may be less familiar: whether a transit agency may impose more stringent standards than those described in this section, and, if so, what the parameters are for testing to that higher standard.[48] The discussion covers the issues of whether federal regulations preempt state laws on drug testing and what are permissible uses of the results of drug tests. Constitutional challenges to drug testing and the legal ramifications of transit agencies conducting physical ability testing not explicitly required by federal or state law are discussed in Section III, Legal Restrictions on Physical Ability Testing.

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[40] For example, the Maine Department of Public Safety relies on the physical fitness test of the Maine Criminal Justice Academy. Applicants must pass the test in order to be placed on the employment register, and may rely on results obtained within the previous year. Maine Department of Public Safety, State Police Trooper, Application Process, www.maine.gov/bhr/state_jobs/directhire/StatePoliceTrooper(10-24-05).htm (accessed Oct. 28, 2009).

[41] Although the Federal CDL requirements do not apply directly to most transit operators, many states have adopted the federal medical requirements, as have many transit agencies. *See* II.B., *Commercial Driver's License/Medical Requirements*, *infra* this digest.

[42] United Parcel Service (UPS) had imposed a blanket prohibition on drivers who could not meet the FMCSA hearing standard, regardless of vehicle size. In June of 2009, UPS apparently agreed to allow drivers who cannot meet the FMCSA standard to compete for jobs driving small delivery vans, provided the drivers are able to pass special tests and receive training. Bob Egelko, *UPS to Allow Hard-of-Hearing Drivers*, SAN FRANCISCO CHRONICLE, June 17, 2009, www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/06/17/BA5A188DRO.DTL (accessed Nov. 16, 2009). *See* III.B.3, *Elements of Claim*, *infra* this digest.

[43] *E.g.*, University of Illinois at Urbana-Champaign requires ARCON strength test for drivers as part of preemployment testing. Employment Services, Nonacademic Staff Pre-Employment Testing, Pre-Employment Physicals, Drug Testing, and ARCON Strength Testing, www.shr.illinois.edu/employment/Pre-EmployTest.html (accessed Nov. 16, 2009).

[44] 101 Pub. L. No. 336, 104 Stat. 327, July 26, 1990, codified as 42 U.S.C. §§ 12101 *et seq*. Tit. I, Employment, is codified as 42 U.S.C. §§ 12111–12117.

[45] Capobianco v. City of N.Y., 422 F.3d 47 (2d Cir. 2005) (sanitation driver dismissed due to congenital night blindness was disabled and could have performed with reasonable accommodation).

[46] Jennifer Sradeja, *Physical Abilities Tested as Part of HT Series*, Ohio Department of Transportation Employee Newsletter, Dec. 2004, at 11, www.dot.state.oh.us/Divisions/Communications/transcript/Transcript&20Archive/Accomplishments2004.pdf (accessed Nov. 10, 2009); Highway Technician 1 Job Description, http://agency.governmentjobs.com/ohio/default.cfm?action=viewclassspec&classSpecID=87625&agency=1483&viewOnly=yes.

[47] Employment Opportunities at Western, www.western.edu/administration/hr/Applicants/job-listings.html.

[48] *E.g.*, Shannon v. N.Y. Transit Auth., 332 F.3d 95, 103 (2d Cir. 2003) (allowing NYCT to set higher requirement for color blindness than in federal standard).

A. Drug and Alcohol Testing[49]

The Omnibus Transportation Employee Testing Act of 1991 (Omnibus Testing Act)[50] requires alcohol and controlled substance testing for employees performing safety-sensitive functions in several modes, including mass transit. The U.S. Department of Transportation (USDOT) implements this legislation through the department's regulation on Procedures for Transportation Workplace Drug and Alcohol Testing Programs.[51] Both FMCSA and FTA apply those procedural requirements through their drug and alcohol testing regulations.[52] Federal Railroad Administration (FRA) requirements, which predate the Omnibus Testing Act, apply to commuter rail employees.[53]

Section 5331 of U.S.C. Title 49 also requires a program of alcohol and controlled substance testing to apply to recipients of funding under §§ 5307, 5309, and 5311 of Title 49. The program requires drug testing for public transportation employees responsible for safety-sensitive functions to be conducted preemployment, on reasonable suspicion, randomly, and post-accident. Reasonable suspicion, random, and post-accident testing for the use of alcohol in violation of law or a federal regulation must be conducted for such employees; preemployment alcohol testing is at the discretion of the public transportation operator. Section 5331 also authorizes the Secretary of Transportation to require periodic recurring testing of public transportation employees responsible for safety-sensitive functions for the use of alcohol or a controlled substance in violation of law or government regulation. Post-accident testing is mandatory for any fatal accident involving public transportation.

FTA implements § 5331 through its regulation on Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations.[54] These requirements apply to employers that receive financial assistance from FTA and to contractors of those employers. FTA's Master Grant Agreement requires that grantees agree to comply with Part 655.[55] The Master Grant Agreement also requires compliance with the FMCSA's drug and alcohol testing requirements, to the extent that the FMCSA requirements are applicable.[56] The FMCSA regulation only applies to CDL holders and specifically excepts employers and drivers required to comply with Part 655,[57] although individual CDL holders are subject to FMCSA sanctions and other ramifications for violating FMCSA drug and alcohol testing requirements that were not included in the FTA regulation.[58]

The requirements of the USDOT, FMCSA, FRA, and FTA drug and alcohol testing regulations are discussed below. Transit agency drug and alcohol testing policies, as well as legal challenges to employee drug and alcohol testing under the regulations, are also discussed.

1. DOT Regulation

The USDOT regulation covers all parties who conduct drug and alcohol tests required by USDOT's agencies and specifies the procedures that must be used in conducting those tests. Important substantive requirements include: the employer is responsible for compliance with the regulation, including the actions of its agents in conducting testing;[59] employers must immediately remove employees from safety-sensitive functions upon receiving a positive drug test result;[60] employers must check on an employee's drug and alcohol testing record before allowing the employee to begin safety-sensitive job functions;[61] and employers must direct a collection under direct observation of an employee when there are unexplained irregularities in the test results and if the drug test is a return-to-duty test or a follow-

[49] For a more extensive discussion of these requirements, s*ee* ROBERT A. HIRSCH, DRUG AND ALCOHOL TESTING—A SURVEY OF LABOR-MANAGEMENT RELATIONS 46 (National Cooperative Highway Research Program, Transit Cooperative Research Program, Legal Research Digest No. 16, 2001).

[50] 102 Pub. L. No. 143, § 6, 105 Stat. 952, Oct. 28, 1991.

[51] 49 C.F.R. pt. 40, www.access.gpo.gov/nara/cfr/waisidx_09/49cfr40_09.html.

[52] 49 C.F.R. pt. 382, Controlled substances and alcohol use and testing, www.access.gpo.gov/nara/cfr/waisidx_09/49cfr382_09.html; 49 C.F.R. pt. 655, Prevention of alcohol misuse and prohibited drug use in transit operations, www.access.gpo.gov/nara/cfr/waisidx_09/49cfr655_09.html.

[53] 49 C.F.R. pt. 219, Control of alcohol and drug use. www.access.gpo.gov/nara/cfr/waisidx_08/49cfrv4_08.html.

[54] 49 C.F.R. pt. 655.

[55] FTA Master Agreement MA(16), 10-1-2009, § 32. Substance Abuse, at 59, www.fta.dot.gov/documents/16-Master.pdf. This section also requires compliance with drug-free workplace requirements, which do not directly mandate drug testing.

[56] *Id*. at 60. *See* ICF INTERNATIONAL, FMCSA REGULATIONS AS THEY APPLY TO FTA SECTION 5310/5311 PROVIDERS: A HANDBOOK (National Cooperative Highway Research Program, Research Results Digest 311, 2006), http://onlinepubs.trb.org/onlinepubs/nchrp/nchrp_rrd_311.pdf.

[57] 49 C.F.R. § 382.103(d)(1). The requirements of 49 C.F.R. pt. 382 and pt. 655 are substantially similar, but not identical. *See* FTA and FMCSA D&A Regulatory Comparison, http://transit-safety.volpe.dot.gov/publications/substance/ImplementationGuidelines/Revisions/Chapter_2.pdf.

[58] Federal Transit Administration, Implementation Guidelines for Drug and Alcohol Regulations in Mass Transit, Nov. 2003, at 2–3, http://transit-safety.fta.dot.gov/publications/substance/ImplementationGuidelines/ImplementationGuidelines_rev_11_2003.pdf.

[59] 49 C.F.R. § 40.11, What are the general responsibilities of employers under this regulation? http://edocket.access.gpo.gov/cfr_2008/octqtr/pdf/49cfr40.5.pdf.

[60] 49 C.F.R. § 40.23, What actions do employers take after receiving verified test results?, http://edocket.access.gpo.gov/cfr_2008/octqtr/pdf/49cfr40.23.pdf.

[61] 49 C.F.R. § 40.25, Must an employer check on the drug and alcohol testing record of employees it is intending to use to perform safety-sensitive duties?, http://edocket.access.gpo.gov/cfr_2008/octqtr/pdf/49cfr40.25.pdf.

up test.[62] The USDOT regulation leaves to the modal administration's discretion whether to allow an employee's supervisor to act as a collection agent if no other collector is available; FTA's regulation does not allow such collection.[63]

In 2008, USDOT revised its regulation to make specimen validity testing mandatory within the regulated transportation agencies.[64] As part of that revision, USDOT included the requirement for direct observation for return-to-duty and follow-up tests noted above. After extending the effective date of the final rule and requesting comments on the requirement for direct observation for return-to-duty and follow-up tests,[65] USDOT issued a notice responding to comments and providing an effective date of November 1, 2008.[66] However, the District of Columbia Circuit Court of Appeals stayed the effective date while it reviewed a constitutional challenge to the case, at which point USDOT returned to the previous requirement.[67] Following the court's decision upholding the regulatory change, USDOT reinstated the direct observation requirement.[68]

2. FMCSA Regulation

The FMCSA regulation on controlled substances and alcohol use and testing applies to all persons subject to the CDL requirements of 49 C.F.R. Part 383, except, as noted above, employers and drivers subject to FTA's regulation. Since the FMCSA regulation is focused on the CDL holder rather than a broader group of employees, certain of the FMCSA requirements differ from corollary requirements under the FTA requirement. For example, the thresholds for testing employees other than the driver in a fatal accident and for testing employees in a nonfatal accident are less rigorous under the FMSCA regulation. In addition, the FMCSA does not provide for suspension of federal funding in the event of noncompliance with the regulation.

3. FRA Regulation

The FRA regulation applies to railroads that operate rolling equipment on standard gauge track that is part of the general railroad system of transportation and railroads that provide commuter or other short-haul rail passenger service in a metropolitan or suburban area.[69] Unlike the FMCSA regulation, the FRA regulation does not explicitly except agencies that are subject to FTA's drug and alcohol testing regulation. However, transit agencies that adhere to the FTA's drug policy may petition the FRA for a waiver from the requirements of Part 219.[70] The regulation requires mandatory hearing procedures that must be followed if an employee contests the validity of test results.[71] The regulation requires testing under the following circumstances:

- Preemployment (including transfer to a safety-sensitive position within the organization) (alcohol testing not required).
- Reasonable suspicion (mandatory based on "specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odors of the employee;"[72] reasonable-cause testing authorized but not required under specified circumstances[73]).
- Random (program must be approved by FRA).
- Post-accident (based on good-faith determination of on-scene railroad representative that incident falls within parameters for required testing).[74]
- Return-to-duty/follow-up (periodic).

4. FTA Regulation

FTA's regulation governing drug and alcohol testing[75] requires testing of safety-sensitive employees in five circumstances:

- Preemployment (including transfer to a safety-sensitive position within the organization) (alcohol testing not required).
- Reasonable suspicion.

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[62] 49 C.F.R. § 40.67, When and how is a directly observed collection conducted?, http://edocket.access.gpo.gov/cfr_2008/octqtr/pdf/49cfr40.67.pdf.

[63] 49 C.F.R. § 655.53, Supervisor acting as collection site personnel.

[64] U.S. Department of Transportation, Office of the Secretary, Final Rule, 49 C.F.R. pt. 40, *Procedures for Transportation Workplace Drug and Alcohol Testing Programs*, 73 Fed. Reg. 35961, June 25, 2008, http://edocket.access.gpo.gov/2008/pdf/E8-14218.pdf.

[65] U.S. Department of Transportation, Office of the Secretary, Change in effective date; request for comments, 49 C.F.R. pt. 40, *Procedures for Transportation Workplace Drug and Alcohol Testing Programs*, 73 Fed. Reg. 50223, Aug. 26, 2008, http://edocket.access.gpo.gov/2008/pdf/E8-19816.pdf.

[66] U.S. Department of Transportation, Office of the Secretary, Response to comments, 49 C.F.R. pt. 40, *Procedures for Transportation Workplace Drug and Alcohol Testing Programs*, 73 Fed. Reg. 62910, Oct. 22, 2008, http://edocket.access.gpo.gov/2008/pdf/E8-25102.pdf.

[67] U.S. Department of Transportation, Office of the Secretary, Final Rule, 49 C.F.R. pt. 40, *Procedures for Transportation Workplace Drug and Alcohol Testing Programs*, 73 Fed. Reg. 70283, Nov. 20, 2008, http://edocket.access.gpo.gov/2008/pdf/E8-27617.pdf.

[68] U.S. Department of Transportation, Office of the Secretary, Final Rule, 49 C.F.R. pt. 40, *Procedures for Transportation Workplace Drug and Alcohol Testing Programs*, 74 Fed. Reg. 37949, July 30, 2009, http://edocket.access.gpo.gov/2009/pdf/E9-18156.pdf. *See* BNSF Railway Co. v. Dep't of Transp., 566 F.3d 200 (D.C. Cir. 2009).

[69] 49 C.F.R. § 219.3(a). Exceptions are set forth in §§ 219.3(b) and 219.3(c).

[70] http://edocket.access.gpo.gov/2003/pdf/03-24744.pdf; http://edocket.access.gpo.gov/2007/pdf/E7-15140.pdf.

[71] 49 C.F.R. § 219.107(d).

[72] 49 C.F.R. §§ 219.300(a)(1) and (2).

[73] 49 C.F.R. § 219.301.

[74] 49 C.F.R. § 219.201(c)(ii).

[75] 49 C.F.R. pt. 655.

- Random.
- Post-accident.
- Return-to-duty/follow-up (periodic).

The regulation requires removing any safety-sensitive employee who violates the rule (by testing positive for illegal drug use, alcohol misuse, or otherwise) from that position and informing the employee of treatment options. The regulation leaves to transit agency policy whether to terminate the employee or retain the employee subject to treatment. As discussed below, such decisions must be consistent with state law and collective bargaining agreements.

The regulation defines "safety sensitive" according to duties, rather than positions. The following functions are defined as safety-sensitive:[76]

- Operating a revenue service vehicle, including when not in revenue service.
- Operating a nonrevenue service vehicle, when required to be operated by a holder of a CDL.
- Controlling dispatch or movement of a revenue service vehicle.
- Maintaining (including repairs, overhaul, and rebuilding) a revenue service vehicle or equipment used in revenue service. This section does not apply to the following: an employer who receives funding under 49 U.S.C. § 5307 or § 5309, is in an area less than 200,000 in population, and contracts out such services; or an employer who receives funding under 49 U.S.C. § 5311 and contracts out such services.
- Carrying a firearm for security purposes.

Transit agencies are responsible for determining which of their positions are subject to the regulation based on the definition of "safety-sensitive functions." For example, Community Transit in Everett, Washington, has included customer and community relations and training positions, as well as several management positions in maintenance and transportation, in its designated safety-sensitive positions.[77] The Los Angeles County Metropolitan Transportation Authority (LA Metro) classifies almost 90 job classifications as safety sensitive.[78]

A recipient that fails to establish a drug and alcohol testing program under the FTA regulation may not be eligible to receive federal financial assistance under Chapter 53 or 23 U.S.C. § 103(e)(4). FTA may suspend a recipient's eligibility for federal funding if the recipient fails to certify compliance with the regulatory requirements. Misrepresentations concerning drug and alcohol testing may subject a recipient to criminal sanctions and fines under 18 U.S.C. § 1001.[79]

Grant recipients are required to retain records as specified under Subpart H of the regulation, ranging from 1 year for negative test results to 5 years for posi-

[76] 49 C.F.R. § 655.4.

[77] The specific safety-sensitive positions are:

- Customer and Community Relations
  - Director of Marketing and TMS.
  - Education Coordinator.
  - Manager of Transportation Management Services.
  - Supervisor of Vanpool.
  - Vanpool Coordinator.
- Maintenance
  - Apprentice Body Person.
  - Apprentice Mechanic.
  - Assistant Facilities and Automotive.
  - Maintenance Manager.
  - Assistant Maintenance Shop Manager.
  - Director of Maintenance.
  - Journey Body Person.
  - Journey Mechanic (Includes Component Rebuild and Automotive Mechanics).
  - Lead Journey Body Person.
  - Lead Journey Mechanic (Includes Component Rebuild and Automotive Mechanics).
  - Lead Vehicle Service Attendance.
  - Maintenance Shop Manager.
  - Manager of Facilities Shop/Maintenance.
  - Manager of Maintenance.
  - Vehicle Service Attendant.
  - Vehicle Service Worker.
- Transportation
  - Assistant Transportation Manager.
  - Chief Operations Officer.
  - Coach Operator (full-time, part-time, and trainee).
  - Contract Services Coordinator.
  - Director of Transportation.
  - Dispatcher.
  - Manager of Contracted Services.
  - Manager of Transportation.
  - Manager of Transportation Administration.
  - Operations Supervisor.
  - Security Officer.
- Training
  - Instructor.
  - Supervisor of Training.
  - Manager Risk and Training.
- Other
  - Schedule Analyst.

Community Transit's Drug and Alcohol Abuse Policy, App. A, www.commtrans.org/About/Documents/Purchasing/RFP%20%2332-08%20Exhibit%20D.pdf (accessed Oct. 28, 2009). *Cf.*, Clemson Area Transit: all drivers, all mechanics; all dispatchers/schedulers; transportation director; maintenance director. Clemson Area Transit Substance Use, Abuse and Testing Policy, Sept. 4, 2006, www.cityofclemson.org/files/090406Item DrugAlcoholPolicy.pdf (accessed Oct. 28, 2009).

[78] Metro Alcohol-and-Drug-Free Work Environment Policy (HR 4-2), App. A.

[79] 49 C.F.R. § 655.82, Compliance as a condition of financial assistance, http://edocket.access.gpo.gov/cfr_2008/octqtr/pdf/49cfr655.82.pdf.

tive test results. Records must be retained in a secure location with controlled access.

5. State Testing Requirements

In a 2001 survey, 35 transportation carriers surveyed on drug and alcohol testing practices responded that they were subject to state testing laws, identifying the following states: Arizona, California, Connecticut, Florida, Iowa, Louisiana, Maine, Maryland, Minnesota, New York, Ohio, Pennsylvania, South Carolina, and Wisconsin. A number of state and local governments have mandatory requirements that must be followed in conducting drug testing.[80] FMCSA and FTA testing requirements preempt state and local requirements if it is not possible to comply with both the federal and state/local requirements or if the state or local requirements pose an obstacle to executing the federal requirement.[81] FRA testing requirements preempt state and local requirements "covering the same subject matter" as the FRA regulation, except for a state or local law "directed at a local hazard that is consistent with [Part 219] and that does not impose an undue burden on interstate commerce."[82]

State law may also specify the notice that must be provided to employees on test results and restrict the disciplinary action that a transit agency may take if an employee tests positive.[83] Failure to comply may result in damages and/or injunctive relief.[84]

6. Judicial Review of Drug and Alcohol Testing Regulations (Preemption and Collective Bargaining)

Preemption.—The First Circuit Court of Appeals rejected a preemption challenge to the FTA drug testing requirements, holding that where Congress places conditions on receipt of federal dollars and an entity accepts federal funding, the Supremacy Clause requires that the federal requirements take precedence over conflicting local law, whether statutory or constitutional.[85] The court also rejected the plaintiffs' argument that the MBTA should be precluded from accepting federal funds, because accepting funding leads to a conflict with state law concerning drug testing. Finally, the court rejected the argument that the MBTA's testing policy was illegal because it exceeded the federal requirements, holding that so long as the transit agency's testing requirements did not conflict with FTA's testing protocol, they violate neither state or federal law.

Collective bargaining.—The Southwest Ohio Regional Transit Authority (SORTA) implemented the federal drug testing requirements with a zero tolerance policy, which required terminating any employee who tested positive for use of a controlled substance. However, SORTA had negotiated a collective bargaining agreement with the Amalgamated Transit Union providing that discharge, suspension, or other disciplinary action could only be with sufficient cause. The union contested the automatic termination of an employee who had tested positive for use of a controlled substance. The arbitration panel determined that the automatic discharge requirement conflicted with, and therefore violated, the collective bargaining agreement. An Ohio appellate court reversed, holding that reinstating the employee violated public policy.

The Ohio Supreme Court found that SORTA did not have the right to unilaterally adopt an automatic termination as a sanction for testing positive because that would conflict with the negotiated sufficient-cause requirement, which would undermine the collective bargaining process. Accordingly the court held that the finding of the arbitration panel was based on the sufficient-cause standard, and so drew its essence from the collective bargaining agreement and was not arbitrary or capricious. The court also found that Ohio law did not preclude providing a second chance to someone who had tested positive for a controlled substance. The court reviewed *Eastern Associated Coal Corp. v. United Mine Workers of Am., Dist. 17*,[86] in which the U.S. Supreme Court reviewed the Omnibus Testing Act and determined that it did not establish public policy against reinstating employees who had tested positive for use of a controlled substance. Relying on the facts that Ohio had adopted the requirements of Part 382 and had no other law or legal precedent requiring termination, the court held that Ohio had "no dominant and well-defined public policy that renders unlawful an arbitration award reinstating a safety-sensitive employee who was terminated for testing positive for a controlled substance, assuming that the award is otherwise reason-

[80] HIRSCH, *supr*a note 49, at 36.

[81] 49 C.F.R. §§ 382.109, 655.6.

[82] 49 C.F.R. § 219.13.

[83] *E.g.*, Minnesota: MINN. STAT. § 181.953, www.revisor.mn.gov/statutes/?id=181.953 (notice), MINN. STAT. § 181.953, www.revisor.mn.gov/statutes/?id=181.953 (prohibits employer from taking disciplinary action based on preliminary screening test that has not been confirmed, requires employer to afford employees who test positive opportunity to participate in drug or alcohol counseling or rehabilitation program before discharging based on first positive (confirmed) test result); Montana: Montana Workforce Drug and Alcohol Testing Act, MONT. CODE ANN. §§ 39-2-205 through 39-2-211, http://data.opi.mt.gov/bills/mca_toc/39_2_2.htm (sets criteria for testing programs; affords employees right of rebuttal; limits adverse actions).

[84] *E.g.*, MINN. STAT. § 181.956, www.revisor.mn.gov/statutes/?id=181.956.

[85] O'Brien v. Mass. Bay Transp. Auth., 162 F.3d 40 (1st Cir. 1998). *See* Byrne v. Mass. Bay Transp. Auth., 196 F. Supp. 2d 77 (D. Mass. 2002) (holding state claim is preempted to extent transit agency policy implements federal mandate of random drug testing of safety-sensitive employees of federal mass transportation grant recipients; differences from federal law permissible so long as there is no conflict). *See also* Keaveney v. Town of Brookline, 937 F. Supp. 975 (D. Mass. 1996) (Federal CDL regulations requiring drug and alcohol testing preempt Massachusetts Declaration of Rights, Massachusetts Privacy Act, and Massachusetts Civil Rights Statutes).

[86] 531 U.S. 57, 121 S. Ct. 462, 148 L. Ed. 2d 354 (2000).

able in its terms for reinstatement."[87] Finally, the court held that given the employee's record, the terms of reinstatement were reasonable, so the reinstatement award did not violate public policy.

B. Commercial Driver's License/Medical Requirements

1. Federal Requirements

The general provisions of the Federal Motor Carrier Safety Regulations (FMCSRs) specifically exempt transportation performed by the federal government, a state, or any political subdivision of a state from the regulations.[88] However, this exemption does not apply to the CDL requirements in Part 383.[89] Moreover, the CDL requirements are not limited to drivers in interstate commerce.[90] Rather, the requirements apply to any driver who operates a commercial vehicle, whether in interstate or intrastate operation, providing they drive on a public road. Accordingly, the CDL requirements do not apply to transit hostlers (public transit employees who maintain and park transit buses on transit system property) unless they drive vehicles on public roads.[91] In addition, Section 33 of the FTA Master Agreement requires recipients of FTA funding to comply with FMCSA's CDL standards.

The government exemption noted above does cover the driver qualification requirements, including medical requirements, of 49 C.F.R. Part 391.[92] Moreover, Part 391 only applies to drivers of CMVs in interstate commerce, although many states adopt these requirements for their own CDLs.[93]

The physical qualifications provisions of Part 391 set forth disqualifying physical conditions and establish vision and hearing requirements. The regulation also provides for alternative physical qualification standards for individuals with loss or impairment of limbs based on a skill performance evaluation.[94] In addition, under 49 U.S.C. § 31136(e) and § 31315, FMCSA may grant an exemption for a 2-year period if it finds such exemption "would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption." The FMCSA grants exemptions to its requirements for vision, diabetes, and epilepsy. The 2005 transit reauthorization legislation contained a provision prohibiting both applying higher physical standards for insulin-treated people than other applicants, except as medically necessary under FMCSA regulations, and requiring insulin-treated applicants for an exemption to have experience operating CMVs while using insulin, although such applicants must demonstrate stable control of their diabetes before operating a CMV in interstate commerce.[95] The Government Accountability Office recently critiqued the medical certification process, finding some evidence of fraud or medical examiners not familiar with medical fitness requirements.[96]

The FMCSRs do not require an examination when a driver returns from injury or illness unless the injury or illness has impaired the driver's ability to perform his or her normal duties, although the motor carrier may require a driver returning from any illness or injury to take a physical examination. But, in either case, the motor carrier has the obligation to determine if an injury or illness renders the driver medically unqualified.[97] This obligation can be fulfilled while still meeting requirements of the ADA, *infra*. FMCSA's medical board has recommended obstructive sleep apnea screening, but this requirement has not yet been adopted.[98]

2. State Requirements

State requirements for CDL waivers for intrastate drivers may be less rigorous than the federal waiver requirements.[99] Otherwise, state CDL standards generally mirror those of the FMCSA, including medical re-

[87] Sw. Ohio Reg'l Transit Auth. v. Amalgamated Transit Union, Local 627, 91 Ohio St. 3d 108, 115, 742 N.E.2d 630, 636 (2001).

[88] 49 C.F.R. § 390.3(f)(2).

[89] Question 10, www.fmcsa.dot.gov/rules-regulations/administration/fmcsr/fmcsrruletext.aspx?chunkKey=090163348002325f.

[90] 49 U.S.C. § 383.3.

[91] Question 15, www.fmcsa.dot.gov/rules-regulations/administration/fmcsr/fmcsrruletext.aspx?chunkKey=0901633480023236.

[92] Part 391: Qualifications of drivers and longer combination vehicle (LCV) driver instructors, www.fmcsa.dot.gov/rules-regulations/administration/fmcsr/fmcsrguidedetails.aspx?menukey=391. Medical requirements are in 49 C.F.R. § 391.41, www.fmcsa.dot.gov/rules-regulations/administration/medical.htm. See FMCSA Medical Programs, www.fmcsa.dot.gov/rules-regulations/topics/medical medical.htm. *See also* ICF INTERNATIONAL, *supra* note 56, at 3–4.

[93] For example, in responding to the report questionnaire, Alabama, Idaho, Indiana, Iowa, Louisiana, Maryland, Minnesota, Nevada, and New Jersey indicated that transit employees [either specifically or as part of larger group that could be expected to include transit employees] must meet the requirements of 49 C.F.R. § 391.41.

[94] Skill Performance Evaluation (SPE), www.fmcsa.dot.gov/rules-regulations/topics/medical/spepackage.htm.

[95] 109 Pub. L. No. 59, 119 Stat. 1742, § 4129, Operation of commercial motor vehicles by individuals who use insulin to treat diabetes mellitus, Aug. 10, 2005.

[96] U.S. GOVERNMENT ACCOUNTABILITY OFFICE, COMMERCIAL DRIVERS: CERTIFICATION PROCESS FOR DRIVERS WITH SERIOUS MEDICAL CONDITIONS 10 (2008), www.gao.gov/new.items/d08826.pdf.

[97] Interpretation for Part 391.45: Qualifications of drivers and LCV driver instructors, www.fmcsa.dot.gov/rules-regulations/administration/fmcsr/fmcsrruletext.aspx?chunkKey=0901633480023273.

[98] www.mrb.fmcsa.dot.gov/documents/FINALJul109_MRB_Meet_Sum_101409.pdf.

[99] *E.g.*, [Oregon] CDL Medical Examination & Physical Qualifications, www.oregon.gov/ODOT/DMV/driverid/cdlmedex.shtml.

quirements.[100] However, there is a distinction between Federal CDL requirements and state requirements for a passenger endorsement. For example, a driver may obtain a vision waiver from FMCSA and yet be denied a passenger endorsement from the state motor vehicle administration.[101] Maryland also does not allow passenger endorsements to individuals who require a CDL intrastate waiver.[102] California also prohibits drivers who do not meet the medical requirements of Section 391.41 from driving buses;[103] the FMCSA has taken the position that even if the FMCSA issues an exemption, a state is free to issue a restricted CDL.[104] Wisconsin, on the other hand, allows municipal bus drivers to obtain a passenger endorsement despite not meeting federal medical requirements.[105]

3. Judicial Review of Requirements

Where an employer requires that employees meet requirements in excess of CDL requirements, applicants or employees who cannot meet the more stringent requirements may challenge such employment practices as violative of the ADA or state nondiscrimination statutes.[106] Only two cases challenging the federal CDL requirements have reached the Supreme Court: *Albertsons, Inc. v. Kirkingburg*[107] and *Murphy v. United Parcel Service, Inc*.[108] In *Albertsons*, the Court upheld the validity of the FMCSA vision requirements; in *Murphy*, the Court held that the plaintiff was not disabled under the ADA, so that the validity of the regulation concerning hypertension was not reached. The Court did, however, draw a distinction between being disabled and being not certifiable under the USDOT medical requirement.

C. Occupational Safety and Health Requirements[109]

To the extent they are applicable to specific transit agencies, health and safety standards of the Federal OSHA[110] may require that transit agencies conduct physical ability testing, such as respirator fit and hearing tests. OSHA's recordkeeping requirements, to the extent they are applicable, will affect how a transit agency manages records of workplace injuries and illnesses.

1. Applicability to Transit Agencies

OSHA has limited jurisdiction over local government agencies. Its jurisdiction over public transit agencies is limited to those agencies in states with state OSHA plans.[111] As of October 2009, 25 states had OSHA-

[100] States that have adopted Part 383 and/or Part 391 in whole or in part include Alabama (has adopted entire Federal Commercial Motor Vehicle Safety Act of 1986), http://dps.alabama.gov/DriverLicense/FAQ.aspx#anchor851895), www.dps.state.al.us/DriverLicense/FAQ.aspx#anchor851895; Illinois (incorporates by reference requirements of 49 C.F.R. pts. 382, 383, and 391. 625 ILL. COMP. STAT. 5/18b105, www.ilga.gov/legislation/ilcs/ilcs5.asp?ActID=1815&ChapAct=625%26nbsp%3BILCS%26nbsp%3B5%2F&ChapterID=49&ChapterName=VEHICLES&ActName=Illinois+Vehicle+Code%2E); Iowa (adopted 49 C.F.R.§ 391.11, IOWA ADMIN. CODE 761—607.10 (321, www.legis.state.ia/us/aspx/ACODocs/DOCS/05-06-2009.761.pdf); Massachusetts (has adopted Part 491, applies to both rail and bus operators, MBTA response to Report Questionnaire); Missouri (has adopted 49 C.F.R. pts. 390 through 397 as state law, http://dor.mo.gov/mvdl/drivers/dlguide/chapter15.pdf); Nevada (requirements for CDLs may not be more stringent than those under federal law. NEV. REV. STAT. 483.908 Adoption of regulations, www.leg.state.nv.us/NRS/NRS-483.html#NRS483Sec908); New Jersey (defers to FMCSA requirements for physical fitness, www.state.nj.us/mvc/Commercial/Getting.htm); Ohio (requires all commercial drivers to meet minimum medical standards, http://www.bmv.ohio.gov/cdl.stm).

[101] *E.g.*, [Maryland] CDL Medical Waiver Information Packet, Requesting Interstate Waiver/Exemption, Requesting Intrastate Waiver, at 2, www.mva.maryland.gov/Resources/CDLWaiver.pdf.

[102] *E.g.*, *id*. at 4.

[103] California notes that the rationale for CDL medical standards is that these drivers have a more physically and mentally demanding environment than other drivers, and their driving has public safety implications. In those rare instances when California makes an exception to the CDL medical requirements, the state issues a CDL restricted to intrastate driving and without a passenger or hazardous materials endorsement. California DMV Commercial Driver License Medical Eligibility: Purpose of Higher Medical Standards: Commercial Driver License (CDL) Medical Requirement Exceptions, www.dmv.ca.gov/dl/driversafety/cdl_guidelines.htm#six_1.

[104] Department of Transportation, Federal Motor Carrier Safety Administration, Notice of final disposition, *Qualification of Drivers; Exemption Applications; Vision,* 65 Fed. Reg. 77066, Dec. 8, 2000, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2000_register&docid=00-31347-filed.pdf.

[105] Wisconsin Commercial Driver's Manual, Vol. 1, Apr. 2009, § 1:6, www.dot.wisconsin.gov/drivers/docs/cdl-vol1.pdf. Wisconsin state medical standards vary from the federal standards; for example, requiring visual acuity of 20/60 in the best eye. *Id*.

[106] *See* III.A.2, *Prohibitions Against Discrimination Based on Physical Disability, supra* this digest.

[107] 527 U.S. 555, 119 S. Ct. 2162, 144 L. Ed. 2d 518 (1999). Although Albertsons did not involve a facial challenge to the regulation itself (Gurley v. N.Y. City Transit Auth., Case No. 03-CV-1321 (FB), 2003 U.S. Dist. LEXIS 21844 (Dec. 5, 2003)), the case is considered to stand for the proposition that the CDL vision standard is not a per se violation of the ADA.

[108] 527 U.S. 516, 119 S. Ct. 2133, 144 L. Ed. 2d 484 (1999).

[109] *See generally*, 2 MARK A. ROTHSTEIN, CHARLES B. CRAVER, ELINOR P. SCHROEDER & ELAINE W. SHOBEN, EMPLOYMENT LAW, ch. 6*, Occupational Safety and Health* (4th ed. 2009).

[110] 29 C.F.R. pt. 1910, www.osha.gov/pls/oshaweb/owasrch.search_form?p_doc_type=STANDARDS&p_toc_level=1&p_keyvalue=1910.

[111] 29 U.S.C. § 652(5). *See* www.osha.gov/fso/osp/index.

approved plans.[112] Transit agencies in these states must meet health and safety standards that are at least as effective as those set forth by OSHA.[113] Even in non-OSHA-plan states, state agencies may apply OSHA standards. Some state requirements are stricter than federal requirements.[114] Transit agencies may also follow OSHA standards as a matter of agency policy.[115]

2. Specific Standards

OSHA requires both preplacement exams and either annual or biannual exams for employees exposed (at specified levels) to a number of substances. Substances associated with such requirements that mechanics and various other transit personnel are typically exposed to include hazardous waste,[116] asbestos,[117] lead,[118] chromium,[119] benzene,[120] bloodborne pathogens,[121] and formaldehyde.[122] In particular, a wide range of transit positions—such as bus servicers, motor cleaners, painters, trackmen, bus repairers, and machinists—may be subject to pulmonary function tests.[123] Such tests are required for employees exposed (at specified levels) to asbestos, formaldehyde, and hazardous waste; who work in permit-required confined spaces[124] (essentially potentially hazardous confined spaces); and who must wear respirators.[125]

In addition to occupational standards for specific hazards, OSHA has a respirator protection program. Under this program OSHA requires the use of respirators "when such equipment is necessary to protect the health of the employee."[126] For example, transit agencies that have areas where concentrations of asbestos meet the threshold for OSHA regulation must provide respirators to each person who enters the regulated area.[127] The standard requires a respiratory protection program that includes medical evaluations of employees required to use respirators and fit-testing procedures for tight-fitting respirators to ensure that employees whose jobs require respirators can safely wear them. The seal check can only be conducted if there is no facial hair between the skin and the facepiece sealing surface. The test includes prescribed exercises, such as breathing, head movements, and bending.[128]

OSHA also requires preplacement and annual hearing exams for employees exposed to sound levels exceeding those specified in the regulation.[129] Positions that may require hearing tests include bus servicers, motor cleaners, painters, trackmen, bus repairers, and machinists.[130]

.html; www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=22439.

[112] Those states are Alaska, Arizona, California, Connecticut, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming. Puerto Rico and the Virgin Islands also have OSHA-approved plans. State Occupational Safety and Health Plans, www.osha.gov/dcsp/osp/index.html.

[113] 29 C.F.R. pt. 1910, Occupational Safety and Health Standards.

[114] ROBERT J. MCCUNNEY, PAUL P. ROUNTREE, DEBRA CHERRY, SHARON DAVIS, JEFFREY LEVIN, LARRY K. LOWRY, J. TOREY NALBONE, BARBARA PINSON & ELLEN REMENCHIK, OCCUPATIONAL AND ENVIRONMENTAL MEDICINE: SELF-ASSESSMENT REVIEW 10 (2004).

[115] *E.g.,* Dallas Area Rapid Transit (DART), DART response to report questionnaire, § IV.A., Tests and standards for current employees: In general.

[116] 29 C.F.R. § 1910.120, Hazardous waste operations and emergency response, http://edocket.access.gpo.gov/cfr_2009/julqtr/pdf/29cfr1910.120.pdf.

[117] 29 C.F.R. § 1910.1001, Asbestos, www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&p_id=9995; § 1926.1101 Asbestos [construction], http://edocket.access.gpo.gov/cfr_2009/julqtr/pdf/29cfr1926.1101.pdf. Medical surveillance may also be required. Medical surveillance guidelines for asbestos—Non-Mandatory—1910.1001 App. H, www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&p_id=10003.

[118] 29 C.F.R. § 1910.1025, Lead, http://edocket.access.gpo.gov/cfr_2009/julqtr/pdf/29cfr1910.1025.pdf.

[119] 29 C.F.R. § 1910.1026, Chromium (VI), http://edocket.access.gpo.gov/cfr_2009/julqtr/pdf/29cfr1910.1026.pdf.

[120] 29 C.F.R. § 1910.1028, Benzene, http://edocket.access.gpo.gov/cfr_2009/julqtr/pdf/29cfr1910.1028.pdf.

[121] 29 C.F.R. § 1910.1030, Bloodborne pathogens, http://edocket.access.gpo.gov/cfr_2009/julqtr/pdf/29cfr1910.1030.pdf.

[122] 29 C.F.R. § 1910.1048, Formaldehyde, http://edocket.access.gpo.gov/cfr_2009/julqtr/pdf/29cfr1910.1048.pdf.

[123] *E.g.,* Chicago Transit Authority Medical Testing Requirement Sheet, provided in response to Physical Ability Questionnaire.

[124] 29 C.F.R. § 1910.146, Permit-required confined spaces, http://edocket.access.gpo.gov/cfr_2009/julqtr/pdf/29cfr1910.146.pdf.

[125] 29 C.F.R. § 1910.134, Respiratory protection, http://edocket.access.gpo.gov/cfr_2009/julqtr/pdf/29cfr1910.134.pdf.

[126] 29 C.F.R. § 1910.134(a)(2).

[127] 29 C.F.R. § 1910.1001, Asbestos, www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&p_id=9995.

[128] App. A to § 1910.134: Fit Testing Procedures (Mandatory), www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&p_id=9780.

[129] 29 C.F.R. § 1910.95, Occupational noise exposure, http://edocket.access.gpo.gov/cfr_2009/julqtr/pdf/29cfr1910.95.pdf.

[130] *E.g.*, Chicago Transit Authority Medical Testing Requirement Sheet, provided in response to Physical Ability Questionnaire.

3. Recordkeeping Requirements

Records must be kept of workplace injuries and illnesses.[131] In particular, employers must record work-related injuries and illnesses on an OSHA *Form 301: Injury and Illness Incident Report* or an equivalent form. These include injuries and illnesses resulting in loss of consciousness, days away from work, restricted work activity or job transfer, or medical treatment beyond first aid.[132] This incident report form could be used as a trigger for assessing the need for a fitness-for-duty exam.[133]

OSHA also requires the employer to protect the privacy of the ill or injured employee in recording illnesses and injuries.[134] Moreover, OSHA directly addresses the confidentiality of employee medical records in its regulations.[135] However, OSHA workplace injury and illness records must be made available to OSHA representatives.[136] The "other federal laws" defense should be available to any claim of a violation of ADA confidentiality requirements for providing records to authorized representatives pursuant to 29 C.F.R. § 1904.40.

D. School Bus Drivers

States generally require additional school bus endorsements, but not necessarily anything that requires physical ability tests in addition to the required CDL physical exam.[137] States may have quite specific physical condition requirements for school bus drivers. Pennsylvania requires school bus operators to receive an annual physical examination administered by a school transportation physician, practical nurse, or physician's assistant.[138] Oregon's requirements for a school bus endorsement appear to exceed Federal CDL requirements.[139]

States may also have stricter drug and alcohol requirements for school bus drivers. For example, in Illinois a person who drives or is in actual physical control of a school bus or any other vehicle owned or operated by or for a public or private school is deemed to have given consent to a chemical test or tests of blood, breath, or urine for the purpose of determining the alcohol content of the person's blood.[140]

New York also appears to impose some restrictions that are stricter than those under Federal CDL requirements. For example, New York State Department of Motor Vehicle Regulations mandate that an insulin-dependent diabetic who has had an incident of hypoglycemic shock within 2 years is disqualified from driving school buses.[141] Other restrictions include barring waivers from Federal CDL requirements[142] and requiring

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[131] 29 C.F.R. pt. 1904—Recording and Reporting Occupational Injuries and Illnesses, www.access.gpo.gov/nara/cfr/waisidx_09/29cfr1904_09.html.

[132] OSHA Forms for Recording Work-Related Injuries and Illnesses, www.osha.gov/recordkeeping/OSHArecordkeepingforms.pdf.

[133] Of the 14 transit agencies that responded to the report questionnaire, only the MBTA and CTA indicated that fitness for duty exams are required after any incident that results in an OSHA 301 incident report (or equivalent state report). Such an exam does not, however, necessarily include functional physical ability testing. Response to question V.A., Source of requirements for conducting employee tests: In general.

[134] 29 C.F.R. § 1904.29(b)(6) through (10), http://edocket.access.gpo.gov/cfr_2009/julqtr/pdf/29cfr1904.29.pdf.

[135] 29 C.F.R. § 1913.10, Rules of agency practice and procedure concerning OSHA access to employee medical records, http://edocket.access.gpo.gov/cfr_2009/julqtr/pdf/29cfr1913.10.pdf.

[136] 29 C.F.R. § 1904.40, Providing records to government representatives, http://edocket.access.gpo.gov/cfr_2009/julqtr/pdf/29cfr1904.40.pdf.

[137] *E.g.*, Indiana, School Bus Endorsement, www.in.gov/dor/3418.htm, IND. CODE 20-9.1-3-1, Physical Fitness for School Bus Driver or School Bus Monitor, cited by Indiana Department of Revenue, Motor Carrier Services Division, Commercial Driver's License Section, Instructions and Information for Physical Examination Forms of CDL Holders (Apparently SPE not available), www.in.gov/dor/files/4195.htm#cdl (click on CDL-PHY, State Form 49867 "Physical Examination Form.").

[138] 67 PA. CODE § 71.3 (2005).

[139] The requirements are:

> (i) No impairment of use of foot, leg, finger, hand or arm, or other structural defect or limitation, likely to interfere with safe driving or other responsibilities of a school bus driver. Drivers may be required to demonstrate ability to: open and close a manually operated bus entrance door control with a force of at least 30 pounds; climb and descend steps with a maximum step height of 17 1/2 inches; operate two hand controls simultaneously and quickly; have a reaction time of 3/4 of a second or less from the throttle to the brake control; carry or drag a 125 pound person 30 feet in 30 seconds or less; depress a brake pedal with the foot to a pressure of at least 90 pounds; depress a clutch pedal with the foot to a pressure of at least 40 pounds unless operating an automatic transmission; exit from an emergency door opening of 24 x 48 inches at least 42 inches from the ground in ten seconds or less. Drivers must be physically able to open all emergency exits installed in any school bus they drive.

OR. ADMIN. R. 581-053-0006, School Bus Driver Training and Certification (7)(d)(A), http://arcweb.sos.state.or.us/rules/OARS_500/OAR_581/581_053.html. However, these requirements do not appear to apply to drivers of public transit who transport students on a nonexclusive basis. School Bus Endorsement, www.oregon.gov/ODOT/DMV/driverid/cdlendrest.shtml#PassRestr.

[140] 625 ILL. COMP. STAT. 5/6-106.1a., Cancellation of school bus driver permit; trace of alcohol, www.ilga.gov/legislation/ilcs/ilcs4.asp?DocName=062500050HCh%2E+6&ActID=1815&ChapAct=625%26nbsp%3BILCS%26nbsp%3B5%2F&ChapterID=49&ChapterName=VEHICLES&SectionID=28511&SeqStart=71300000&SeqEnd=90150000&&ActName=Illinois+Vehicle+Code%2E.

[141] Christopher v. Laidlaw Transit Inc., 899 F. Supp. 1224, 1226 (S.D.N.Y. 1995), citing N.Y. COMP. CODES R. & REGS. tit. 15, pt. 6, 6.11(b)(3).

[142] *E.g.*, Maryland: CDL Medical Waiver Information Packet, Requesting Interstate Waiver/Exemption, Requesting Intrastate Waiver, at 2, www.mva.maryland.gov/Resources/CDLWaiver.pdf.

school bus drivers from age 65 onward to undergo annual medical exams.[143]

In general, it does not appear that specific physical requirements for school bus drivers apply to transit operators. The only federal requirement specific to school bus drivers is that for a school bus endorsement,[144] which does not impose additional physical requirements beyond those for a CDL nor require physical ability testing. Some states may specifically exclude vehicles operated by public transit agencies from the definition of school bus, thereby making additional requirements for school bus drivers inapplicable to transit bus operators who transport school children.[145] In addition, some states only require the school bus endorsement to drive a yellow school bus.[146]

E. Transit Agency Policy

Transit agencies may require physical ability tests that are not mandated by federal or state law. Agencies may require tests to screen out unqualified applicants[147] and to reduce costs.

To the extent that testing is based on federal or state requirements for certain levels of ability, transit agencies may not allow employees to meet lesser standards. However, provided that they remain within the parameters of nondiscrimination requirements, transit agencies themselves may set more stringent requirements than under federal or state law. For example, an agency's own experience with accidents may lead it to follow federal requirements for CDL waivers rather than less stringent state waiver requirements. Examples cited in response to the report questionnaire of going beyond FTA drug and alcohol testing include requiring preemployment alcohol testing, preemployment drug and alcohol testing for all positions, post-accident testing for accidents not covered by FTA regulations, testing of safety-sensitive employees after an absence from work of 30 consecutive calendar days, and a drug test with the periodic CDL physical exam.[148] However, absent legislative authority, extending the more rigorous school bus requirements to bus and rail operators as a matter of agency policy could raise issues under disability discrimination law, as it appears the rationale for the more rigorous requirements—extra care required for those who transport children—would not apply to transit operators not in a similar position of trust.

III. LEGAL RESTRICTIONS ON PHYSICAL ABILITY TESTING

USDOT requires that grant recipients not discriminate on the basis of disability in federally-funded grant programs.[149] The Federal Transit Act, FTA's implementing regulations, and the Master Agreement all prohibit employment discrimination based on characteristics that may be affected by physical ability testing, such as gender, disability, or age.[150] These USDOT/FTA statutory and regulatory provisions mandate compliance with the Civil Rights Act of 1964, as amended; the ADA; and the Age Discrimination in Employment Act (ADEA).[151] The nondiscrimination requirements of these statutes affect the permissible scope of physical ability testing. The Family and Medical Leave Act of 1993 (FMLA)[152] also may affect the permissible scope of a transit agency's actions concerning physical ability testing. Of these, issues concerning physical ability testing

[143] CAL. VEH. CODE, § 12517.2., Medical Examination Requirements, http://dmv.ca.gov/pubs/vctop/d06/vctop/d06/vc12517_2.htm.

[144] 49 C.F.R. § 383.123, Requirements for a school bus endorsement, http://edocket.access.gpo.gov/cfr_2008/octqtr/pdf/49cfr383.123.pdf.

[145] *E.g.*, The Pupil Transportation Act, Act 187 of 1990 (Michigan), 257.1801 *et seq*., www.legislature.mi.gov/documents/mcl/pdf/mcl-Act-187-of-1990.pdf.

[146] *E.g.*, Illinois Commercial Driver's License Study Guide, § 4-B: School Bus Endorsement, at 60, www.sos.state.il.us/publications/pdf_publications/dsd_cdl10.pdf.

[147] EEOC, Employment Tests and Selection Procedures, www.eeoc.gov/policy/docs/factemployment_procedures.html; David E. Hollar, *Physical Ability Tests and Title VII*, 67 U. CHI. L. REV. 777, 784–85 (2000).

[148] *E.g.*, Los Angeles County Metropolitan Transportation Authority (LA Metro) requires preemployment alcohol testing and drug test with periodic exam; MBTA requires preemployment drug and alcohol testing for all job applicants; NYCT requires preemployment testing for titles not covered by FTA regulation and post-accident testing not covered by FTA regulation. (Based on responses to question VII.4 of study questionnaire).

[149] 49 C.F.R. pt. 27, Nondiscrimination on the basis of disability in programs or activities receiving federal financial assistance. www.access.gpo.gov/nara/cfr/waisidx_08/49cfr27_08.html.

[150] Section 5332 of Title 49 prohibits discrimination based on race, color, creed, national origin, sex, or age under a project, program, or activity receiving funding under ch. 53. FTA Circular C 4704.1, Equal Employment Opportunity Program Guidelines for Grant Recipients, July 26, 1988, requires compliance with Title VII of the Civil Rights Act of 1964, www.fta.dot.gov/documents/FTAEEOProgramGuidelines.pdf. FTA's master grant agreement requires that grantees agree to comply with all applicable civil rights laws and regulations, including the requirements of Title VII and the ADA. FTA Master Agreement MA(16), *supra* note 55, at 32–36.

[151] 90 Pub. L. No. 202, 81 Stat. 602, Dec. 15, 1967, codified as 29 U.S.C. §§ 621 *et seq*.

[152] 103 Pub. L. No. 3, 107 Stat. 6 www.dol.gov/whd/regs/statutes/fmla.htm, codified as 29 U.S.C. §§ 2601 *et seq*.; 29 C.F.R. pt. 825; Final Rule, 73 Fed. Reg. 67934 (Nov. 17, 2008), www.dol.gov/federalregister/PdfDisplay.aspx?DocId=21763 (accessed Dec. 2, 2008). *See* Health Benefits, Retirement Standards, and Workers' Compensation: Family and Medical Leave, www.dol.gov/Compliance/Guide/fmla.htm.

are most likely to relate to Title VII of the Civil Rights Act of 1964[153] and the ADA.[154]

This section discusses legal requirements under these federal statutes—as well as related state requirements—that place limits on physical ability testing, including prohibitions against employment discrimination based on gender, disability, and age, as well as medical leave requirements. (Discrimination based on race, while obviously unlawful, is rarely an issue in physical ability testing cases.) Search and seizure protections are also addressed.

A. Title VII

Title VII prohibits employment practices that discriminate based on race, color, religion, sex, or national origin.[155] Those requirements apply to state and local governments that have 15 or more employees or receive federal funding and all private employers with more than 15 employees.[156] The Civil Rights Act of 1991[157] amended Title VII, clarifying the burden of proof under disparate impact cases,[158] among other changes. The U.S. Department of Justice (DOJ) and the EEOC share enforcement responsibility of Title VII, with DOJ having the responsibility to file a civil action against a state or local governmental agency, either where the EEOC has found reasonable cause but has not been able to reach a conciliation agreement or where, even absent prior referral, a pattern or practice of discrimination is involved.[159]

Title VII defines an employee as "an individual employed by an employer."[160] Courts have construed the term "employee" under the Act in the context of "the conventional master-servant relationship as understood by common-law agency doctrine."[161] Thus, whether an individual who does not receive a salary may nonetheless be an employee for Title VII purposes based on job-related benefits is a question of fact.[162]

This subsection briefly reviews the difference between intentional discrimination and disparate impact discrimination. Subsection A then discusses the establishment and evolution of the disparate impact doctrine, including the business necessity defense. Finally, the subsection addresses EEOC guidelines on test selection criteria, including validation.

1. Intentional Discrimination v. Disparate Impact

Intentional discrimination involves taking action to avoid selecting or promoting persons in protected classes, for example, by imposing different requirements on such applicants or employees than on other applicants or employees. Absent direct evidence of an intent to discriminate, a pattern or practice of intentional discrimination may be shown by proving regular and purposeful discrimination by a preponderance of the evidence. Such discrimination clearly violates the Civil Rights Act. Where, for example, male and female job applicants both receive raw test scores that meet requirements, but female applicants are scored as failing, a finding of intentional discrimination is supported.[163] In addition, an employment policy that treats members of a protected class differently than members of another class on its face, such as an employment policy that is explicitly gender based, amounts to disparate treatment. Such a policy can only be defended where the gender-based practice is a bona fide occupational qualification (BFOQ),[164] that is, where sex is an occupational qualification reasonably necessary to the normal

[153] 88 Pub. L. No. 352, 78 Stat. 241, tit. VII, July 2, 1964, codified as 42 U.S.C. § 2000e.

[154] ROTHSTEIN, CRAVER, SCHROEDER & SHOBEN, *supra* note 109, at 94.

[155] 42 U.S.C. § 2000e-2, http://frwebgate.access.gpo.gov/cgi-bin/usc.cgi?ACTION=RETRIEVE&FILE=$$xa$$busc42.pt1.wais&start=26948980&SIZE=17763&TYPE=PDF. States may provide protection to a greater number of classes than tit. VII. *E.g.*, IOWA CODE § 216.6 Unfair Employment Practices, prohibiting employment discrimination based on "age, race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability…unless based upon the nature of the occupation," http://coolice.legis.state.ia.us/Cool-ICE/default.asp?category=billinfo&service=IowaCode&ga=83. However, for purposes of physical ability testing it seems unlikely that classes other than those protected by federal law would be at issue.

[156] 42 U.S.C. § 2000e, Definitions, http://frwebgate.access.gpo.gov/cgi-bin/usc.cgi?ACTION=RETRIEVE&FILE=$$xa$$busc42.pt1.wais&start=26860359&SIZE=84934&TYPE=PDF. The Equal Employment Opportunity Act of 1972, 92 Pub. L. No. 261, 86 Stat. 103 extended the requirements of tit. VII to state and local governments. Those requirements include the disparate impact doctrine. Blake v. City of L.A., 595 F.2d 1367, 1374 (9th Cir. 1979).

[157] 102 Pub. L. No. 166, 105 Stat. 1071, tit. I, Nov. 21, 1991, codified in various sections of 42 U.S.C. § 2000e-2 *et seq*.

[158] CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, TITLE VI LEGAL MANUAL, at n.39, www.usdoj.gov/crt?cor/coord/vimanual.php.

[159] U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, Employment Litigation Section—Affirmative Suits Under Title VII, 8-2.211, www.usdoj.gov/usao/eousa/foia_reading_room/usam/title8/2mcvr.htm#8-2.211.

[160] 42 U.S.C. § 2000e(f).

[161] Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322–23, 112 S. Ct. 1344, 1348, 117 L. Ed. 2d 581, 589 (1992).

[162] *E.g.*, Haavistola v. Cmty. Fire Co., 6 F.3d 211, 221–22 (4th Cir. 1993) (reasonable fact finder could decide Title VII employment relationship existed where volunteer firefighter received benefits such as disability pension, survivors' benefits, group life insurance, and scholarships for dependents upon death); Pietras v. Bd. of Fire Comm'rs, 180 F.3d 468, 472 (2d Cir. 1999) (probationary firefighter receiving benefits more generous than those in *Haavistola* could reasonably be held to be employee under Title VII).

[163] E.E.O.C .v. Dial Corp., 469 F.3d 735 (8th Cir. 2006).

[164] Frank v. United Airlines, Inc., 216 F.3d 845, 853–54 (9th Cir. 2000).

operation of the business or enterprise that offers the defense.[165]

Where a plaintiff alleges intentional discrimination but lacks direct evidence of discriminatory purpose, courts generally apply the evidentiary framework of *McDonnell Douglas Corp. v. Green*[166] and *Texas Dep't of Community Affairs v. Burdine*,[167] referred to as the *McDonnell Douglas-Burdine* burden-shifting framework. The plaintiff establishes a *prima facie* case by showing that he is a member of a protected class, he was qualified for the job, he suffered an adverse employment decision, and he was replaced by a person outside the protected class or treated differently than similarly situated nonprotected employees.[168] The employer must then articulate a legitimate, nondiscriminatory reason for the adverse employment decision. If such evidence is proffered, the employee may yet prevail by showing that the proffered explanation is a pretext for discrimination.[169]

As discussed below, the Supreme Court has also held that an employment practice that has a disparate impact on a protected class—that is, adversely affects members of that class far more than it affects other employees—may be unlawful even without a discriminatory intent on the part of the employer.[170] For such an employment practice to be lawful, the employers must show the business necessity of the practice. The precise requirements of meeting that standard have been the subject of much litigation and commentary.

Employers who change employment practices to avoid having them result in adverse impacts may face "reverse discrimination actions"; employees who benefited from those practices may allege that they have been discriminated against. The Supreme Court has now held that when an employer uses a test whose results have a disparate impact on a protected class, the employer may not attempt to remedy that result by discriminating against employees not in the protected class unless there is a strong basis-in-evidence that the employer would otherwise have been liable under the federal disparate impact statute.[171]

The Second Circuit has held that individual supervisors are not personally liable under Title VII.[172] However, the First Circuit has held that employers who mask intentional discrimination by purporting to rely on preemployment screening tests may face personal liability. For example, the First Circuit upheld a district court's monetary sanctions against a New Hampshire mayor who had claimed that physical ability tests were used to determine hiring for the town's fire department, when in fact the defendants made hiring decisions based on undisclosed subjective criteria.[173]

2. Disparate Impact Analysis: Supreme Court

A series of Supreme Court cases from the early 1970s through the late 1980s established the doctrine of unlawful disparate impact, which is particularly relevant for physical ability tests.[174] Although these cases provided somewhat inconclusive guidance on the requirements for defending against a charge of disparate impact discrimination, they nonetheless delineate the overall legal framework for analyzing disparate impact cases.

Griggs v. Duke Power Co.[175]—*Griggs* is the seminal disparate impact case. Chief Justice Burger delivered

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[165] 42 U.S.C. § 2000e–2(e). The BFOQ cannot be based on stereotyped characterizations of the sexes. *See* 29 C.F.R. § 1604.2(a)(1)(ii). Rather, in order to establish a sex-based BFOQ, the employer must have a "basis in fact" for believing that no members of one sex could perform the job in question. Dothard v. Rawlinson, 433 U.S. 321, 335 (1977). State law may allow an employer to apply to the relevant state agency, such as a Human Rights Commission, for a certification that a physical qualification is a bona fide occupational qualification. *E.g.*, R.I.G.L. § 28-5-7(4), www.rilin.state.ri.us/statutes/title28/28-5/28-5-7.HTM. Under Rhode Island law such a request would be evaluated after a public hearing. Response to report questionnaire from Cynthia Hyatt, Legal Counsel, State of Rhode Island Commission for Human Rights, June 15, 2009. Absent such a certification, the question of the validity of a physical qualification is likely to be determined on a case-by-case basis, decided if and when a person with a disability or another member of a protected class filed a complaint alleging that the requirement for a particular physical ability is discriminatory.

[166] 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

[167] 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

[168] White v. Baxter Healthcare Corp., 533 F.3d 381, 391 (6th Cir. 2008).

[169] *Id*.

[170] An employment practice that has a disparate impact on eligibility for employment or promotion may not be defended on the grounds that it has no effect on bottom-line employment or promotion because of affirmative action. Connecticut v. Teal, 457 U.S. 440, 102 S. Ct. 2525, 73 L. Ed. 2d 130 (1982). "Thus, under Teal and its progeny, individual components of a hiring process may constitute separate and independent employment practices subject to Title VII even if the overall decision-making process does not disparately impact the ultimate employment decisions involving a protected group." Bradley v. City of Lynn, 443 F. Supp. 2d 145, 158–59 (D. Mass. 2006).

[171] Ricci v. DeStefano, 557 U.S. ____, 129 S. Ct. 2658, 174 L. Ed. 2d 490 (2009).

[172] Mandell v. County of Suffolk, 316 F.3d 368, 377 (2d Cir. 2003).

[173] Legault v. Zambarano, 105 F.3d 24 (1st Cir. 1997).

[174] Typically there are significant strength differences between men and women. DEBORAH L. GEBHARDT, ESTABLISHING PERFORMANCE STANDARDS (Ch. 6, Stefan Constable & Barbara Palmer, eds., *The Process of Physical Fitness Standards Development*, 2000), www.dtic.mil/cgi-bin/GetTR Doc?AD=ADA495349&Location=U2&doc=GetTRDoc.pdf (accessed Oct. 27, 2009). Due to these typical disparities, strength and stamina tests tend to have disparate impact on women. Michael E. Brooks, *Law Enforcement Physical Fitness Standards and Title VII*, THE FBI LAW ENFORCEMENT BULLETIN, May 2001, at 26, 29, www.fbi.gov/publications/leb/ /2001/may01leb.pdf (accessed Nov. 29, 2008). *See, e.g.*, Evans v. City of Evanston, 881 F.2d 382, 384 (7th Cir. 1989); EEOC v. Dial, 469 F.3d 735 (8th Cir. 2006).

[175] 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971).

the court's unanimous decision. The employer in *Griggs*, which before the passage of the Civil Rights Act of 1964 had routinely discriminated overtly against blacks in employment, had instituted a requirement for either a high school diploma or passing an intelligence test and a general aptitude test for employees to be hired into its higher-paying departments or to transfer from the lowest-paying department into those higher-paying departments. Neither test measured aptitude for a particular job or category of jobs. White employees who were hired before those requirements were in place nonetheless performed satisfactorily. The lower courts had found that absent a showing of discriminatory intent, there was no violation of the Civil Rights Act.

In reviewing the purpose of the Civil Rights Act, the Court stated that Congress intended to require "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." Thus employment tests or criteria must offer genuine opportunity: they must take into account applicants' conditions. Accordingly, the Court found that the Civil Rights Act "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity." The Court held that if an employment practice that excludes members of a protected class "cannot be shown to be related to job performance, the practice is prohibited."[176]

The Court then noted that the employment tests had been adopted because the company thought they would generally improve the quality of the workforce, rather than on the basis of study showing that they bore "a demonstrable relationship to successful performance of the jobs" for which they were used. Moreover, employees who had not met these requirements performed successfully in the jobs for which they were now required.[177] The Court held that Title VII reached the consequences of employment practices, not just the employer's intent, and that under Title VII, employment practices that are discriminatory in effect are unlawful unless the employer meets "the burden of showing that any given requirement (has)…a manifest relationship to the employment in question."[178]

In examining the employer's contention that its general intelligence tests were permitted under the section of the Civil Rights Act allowing professionally-developed ability tests not designed, intended, or used to discriminate based on race, the Court referred to the EEOC's guidelines interpreting that section as only allowing job-related tests. The Court reviewed the legislative history of the provision in question and found that without question the EEOC's interpretation was consistent with congressional intent. The Court held that employment tests or measuring procedures may not control employment decisions unless "they are demonstrably a reasonable measure of job performance."[179] While clearly establishing a claim for discrimination based on disparate impact, *Griggs* did not make clear what showing was required to establish a defense of business necessity and what was required to show that an employment practice met the business necessity standard.[180]

Takeaway: Employment practice with discriminatory effect is prohibited unless the practice bears a demonstrable relationship to successful performance of the job covered by the practice.

Albemarle Paper Co. v. Moody[181].—In *Albemarle,* the Court examined the question of whether the employer had met the burden of showing that its employment tests were job related. The employer, a paper mill, instituted two intelligence tests to screen employees for entry into the higher-paying, skilled job lines at its plant. Neither test had been validated for job-relatedness at the plant. Incumbents were not required to pass the tests to retain their jobs or be promoted. A number of white incumbents in higher-ranking job groups could not in fact pass the tests. The employer hired an industrial psychologist to validate the tests before the case went to trial.

The Court reiterated the requirement for establishing a *prima facie* case of discrimination: showing that "the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants."[182] The Court then reviewed the question of job-relatedness. The Court noted that the EEOC guidelines on validation do not have the force of formal regulations, but are entitled to great

[176] *Id*. at 431.

[177] *Id*. at 431–32 (1971). The Court did not reach the question of whether an employer may adopt testing requirements that take into account the need for advancement if the employer can show a genuine business need for such requirements. *Id*. at 432.

[178] *Id*.

[179] *Id*. at 436.

[180] Andrew C. Spiropoulos, *Defining the Business Necessity Defense to the Disparate Impact Cause of Action: Finding the Golden Mean*, 74 N.C. L. REV. 1479, 1487–88 (1996).

[181] 422 U.S. 405, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (1975).

[182] *Id*. at 425, citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668 (1973). *McDonnell Douglas* established the burden shifting analysis for Title VII claims. The Court held that the plaintiff carries the initial burden of establishing a prima facie case of discrimination. In the case of racial discrimination, the plaintiff meets that burden by showing:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802. The burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for rejecting the plaintiff. The plaintiff in turn must be afforded an opportunity to establish that the proffered reason is in fact a pretext for discrimination. *Id*. at 802–04. Although McDonnell Douglas involved a claim of intentional discrimination, the burden shifting analysis is applied to disparate-impact claims as well.

deference.[183] Under those guidelines, as under *Griggs*, discriminatory tests "are impermissible unless shown, by professionally acceptable methods, to be 'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.'"[184] Using that standard, the Court found Albemarle's validation study to be insufficient. There was insufficient correlation between the tests and successful performance in the jobs being studied; the study relied in part on subjective supervisory rankings without clear criteria of job performance being relied upon; the study focused on high-level jobs, but used those results for testing entry-level positions, without justifying the use of the high-level measures for the entry-level jobs; and the validation study dealt with experienced white workers, but the tests were given to young, inexperienced, and often nonwhite applicants.

Takeaway: Where test is criterion-related, validating predictive value before implementation, using professionally acceptable methods, is particularly important.

Dothard v. Rawlinson[185]*—Dothard* involved a requirement under Alabama law that correctional counselors meet a 120 lb minimum weight standard and 5 ft 2 in. minimum height standard (the maximum standards were not at issue in the case), as well as a regulatory requirement establishing gender criteria for assigning counselors to maximum security institutions for positions with close physical proximity to inmates. The Court first determined that it was appropriate to judge the *prima facie* case based on statistics showing that the combined height and weight minimums would exclude 41.13 percent of the female population while excluding less than 1 percent of the male population. The Court rejected the argument that national statistics, as opposed to actual statistics concerning actual applicants for correctional positions in Alabama, were insufficient to establish a *prima facie* case.

The Court then turned to the argument that the height and weight requirements were job related because of their relationship to strength, some amount of which was deemed essential to effective job performance. The Court noted, however, that the state failed to produce any evidence specifically justifying the statutory standards; despite the fact that the height and weight requirements were established by statute, the state as employer still bore the burden of showing that the discriminatory employment practice was necessary to safe and efficient job performance.[186] The Court found that the state could meet the standards of Title VII by adopting and validating a test that measures strength directly, because such a test would measure the person for the job, not the person in the abstract. Thus, in *Dothard,* the Court rejected the "more is better" justification for an employment practice.[187]

Finally the Court addressed the question of whether the challenged regulation was permissible on the ground that gender was a BFOQ for counselors. The Court found that the use of gender to assign counselors in close contact was not based on stereotypes, but on the real need not to have women put in danger of assault, as for example from sex offenders scattered throughout the maximum-security prisons. The Court noted that the real danger of women counselors being assaulted implicated not just their safety but maintenance of security in the prisons.

Takeaway: Where strength is required to perform an essential function of the job, strength should be measured directly, not through unreliable proxies such as height and weight.

New York City Transit Authority v. Beazer[188].—*Beazer* involved a challenge to the transit authority's rule prohibiting the employment of narcotics users, including methadone users. The Court rejected the finding of the lower court that the statistics cited established a *prima facie* case.[189] The Court found that even were the statistical evidence valid, it was rebutted by the transit authority's showing that the narcotics rule was job related. The Court stated in a footnote that the authority's legitimate employment goals of safety and efficiency required excluding all methadone users from safety-sensitive positions and that those goals were significantly served by, even if not required, the rule excluding all methadone users even from non-safety-sensitive positions. The Court concluded that the record demonstrated that the rule bore a "manifest relationship to the employment in question," citing *Griggs* and *Albemarle*. The Court then remarked that the employees had not carried their ultimate burden of proving a

[183] *Albemarle Paper*, 422 U.S. at 431. *See also* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 257, 111 S. Ct. 1227, 1235, 113 L. Ed. 2d 274, 287 (1991); El v. SEPTA, 479 F.3d 232, 244 (3d Cir. 2007). The Second Circuit has held that the EEOC Guidelines are the primary yardstick by which the court measures test validation. Gulino v. N.Y. State Educ. Dep't, 460 F.3d 361, 384 (2d Cir. 2006).

[184] *Albemarle Paper*, 422 U.S. at 432, citing 29 C.F.R. § 1607.4(c).

[185] 433 U.S. 321, 97 S. Ct. 2720, 53 L. Ed. 2d 786 (1977). *See also* Blake v. City of L.A., 595 F.2d 1367, 1372 (9th Cir. 1979) (holding height requirement for Los Angeles police department not shown to be job related or required by business necessity; validation cannot rely on "what is obvious").

[186] *Dothard*, 433 U.S. at 331, 332, n.14 (1977).

[187] El v. SEPTA, 479 F.3d 232 (3d Cir. 2007).

[188] 440 U.S. 568, 99 S. Ct. 1355, 59 L. Ed. 2d 587 (1979).

[189] The rejected statistics were that 81 percent of the employees referred to the transit authority's medical director were black or Hispanic (since there was no breakdown of how many referrals were for methadone use) and 63 percent of the 65 percent of all New Yorkers receiving methadone maintenance in public programs were black or Hispanic (since there was no showing of the racial breakdown of otherwise qualified applicants and employees participating in public methadone maintenance programs or any information about participants in private programs). The court found that these statistics did not show that the percentage of black and Hispanic methadone users was any higher than the percentage of black and Hispanic members of the general population in New York City. *Id*. at 584–87.

Title VII violation.[190] Justice White, dissenting, took the position that the transit authority had the burden of establishing job-relatedness and that "petitioners have not come close to showing that the present rule is 'demonstrably a reasonable measure of job performance. [citing *Griggs*] No one could reasonably argue petitioners have made the kind of showing demanded by *Griggs* or [*Albemarle.*]"[191]

Takeaway: Beazer applies the manifest relationship standard, met by significantly serving safety and efficiency goals. Since this is the standard used in *Wards Cove*, questions exist about the current validity of this standard.

Wards Cove Packing Co. v. Atonio[192]*—Wards Cove* was a 5-4 decision holding that the plaintiff in a disparate impact case has the burden of proof on the issue of whether the disparate impact was caused by the employer's employment practices and whether those employment practices were justified by business necessity.[193]

The Court rejected the lower court's holding of what constituted a *prima facie* case of disparate impact.[194] In addition, the Court held that merely showing a racial imbalance in the workforce is not sufficient for establishing a *prima facie* case. Instead the plaintiff must show that the application of a specific employment practice has created the imbalance: "Respondents will also have to demonstrate that the disparity they complain of is the result of one or more of the employment practices that they are attacking here, specifically showing that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites."[195]

The Court then addressed the standard for meeting the business necessity test, holding that the employer carries the burden of production on this issue, but the employee maintains the burden of persuasion, matching the plaintiff's burden in disparate treatment cases.[196]

The dissenting Justices took the position that the majority opinion upset the longstanding burdens of proof in disparate impact cases and rejected the Court's own interpretation of Title VII as placing a "weighty" burden of establishing business necessity. In addition, the dissent argued that the majority had redefined the employee's burden of proof by requiring identification of the specific employment practices that have produced the disparate impact.

Takeaway: Held the burden of proof of business necessity lies with the plaintiff, which holding was overturned by statute; recognized legitimate employment goal standard for meeting business necessity test, a standard now in question.

3. Civil Rights Act of 1991

The Civil Rights Act of 1991 (1991 Act) explicitly shifted the burden of proof for the business necessity defense to the defendant.[197] As amended, the provision on unlawful employment practices now provides that a *prima facie* case of unlawful disparate impact is established if the employee shows that the employer uses an employment practice that causes a disparate impact based on protected class status and the employer fails to show that the practice is "job related for the position in question and consistent with business necessity."[198] The 1991 Act specifies that the only legislative history to be considered in interpreting the new provision is a memorandum that states that "(t)he terms 'business necessity' and 'job related' are intended to reflect the concepts enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*."[199] The 1991 provision has been interpreted as having been passed to codify the Supreme Court's approach to disparate impact cases as expressed in *Griggs*.[200] This provision arguably increased the standard because it requires a showing of business necessity instead of merely

[190] *Id*. at 587, n.31.

[191] *Id*. at 602.

[192] 490 U.S. 642, 109 S. Ct. 2115, 104 L. Ed. 2d 733 (1989).

[193] The employer was a salmon cannery. The plaintiffs alleged that the employer's hiring and promotion practices resulted in a workforce in which the higher-paid skilled jobs (noncannery) were predominantly held by white employees and the lower-paid unskilled jobs (cannery) were predominantly held by nonwhite employees. In addition, the cannery and noncannery employees lived in separate dormitories and ate in separate mess halls.

[194] The lower court had held that a low percentage of nonwhite workers in noncannery jobs and a high percentage of nonwhite workers in the cannery jobs made out a prima facie case of disparate impact. The Court stated that the comparison should have been between the racial composition of the jobs in question and the racial composition of the qualified population in the labor market in question, because if the low percentage of nonwhites was due to a lack of qualified candidates, the employer's practices would not be at fault. Otherwise, the Court reasoned, employers would be forced to use quotas to avoid disparate impact challenges.

[195] *Id*. at 657.

[196] The Court stated that "it is generally well established that…the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer," noting that "there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster." *Id*. at 659 (1989). The Court stated that any statements in earlier cases such as *Dothard* should have been understood to mean the burden of production, not persuasion. *Id*. at 659–60. Finally, the Court addressed the issue of alternative employment practices, noting that the employees must establish that any such alternatives are equally effective, taking cost or other burdens into account. *Id*. at 661 (1989).

[197] 42 U.S.C. § 2000e-2(k)(1)(A).

[198] *Id*.

[199] *E.g.*, David E. Hollar, *Physical Ability Tests and Title VII*, 67 U. CHI. L. REV. 777, 783 (2000), citing 137 CONG. REC. § 15276 (Oct. 25, 1991).

[200] *Id*.

significantly serving a legitimate employment goal,[201] although it can also be argued that it is not clear whether those contending a stricter standard was enacted or those contending a more lenient standard was enacted are correct.[202] The Third Circuit, at least, has held that the 1991 Act "abrogated the *Wards Cove* definition of business necessity."[203]

The 1991 Act also provides that separate passing scores for subgroups such as females and minorities may not be used for assessments that affect employment standing, for example, selection and promotion.[204] This has resulted in some confusion about the permissibility of assessing general physical fitness using percentiles that are adjusted for gender and age. A number of public agencies use the age-and gender-based fitness standards of the Cooper Institute for Aerobic Research.[205] However, the validity of these standards is unclear.[206]

4. Job Relatedness/Business Necessity Defense for Physical Ability Tests: Lower Courts

The Supreme Court has not addressed the standard for evaluating use of physical fitness tests as a screening device for employment purposes.[207] Accordingly the standard must be based on the general law of disparate impact, which means that the precise requirement for the business necessity defense varies by jurisdiction.[208] The standards most widely applied include the manifest relationship test,[209] the demonstrably necessary test,[210] and the close-approximation-to-job-tasks test.[211] The Third Circuit has articulated the arguably strictest standard, the minimum qualifications necessary test.[212] It has been suggested that this Third Circuit standard is more stringent than the EEOC's means of validation.[213]

To be permissible under Title VII, a discriminatory physical ability test must measure abilities required to perform essential functions of the job. To meet this requirement, the test must be based on a job analysis of essential job functions, must test abilities that significantly correlate—directly or indirectly—to those required for successful performance of those job functions, and must accurately test those abilities. A test may be pass–fail or used to rank candidates. However, using tests for ranking is permissible "only where the test scores vary directly with job performance."[214] Thus a test with an arbitrary cutoff score unrelated to job needs may be rejected.[215] In addition, courts may reject cutoff scores where it can be shown that a lower cutoff score would reduce the disparate impact while still effectively measuring job qualifications.[216] Tests used as a

[201] Brooks, *supra* note 174, at 29.

[202] Andrew C. Spiropoulos, *Defining the Business Necessity Defense to the Disparate Impact Cause of Action: Finding the Golden Mean*, 74 N.C. L. REV. 1479, 1487–88 (1996).

[203] El v. SEPTA, 479 F.3d 232, 241 (3d Cir. 2007).

[204] 42 U.S.C. § 2000e-2(l).

[205] *E.g.*, Department of Public Safety, Vermont State Police, www.dps.state.vt.us/vtsp/process.html.

[206] *E.g.*, Hoffman & Associates, *Total Fitness for Public Safety*, Mar. 6, 2009, at 13, http://post.state.nv.us/Administration/Cat3%20Physical%20Readiness%20Standards%20Validation%20Report.pdf (accessed Dec. 1, 2009). *See* discussion of *In re* Grievance of Scott, 172 Vt. 288, 779 A.2d 655 (Vt. 2001) in III.A.6., *Gender/Age Norming*, *infra* this digest.

[207] Hollar, *supra* note 199, at 777, 793.

[208] Michael R. Sarno, *Issues in the Third Circuit: Employers Who Implement Preemployment Tests To Screen Their Applicants, Beware (Or Not?): An Analysis Of Lanning v. Southeastern Pennsylvania Transportation Authority and the Business Necessity Defense as Applied in Third Circuit Employment Discrimination Cases*, 48 VILL. L. REV. 1403, 1414–16 (2003). Hollar, *supra* note 199, at 777. Hollar's analysis of the approaches to the business necessity test, while exhaustive, relies in part on a significant number of cases that pre-date the 1991 Act, and to that extent do not shed light on the standards since enactment.

[209] Sarno, *supra* note 208, at 1415, n.45, citing Ass'n of Mexican-American Educators v. Cal., 231 F.3d 572, 585 (9th Cir. 2000); Bullington v. United Air Lines, Inc., 186 F.3d 1301, 1315 n.10 (10th Cir. 1999) (using manifest relationship test when no safety concerns implicated); NAACP v. Town of East Haven, 70 F.3d 219, 225 (2d Cir. 1995). The Second Circuit has remarked that "job-relatedness" and "business necessity" are interchangeable terms. Gulino v. N.Y. State Educ. Dep't, 460 F.3d 361, 382 (2d Cir. 2006). The *Gulino* court, while apparently still applying the manifest relationship test, held that tests with a disparate impact must be shown to be a reasonable measure of job performance in order to be considered job related. Test validation can be shown by the opinion of experts in the field of test validation, evaluated against clearly established guideposts such as the EEOC Guidelines. *Id.* at 383–84.

[210] Sarno, *supra* note 208, at 1415, n.47, citing Bew v. City of Chicago, 252 F.3d 891, 894 (7th Cir. 2001); Anderson v. Zubieta, 180 F.3d 329, 342 (D.C. Cir. 1999); Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1118–19 (11th Cir. 1993); Banks v. City of Albany, 953 F. Supp. 28, 35 (N.D.N.Y. 1997).

[211] Sarno, *supra* note 208, at 1416, n.48, citing Smith v. City of Des Moines, 99 F.3d 1466, 1470–73 (8th Cir. 1996).

[212] Lanning v. SEPTA, 181 F.3d 478 (3d Cir. 1999). *See* III.A.1, *Title VII*, *infra* this digest. In applying the minimum qualifications standard, the Third Circuit has also held that a discriminatory practice must accurately, if not perfectly, measure an applicant's ability to perform essential job functions; the employer may hire the applicant most likely to perform a particular job successfully over applicants less likely to do so. El v. SEPTA, 479 F.3d 232, 242 (3d Cir. 2007).

[213] Brooks, *supra* note 174, at 30.

[214] Williams v. Vukovich, 720 F.2d 909, 924 (6th Cir. 1983).

[215] Pietras v. Bd. of Fire Comm'rs, 180 F.3d 468 (2d Cir. 1999). The district court held that the requirement that all firefighter candidates drag a hose 150 ft in less than 4 minutes was not job related after finding no rational basis for time selected. The fire department had timed incumbent firefighters (predominantly male), averaged the scores, and added half a minute for "leeway." In a footnote the appellate court agreed that there was no evidence that the time selected was job related. *Id*. at 472, n.5.

[216] EEOC v. Simpson Timber Co., 1992 U.S. Dist. LEXIS 5829, *10–11 (W.D. Wash.).

ranking mechanism for promotion may also be subject to scrutiny for disparate impact.[217]

Two circuit cases dealing with physical ability testing are particularly relevant: *Lanning v. Southeastern Pennsylvania Transportation Authority*[218] (SEPTA) and *EEOC v. Dial*.[219] Given the weight of these cases, they are discussed here at some length. Also covered is the viability of safety as a business justification and the plaintiff's rebuttal of a less discriminatory alternative.

Lanning: The Third Circuit reviewed the question of the appropriate legal standard for evaluating an asserted business justification for the cutoff score in a screening exam that has been challenged as discriminatory in a disparate impact challenge. SEPTA, which at the time of the lawsuit employed "an extremely low number of women in its transit police force,"[220] had decided to upgrade the physical fitness level of its police officers and hired an expert physiologist as a consultant to develop an appropriate physical fitness exam. After observing and speaking with SEPTA transit police, including some experienced officers deemed subject matter experts, the consultant determined that running, jogging, and walking were important tasks for the police officers. The consultant developed a test that would require the aerobic capacity that the consultant deemed necessary to perform the tasks of a SEPTA transit police officer. The test was that an officer be required to run 1.5 mi in full gear in 12 minutes, a task that was not required during the course of a SEPTA police officer's duties.

The test had a markedly higher rate of failure for female applicants, and Judge Mansmann, delivering the opinion of the Third Circuit, noted that SEPTA conceded the existence of a disparate impact on female applicants. Judge Mansmann also noted that SEPTA began testing incumbent officers, at first disciplining those who failed, and then dropping that approach in favor of providing incentives for passing the test. Although significant numbers of incumbent officers failed the tests, SEPTA never attempted to determine whether the officers who had failed had negatively affected SEPTA's ability to carry out its mission. Moreover, SEPTA had recognized the achievements of officers who had failed the test and had never imposed any negative consequences for a police officer for failing to perform the physical job requirements. In addition, the one female officer hired despite failing the test has received numerous recognitions from SEPTA for her performance.

After the litigation was filed, SEPTA hired statisticians to examine the statistical relationship between the aerobic capacity of SEPTA's officers and their number of arrests, arrest rates, and number of commendations. Based on those reports and one estimating that more than 50 percent of people arrested for serious crimes[221] between 1991 and 1996 had aerobic capacity above that required to pass the test, the district court found that SEPTA had established the aerobic capacity requirement to be job related and justified by business necessity. The district court also relied on a report that found a significantly smaller decrease in ability to perform physical activity after a 3-minute run among officers with aerobic capacities slightly above those required by the test than the decrease in ability among those with a lesser aerobic capacity.

After reviewing the facts as described above, Judge Mansmann reviewed the legal framework for examining a Title VII disparate impact claim, focusing almost exclusively on the "business necessity" prong of the job related and consistent with business necessity defense, as well as the history of the disparate impact doctrine and the introduction of the concept of business necessity as the touchstone for evaluating disparate impact claims. He categorized *Wards Cove* as departing from previous interpretations of the business necessity test. Judge Mansmann explained that the Civil Rights Act of 1991 was passed to codify the interpretations of business necessity and job related set forth in *Griggs* and the other Supreme Court cases before *Wards Cove*, making clear that the employer bears both the burden of production and persuasion in establishing the business necessity defense. The court cited the statutory language concerning business necessity, including the statutory directions concerning legislative interpretation of the 1991 Act.

Judge Mansmann acknowledged that following enactment "proponents of both a strict test for business necessity and a more liberal requirement claimed victory in the standard adopted by the Act."[222] However, given that the Supreme Court had not addressed the issue since the passage of the 1991 Civil Rights Act and that the circuit court opinions that had applied the 1991 Act's standards had done so "with little analysis,"[223] Judge Mansmann looked to Congress's interpretive memorandum, concluding that Congress had distinguished between *Griggs* and *Wards Cove* and had clearly intended to endorse the *Griggs* standard, so that the *Wards Cove* standard had not survived enactment of the 1991 Civil Rights Act.

The court explained its articulation of the minimum qualifications standard as follows:

> In the context of a hiring exam with a cutoff score shown to have a discriminatory effect, the standard that best effectuates [the mission begun in Griggs] is implicit in the Court's application of the business necessity doctrine to the employer in Griggs, i.e., that a discriminatory cutoff score is impermissible unless shown to measure the

[217] Bradley v. City of Lynn, 443 F. Supp. 2d 145, 159 (D. Mass. 2006).

[218] 181 F.3d 478 (3d Cir. 1999), *cert. denied*, 528 U.S. 1131 (2000).

[219] 469 F.3d 735 (8th Cir. 2006).

[220] *Lanning*, 181 F.3d at 483.

[221] These crimes accounted for about 10 percent of all reported incidents and 7 percent of all reported arrests. *Id*. at 484, n.8.

[222] *Id*. at 488.

[223] *Id*.

> minimum qualifications necessary for successful performance of the job in question. Only this standard can effectuate the mission begun by the Court in Griggs; only by requiring employers to demonstrate that their discriminatory cutoff score measures the minimum qualifications necessary for successful performance of the job in question can we be certain to eliminate the use of excessive cutoff scores that have a disparate impact on minorities as a method of imposing unnecessary barriers to employment opportunities.[224]

Having concluded that *Griggs* and its progeny require a minimum qualifications standard, the court deemed it a foregone conclusion that the 1991 Act, which required conformance with the Griggs standard, incorporated the minimum qualifications standard in its definition of business necessity.

The court also discussed the policies behind the disparate impact theory of discrimination, noting that an employer's job requirements could incorporate standards based on historically discriminatory biases rather than actual job requirements; accordingly, the minimum qualifications standard is needed to protect against covert discrimination. Accordingly, the court held that

> the business necessity standard adopted by the Act must be interpreted in accordance with the standards articulated by the Supreme Court in *Griggs* and its pre-*Wards Cove* progeny which demand that a discriminatory cutoff score be shown to measure the minimum qualifications necessary for the successful performance of the job in question in order to survive a disparate impact challenge.[225]

Furthermore, the court specifically rejected the dissent's argument that *Spurlock v. United Airlines, Inc.*[226] precluded applying the minimum qualifications standard to a safety-related job, taking instead the position that since the Supreme Court had not adopted *Spurlock*, it was excluded by the 1991 Act. In addition, the court noted that if SEPTA could show failure to meet a certain aerobic capacity would endanger public safety, such a requirement would then meet the standard the Court of Appeals had articulated.[227]

Judge Mansmann found that the district court had rejected the *Dothard* standard as *dicta*, relying instead on language in *Beazer*, *supra*, which language Judge Mansmann stated was *dicta* and in any event mirrored the *Wards Cove* approach rejected by the 1991 Act. Moreover, the appellate court found that the district court had erred in relying on the SEPTA consultant's expertise and in failing to consider whether the disputed cutoff in fact reflected the minimum aerobic capacity necessary to successfully perform the job in question.[228] The court rejected the "more is better" approach as sole validation for adopting particular cutoff scores, suggesting that such an approach is antithetical to the policies underlying Title VII and disparate impact theory. Following the district court's rationale, any employer whose jobs entail physical activity could adopt unnecessarily high cutoff scores on the theory that more is better, thereby eliminating virtually all women using a facially neutral, but effectively discriminatory, criterion, a result the Third Circuit found to contravene *Griggs*. Therefore, the appellate court vacated the lower court's judgment and remanded with instructions to reconsider, using the appellate court's standard, whether SEPTA had met its burden of establishing that the 1.5-mi test measured the minimum aerobic capacity for successful job performance by a SEPTA police officer. In particular, the appellate court noted that plaintiff's evidence concerning lack of correlation between the test and minimal job qualifications (that incumbent officers had failed the test but successfully performed the job and that other police forces do well without this type of test) was in fact relevant and should be considered by the district court upon remand.

Upon remand the district court held another hearing and found that SEPTA had met the burden of persuasion as set forth by the Court of Appeals. When that decision was again appealed to the Third Circuit, a different three-judge panel upheld the district court, finding that SEPTA had established that its aerobic capacity test "measure[d] the minimum qualifications necessary for successful performance as a SEPTA transit police officer and ha[d], thus, justified the conceded disparate impact on female candidates by showing business necessity."[229]

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[224] *Id*. at 489. The court found support in both *Albemarle* and *Dothard* to reinforce the conclusion that the minimum qualifications standard is implicit in *Griggs* and central to the mission of eradicating discrimination practiced by applying facially neutral but in effect discriminatory employment practices: "Taken together, Griggs, Albemarle and Dothard teach that in order to show the business necessity of a discriminatory cutoff score an employer must demonstrate that its cutoff measures the minimum qualifications necessary for successful performance of the job in question. *Id*."

[225] *Id*. at 490.

[226] 475 F.2d 216 (10th Cir. 1972) (holding lower standard of showing job relatedness for safety-related positions).

[227] *Lanning*, 181 F.3d at 491, n.16. *Cf,*, Zamlen v. City of Cleveland, 906 F.2d 209, 217 (6th Cir. 1990) (Recognizing *Spurlock* doctrine, relying on *Wards Cove* standard for establishing required burden of proof.) The argument that the *Spurlock* doctrine survived the Civil Rights Act of 1991 is considered controversial. Andrews & Risher, *supra* note 31, at 9.

[228] The district court had relied on a study that the consultant had done for the Anne Arundel County police department; however the appellate court found fault with using that study to validate the SEPTA cutoff score, in that there was no finding that the job descriptions were similar, nor that the Anne Arundel study measured for qualities relevant to qualities significant to SEPTA transit police performance. *Lanning*, 181 F.3d at 491, n.18. *See also* United States v. City of Erie, 411 F. Supp. 2d 524 (W.D. Pa. 2005).

[229] Lanning v. SEPTA, 308 F.3d 286, 288 (3d Cir. 2002) (Lanning II). The original panel for Lanning II included Judges Mansmann, McKee, and Barry. However, Judge Mansmann died before the opinion was rendered and the panel was reconstituted to include Judge Roth. Since Judge Mansmann authored the opinion in Lanning I and Judge McKee dissented from the opinion in Lanning II, it is possible that had Judge

The Third Circuit explained that an employer could show that a passing standard reflects the "minimum qualifications necessary" for successful performance by showing that individuals who pass the test are "likely to be able to do the job" whereas individuals who fail the test "will be much less likely to successfully execute critical policing tasks."[230] In applying that standard to the case at hand, the Third Circuit found that the district court's analysis of SEPTA's justifications was not clearly erroneous, establishing that what the aerobic capacity tested was related to a SEPTA police officer's job performance because studies indicated "that individuals who fail the test will be much less likely to successfully execute critical policing tasks."[231] The court emphasized that although the test produced disparate impacts, women who trained for the test were able to pass it at higher rates, deeming it reasonable for SEPTA to expect applicants to make the commitment to physical fitness before they are hired, rather than after.

Takeaway: "More is better" is not a sufficient rationale for test cutoff scores. To show business necessity, a discriminatory test cutoff score should measure the minimum qualifications necessary for successful performance of the job in question. The fact that individuals did not pass a preemployment test (failed/test not administered) and yet successfully perform essential functions of the job undercuts the business necessity defense.

Dial: This case involved a challenge to a strength test used by a meat packing plant, ostensibly instituted to reduce on-the-job injuries. The EEOC alleged that Dial had engaged in intentional discrimination and that its test had an unlawful disparate impact on females, an allegation upheld by both the district and appellate courts.

Specifically, employees at Dial's sausage packing area were required to carry about 35 lb of sausage at a time, lifting and loading the sausage to heights of 30 to 60 in. above the floor. These workers experienced disproportionately more injuries than other workers in the plant. In late 1996, Dial began measures to reduce these injuries, including ergonomic job rotation, implementing a team approach, and reducing machine heights. In 2000, Dial began using the Work Tolerance Screen (WTS), which required applicants to lift and lower a 35-lb bar between two frames, 30 and 60 in. above the floor. Applicants were given 7 minutes to work at their "own pace" while an occupational therapist took notes on their performance, documenting how many lifts were accomplished. In the 3 years before Dial instituted the WTS, women constituted 46 percent of new hires; that number dropped to 15 percent after the test was begun. Both overall injuries and strength-related injuries declined after the test was implemented, but that trend had begun in 1998 after Dial began other measures to reduce injuries.[232]

The EEOC's expert on industrial organization testified that the WTS was significantly more difficult than the actual job requirement, as the job required an average of 1.25 lifts per minute, with rests between lifts, while test takers performed an average of 6 lifts per minute, with no breaks. In addition, according to the expert, women's rate of injury had been lower than men's in 2 of the 3 years before WTS was implemented. Based on his analysis of the written evaluations, more men than women were offered employment even though their evaluations were similar. There was also evidence that the occupational nurse had marked some women as failing even though they had completed the test. Dial's expert on work physiology testified to his opinion that the test effectively tested skills representative of the actual job. Dial's industrial and organizational psychologist testified that the WTS measured job requirements and the decrease in job injuries could be attributed to the test. The plant nurse testified that Dial knew that WTS was screening out more women, but its continued use was justified by the decrease in injuries.[233]

The Eighth Circuit found that a reasonable jury could have found Dial's pattern of differing treatment of men and women supported an inference of intentional discrimination.[234]

Mansmann remained on the panel, Lanning II might not have upheld SEPTA's aerobic test.

[230] *Id*. at 291.

[231] *Id*. The Court of Appeals noted:

> …the District Court credited a study that evaluated the correlation between a successful run time and performance on 12 job standards. The study found that individuals who passed the run test had a success rate on the job standards ranging from 70% to 90%. The success rate of the individuals who failed the run test ranged from 5% to 20%. The District Court found that such a low rate of success was unacceptable for employees who are regularly called upon to protect the public. In so doing, the District Court implicitly defined "minimum qualifications necessary" as meaning "likely to be able to do the job."

Id. (footnote omitted.)

[232] EEOC v. Dial, 469 F.3d 735, 739 (8th Cir. 2006).

[233] *Id*. at 739–40.

[234] *Id*. at 742 (8th Cir. 2006). The court reviewed the standard for finding a pattern or practice of intentional discrimination:

> A pattern or practice of intentional sex discrimination must be shown by proving "regular and purposeful" discrimination by a preponderance of the evidence, Int'l Brotherhood of Teamsters v. U.S., 431 U.S. 324, 339, 360, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977). EEOC must show that more than an isolated act of discrimination occurred and that "discrimination was the company's standard operating procedure," id., but statistics combined with anecdotal examples of discrimination may establish a pattern or practice of regular, purposeful discrimination. Morgan v. United Parcel Service of America, Inc., 380 F.3d 459, 463–64 (8th Cir. 2004). Moreover, discriminatory intent can be inferred from the mere fact of differences in treatment, Teamsters, 431 U.S. at 335 n.15.

Id. at 741. The court noted that the statistical disparity between the pass rate for men and women far exceeded the standard of significance, and yet Dial continued to use the test, arguing that "men and women are not similarly situated and have profound physiological differences." However, men and women had both worked the job before the test was imple-

The court noted that given a *prima facie* case of disparate impact, the employer must show that the test in question is "related to safe and efficient job performance and is consistent with business necessity,"[235] with the business necessity defense requiring proof that the test was related to the job in question and its required skills and physical requirements.[236] There was no clear error in the district court's giving more credibility on the content validity issue to the EEOC's expert in industrial organization concerning the difficulty of the test compared with the job than to Dial's physiology expert on the representative nature of the WTS. The evidence—which showed that the decrease in injuries started 2 years before the test was implemented and that in that time women had had lower injury rates than men—did not require the trial court to find that WTS had caused a decrease in injury and therefore was criterion valid. Finally, although the burden of showing the existence of a less discriminatory alternative would have fallen to the EEOC if Dial had established its business necessity test, in this case showing that the other safety measures had not caused the decrease in injury was part of Dial's burden of establishing the necessity of the WTS.

Takeaway: If an employment practice with disparate impact is meant to reduce injuries, the employer should be able to validate that effect; if the effect is disputed, proving validity may be part of the employer's business necessity defense; tasks in a preemployment screening test should not be more onerous than actual job tasks.

Safety justification—The Eleventh Circuit has held that protecting employees from workplace hazards is a legitimate business goal sufficient to justify an employment practice that may have disparate impact.[237] *Fitzpatrick* involved a challenge to the Atlanta Fire Department's requirement that firefighters be cleanshaven. The plaintiffs argued that the policy had a discriminatory disparate impact on African American men, many of whom cannot shave because of a medical condition. The City of Atlanta defended its rule on safety grounds: individuals with facial hair could not safely wear the firefighter's positive-pressure, self-contained breathing apparatus (SCBA), as facial hair interferes with the respirator's seal. In support of its position, the city cited three national standards recommending against wearing SCBAs with facial hair contacting the sealing surface of the face piece, those of the American National Standards Institute, the National Institute for Occupational Safety and Health, and OSHA.[238] The court rejected the plaintiffs' argument that a 6-year period in which the city allowed "shadow beards" did not establish that such an accommodation was really safe. The court was particularly influenced by the national standards, which although not binding on the city, were nonetheless taken as "a trustworthy bench mark for assessing safety-based business necessity claims"; the court held that the only reasonable inference supported by those standards was that shadow beards are prohibited under those standards.[239]

Takeaway: Even if nonbinding, national standards may provide benchmarks for assessing safety-based business necessity claims.

Less Discriminatory Alternative.[240]—If an employment test that has disparate impact is in fact job-related and consistent with business necessity, it may nonetheless be held unlawful if the plaintiff can show that a less discriminatory—but still effective—test could be used. However, the cost or burden of the plaintiff's identified alternative may be taken into account in determining effectiveness.[241] Less discriminatory alternatives may apply to the cut-off scores as well as the test itself. [242] Assuming more than one alternative presents itself, the employer is not necessarily required to adopt the employment practice with the least adverse impact.[243]

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mented, and similarly situated men were hired when women were not.

[235] *Id*. at 742 (8th Cir. 2006), citing Firefighters Inst. for Racial Equality v. City of St. Louis, 220 F.3d 898, 904 (8th Cir. 2000).

[236] *Id*. at 742, citing Belk v. SW. Bell Tel. Co., 194 F.3d 946, 951 (8th Cir. 1999).

[237] Fitzpatrick v. City of Atlanta, 2 F.3d 1112 (11th Cir. 1993).

[238] *Id*. at 1120.

[239] *Id*. at 1121.

[240] If the underlying job task itself may be readily reconfigured, the court may find that a less discriminatory alternative exists. For example, the Alaska statute prohibiting unemployment discrimination provides that it is unlawful to discriminate in employment when the reasonable demands of the position do not require making the distinction. The Alaska Supreme Court construes the exception narrowly, taking the word "demands" to mean "requirements or necessities that are of an urgent nature." McLean v. State of Alaska, 583 P.2d 867, 869 (Alaska 1978). In McLean the court noted that in the case of a job that required employees to haul 100-lb bundles of laundry, there was not only no showing that women could not haul the bundles, but no showing that the laundry could not be placed in smaller bundles, thereby obviating the problem altogether. *Id.* at 870.

[241] Allen v. City of Chicago, 351 F.3d 306, 312 (7th Cir. 2003). In the context of arguing that a selection procedure with a higher percentage of merit-based promotions would be as valid as the challenged procedure, the Seventh Circuit held that the plaintiffs were required to show their alternative procedure would lead to a workforce substantially equally qualified as would the challenged procedure. In addition, the court found that the cost or other burdens of the alternative procedure should be taken into account in evaluating whether the alternative is an equally valid alternative. Moreover, the court held that a nondiscriminatory history for a type of selection procedure is insufficient to establish that a similar procedure would be less discriminatory than the challenged procedure. *Id*. at 313–17. The Ninth Circuit has also recognized that cost of the alternative procedure is a legitimate concern. Clady v. County of L.A., 770 F.2d 1421, 1432 (9th Cir. 1985).

[242] Jackson, *supra* note 1, at 207–8.

[243] *Clady,* 770 F.2d at 1432, citing Guardians Ass'n of the N.Y. City Police Dep't v. Civil Serv. Comm'n, 630 F.2d 79, 110 (2d Cir. 1980).

Takeaway: Employers need not sacrifice effectiveness in selecting a less discriminatory method for measuring ability to perform essential functions of the job.

5. EEOC Uniform Guidelines/Test Validation

Some of the EEOC's most significant guidance is contained in the Uniform Guidelines on Employee Selection Procedures.[244] The guidelines were originally adopted in 1978 by the EEOC, Civil Service Commission, Department of Labor, and DOJ to provide employers and others with a uniform set of principles for complying with federal law prohibiting employment practices that discriminate on the basis of race, color, religion, sex, and national origin. The EEOC guidelines are perhaps the most widely cited source.

The EEOC applies the Uniform Guidelines in enforcing Title VII, as does the DOJ in exercising its responsibilities under federal law. The Uniform Guidelines apply to procedures used to make a wide range of employment decisions, such as hiring, retention, promotion, demotion, transfer, referral, or firing. The guidelines do not have the force of law but indicate the standards the EEOC applies in enforcing Title VII, and—as noted in *Albemarle*, *supra*—are normally given great deference by reviewing courts.[245] The Uniform Guidelines cover the relationship between the use of selection procedures and discrimination, as well as providing standards for test validation. The EEOC has also published guidance interpreting and clarifying the regulatory guidelines.[246]

Under the Uniform Guidelines, an employee selection procedure that has an adverse impact on a protected class will be considered discriminatory unless the procedure has been validated as consistent with the guidelines (except in limited circumstances described in the guidelines).[247] Since an employer—assuming more than one appropriate selection procedures is available—should adopt the procedure with less adverse impact, whenever a validity study is called for the employer should include exploration of alternative selection procedures in the study.[248] While validation may be considered good personnel management procedure, it is only required when a procedure results in adverse impact on a protected class.[249] Once adverse impact is demonstrated, however, the EEOC considers it a violation of the Uniform Guidelines to continue using the procedure without validating it. Professionally accepted means of validation other than the EEOC Guidelines may be used to validate tests, providing the studies meet requirements set forth in the Guidelines, such as job similarity and fairness evidence for criterion-related validity evidence,[250] but federal enforcement agencies will give precedence to the EEOC Guidelines.[251]

Under the guidelines, adverse impact is a "substantially different rate of selection in hiring, promotion, or other employment decision which works to the disadvantage of members of a race, sex, or ethnic group."[252] The EEOC's rule of thumb for adverse impact is the four-fifths rule: if the selection rate for a protected class is less than 80 percent of the selection rate for the group with the highest selection rate, the procedure is

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[244] EEOC: 29 C.F.R. pt. 1607 (2009), www.access.gpo.gov/nara/cfr/waisidx_09/29cfr1607_09.html; DOJ: 28 C.F.R. § 50.14, http://edocket.access.gpo.gov/cfr_2009/julqtr/pdf/28cfr50.14.pdf.

[245] *Albemarle Paper*, 422 U.S. at 431 (1975). The Ninth Circuit has held that "while noncompliance [with the Uniform Guidelines] is not necessarily fatal, it diminishes the probative value of the defendants' validation study." Ass'n of Mexican-American Educators v. State of Cal., 195 F.3d 465, 487 (9th Cir. 1999), citing Clady v. County of L.A., 770 F.2d 1421, 1430 (9th Cir. 1985) (internal quotations omitted). *See also* United States v. City of Chicago, 573 F.2d 416, 427 (7th Cir. 1978) (employer's burden of justification heavier if EEOC Guidelines not followed).

[246] EEOC, Uniform Employee Selection Guidelines Interpretation and Clarification (Questions and Answers), www.uniformguidelines.com/questionandanswers.html.

[247] 29 C.F.R. § 1607.3, Discrimination defined: Relationship between use of selection procedures and discrimination, http://edocket.access.gpo.gov/cfr_2009/julqtr/pdf/29cfr1607.3.pdf; § 1607.6, Use of selection procedures that have not been validated, http://edocket.access.gpo.gov/cfr_2009/julqtr/pdf/29cfr1607.6.pdf.

[248] 29 C.F.R. § 1607.3, Discrimination defined: Relationship between use of selection procedures and discrimination, http://edocket.access.gpo.gov/cfr_2009/julqtr/pdf/29cfr1607.3.pdf.

[249] 29 C.F.R. § 1607.1, Statement of purpose, http://edocket.access.gpo.gov/cfr_2009/julqtr/pdf/29cfr1607.1.pdf.

[250] 29 C.F.R. § 1607.7, Use of other validity studies, http://edocket.access.gpo.gov/cfr_2009/julqtr/pdf/29cfr1607.7.pdf. Clady v. County of L.A., 770 F.2d 1421, 1430 (9th Cir. 1985). Two other major sources of validation are the Standards for Educational and Psychological Testing (American Educational Research Association, American Psychological Association, and National Council on Measurement in Education, 1999) and the Principles for the Validation and Use of Personnel Selection Procedures (Society for Industrial and Organizational Psychology, 2003) [PRINCIPLES FOR THE VALIDATION AND USE OF PERSONNEL SELECTION PROCEDURES, (4th ed. 2003), www.siop.org/_Principles/principles.pdf.]. Richard Jeanneret, *Professional and Technical Authorities and Guidelines*, *in* EMPLOYMENT DISCRIMINATION LITIGATION: BEHAVIORAL, QUANTITATIVE, AND LEGAL PERSPECTIVES (Frank J. Landy & Eduardo Salas, eds., 2005). Jeanneret includes a comparison of these two sources of validation and the Uniform Guidelines, and suggests that the approach in the Uniform Guidelines of dividing validity into three types is outdated.

[251] EEOC, Uniform Employee Selection Guidelines Interpretation and Clarification (Questions and Answers), www.uniformguidelines.com/questionandanswers.html, Question 40.

[252] 29 C.F.R. § 1607.16.B Definitions: Adverse Impact. *See* Bernard R. Siskin & Joseph Trippi, *Statistical Issues in Litigation*, *in* EMPLOYMENT DISCRIMINATION LITIGATION: BEHAVIORAL, QUANTITATIVE, AND LEGAL PERSPECTIVES (Frank J. Landy & Eduardo Salas, eds., 2005).

deemed to have a disparate impact.[253] This rule does not have the force of law, but is considered to be a good indictor that a procedure likely has an adverse impact. However, statistically significant differences in selection rates of less than 20 percent may still result in unlawful discrimination.[254] Conversely, if the number of people selected is very small, there may not be unlawful discrimination even if the rates would normally trigger the four-fifths rule. A factor to consider in this regard is whether there is a pattern of selection differences over time.[255]

In determining adverse impact, the EEOC first looks at the overall selection process and then examines each selection procedure within the process. If there is no overall adverse impact, there is generally no reason to examine individual components of the process.[256] Adverse impact determinations should be made for each group constituting 2 percent or more of either the employer's workforce or the workforce in the relevant labor market.[257]

Where a specific selection procedure has been held not to be job related in similar circumstances, the employer should have evidence of the procedure's validity. An example is minimum height requirements.[258]

Validation is "the demonstration of the job relatedness of a selection procedure."[259] The Guidelines provide for three types of validation: criterion-related, content, and construct.[260] The EEOC describes these validation strategies as follows:[261]

> (1) Criterion-related validity—a statistical demonstration of a relationship between scores on a selection procedure and job performance of a sample of workers.
>
> (2) Content validity—a demonstration that the content of a selection procedure is representative of important aspects of performance on the job.
>
> (3) Construct validity—a demonstration that (a) a selection procedure measures a construct (something believed to be an underlying human trait or characteristic, such as honesty) and (b) the construct is important for successful job performance.

Of these three, criterion-related and content are most relevant for physical ability tests. The appropriateness of validation strategy depends on the type of selection procedure and job, and technical and administrative feasibility. The EEOC advises that where the following conditions exist, the employer should consider a criterion-related validation study: a substantial number of individuals for inclusion in the study, a considerable range of performance on the selection and criterion measures, and reliable and valid measures of job performance either available or capable of being developed. Where criterion-based validity studies are conducted, the employer should investigate fairness. A procedure is unfair if average results for one group are lower than average results for another group, but members of the first group perform as well on the job as members of the second group.[262] Content validity is appropriate where work samples or other operational measures of prerequisite skills can be developed, but not for skills or abilities that are expected to be learned on the job.[263]

Criterion-related tests measure skills that estimate or predict critical job duties, behaviors, or outcomes. For example, if a job analysis shows that lifting is an important factor, a selection test that measures strength (correlated to the type of lifting required) would be used. "Predictive validation requires a comparison between an applicant's test scores and subsequent on-the-job performance as an employee; concurrent validation methods correlate the test scores of present employees vis-a-vis their present job performance."[264] Content tests reflect important elements of the job, and are often work sample tests. Lifting a 50-lb box would be a content-based test for a job that requires

[253] 29 C.F.C. § 1607.4 Information on impact, http://edocket.access.gpo.gov/cfr_2009/julqtr/pdf/29cfr1607.4.pdf.

[254] *See* Isabel v. City of Memphis, 404 F.3d 404, 411–13 (6th Cir. 2005).

[255] EEOC, Uniform Employee Selection Guidelines Interpretation and Clarification (Questions and Answers), www.uniformguidelines.com/questionandanswers.html, Question 21.

[256] *Id*., Question 13.

[257] 29 C.F.R. § 1607.15 Documentation of impact and validity evidence, http://edocket.access.gpo.gov/cfr_2009/julqtr/pdf/29cfr1607.15.pdf.

[258] EEOC, Uniform Employee Selection Guidelines Interpretation and Clarification (Questions and Answers), www.uniformguidelines.com/questionandanswers.html, Question 25.

[259] *Id*., Question 32.

[260] Other sources may describe validation somewhat differently. For example, the American Psychological Association Standards set forth 5 validation strategies or sources of validity evidence and 24 specific validity standards. Jeanneret, *supra* note 250.

[261] EEOC, Uniform Employee Selection Guidelines Interpretation and Clarification (Questions and Answers), www.uniformguidelines.com/questionandanswers.html, Question 32. *See, e.g.*, United States v. City of Erie, 411 F. Supp. 2d 524 (W.D. Penn. 2005).

[262] EEOC, Uniform Employee Selection Guidelines Interpretation and Clarification (Questions and Answers), www.uniformguidelines.com/questionandanswers.html, Questions 67–68.

[263] *Id*. Question 51. 29 C.F.R. § 1607.14B. Technical standards for criterion-related validity studies, 14C. Technical standards for content validity studies, http://edocket.access.gpo.gov/cfr_2009/julqtr/pdf/29cfr1607.14.pdf. Under certain circumstances there may also be operational advantages to using criterion-valid tests. *See* Jackson, *supra* note 1, at 122.

[264] Vulcan Soc'y of N.Y. City Fire Dep't v. Civil Serv. Comm'n, 490 F.2d 387, 394 (2d Cir. 1973); Firefighters Inst. for Racial Equality v. City of St. Louis, 549 F.2d 506 (8th Cir. 1977).

lifting 50-lb packages.[265] Generally, content-based tests should be used as a pass-fail measure rather than ranking candidates. Content-based tests are the most direct measurement of job performance capability, provided that they in fact measure critical job elements. The Uniform Guidelines provide:

> The closer the content and the context of the selection procedure are to work samples or work behaviors, the stronger is the basis for showing content validity. As the content of the selection procedure less resembles a work behavior, or the setting and manner of the administration of the selection procedure less resemble the work situation, or the result less resembles a work product, the less likely the selection procedure is to be content valid, and the greater the need for other evidence of validity.[266]

The standards for conducting validity studies are described in detail under the Uniform Guidelines.[267] Demonstrating a rational relationship between an employment procedure and the job in question is not sufficient for purposes of Title VII.[268] Cut-off scores must also be validated for a relationship to successful job performance.[269] That is, there must be some evidence supporting the conclusion that a cut-off score is related to job proficiency.[270]

As illustrated by *United States v. City of Erie*,[271] taking a casual approach to test design and validation is legally perilous. The *City of Erie* court found that using incumbent employees to design or validate a test does not meet professionally-established standards. Rather, criterion-related validity can only be established by collecting data on test scores and job performance measures and performing statistical analyses to show that there is "a relationship between the predictor and the criterion such that individuals who have higher test scores tend to have higher levels of performance and individuals who have lower test scores tend to have lower levels of performance."[272] Moreover, even the opinions of an expert in industrial physiology must be supported by empirical evidence or persuasive analysis to provide validation; expert assumptions are not an adequate substitute for a research design study as validation.[273] The *City of Erie* court also found that where a physical ability test is composed of several components but timed based on completing the entire test, the test should be validated as a single test, not on a component basis. In *City of Erie*, a police candidate physical ability test (PAT) included three components—a 220-yd obstacle course, 17 push-ups, and 9 sit-ups—to be completed within 90 seconds.[274] The district court found that because these components were not structurally independent, they could not be validated separately.

Moreover, the court found that the city did not establish that the passing standard of the PAT reflected the minimum level of physical ability necessary for successful job performance; rather a review of the standard-setting process suggested that the standard had been set too high. A key factor was the litany of officers who either failed the test or barely passed it and yet were not shown to be minimally-performing officers. The court also noted that the fact that substantial numbers of successful incumbent officers could not pass the test suggested that the standard for passing did not correlate to minimum qualifications necessary to successful job performance. Accordingly, the court concluded that the city had failed to demonstrate business necessity.

Regardless of the type of validation at issue, the entire validation process may fail where the job analysis is deficient. Absent a thorough job analysis, assessment of appropriate content is impossible.[275] The *Thomas* court also found that using the physical agility tests in question to rank candidates was impermissible as the defendants produced no evidence that a passing score was valid prediction of successful job performance, let alone that a candidate who scored highly would perform better than a candidate who passed with a lower score.

Takeaway: Test design and validation must meet professionally accepted standards, including being based on a thorough job analysis and being supported by objective evidence that shows correlation between the passing score and successful job performance. The employer remains legally responsible for test design and validation.

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[265] James A. Hodgdon & Andrew S. Jackson, *Physical Test Evaluation for Job Selection in* THE PROCESS OF PHYSICAL FITNESS STANDARDS DEVELOPMENT 140–43 (Stefan Constable, Barbara Palmer eds., 2000), www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA495349&Location=U2&doc=GetTRDoc.pdf (accessed Oct. 27, 2009).

[266] 29 C.F.R. § 1607.14C (4) Standards for demonstrating content validity, http://edocket.access.gpo.gov/cfr_2009/julqtr/pdf/29cfr1607.14.pdf.

[267] 29 C.F.R. § 1607.14, Technical standards for validity studies, http://edocket.access.gpo.gov/cfr_2009/julqtr/pdf/29cfr1607.14.pdf.

[268] Washington v. Davis, 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976). EEOC, Uniform Employee Selection Guidelines Interpretation and Clarification (Questions and Answers), www.uniformguidelines.com/questionandanswers.html, Question 37.

[269] Isabel v. City of Memphis, 404 F.3d 404 (6th Cir. 2005).

[270] Thomas v. City of Evanston, 610 F. Supp. 422, 431 (N.D. Ill. 1985), citing 29 C.F.R. § 1607.5(H) [*Cutoff scores*, http://edocket.access.gpo.gov/cfr_2009/julqtr/pdf/29cfr1607.5.pdf].

[271] 411 F. Supp. 2d 524 (W.D. Pa. 2005).

[272] *Id*. at 558.

[273] *Id*. at 558–59, 569–70.

[274] *Id*. at 532–53. By the time of the district court decision, the City of Erie had discontinued the PAT and required instead that applicants for entry-level police officer positions be certified as law enforcement officers by the Commonwealth. That certification requires scoring in the 50 percent percentile on an age and gender-normed physical agility test. *Id*. at 534, n.8.

[275] Thomas v. City of Evanston, 610 F. Supp. 422 (N.D. Ill. 1985) (analysis based on three respondent's answers to seven-question survey and observations of graduate student during ride-alongs with police insufficient for thorough job analysis); Legault v. aRusso, 842 F. Supp. 1479, 1488–89 (D. N.H. 1994).

6. Gender/Age Norming

Despite the 1991 amendments to the Civil Rights Act, gender norming may be upheld where it does not act to impose greater burdens of compliance on either sex. For example, a Michigan court upheld a gender-normed performance skills test required by the Michigan State Police for entry into the police academy. Two male candidates who had failed to meet the passing standard for men, but who would have passed under the standard for women, argued that the test amounted to intentional gender-based discrimination in violation of the Michigan Constitution and civil rights act. They also argued that if gender norming was constitutional, the test should be age-normed as well. The court rejected both arguments, finding that the Michigan Constitution does not require equal treatment of individuals not similarly situated. The court held that tests that control for "inherent 'immutable' characteristics as between males and females and thus provide differing standards" do not violate equal protection.[276] The court then applied the heightened scrutiny test to determine whether the gender-normed test was substantially related to an important government purpose. The court found that the gender-normed test was intended to determine the most physically fit female candidates, rather than to exclude male candidates. The test served to expand the available pool of candidates, and served the important government interest of avoiding the disparate impact that a single standard would have on female candidates. The court also rejected the age discrimination argument, finding that the plaintiffs did not establish their protected class status, or that age, rather than physical fitness, was the factor causing any disparity in test results.

A Vermont court reached a similar result in reviewing a challenge to the Vermont State Police's physical fitness requirements for incumbent officers.[277] The Vermont test required that officers meet the fitness ability for the 50th percentile of the general population under the Cooper Institute for Aerobic Research standard. The Vermont State Police had studied the benefits of the physical fitness requirement before making it mandatory, finding a number of recognized benefits, including decreased lost workdays due to workers' compensation claims, decreased absenteeism, and decreased health problems. The fitness standard was both age-and gender-normed. The plaintiff argued that the fitness requirements constituted impermissible discrimination because he was held to a higher standard than female or older troopers required to perform the same job duties. The Vermont Labor Relations Board had held that the test held males and females to the same level of fitness based on their aerobic capacity and older persons and younger persons to the same level of fitness based on their aerobic capacity. The court found that the plaintiff failed to make out a *prima facie* case, because he had not established that he was discriminated against as a member of a protected class. Male troopers did not have a higher rate of failure under the standard than female troopers. Moreover, the plaintiff would have failed the test even if he had been held to the fitness standard for female or older troopers. The plaintiff also argued that the mandatory physical fitness standards must be related to specific job requirements to be permissible. The court noted that all cases requiring that physical fitness standards be job related imposed that requirement only after a *prima facie* case of discrimination had been established. Since no such case had been established, the court did not reach that issue.

A gender-normed, sit-and-reach test was referenced but not discussed in *Conroy v. City of Philadelphia*. The test at issue was part of a mandatory physical fitness exit exam from the police academy.[278]

Takeaway: While separate passing scores for assessments that affect employment standing are unlawful under Title VII as amended by the 1991 Act, using gender and age adjusted standards for general physical fitness, e.g., requiring that applicants score in the 50th percentile, when such percentiles are commonly gender and age normed, may be permissible. Gender-and age-norming general health standards may be permissible because they actually provide a way to measure differently situated groups so as to provide equivalent measures of fitness. Gender norming may also be upheld where it is used to enlarge a pool of applicants rather than to exclude applicants at the hiring stage.

B. Prohibitions Against Discrimination Based on Physical Disability

Title I of the ADA[279] prohibits discrimination against a qualified individual on the basis of disability in any aspect of employment, including hiring, advancement, or discharge.[280] Failure to make reasonable accommoda-

[276] Alspaugh v. Mich. Law Enforcement Officers Training Council, 246 Mich. App. 547, 556, 634 N.W.2d 161, 166 (2001).

[277] *In re* Scott, 172 Vt. 288, 779 A.2d 655 (Vt. 2001).

[278] 421 F. Supp. 2d 879 (E.D. Pa. 2006).

[279] Unless otherwise noted, the following EEOC guidance documents are the reference sources for requirements cited in this section: EEOC, ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations, www.eeoc.gov/policy/docs/medfin5.pdf; EEOC, Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act, No. 915-002 (July 27, 2000), www.eeoc.gov/policy/docs/guidance-inquiries.html; Questions And Answers: Enforcement Guidance On Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act (ADA), www.eeoc.gov/policy/docs/qanda-inquiries.html; EEOC Enforcement Guidance: Workers' Compensation and the ADA, www.eeoc.gov/policy/docs/workcomp.html.

[280] 42 U.S.C. § 12112(a). The Rehabilitation Act of 1973, 29 U.S.C. §§ 701–796, prohibits discrimination on the basis of disability in federal employment and programs, including programs receiving federal financial assistance. The standards for determining employment discrimination are the same under this act as under Title I of the ADA. U.S. Department of Justice, Civil Rights Division, Disability Rights Section, *A Guide*

tion to individuals with disabilities, absent undue hardship, constitutes unlawful discrimination under the ADA.[281] Both disparate-treatment and disparate-impact claims are cognizable under ADA.[282] All of the courts of appeals have applied Title VII standards to disparate-treatment cases under the ADA.[283]

Title I covers state and local governments as well as private employers and is enforced by the EEOC,[284] although state governments may not be sued for money damages.[285] The EEOC exercises the same enforcement powers, remedies, and procedures as under Title VII when it enforces ADA.[286] Title II also covers public agency employment, and it is enforced by DOJ.[287] DOT makes compliance with both the EEOC and DOJ regulations a condition of receipt of federal assistance from DOT.[288]

The ADA's nondiscrimination requirements limit an employer's ability to make disability-related inquiries and require medical examinations[289] at three stages: pre-offer, post-offer, and employment. The ADA also requires that employers maintain the confidentiality of medical information.[290]

This section reviews issues related to the requirements of the ADA, such as limitations on disability-related inquiries and medical examinations, the definition of disability, the elements of a *prima facie* case of ADA discrimination, and defenses to a *prima facie* case. State law on disability discrimination is also addressed. The principles discussed govern determining at what points in the employment process it is legally permissible to conduct a physical ability test, as well as distinguishing between a physical ability test and a medical examination, including identifying those elements that would make an otherwise lawful physical ability test impermissible because of the point in the employment process at which the test is conducted.

1. Disability-Related Inquiries and Medical Examinations

Timing Restrictions.—Before an offer of employment is made, all disability-related inquiries and medical examinations are prohibited, even if they are job-related. After a conditional job offer is extended, disability-related inquiries and medical exams are permitted regardless of relation to the job, provided that the employer makes inquiries and conducts exams for all employees in the same job category and the medical exams are the last step in the hiring process.[291] Although post-offer medical exams or medical inquiries need not be job related and consistent with business necessity, if an applicant is not hired because such exam or inquiry reveals a disability, the reason for not hiring must be job related and consistent with business necessity.[292]

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to Disability Rights Laws, Sept. 2005, www.ada.gov/cguide.htm#anchor65610. Rehabilitation Act cases are precedent for ADA cases, and vice versa. Breen v. Dep't of Transp., 282 F.3d 839, 841 (D.C. Cir. 2002); Alston v. Wash. Metro. Area Transit Auth., 571 F. Supp. 2d 77, 81, 350 U.S. App. D.C. 212 (D.D.C. 2008); Dale v. Wynne, 497 F. Supp. 2d 1337, 1341 (M.D. Ala., 2007).

[281] 42 U.S.C. § 12112(b)(5). *See* Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Notice No. 915.002, Oct. 17, 2002, www.eeoc.gov/policy/docs/accommodation.html#N_1_. The duty to provide reasonable accommodation may apply to medical evaluations. Rohr v. Salt River Project Agric. Improvement & Power Dist., 555 F.3d 850, 863 (9th Cir. 2009).

[282] Raytheon Co. v. Hernandez, 540 U.S. 44, 124 S. Ct. 513, 157 L. Ed. 2d 357 (2003); Smith v. City of Des Moines, Iowa, 99 F.3d 1466 (8th Cir. 1997).

[283] *Raytheon*, 540 U.S. at 50, n.3 (2003).

[284] EEOC, Disability Discrimination, www.eeoc.gov/laws/types/disability.cfm.

[285] Board of Trustees of Ala. v. Garrett, 531 U.S. 356, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001). However, individuals may sue state governments under Title II of the ADA. Tennessee v. Lane, 541 U.S. 509, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004). The difference in the two holdings turned on the fact that in *Garrett* the Court ruled that Congress had not met the congruence and proportionality test—that is had not gathered enough evidence of discrimination based on disability related to equal protection to justify abrogating sovereign immunity, whereas in *Lane* the Court ruled that there was enough evidence of disability discrimination related to due process to justify abrogation.

[286] E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 122 S. Ct. 754, 151 L. Ed. 2d 755 (2002). The opinion also held that an arbitration agreement doesn't preclude E.E.O.C. from pursuing available remedies.

[287] United States Attorneys' Manual, Disability Rights Section—ADA Enforcement, www.usdoj.gov/usao/eousa/foia_reading_room/usam/title8/2mcvr.htm#8-2.410.

[288] 49 C.F.R. § 27.19, Compliance with Americans with Disabilities Act requirements and FTA policy, www.fta.dot.gov/documents/Part_27_PDF10-1-07_edition.pdf.

[289] The EEOC defines "medical examination" as "a procedure or test that seeks information about an individual's physical or mental impairments or health." Preemployment Disability-Related Questions and Medical Examinations, www.eeoc.gov/policy/docs/medfin5.pdf, at 13.

[290] 42 U.S.C. § 12112(d)(3); 29 C.F.R. § 1630.14(b)(1),(2).

[291] 42 U.S.C. § 12112(d)(2). *See* EEOC, Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act, No. 915-002 (July 27, 2000), www.eeoc.gov/policy/docs/guidance-inquiries.html. The job offer must be "real." All other nonmedical components of the hiring process, such as background checks, must be completed before the medical exam is required. If there are components that cannot be reasonably completed before the medical exam, the employer must make that showing. Leonel v. Am. Airlines, 400 F.3d 702 (9th Cir. 2004). *See also* Preemployment Disability-Related Questions and Medical Examinations, www.eeoc.gov/policy/docs/medfin5.pdf, at 17.

[292] U.S. Equal Employment Opportunity Commission, U.S. Department of Justice Civil Rights Division: Americans with Disabilities Act, Questions and Answers, www.ada.gov/qandaeng.htm.

The ADA also limits an employer's ability to make disability-related inquiries of employees.[293] Employers may not require current employees to undergo medical exams unless the exam "is shown to be job-related and consistent with business necessity."[294] That prohibition applies to all employees, regardless of disability status.[295] Employers may, however, "make inquiries into the ability of an employee to perform job-related functions."[296] Thus it is permissible to require employees to undergo medical exams if there is evidence of a job performance or safety problem or if required by other federal laws, such as the CDL requirement. In the event of conflict between the ADA and another federal requirement, the employer still must determine if there is reasonable accommodation consistent with the requirements of the other federal laws. Although generally periodic medical exams are considered unlawful under EEOC guidance, periodic exams of employees in safety-sensitive positions, where such exams address specific job related concerns, can be justified as job-related and consistent with business necessity.

Disability-Related Inquiry.—EEOC considers a "disability-related inquiry" to be a question "likely to elicit information about a disability." Examples include asking whether the employee has or has ever had a disability, what kinds of prescription medicine the employee takes, or what the results are of any genetic testing the employee has had. Questions not likely to elicit information about a disability and thus permitted at any time include questions about an employee's general well-being, the employee's ability to perform job functions, and the employee's current use of illegal drugs.[297]

The Second Circuit has held that a requirement that a return-to-work certificate contain a general diagnosis raises sufficient potential to reveal a disability or perception thereof may only be allowed as a business necessity.[298] Business necessity in this context must amount to more than mere expediency, such as "ensuring that the workplace is safe and secure or cutting down on egregious absenteeism. The employer must also show that the examination or inquiry genuinely serves the asserted business necessity and that the request is no broader or more intrusive than necessary."[299] Examples of permissible requests for exams or releases include requiring a medical release before rehiring an employee who had previously resigned because of a disability;[300] requiring a medical exam from an employee, whose job required lifting, when the employee sought to return from leave after back surgery following a work-related injury;[301] requiring an extensive questionnaire from an employee's doctor where the employee had suffered a stroke and requested a transfer to a more strenuous position.[302]

In *Transport Workers Union of America, Local 100, AFL-CIO v. New York City Transit Authority (NYCT),*[303] the district court reviewed the NYCT's sick leave policy requiring notice before sick leave, employee-furnished explanations of the reason for sick leave regardless of time taken off, and doctor's certification concerning sick leave. The transit agency offered two justifications for the policy: 1) detection and deterrence of sick leave abuse, and 2) alerting the authority to dangerous medical conditions in safety-sensitive employees.[304] The court reviewed the extent and cost of sick leave abuse, and found that it was significant but not so widespread as to include overwhelming numbers of employees. The court also found that the review of the sick leave forms had some indeterminate deterrent effect on sick leave abuse

[293] *See* Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act, No. 915-002 (July 27, 2000), www.eeoc.gov/policy/docs/guidance-inquiries.html.

[294] 42 U.S.C. § 12112(d)(4)(A).

[295] Fredenburg v. Contra Costa County Dep't of Health Servs., 172 F.3d 1176, 1182-82 (9th Cir. 1999).

[296] 29 C.F.R. § 1630.14(c).

[297] Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act, No. 915-002 (July 27, 2000), www.eeoc.gov/policy/docs/guidance-inquiries.html, Question 1.

[298] Conroy v. N.Y. State Dep't of Correctional Servs., 333 F.3d 88 (2d Cir. 2003).

[299] *Id*. at 97–98.

[300] Harris v. Harris & Hart, Inc., 206 F.3d 838, 844 (9th Cir. 2000).

[301] Porter v. U.S. Alumoweld Co., 125 F.3d 243, 246 (4th Cir. 1997).

[302] Riechmann v. Cutler-Hammer, Inc., 183 F. Supp. 2d 1292, 1299 (D. Kan. 2001).

[303] 341 F. Supp. 2d 432 (S.D.N.Y. 2004).

[304] The sick leave policy required: 1) any employee who sought sick leave to give at least 1-hour notice before the start of the employee's tour of duty, providing a brief description of the nature of illness or condition requiring the absence; 2) any employee who returned from sick leave of any length to submit within 3 days of return from absence a "sick form" that stated the "nature of [the] disability" that caused the employee to be "unfit for work on account of illness during this period"; 3) employees under specified circumstances to submit a doctor's certification in which the doctor certified that the illness "so incapacitated the employee that he/she was incapable of performing his/her duties" during the specified period of time and briefly stated the employee's "diagnosis/objective findings" and "treatment/prognosis and expected date of return." The requirements for submitting the doctor's certificate depended on the employee's union representation and the employee's history of sick leave usage. One represented group in its entirety and those in the other represented group with the heaviest record of sick leave usage were required to submit the doctor's certificate after an absence of more than 2 days; the employees in the second represented group without the extensive sick leave history were required to submit the doctor's certificate after an absence of more than 3 days. A third group of employees—those on a "sick leave control list"—were required to submit the doctor's certificate after sick leave of any length. Employees were placed on a sick leave control list after taking six absences without a doctor's certificate in 1 year or after being consistently absent on the same day of the week or month, adjacent to holidays or sports events, or similar suspicious conduct. *Id*. at 438–39.

and apparently detected some potentially dangerous medical conditions among safety-sensitive employees.

The district court held that the explanation and certification required under NYCT's policy clearly constituted medical inquiries subject to the ADA, and that the policy could only be allowed if its provisions were job-related and consistent with business necessity. The court also held that the asserted business necessity of curbing sick leave abuse was only sufficient as to the employees on the sick leave control list, and the business necessity of ensuring safety was sufficient as to bus operators and other safety-sensitive employees. As to the business necessity of deterring sick leave abuse, the court found that, given the cost of sick leave abuse and NYCT's obligation under New York law to operate on a self-sustaining basis, NYCT had demonstrated that curbing sick leave abuse was a business necessity; the medical diagnoses, due to their deterrent effect, serve the purpose of curbing sick leave abuse; NYCT had not met the burden of showing a reasonable basis for making inquiries of all employees taking leave, regardless of the amount, but had met that burden as to the employees on the control list. As to the business necessity of maintaining public safety, the court found that it was clearly a business necessity for NYCT to ensure that bus operators are fit to perform their duties; despite the possibility of more effective approaches, NYCT had met the burden of showing the reasonable effectiveness of the policy in maintaining safety; and NYCT had met the burden of establishing a reasonable basis for applying the policy to bus operators.

Finally, the court held that for employees not on the sick leave control list or not in safety-sensitive positions, NYCT could make inquiries that require an employee to 1) call in advance of sick leave, but not to describe the nature of the illness; 2) submit a sick form upon return stating unfitness to work due to illness during the absence, but not to state the nature of the disability; and 3) submit a doctor's certificate (after absences of lengths determined by collective bargaining) certifying that the employee was incapable due to illness of performing duties during a specific period and is now fit to resume duties, but not to describe the nature of illness or treatment.

Verification after sick leave may be covered by collective bargaining agreements. For example, King County Metro in Seattle agreed to limit verification for use of sick leave to situations where an employee with less than a certain number of hours of sick leave is absent for more than 5 consecutive days; an employee requests use of other leave for sick leave; or the employee is suspected, after prior warning and reasonable investigation by Metro, of continuing to abuse sick leave.[305]

Regardless of the safety-related nature of the position, an employer may, however, make medical inquiries of an individual employee if the employer has reasonable basis for believing that the employee's medical condition may be the reason for poor performance problems. For example, if an employee returns from sick leave and then begins experiencing frequent absences from his or her duty station (where attendance is required) and discloses to a supervisor or to an other employee within the hearing of a supervisor that the employee is experiencing symptoms such as frequent fatigue, excessive thirst, and constant need to use the restroom, the employer may ask whether the employee has diabetes or send the employee for a medical examination, because there is reason to believe that diabetes may be affecting the employee's ability to perform one of the essential duties of the job (presence at duty station).[306]

Takeaway: Inquiries that may disclose a disability—such as requesting a diagnosis—may be made following an illness or injury upon adequate showing of business necessity. Such a showing requires that the purpose asserted be vital to the business, the inquiry reasonably serve that purpose, and the scope of the inquiry be no more intrusive than necessary. Merely asserting the need to reduce sick leave abuse without establishing the existence of such abuse, for example, should not be sufficient to support a request for a diagnosis. Requiring an employee with no history of abuse of sick leave to provide a diagnosis is likely to violate the ADA. However, if objective factors indicate that a medical condition may be creating performance problems, the employer may make appropriately limited medical inquiries.

Medical Examinations.—The term "medical examination" is not defined under the ADA or the implementing regulations but is the subject of EEOC guidance that courts rely on in interpreting what constitutes a medical exam.[307] The EEOC considers a procedure or test that seeks information about an individual's physical or mental health or impairments to be a medical exam. The factors EEOC lists in its guidance for determining whether a procedure is a medical exam are the following:[308]

- Is it administered by a health care professional or someone trained by a health care professional?
- Are the results interpreted by a health care professional or someone trained by a health care professional?
- Is it designed to reveal an impairment or physical or mental health?

[305] METRO/King County New Sick Leave Agreement (agreement covers medical verification of sick leave, including self-verification), www.atu587.com/documents/PDFofSickleaveletter.pdf.

[306] *See* EEOC, Questions and Answers About Diabetes in the Workplace and the Americans with Disabilities Act (ADA), Question 4, www.eeoc.gov/facnts/diabetes.html.

[307] Indergard v. Ga. Pac. Corp., 582 F.3d 1049, 1053 (9th Cir. 2009). See II.B.

[308] Preemployment Disability-Related Questions and Medical Examinations, www.eeoc.gov/policy/docs/medfin5.pdf, at 13.

- Is the employer trying to determine the applicant's physical or mental health or impairments?
- Is it invasive (for example, does it require the drawing of blood, urine or breath)?
- Does it measure an applicant's performance of a task, or does it measure the applicant's physiological responses to performing the task?
- Is it normally given in a medical setting (for example, a health care professional's office)?
- Is medical equipment used?

Vision tests conducted and analyzed by an ophthalmologist or optometrist and pulmonary function tests are considered to be medical exams by the EEOC. The Supreme Court has held that the federal CDL vision standard is not a *per se* violation of the ADA.[309] At the time *Albertson's* was decided, the waiver program was not part of the CDL regulation; the Court found that the existence of the pilot waiver program did not create an obligation on the part of the employer to do an individualized assessment of an employee's ability to show the job-relatedness of requiring the individual to meet the standard.

Tests for illegal drug use are not considered medical exams for purposes of the ADA.[310]

Applying Timing Restrictions and Definitions.— Since asking an employee whether he or she can perform job functions is not a disability-related inquiry,[311] it is permissible before making a conditional offer of employment for the employer to ask about an applicant's ability to perform essential job functions,[312] including asking the applicant to demonstrate how he or she would perform a specific job task required to carry out those essential functions.[313] For example, requiring an applicant to lift a 30-lb box and carry it 20 ft is not a medical exam. However, if the employer measures the applicant's heart rate or blood pressure after the applicant completes the task, the test is a medical exam. Similarly, physical agility tests—like running an obstacle course—or physical fitness tests—like measuring an applicant's ability to run or lift—are not medical exams, unless the employer measures the applicant's physiological or biological responses.[314] Even absent the medical component, if such tests tend to screen out applicants on the basis of disability, the employer must show that the test is job-related and consistent with business necessity.

Under the EEOC guidance, an employer may describe a physical agility test to an applicant and ask the applicant to provide a medical certification that the applicant can safely perform the test. The guidance also provides that it is permissible for an employer to ask an applicant to release the employer from liability for injuries incurred in performing a physical ability test. However, the enforceability of such releases is decided under state tort law, not under the ADA. Applicability of workers' compensation for injuries suffered is also determined under state law.[315] While it is clearly unlawful to conduct medical testing pre-offer, it is not clearly required that nonmedical physical ability tests meant to ensure that an applicant can reasonably perform job functions be administered pre-offer.

As noted under medical inquiries, if an employee returns to work after illness or injury and displays symptoms or problems that provide objective reasons to believe that a medical condition may be causing performance problems, the employer may require the employee to undergo a medical examination. However, the procedural requirements and permissible actions based on results of the medical examination may be subject to limitations.

For example, procedural issues for return-to-work medical testing may be subject to collective bargaining agreements. A New Jersey court has held that test criteria for physical fitness and agility for incumbent police officers were not negotiable, finding that the tests were job-related as opposed to being health-and safety-related matters that would be subject to negotiation. However, the procedural aspects of the test were found to be negotiable.[316] In addressing a question concerning the right of an injured transit police officer to have a panel of doctors determine his permanent disability status, the New Jersey Public Employment Relations Commission has ruled that while the public employer has a right to require a returning transit police officer to pass a physical agility test, the procedure under which an officer returning to work following an injury is determined to be permanently disabled is within the scope of negotiations under the collective bargaining agreement.[317]

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[309] Albertson's v. Kirkingburg, 527 U.S. 555, 119 S. Ct. 2162, 144 L. Ed. 2d 218 (1999). *See also* Knoll v. SEPTA, CA Co. 01-2711, 2002 U.S. Dist. LEXIS 17164 (E.D. Pa. 2002) (failure of annual physical examination due to substandard vision was legitimate and not shown to be pretext for disability discrimination); Gurley v. N.Y. City Transit Auth., 2003 U.S. Dist. LEXIS 21844 (E.D.N.Y. 2003).

[310] 42 U.S.C. § 12114(d).

[311] 29 C.F.R. § 1630.14(a), Medical examinations and inquiries specifically permitted: Acceptable pre-employment inquiry, http://edocket.access.gpo.gov/cfr_2009/julqtr/pdf/29cfr1630.14.pdf.

[312] 29 C.F.R. § 1630.2(n), Essential functions, http://edocket.access.gpo.gov/cfr_2009/julqtr/pdf/29cfr1630.2.pdf.

[313] Preemployment Disability-Related Questions and Medical Examinations, www.eeoc.gov/policy/docs/medfin5.pdf, at 2.

[314] *Id*. at 13.

[315] *See* II.A.5, *Tort/Workers' Compensation Liability for Injuries Suffered During Physical Ability Test*, *infra* this digest.

[316] Bridgewater Township v. P.B.A. Local 174, 196 N.J. Super. 258, 482 A.2d 183 (1984). *See also* N.J. Transit, P.E.R.C. No. 2007-15, 32 NJPER 317 (¶ 132 2006) (return to work fitness requirements nonnegotiable).

[317] *E.g.* In the Matter of New Jersey Transit Corporation, P.E.R.C. No. 2007-63, May 31, 2007, www.perc.state.nj.us/percdecisions.nsf/IssuedDecisions/7804E54E7B44EE64852572ED007136B9/$File/PERC%202007%2063.pdf?OpenElement (labor dispute arising from fitness for duty

2. Definition of Disability [318]

The ADA does not specify conditions that are considered disabilities. Rather it defines disability as "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment (as described in paragraph (3))."[319]

The scope of what is considered a disability has been a matter of some controversy, as the Supreme Court placed significant limitations on what can be considered a disability.[320] In 1999, the Court ruled that mitigating measures must be taken into account when determining if an individual's impairment substantially limits a major life activity.[321] The result of determining disability with mitigating measures taken into account is that the individual is more likely to be found not to have a disability, at which point the ADA analysis ceases and the reviewing court does not reach the question of whether the employee engaged in unlawful discrimination.[322] In 2002, the Supreme Court decided *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*.[323] In that decision, the Court found that the Sixth Circuit Court of Appeals had failed to consider a broad enough range of manual tasks in determining whether the plaintiff was disabled.[324] Moreover, the Court interpreted the terms "substantially limits" and "major life activities" narrowly and broadly, respectively. The Court stated that "substantially" must mean "considerable" or "to a large degree," so that impairments that interfere only in a minor way cannot be disabilities under the ADA.[325] The Court also stated that "major" must mean "important" and concluded that "major life activities" must mean activities "of central importance to daily life" such as "household chores, bathing, and brushing one's teeth." [326]

This interpretation of disability narrowed the range of impairments that qualified as disabilities under the ADA, particularly in the case of being regarded as disabled. For example, the Seventh Circuit rejected the claim of a truck driver (considered 20 percent disabled by the Army due to a hand injury) that he had been terminated because his employer considered him to be disabled. The court found that despite the fact that the employer had told him that he was fired because of his disability, there was no showing that the employer believed him to be disabled within the meaning of the ADA. The fact that the employee was able to drive a truck that had not been modified for a disabled driver showed that he was not disabled within the meaning of the Act.[327] Another employee who was terminated because an injury to his right wrist precluded him from running a truck route or training new employees was deemed not to be disabled within the meaning of the ADA because he was still able to perform major life activities such as brushing his teeth with his other hand.[328] However, the Ninth Circuit held that an individual suffering from insulin-dependent, Type 2 diabetes raised a genuine issue of material fact as to whether his diabetes substantially limited his life activity of eating by proffering evidence of his need to strictly monitor what and when he ate and the inability of daily insulin intake to stabilize his condition.[329]

An individual may be regarded as disabled in one of two ways: "(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities."[330] Where an employer substantially limits an employee's responsibilities based on concerns that the employee's perceived medical condition may affect the plaintiff's ability to perform time-critical, safety-related duties, the employer may be found to regard the employee as substantially limited in the major life activity of working.[331] A requirement of being 100 percent disability-free has been held to qualify as considering an

issues); METRO/King County New Sick Leave Agreement (agreement covers medical verification of sick leave, including self-verification), www.atu587.com/documents/PDFofSickleaveletter.pdf.

[318] Current or recent drug users and alcohol abusers are not considered individuals with disabilities under the ADA. 29 U.S.C. § 706(8)(B). *See* Isidore Silver, *Application of ADA to Drug Dependence and Alcoholism*, 1 PUBLIC EMPLOYEE DISCHARGE AND DISCIPLINE, § 10.3 (3d. ed. 2001); s*ee* HIRSCH, *supra* note 49, at 39-42.

[319] 42 U.S.C. § 12102(1), as amended by 110 Pub. L. No. 325, 122 Stat. 3553. The parenthetical in subparagraph (C) was added by the ADAAA.

[320] Bonnie Poitras Tucker, *The American with Disabilities Act: The Supreme Court's Definition of Disability Under the ADA: A Return to the Dark Ages*, 52 ALA. L. REV. 321 (2000).

[321] Sutton v. United Airlines, 527 U.S. 471, 119 S. Ct. 2139, 144 L. Ed. 2d 450 (1999); Murphy v. United Parcel Serv., 527 U.S. 516, 119 S. Ct. 2133, 144 L. Ed. 2d 484 (1999); Albertsons, Inc. v. Kirkingburg, 527 U.S. 555, 119 S. Ct. 2162, 144 L. Ed. 2d 518 (1999). Based on these cases, employees with diabetes, epilepsy, heart disease, and hearing impairment experienced adverse employment actions related to their conditions but were held to not be disabled under the ADA because their conditions were managed with medication or other aids. Chai R. Feldblum, Kevin Barry & Emily A. Benfer, *The ADA Amendments Act of 2008*, 13 TEX. J. ON C.L. & C.R. 187, 218–20 (2008).

[322] *Id*. at 207–11.

[323] 534 U.S. 184, 122 S. Ct. 681, 151 L. Ed. 615 (2002).

[324] *Id*. at 187.

[325] *Id*. at 196–97.

[326] *Id*. at 197, 201–02.

[327] Tockes v. Air-Land Transport Servs., Inc., 343 F.3d 895 (7th Cir. 2003).

[328] Didier v. Schwan Food Co., 387 F. Supp. 2d 987 (W.D. Ark. 2005).

[329] Rohr v. Salt River Project Agric. Improvement & Power Dist., 555 F.3d 850 (9th Cir. 2009).

[330] *Sutton*, 527 U.S. at 489.

[331] Duffett v. Mineta, 432 F. Supp. 2d 293, 300 (E.D.N.Y. 2006).

individual to be substantially limited in the major life activity of working.[332] (Such a policy is also a *per se* violation of the ADA because it ignores the individualized assessment and reasonable accommodation required by the ADA.)[333]

A number of circuit courts have held that a request for a medical exam to determine whether an employee is able to perform a particular job does not in and of itself establish that the employer regarded the employee as disabled under the ADA.[334] In *Tice*, the employee's back was injured in a non-work-related incident. After scheduling and then canceling back surgery, the employee submitted a return-to-work certificate from a back surgeon. The certificate did not address the safety of Tice's return to work. The transit agency required an independent medical exam (IME). The employee claimed that requiring the IME violated the ADA, arguing that the transit agency should have relied on the return-to-work letter from his doctor. The court found ample evidence for the transit agency to be concerned about the employee's fitness, due to his own complaints about pain and complaints from others about his driving, apparently arising from leg spasms. The court also found that there was ample evidence justifying the decision not to rely exclusively on the employee's doctor, including a statement from the doctor that he was relying on the employee's assessment that he could drive safely, so that requiring the IME to ensure the safety of the agency's passengers was consistent with business necessity.[335]

Takeaway: Courts may allow a transit agency to require an IME based on objective concerns, such as concerns raised by the employee's complaints about pain and complaints from others about the employee's performance.

ADA Amendments Act of 2008 (ADAAA).[336]—In large part in reaction to those Supreme Court cases interpreting the ADA restrictively, the scope of covered disabilities was substantially increased by enactment of the ADAAA. The ADAAA specifically rejected the holdings in *Sutton* and its companion cases and in *Toyota Motor Manufacturing.*[337] In its substantive provisions, the ADAAA added definitions of "major life activities" and "regarded as having such an impairment" for purposes of the definition of "disability." In particular, the amendment requires that an impairment that substantially limits one major life activity need not do so for other major life activities to be considered a disability and that the ameliorative effects of mitigating measures (except ordinary eyeglasses and contact lenses) should not be taken into account in determining whether an impairment substantially limits activities. The change in the standard for "regarded as" means that an employee no longer has to establish that the employer views the impairment as being within the definition of disabled under the ADA, a substantial lowering of the plaintiff's burden. However, the ADAAA specifies that such an individual is not entitled to reasonable accommodation under the ADA, thus resolving a split among the circuit courts of appeals.[338] In addi-

[332] Warmsley v. N.Y. City Transit Auth., 308 F. Supp. 2d 114, 120 (E.D.N.Y. 2003).

[333] *Id*. at 122, citing Equal Employment Opportunity Comm'n v. Yellow Freight System, Inc., No. 98 CIV 2270, 2002 U.S. Dist. LEXIS 16826, at 20 (S.D.N.Y. Sept. 9, 2002); McGregor v. Nat'l R.R. Passenger Corp., 187 F.3d 1113, 1116 (9th Cir. 1999); Beveridge v. Nw. Airlines, Inc., 259 F. Supp. 2d 838, 848 (D. Minn. 2003); Allen v. Pac. Bell, 212 F. Supp. 2d 1180, 1196 (C.D. Cal. 2002); Hasbrouck v. Youth Servs. Int'l, Inc., No. C01-3050, 2002 U.S. Dist. LEXIS 15486, at 2, n.3 (N.D. Iowa Aug. 19, 2002); Norris v. Allied-Sysco Food Servs., Inc., 948 F. Supp. 1418, 1437 (N.D. Cal. 1996); Heise v. Genuine Parts Co., 900 F. Supp. 1137, 1154 n.10 (D. Minn. 1995).

[334] Tice v. Centre Area Transp. Auth., 247 F.3d 506 (3d Cir. 2001).

[335] *Id*. at 517–18.

[336] 110 Pub. L. No. 325, 122 Stat. 3553 (2008).

[337] Section 2 of the ADAAA provides:

> (b) PURPOSES.—The purposes of this Act are—
>
> (1) to carry out the ADA's objectives of providing "a clear and comprehensive national mandate for the elimination of discrimination" and "clear, strong, consistent, enforceable standards addressing discrimination" by reinstating a broad scope of protection to be available under the ADA;
>
> (2) to reject the requirement enunciated by the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures;
>
> (3) to reject the Supreme Court's reasoning in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in School Board of Nassau County v. Arline, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973;
>
> (4) to reject the standards enunciated by the Supreme Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), that the terms "substantially" and "major" in the definition of disability under the ADA "need to be interpreted strictly to create a demanding standard for qualifying as disabled," and that to be substantially limited in performing a major life activity under the ADA "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives";
>
> (5) to convey congressional intent that the standard created by the Supreme Court in the case of Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) for "substantially limits," and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis; and
>
> (6) to express Congress' expectation that the Equal Employment Opportunity Commission will revise that portion of its current regulations that defines the term "substantially limits" as "significantly restricted" to be consistent with this Act, including the amendments made by this Act.

[338] *Cf.*, Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1232 (9th Cir. 2003) (not required); Weber v. Strippit, Inc., 186 F.3d

tion, the ADAAA specified rules of construction for the definition of "disability," requiring construction in favor of broad coverage and providing specific rules concerning how to determine whether an impairment substantially limits a major activity of life.[339] The ADAAA also amended the statute to require that an employer may not use uncorrected vision as a standard unless such use is shown to be job-related for the position in question and consistent with business necessity.[340] Finally, the ADAAA provides that the ADA shall not provide any basis for an individual without a disability to claim that the individual was discriminated against because of the lack of disability. The Act specifically authorizes the EEOC, the Attorney General, and USDOT to issue regulations interpreting the definition of disability under the ADA. The EEOC regulations have been proposed but not finalized.[341]

Takeaway: Cases relying on *Sutton* and *Toyota Motor Manufacturing* to find a plaintiff not disabled under the ADA may no longer be persuasive authority. Plaintiffs asserting "regarded as" claims may be more successful than before enactment of the ADAAA. The amendment on uncorrected vision could affect how courts review an employer's use of standards in excess of federal standards.

Physiological Cause v. Mere Physical Characteristic.—An important issue not changed by the ADAA is when a physical characteristic can constitute an impairment. EEOC guidance provides that "impairment" under the ADA "does not include physical characteristics such as eye color, hair color, lefthandedness, or height, weight or muscle tone that are within 'normal'

907, 916 (8th Cir. 1999) (not required); Workman v. Frito-Lay, Inc., 165 F.3d 460, 467 (6th Cir. 1999) (not required); Newberry v. E. Tex. State Univ., 161 F.3d 276, 280 (5th Cir. 1998) (not required) and Katz v. City Metal Co., 87 F.3d 26 (1st Cir. 1996) (required); Williams v. Phila. Housing, 380 F.3d 751 (3d Cir. 2004) (required); D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1240 (11th Cir. 2005) (required); Kelly v. Metallics West, Inc., 410 F.3d 670, 675 (10th Cir. 2005) (required). The question has not been settled in the Fourth Circuit. Wilson v. Phoenix Specialty Mfg. Co., Inc., 513 F.3d 378 (4th Cir. 2008); Bateman v. Am. Airlines, Inc., 614 F. Supp. 2d 660 (E.D. Va. 2009).

[339] Section 4 of 110 Pub. L. No. 325 amended § 3 of the ADA by amending it to cover only the definition of disability and adding the following three paragraphs following the main definition in paragraph (1):

> (2) Major life activities.—
>
> (A) In general.—For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
>
> (B) Major bodily functions.—For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.
>
> (3) Regarded as having such an impairment.—For purposes of paragraph (1)(C):
>
> (A) An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.
>
> (B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.
>
> (4) Rules of construction regarding the definition of disability.—The definition of "disability" in paragraph (1) shall be construed in accordance with the following:
>
> (A) The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.
>
> (B) The term "substantially limits" shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.
>
> (C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.
>
> (D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
>
> (E)(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as—
>
> (I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;
>
> (II) use of assistive technology;
>
> (III) reasonable accommodations or auxiliary aids or services; or
>
> (IV) learned behavioral or adaptive neurological modifications.
>
> (ii) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.
>
> (iii) As used in this subparagraph—
>
> (I) the term "ordinary eyeglasses or contact lenses" means lenses that are intended to fully correct visual acuity or eliminate refractive error; and
>
> (II) the term "low-vision devices" means devices that magnify, enhance, or otherwise augment a visual image.

[340] 110 Pub. L. No. 325, § 5, amending 42 U.S.C. § 12113. Section 5 also amends the general rule on discrimination under Title I of the ADA by changing the prohibition on discriminating against "a qualified individual with a disability because of the disability of such individual" to prohibiting discrimination against "a qualified individual on the basis of disability." A corresponding change is made to definition (8) under Title I by deleting the phrase "with a disability" each time it appears in the definition.

[341] Equal Employment Opportunity Commission (EEOC), 29 C.F.R. Part 1630, *Notice of proposed rulemaking*, 74 Fed. Reg. 48431, Sept. 23, 2009, http://edocket.access.gpo.gov/2009/pdf/E9-22840.pdf.

range and are not the result of a physiological disorder."[342] Courts have focused on the phrase "physiological disorder," holding that a mere physical characteristic such as weight does not constitute an impairment under the ADA.[343] In *Andrews*, a group of Ohio police officers challenged weight limits and fitness requirements, including strength and cardio-respiratory endurance criteria, as discriminatory under the ADA and the Rehabilitation Act of 1973, arguing that the requirements were not job-related or consistent with business necessity.[344] The Sixth Circuit noted that fitness and medical criteria are closely related to an individual's ability to perform certain law enforcement jobs, but that the determination of whether specific criteria are job-related or consistent with business necessity can only be made based on specific facts, not as a matter of law. In any event, the court held that the mere characteristic of being overweight was not an impairment under the ADA or Rehabilitation Act.[345]

Accordingly, even morbid obesity—that is body weight more than 100 percent over normal—can be considered a disability only when caused by a physiological condition.[346] In *Watkins* the Sixth Circuit rejected the EEOC's argument that morbid obesity should be considered an impairment regardless of the cause. However, where the ADA status of an employee's obesity is not in question, a suggestion that an employer disparaged an employee because of the employee's weight does not rise to a showing of perceiving an employee's ability to work being impaired because of disability.[347]

Takeaway: Merely being overweight, however severely, is not a disability under the ADA. However, the change in the definition of "regarded as" under the ADAAA could affect the outcomes of claims of being regarded as being disabled due to being overweight.

3. Elements of Claim and Defenses

Prima Facie Case.—The employee bears the burden of establishing a *prima facie* case of discrimination under the ADA. The employee does so by showing that the employer is subject to the ADA; the employee is a person with a disability within the meaning of the ADA (or is regarded as having such disability); the employee was otherwise qualified to perform the essential functions of the job, with or without reasonable accommodation; and the employee suffered adverse employment action because of the disability.[348] An employment standard that focuses directly on an individual's disability or potentially disabling condition, such as requiring an individual to be "100 percent healed" after an injury, is facially discriminatory.[349] While it is the EEOC's position that an employee need not demonstrate the existence of disability to challenge an employment practice requiring medical exams or inquiries in violation of 42 U.S.C. § 12112(d)(4)(a),[350] and several circuits have agreed,[351] some courts have required a showing of disability to challenge disability-related inquiries and medical examinations.[352]

Determining whether an individual is qualified under the ADA to perform essential functions of the job requires determining that the individual has "the requisite skill, experience, education and other job-related requirements of the employment position…and…with or without reasonable accommodation, can perform the essential functions" of the position in question.[353] The plaintiff bears the burden of proving that he or she is qualified to perform the essential job functions, but if the employer disputes that ability, the employer must present evidence establishing the functions in ques-

[342] 29 C.F.R. § 1630.2(h) (Appendix).

[343] Andrews v. State of Ohio, 104 F.3d 803 (6th Cir. 1997).

[344] *Id*.

[345] *See also* Dale v. Wynne, 497 F. Supp. 2d 1337 (M.D. Ala. 2007) (holding obesity not caused by physiological factor is not disability under Rehabilitation Act).

[346] EEOC v. Watkins Motor Lines, Inc., 463 F.3d 436 (6th Cir. 2006); Ivey v. District of Columbia, 949 A.2d 607, 613, n.3 (D.C. App. 2008), citing Francis v. City of Meriden, 129 F.3d 281, 286 (2d Cir. 1997) (holding that "obesity, except in special cases where the obesity relates to a physiological disorder, is not a 'physical impairment' within the meaning of the [ADA]"); Andrews v. Ohio, 104 F.3d 803, 808 (6th Cir. 1997) (holding, in the context of obesity, that "physical characteristics that are 'not the result of a physiological disorder' are not considered 'impairments' for the purposes of determining either actual or perceived disability" (quoting 29 C.F.R. § 1630.2(h) (App. 1995))); Cook v. State of R.I., Dep't of Mental Health, Retardation, & Hosps., 10 F.3d 17, 23 (1st Cir. 1993) (obesity is an impairment when expert testimony established that the plaintiff had "a physiological disorder involving a dysfunction of both the metabolic system and the neurological appetite-suppressing signal system"); Merker v. Miami-Dade County Fla., 485 F. Supp. 2d 1349, 1353 (S.D. Fla. 2007) ("[O]besity is not a qualifying impairment, or disability, unless it is shown to be the result of a physiological disorder."); Fredregill v. Nationwide Agribusiness Ins. Co., 992 F. Supp. 1082, 1089 (S.D. Iowa 1997) (holding that obesity "must relate to a physiological disorder or condition to meet the statutory definition of disability").

[347] *Ivey*, 949 A.2d 607.

[348] Alston v. Wash. Metro. Area Transit Auth., 571 F. Supp. 2d 77, 81 (D.D.C. 2008).

[349] McGregor v. Nat'l R.R. Passenger Corp., 187 F.3d 1113, 1116 (9th Cir. 1999).

[350] EEOC, Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act, No. 915-002 (July 27, 2000), www.eeoc.gov/policy/docs/guidance-inquiries.html.

[351] Conroy v. N.Y. State Dep't of Correctional Servs., 333 F.3d 88, 94–95 (2d Cir. 2003); Cossette v. Minn. Power & Light, 188 F.3d 964, 969–70 (8th Cir. 1999); Fredenburg v. Contra Costa County Dep't of Health Services, 172 F.3d 1176, 1182 (9th Cir. 1999); Roe v. Cheyenne Mountain Conference Resort, Inc., 124 F.3d 1221, 1229 (10th Cir. 1997); Griffin v. Steeltek, Inc., 160 F.3d 591, 595 (10th Cir. 1998). Murdock v. Washington, 193 F.3d 510, 512 (7th Cir. 1999) (dicta).

[352] *E.g.*, Armstrong v. Turner Indust., Inc., 141 F.3d 554, 558 (5th Cir. 1998); Hunter v. Habegger Corp., 1998 U.S. App. LEXIS 4167 (7th Cir. 1998).

[353] *See* 29 C.F.R § 1630.2(m), http://edocket.access.gpo.gov cfr_2009/julqtr/pdf/29cfr1630.2.pdf.

tion.[354] This element of the claim is only reached if the plaintiff is able to establish disability under the ADA.

Defining Essential Functions.—Essential functions of the job means fundamental job duties, not including marginal functions.[355] While courts look to job descriptions in determining what constitutes essential job functions, such descriptions are not conclusive as to what constitutes an essential job function, as an employer cannot make every element of a job "essential" merely by incorporating it into the job description.[356] Moreover, the employer's good faith judgment as to what constitutes an essential function is not dispositive when not supported by other factors.[357] Determination of what constitutes an "essential job function" is a jury question, and one that an appellate court may thus decline to rule on even if it appears the court finds a function not to be essential.[358]

The Second Circuit held in *Shannon v. New York City Transit Authority*[359] that the ability to distinguish the colors of traffic signals is an essential function of being an NYCT bus driver. The court held that the ability should be judged from evidence at the time the employee was constructively fired, and that the employee's eye tests showing distinct color vision abnormality and a diagnosis of red/green deficiency were sufficient to establish lack of ability to distinguish the colors of traffic signals. In determining that such ability was an essential function of the job, the court looked to the employer's job description, which prohibited certifying bus drivers with red, green, and amber color blindness based on New York State law. The court rejected the employee's argument that the availability of a waiver from the color-blindness standard meant that color vision was not an essential element of the job. The court reviewed the state and federal regulations and concluded that there appeared to be no waiver from the federal standard. Moreover, the court held that even if the regulations did allow a color-blind driver to drive a bus, it was within the transit agency's discretion to enforce a higher standard:

> A NYCTA bus driver guides a vehicle weighing thirteen tons and carrying up to 70 passengers, works eight hour shifts in all kinds of weather, and is required to spot traffic hazards from all directions and from a distance. Color differentiation is a qualification that NYCTA may properly deem essential for driving a bus because it conduces to the safety of passengers and because it serves to limit NYCTA's tort liability in situations where color-blindness might cause an accident as well as where it may be alleged to have done so.[360]

The court did not see any greater duty to accommodate under either the New York State or New York City human rights laws than under the federal statute. In a case dealing with a related matter, a district court also upheld the NYCT's requirement that bus operators have 20/40 visual acuity.[361]

Relying in part on *Shannon*, a New York district court upheld NYCT's ability to change its policy concerning medically-restricted train operators. The agency changed the policy from allowing medically-restricted employees to operate trains only in the yard to no longer employing train operators with yard only or no mainline restrictions.[362] As a result, a hearing-impaired employee was no longer permitted to work as a train operator. The court found there was no evidence that the safety-related change was a pretext for discrimination.

United Parcel Service (UPS) has argued that meeting the USDOT hearing requirements for a CDL is an essential function of the job of being a UPS driver, even for vehicles for which DOT certification is not required.[363] The *Bates* district court had held that UPS

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[354] Benson v. Nw. Airlines, Inc., 62 F.3d 1108, 1113 (8th Cir. 1995); Ward v. Mass. Health Research Inst., Inc., 209 F.3d 29, 35 (1st Cir. 2000); EEOC v. Wal-Mart Stores, Inc., 477 F.3d 561, 568 (8th Cir. 2007).

[355] 29 C.F.R. § 1630.2(n)(1), http://edocket.access.gpo.gov/cfr_2009/julqtr/pdf/29cfr1630.2.pdf. The regulation provides that the reasons a function may be considered essential include:

> (i) The function may be essential because the reason the position exists is to perform that function;
>
> (ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or
>
> (iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

29 C.F.R. § 1630.2(n)(2). Evidence of whether a function is essential includes:

> (i) The employer's judgment as to which functions are essential;
>
> (ii) Written job descriptions prepared before advertising or interviewing applicants for the job;
>
> (iii) The amount of time spent on the job performing the function;
>
> (iv) The consequences of not requiring the incumbent to perform the function;
>
> (v) The terms of a collective bargaining agreement;
>
> (vi) The work experience of past incumbents in the job; and/or
>
> (vii) The current work experience of incumbents in similar jobs.

29 C.F.R. § 1630.2(n)(3).

[356] Rohr v. Salt River Project Agric. Improvement & Power Dist., 555 F.3d 850, 864 (9th Cir. 2009).

[357] Gillen v. Fallon Ambulance Serv., Inc., 283 F.3d 11, 25 (1st Cir. 2002).

[358] *See* Turner v. Hershey Chocolate U.S.A., 440 F.3d 604 (3d Cir. 2006) (reviewing the job function in question against the factors of 29 C.F.R. § 1630.2(n)(3) and finding that five of seven factors pointed in the direction of finding the disputed function was not essential, but ruling that the question was one for a jury).

[359] 332 F.3d 95 (2d Cir. 2003).

[360] *Id*. at 103 (citation omitted).

[361] Gurley v. N.Y. City Transit Auth., 2003 U.S. Dist. LEXIS 21844 (E.D.N.Y. 2003).

[362] Gaines v. N.Y. City Transit Auth., 528 F. Supp. 2d 135 (E.D.N.Y. 2007).

[363] Bates v. UPS, Inc., 511 F.3d 974 (9th Cir. 2007). UPS imposed the Federal CDL standard for hearing on all of its

failed to demonstrate that a USDOT certification was an essential job function, and the Ninth Circuit held that was not clearly erroneous.[364] The appellate court also held that while the employer bore the burden of showing a nexus between its hearing standard and safety, the plaintiffs first bore the burden of showing that they were able to safely drive the vehicles at issue. The court noted that when an employer chooses a standard that exceeds minimum legal requirements and that screens out individuals with a disability, the employer bears the burden of establishing job-relatedness and business necessity.[365]

The Ninth Circuit also rejected an ADA challenge to UPS's requirements that all drivers meet Federal CDL vision requirements, regardless of vehicle size.[366] That holding was based on a pre-ADAAA analysis of what constitutes a disability under the ADA. Future litigation will determine whether various physical requirements that are more restrictive than FMCSA CDL requirements will be upheld under the new definition of disability under the ADA.[367] A different conclusion as to some of the *EEOC v. UPS* plaintiffs was reached under state law claims.[368]

A Tennessee district court found that UPS had articulated a legitimate business necessity justifying the requirement that a driver be certified by a UPS-authorized physician.[369] In that case, the plaintiff had received a USDOT certification from his own physician even though he had already failed the CDL vision test due to his documented legal blindness in one eye and had been denied a waiver by USDOT. On the other hand, if an employer relies on a refusal to issue a USDOT medical certificate that the employer knows or should have known was not warranted, the employer may be liable for the resultant violation of the ADA.[370] In *Texas Bus Lines*, the examining physician had refused to issue the plaintiff a USDOT medical certificate based on his observation that "she had difficulty getting out of her seat in the waiting area, and that she 'waddled' slowly to the examining room,"[371] so that the physician noted that she could not move swiftly in the case of an accident and did not meet DOT requirements. Neither of the job interviewers had observed any difficulties in movement on the part of the plaintiff. The district court found that the plaintiff was denied the medical certificate based on the employer and physician's perceived and mistaken belief that the plaintiff was disabled due to her obesity. The court also found that the employer was familiar enough with the USDOT requirements not to have relied on the physician's erroneous and subjective opinion regarding the plaintiff's physical qualifications.

Another potential issue regarding essential functions is whether the ability to work an entire 8-hour shift is an essential function of a bus driver's job. In a case where a bus driver with a disability that prevented him from driving a full 8-hour shift had requested a split-shift accommodation, the Oregon District Court held that there was a genuine issue of material fact as to whether "continuous driving for eight hours is an essential function of the job."[372]

Establishing Reasonable Accommodation.—The *prima facie* case requires the employee to be able to perform essential job functions with or without reasonable accommodation. Where accommodation is required, what constitutes reasonable accommodation may become an issue. Reasonable accommodation under the ADA may include "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities."[373]

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drivers, regardless of vehicle weight, even though the federal standard does not apply to vehicles not exceeding a gross vehicle weight rating (GVWR) of 10,000 lbs.

[364] *Id*. at 991. Where the plaintiff's claim that he can perform essential job functions is in dispute, both the Eighth and Ninth Circuits require that the employer asserting such a claim must produce evidence establishing those functions. *Id*. at 990–91, citing EEOC v. Wal-Mart, 477 F.3d 561, 568 (8th Cir. 2007).

[365] The court noted:

> By requiring UPS to justify the hearing test under the business necessity defense, but also requiring plaintiffs to show that they can perform the essential functions of the job, we are not saying, nor does the ADA require, that employers must hire employees who cannot safely perform the job, particularly where safety itself is an essential function. Nor are we saying that an employer can never impose a safety standard that exceeds minimum requirements imposed by law. However, when an employer asserts a blanket safety-based qualification standard—beyond the essential job function—that is not mandated by law and that qualification standard screens out or tends to screen out an individual with a disability, the employer—not the employee—bears the burden of showing that the higher qualification standard is job-related and consistent with business necessity, and that performance cannot be achieved through reasonable accommodation.

Id. at 992–93.

[366] EEOC v. United Parcel Serv., Inc., 306 F.3d 794 (9th Cir. 2002) (holding monocular job applicants not disabled under the ADA, and therefore not reaching the issue of whether UPS prohibition against monocular drivers of vehicles not subject to FMCSA regulations was discriminatory).

[367] *See* Rohr v. Salt River Project Agric. Improvement & Power Dist., 555 F.3d 850, 853, 861-62 (9th Cir. 2009) (noting expansion under ADAAA of class of individuals protected under ADA).

[368] EEOC v. United Parcel Serv., Inc., 424 F.3d 1060 (9th Cir. 2005).

[369] Broadway v. United Parcel Serv., Inc., 499 F. Supp. 2d 992 (M.D. Tenn. 2007).

[370] EEOC v. Tex. Bus Lines, 923 F. Supp. 965 (S.D. Tex. 1996).

[371] *Id*. at 967.

[372] Simmons v. Lane Transit Dist., 2006 U.S. Dist. LEXIS 22289 (D. Or. 2006).

[373] 42 U.S.C. § 12111(9)(B).

The employee must identify a reasonable accommodation, going beyond mere speculation.[374] The burden is to show that the accommodation seems reasonable "on its face, i.e., ordinarily or in the run of cases."[375] Reasonable accommodation cannot involve eliminating an essential job function.[376] The employer is never required to reallocate essential job functions as a reasonable accommodation, but may do so voluntarily. An employer is not required to lower production standards uniformly applied to all employees, but may do so voluntarily. However, reasonable accommodation to allow an employee with a disability to meet production standards may be required. Where there are two or more effective accommodations, the employer has the discretion to choose between them.

A "100 percent healed" policy is a *per se* violation of the ADA because such a policy substitutes a blanket prohibition for the required individual assessment of whether an individual can perform the essential functions of his or her job either with or without accommodation.[377]

The Second Circuit has held that that there must be a causal link between the specific condition that limits a major life activity and the reasonable accommodation required, so that merely because an individual has a disability under the ADA, the employer need not accommodate another impairment resulting from the same cause as the ADA disability, if the second impairment is not itself a disability under the ADA. The court recognized, however, that adverse effects of disabilities or side effects from medical treatment of disabilities arise because of the disability and thus require accommodation.[378]

Once an employee requests reassignment as an accommodation, the employer must engage with the employee to determine if there is a job that the employee can perform with the employee's limitations. To prevail on the claim that reasonable accommodation was possible, the employee must show that "a reasonable accommodation was possible and would have led to a reassignment position."[379] Thus the plaintiff must show that there was in fact a vacancy and that the plaintiff was qualified—if not the most qualified candidate—to fill the vacancy.[380] The circuits are split on the question of whether the ADA and the Rehabilitation Act require an employer to reassign a disabled employee to a vacant position when there are more-qualified candidates for that position.[381] The Supreme Court had granted *certiorari* for *Huber*, but withdrew the writ when the case settled.[382] The Supreme Court has held that it is not reasonable to reassign an employee with a disability in violation of a seniority system.[383]

When an employee remains disabled following the expiration of workers' compensation leave, the employer should consider reasonable accommodation rather than automatically terminating the employee.[384]

Employer's Affirmative Defenses.—The employer bears the burden of defending the decision not to adopt the employee's identified accommodation.[385] The EEOC has found that compliance with OSHA standards is irrelevant to determining whether the employer's accommodation is reasonable, as those standards do not take an individual's specific medical needs into consideration.[386] Limitations on the duty of reasonable ac-

[374] Jackan and United States v. NYS Dep't of Labor, 205 F.3d 562, 566–67 (2d Cir. 2000) citing Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1304 n.27 (D.C. Cir. 1998) (en banc), Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278, 1286 (11th Cir. 1997), Mengine v. Runyon, 114 F.3d 415, 420 (3d Cir. 1997); Willis v. Conopco, Inc., 108 F.3d 282 (11th Cir. 1997).

[375] US Airways, Inc., v. Barnett, 535 U.S. 391, 401, 122 S. Ct. 1516, 1526, 152 L. Ed. 2d 589, 602 (2002).

[376] Shannon v. N.Y. City Transit Auth., 332 F.3d 95, 100 (2d Cir. 2003).

[377] McGregor v. Nat'l R.R. Passenger Corp., 187 F.3d 1113, 1116 (9th Cir. 1999).

[378] Felix v. N.Y. City Transit Auth., 324 F.3d 102 (2d Cir. 2003) (request for nonsubway assignment not causally connected to disability of insomnia; fact that inability to work in subway due to anxiety caused by same incident as caused insomnia not sufficient to create requirement to accommodate inability to work in subway).

[379] Alston v. Wash. Metro. Area Transit Auth., 571 F. Supp. 2d 77, 82 (D.D.C. 2008), citing Smith v. Midland Brake, Inc., 180 F.3d 1154, 1174 (10th Cir. 1999) (en banc).

[380] *Id*. at 84, citing McCreary v. Libbey-Owens-Ford Co., 132 F.3d 1159, 1165 (7th Cir. 1997).

[381] *Cf.* Aka v. Wash. Hosp. Ctr., 156 F.3d 1284 (D.C. Cir. 1998) (en banc) (reassign must mean more than allowing to compete with everyone else); Smith v. Midland Brake Inc., 180 F.3d 1154 (10th Cir. 1999) (reassignment obligation means more than merely allowing disabled employee to compete for vacant position); with EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024 (7th Cir. 2000), reassignment obligation does not require employer to turn away more qualified applicant); Huber v. Wal-Mart Stores, Inc., 486 F.3d 480 (8th Cir. 2007) (ADA does not require employer to reassign qualified disabled employee to vacant position when such a reassignment would violate legitimate nondiscriminatory policy of employer to hire most qualified candidate).

[382] Greg Stohr, *Wal-Mart, Worker Cancel High Court Clash, Settle Case*, Bloomberg, Jan. 14, 2008, www.bloomberg.com/apps/news?pid=20601087&sid=aypIB8Osgv5E&refer=home (accessed Nov. 8, 2009).

[383] US Airways, Inc., v. Barnett, 535 U.S. 391, 122 S. Ct. 1516, 152 L. Ed. 2d 589 (2002).

[384] EEOC v. Sears Roebuck & Co., N.D. Ill. No. 04 C 7282. Sears agreed to a $6.2 million consent decree and remedial relief. Sears, Roebuck to Pay $6.2 Million for Disability Bias, EEOC Press Release, Sept. 29, 2009, http://archive.eeoc.gov/press/9-29-09.html (accessed Dec. 3, 2009).

[385] *E.g.*, Turner v. Hershey Chocolate USA, 440 F.3d 604, 614 (3d Cir. 2006) (employer bears burden of establishing affirmative defense of undue hardship).

[386] Iftikar-Khan v. U.S. Postal Serv., EEOC Appeal No. 07A40137 (Dec. 15, 2005), XVII DIGEST OF EQUAL EMPLOYMENT OPPORTUNITY LAW (Winter Quarter 2006), www.eeoc.gov/federal/digest/xvii-1.cfm.

commodation include imposition of "undue hardship,"[387] direct threat—discussed *infra*—or conflict with seniority rules.[388] Undue hardship refers "not only to financial difficulty, but to reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business."[389]

Employer's Defense to Prima Facie Case.—If the employee establishes a *prima facie* case, the employer must show that the employment practice is job-related and consistent with business necessity (or in the case of an allegation of disparate treatment, articulate a legitimate nondiscriminatory reason for its actions). In the case of making a disability-related inquiry or requiring a medical examination for an incumbent employee, the employer may meet this burden by demonstrating that the employer has a reasonable belief, based on objective evidence, that either the employee's ability to perform essential job functions is impaired by a medical condition or the employee poses a direct threat due to a medical condition.

Courts have recognized safety as a legitimate business justification for an employment practice that may have disparate impact on individuals with a disability. The Eleventh Circuit held that safety concerns about beards interfering with firefighter respirators defeated a claim that the no-beard rule discriminated against plaintiffs as handicapped individuals under Section 504 of the Rehabilitation Act.[390]

Where OSHA standards require medical examinations or medical inquiries, such exams and inquiries do not violate the ADA.[391] To the extent that OSHA standards set nondiscretionary physical requirements, those standards may form the basis for an "other federal laws" defense to challenges to employment practices that exclude or tend to seclude individuals with a disability.[392] For example, if OSHA requires the employees in a specific job to wear a respirator, an employee who cannot wear a respirator because of a disability is not qualified for that job.[393] Depending on the facts, the ADA may require that the agency consider transferring such an employee to an equivalent vacant position.[394] If an OSHA standard in fact requires removing a person with a disability from a job for health and safety reasons, no direct threat analysis under ADA is required.[395]

Even so, OSHA standards do not eliminate otherwise applicable requirements to provide reasonable accommodation. For example, an employee identified by an OSHA test as having hearing loss due to loud equipment could possibly be accommodated with sound abatement equipment.

Where OSHA standards permit but do not require the employment practice alleged to be discriminatory, the employer must provide justification for an employment practice that may tend to exclude individuals with a disability.[396] *Rohr* involved the ADA claim of a welding metallurgy specialist with Type 2 diabetes who was terminated in part because of his failure to renew his respiratory medical certification. The employer's Health Services Department refused to administer the required breathilator test due to the plaintiff's high blood pressure, which was related to his diabetes. The employer argued that even if the test screened out an individual with a disability, the respirator certification test was a business necessity because the test was required by the OSHA respirator standard. However, the Ninth Circuit found the respirator standard to be sufficiently broad as to require the employer to demonstrate the necessity of either the particular breathilator test used or the absence of an alternative method for individuals with high blood pressure as a reasonable accommodation. In addition the court found that the employer had failed to demonstrate that there was even a possibility that the plaintiff would be required to use a respirator, and thus had failed to demonstrate job-relatedness.

4. Direct Threat Defense[397]

The ADA provides that an employer may defend against an ADA claim of discrimination by showing that an individual's disability poses "a direct threat to the health or safety of other individuals in the workplace."[398] The EEOC, in its implementing regulations, expanded the scope of the defense by providing that an employer could show that the employee's health condi-

[387] 29 C.F.R. § 1630.2(p), http://edocket.access.gpo.gov/cfr_2009/julqtr/pdf/29cfr1630.2.pdf.

[388] *Barnett*, 535 U.S. 391.

[389] Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, n.17, citing 42 U.S.C. § 12111(10), 29 C.F.R. § 1630.2(p); 29 C.F.R. pt. 1630 App. § 1630.2(p), www.eeoc.gov/policy/docs/accommodation.html.

[390] Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1125–1127 (11th Cir. 1993).

[391] Questions And Answers: Enforcement Guidance On Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act (ADA), www.eeoc.gov/policy/docs/qanda-inquiries.html, Question 21.

[392] 29 C.F.R. § 1630.15(e).

[393] *See* The Americans With Disabilities Act: Applying Performance and Conduct Standards to Employees With Disabilities, Question 23, www.eeoc.gov/facts/performance-conduct.html.

[394] Susanne M. Bruyere, *Occupational Safety and Health and Disability Nondiscrimination in the Workplace: Complying with Dual Requirements*, Employment and Disability Institute, Employment and Disability Institute Collection, June 2002, at 4, http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1035&context=edicollect.

[395] *Id*. *See* II.B.3, *Direct Threat Defense*, *infra* this digest.

[396] Rohr v. Salt River Project Agric. Improvement & Power Dist., 555 F.3d 850, 862–63 (9th Cir. 2009).

[397] Ann Hubbard, *Understanding and Implementing the ADA's Direct Threat Defense*, 95 NW. U. L. REV. 1279 (2001); Andrews & Risher, *supra* note 31, at 22.

[398] 42 U.S.C. § 12113(b). "Direct threat" is defined as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C. § 12111(3).

tion poses a direct threat to him/herself or others. The Supreme Court upheld the regulation in *Chevron U.S.A. Inc. v. Echazabal*.[399] The Court engaged in extensive statutory construction analysis in finding the regulation did not exceed the statutory scope. Part of the Court's analysis focused on the fact that exposing an employee with a liver condition to toxic chemicals would risk violating OSHA, specifically the requirement to furnish working conditions free from recognized hazards.[400]

The factors to be considered in evaluating the existence of a direct threat include duration of the risk, nature and severity of the potential harm, likelihood that the potential harm will occur, and imminence of the potential harm."[401]

The circuit courts are split over which party bears the burden of proof on the direct threat issue, with some circuits classifying direct threat as part of the plaintiff's *prima facie* case and others regarding it as an affirmative defense.[402] The Eleventh Circuit has held that the employee bears the burden of proof on this issue.[403] The Second, Fifth, Seventh, Eighth, and Ninth Circuits have held that the defendant bears the burden of proof.[404] The First Circuit has drawn a distinction between jobs involving public safety and those that do not, holding that where essential job functions implicate safety, the plaintiff bears the burden of establishing that he or she can perform them without endangering others, while where direct threat is a defense not tied to essential job functions the burden rests with the defendant.[405] The Tenth Circuit has similarly held that in the public safety arena, an employer may appropriately make not posing a threat to the safety of self or others part of the job qualifications standard, with the burden of proof resting with the plaintiff.[406]

Merely asserting a safety rationale for a practice does not establish that allowing a deviation to provide accommodation under the ADA would constitute a direct threat.[407] For example, theoretical concerns about a bus driver's abilities to respond in an accident due to the driver's weight are not sufficient to establish a direct threat defense.[408] Moreover, employers may not speculate about future risks from a perceived disability and deny employment based on that speculation. Thus, withdrawing an offer of employment after a review of an applicant's workers' compensation records showed a history of on-the-job injuries has been held to be a violation of the ADA.[409]

5. State Law

State law cannot reduce the protection provided under the ADA, but can increase it. Where the state law is modeled on the ADA,[410] the state court may consider federal cases as persuasive authority in interpreting its own nondiscrimination statute.[411] However, where the state law is not co-extensive, an individual may be considered disabled under state law even if the individual is not considered disabled under the ADA.[412] For example, the Ninth Circuit Court of Appeals, which had rejected a challenge to UPS's vision protocol under the ADA because the plaintiffs were found not to be dis-

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[399] 536 U.S. 73, 122 S. Ct. 2045, 153 L. Ed. 2d 82 (2002) (upheld EEOC regulation allowing defense that worker's disability on the job would pose direct threat to his health). *See also* Siederbaum v. City of N.Y., 309 F. Supp. 2d 618 (S.D.N.Y. 2004) (general discussion of direct threat standard).

[400] Eschazabal, 536 U.S. at 84, citing 29 U.S.C. § 654(a)(1).

[401] 29 C.F.R. § 1630.2(r), http://edocket.access.gpo.gov/cfr_2009/julqtr/pdf/29cfr1630.2.pdf.

[402] Rene L. Duncan, *The "Direct Threat" Defense Under the ADA: Posing a Threat to the Protection of Disabled Employees*, 73 MO. L. REV. 1303, 1312 (2008).

[403] Moses v. Am. Nonwovens, Inc., 97 F.3d 446 (11th Cir. 1996) (per curiam); LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 836 (11th Cir. 1998); Waddell v. Valley Forge Dental Assoc., Inc., 276 F.3d 1275, 1280 (11th Cir. 2001).

[404] *Second Circuit*: Lovejoy-Wilson v. NOCO Motor Fuel, Inc., 263 F.3d 208, 220 (2d Cir. 2001); Hargrave v. Vermont, 340 F.3d 27, 35 (2d Cir. 2003). *Fifth Circuit*: Rizzo v. Children's World Learning Centers, Inc., 84 F.3d 758 (5th Cir. 1996); .*Seventh Circuit*: U.S. EEOC v. AIC Security Investigations, Ltd., 55 F.3d 1276, 1283–84 (7th Cir. 1995); Dadian v. Village of Willmette, 269 F.3d 831, 841 (7th Cir. 2001); Branham v. Snow, 392 F.3d 896, 906–07 & n.5 (7th Cir. 2004). *Eighth Circuit*: EEOC v. Wal-Mart Stores, Inc., 477 F.3d 561 (8th Cir. 2007). *Ninth Circuit*: Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1247 (9th Cir. 1999); Hutton v. Elf Atochem North America, Inc., 273 F.3d 884, 893 (9th Cir. 2001); Echazabal v. Chevron USA, Inc., 336 F.3d 1023, 1027 (9th Cir. 2003).

[405] EEOC v. Amego, Inc., 110 F.3d 135, 144 (1st Cir. 1997).

[406] McKenzie v. Benton, 388 F.3d 1342 (10th Cir. 2004) (employer was sheriff's department; employee had appropriately discharged firearm while off duty).

[407] Turner v. Hershey Chocolate USA, 440 F.3d 604, 615 (3d Cir. 2006).

[408] E.E.O.C. v. Tex. Bus Lines, 923 F. Supp. 965 (S.D. Tex. 1996).

[409] Garrison v. Baker Hughes Oilfield Operations, Inc., 287 F.3d 955 (10th Cir. 2002). The court held:

> The results of a medical inquiry or examination may not be used to disqualify persons who are currently able to perform the essential functions of a job, either with or without an accommodation, because of fear or speculation that a disability may indicate a greater risk of future injury, or absenteeism, or may cause future workers' compensation or insurance costs.

Id. at 960.

[410] *E.g.*, Kansas: Bowers v. Bethany Medical Ctr., 959 F. Supp. 1385 (D. Kan. 1997); Pennsylvania: McCarron v. British Telecom, 2002 U.S. Dist. LEXIS 15151 (E.D. Pa. 2002).

[411] *E.g.*, McDonald v. Dep't of Envtl. Quality, 2009 MT 209, 351 Mont. 243 (2009).

[412] *E.g.,* Whitney v. Wal-Mart Stores, Inc., 2005 ME 37, 895 A.2d 309, 313 (2006) (Maine Human Rights Act definition of "disability" more extensive than that under ADA). *See* Isidore Silver, *Application of ADA to Drug Dependence and Alcoholism* § 10.20, 1 PUBLIC EMPLOYEE DISCHARGE AND DISCIPLINE (3d ed 2001).

abled under the ADA,[413] held that the plaintiffs were disabled under the California Fair Employment and Housing Act.[414] The difference in the two cases was that the requirement for disability under the state law was less restrictive than that under the ADA. In particular, state discrimination laws relating to disability or handicap may not include the ADA requirement that the condition result in a substantial limitation on a major life activity.[415]

Similarly, UPS's policy of applying Federal CDL standards to an individual driving a vehicle not covered by those standards was held to violate Maine's Human Rights Act.[416] In *Warren*, UPS required a Federal CDL certificate to drive a vehicle with a GVW of 10,000 lb or less and refused to waive that requirement as a reasonable accommodation to allow an employee with a history of epilepsy to drive such a vehicle. UPS's refusal was not based on an individualized assessment of the safety of allowing the particular individual to drive the vehicle. The court found this policy to violate the Maine Human Rights Act and ordered that UPS not apply its USDOT certification requirement to a Maine route that does not require USDOT certification under federal law, when applying that requirement operates to exclude the plaintiff based on his disability.

Moreover, burdens of proof under state laws may be different than those under the ADA. For example, under the Maine Human Rights Act—which does not require a showing of substantial limitation on a major life activity[417]—the employer bears the burden of proving that the applicant or employee "is unable to perform the duties or to perform the duties in a manner that would not endanger the health or safety of the individual or others."[418] This defense requires an individualized assessment of the relationship between the specific job requirements and the applicant or employee's physical disability. The mere possibility that a disability may pose a danger is insufficient.[419]

While state law may recognize a larger range of conditions as protected disabilities than federal law, it may also provide for a safety-of-others defense. For example, the California discrimination statute provides that an employer may show that after reasonable accommodation, the applicant or employee cannot perform the essential job functions in a way that would not endanger the health or safety of others more than if a person without that disability performed those functions. Thus, a California court upheld weight restrictions for ambulance drivers as supported by a rational basis. The employer had maintained that "[b]ecause sudden incapacitation of an ambulance driver could be life-threatening, the standards governing this job call for employees who are not susceptible to injury and who are not overweight as this could impair job performance."[420] The court found that it was without question an essential function of the job to lift and carry extremely heavy weights, occasionally on stairs. The employer's expert witnesses cited studies establishing that being overweight "compromises an emergency worker's strength, agility, and ability to lift and climb." Given the nexus between safety of ambulance drivers and members of the public and the abilities of ambulance drivers who are overweight, the standard was reasonable.[421] In the case of the California statute, the employer must make an individualized showing that the defense applies to a particular individual, but categorical evidence may be used if it provides a sufficiently strong showing that closely matching impairments resulted in disqualification.

State law may allow a supervisory employee to be held individually liable under the discrimination statute. For example, the New Jersey Law Against Discrimination provides for personal liability for a supervisor who commits discriminatory acts within the scope of his employment so as to aid and abet the employer's discriminatory conduct. The Third Circuit has interpreted the standard to be whether the supervisor knowingly gives substantial assistance or encouragement to the employer's unlawful conduct. Merely having a role in the discriminatory conduct is insufficient.[422]

If a municipality adopts an unconstitutional policy that was authorized or mandated by state law, the municipality may be subject to suit asserting claims based on the constitutional violation. Following state law may not be a defense unless the municipality is simply enforcing the state law without adopting a specific policy. Moreover, the requirements of Title VII take precedence over state law, so a municipal policy that impermissibly discriminates based on gender may result in

[413] EEOC v. UPS, Inc., 306 F.3d 794 (9th Cir. 2002).

[414] EEOC v. United Parcel Serv., Inc., 424 F.3d 1060 (9th Cir. 2005). *See also* Bryan v. United Parcel Serv., Inc., 307 F. Supp. 2d 1108 (N.D. Cal. 2004) (holding monocular individuals limited in major life activity of working and thus disabled under California's Fair Employment and Housing Act).

[415] *E.g.,* Failla v. City of Passaic, 146 F.3d 149 (3d Cir. 1998); Burton v. Metro. Transp. Auth., 244 F. Supp. 2d 252, 258 (S.D.N.Y. 2003) (under New York State's Human Right Law, individual can establish disability by demonstrating impairment by medically accepted techniques: substantial limitation of normal activities not required). *See also* Green v. State of Cal., 33 Cal. Rptr. 3d 254, 132 Cal. App. 4th 97 (2005) (defendant has burden of proving plaintiff cannot perform his duties with reasonable accommodation; distinction between plaintiff's disability and work restrictions for his disability constitute distinction without a difference).

[416] Warren v. United Parcel Serv., Inc., 495 F. Supp. 2d 86 (D. Maine 2007).

[417] Whitney v. Wal-Mart Stores, Inc., 2006 ME 37, at 31, 895 A.2d 309, 316.

[418] 5 ME. REV. STAT. ANN. § 4573-A(1-B); Rooney v. Sprague Energy Corp., 581 F. Supp. 2d 94 (D. Me. 2008).

[419] Maine Human Rights Com. v. Canadian Pac., Ltd., 458 A.2d 1225, 1234 (Me. 1983).

[420] McMillen v. Civil Service Comm'n, 6 Cal. App. 4th 125, 128, 8 Cal. Rptr. 2d 548, 549 (1992).

[421] *Id*. at 551.

[422] Failla v. City of Passaic, 146 F.3d 149 (3d Cir. 1998).

Title VII liability even if the policy is based on state law.[423] As the Second Circuit remarked: "Title VII explicitly relieves employers from any duty to observe a state hiring provision 'which purports to require or permit' any discriminatory employment practice."[424] This issue of municipal liability depends on the law of the particular circuit and state.[425]

State law may bar prohibiting classes of individuals from receiving CDLs based on impairment, instead requiring case-by-case evaluations of the ability of disabled individuals to safely perform job-related responsibilities. Wisconsin's Fair Employment Act, for example, requires that such determinations cannot be made by a general rule affecting a class of individuals, but must be made on a case-by-case basis, and a Wisconsin court has held that this provision applies to state regulations on physical standards for school bus drivers.[426] *Bothum* concerned a school bus driver who was denied renewal of his license because of his use of an oral hypoglycemic agent to control his Type 1 diabetes. The court addressed the question of how the above requirement of Wisconsin's Fair Employment Act should be applied to the Wisconsin statute requiring applicants for school bus driver's licenses to pass physical exams and the implementing regulation prohibiting without exception a person using a hypoglycemic agent from obtaining a school bus driver's license. The court rejected the Wisconsin Department of Transportation's argument that the only way to harmonize the two statutes was to read the transportation provision as an exception to the Fair Employment Act. Instead the court held that the department was free to establish physical standards for licensing school bus drivers "so long as those standards do not constitute a general rule 'prohibit[ing]…licensure of handicapped individuals in general or a particular class of handicapped individuals,' within the meaning of sec. 111.34(2)(b), Stats [Fair Employment Act]."[427]

State law may also require individualized determinations of physical performance ability, rather than relying solely on standardized requirements, under certain circumstances. For example, the Iowa Supreme Court has held that if the accuracy of the facts underlying a standardized employment requirement has been tested subject to a rule-making process allowing interested parties to participate, such requirements may be a conclusive basis for decision making. However, where absolute rules have not been adopted, individualized assessments are required. Thus, where the city had not formally adopted a minimum cardiopulmonary performance requirement for spirometry tests for firefighters, an employee adversely affected by the requirement was entitled to challenge its factual basis.[428]

State law may require that employers may only require medical exams as a condition of employment—that is for job applicants and current employees—if the employer pays for the exam. Violations may result in a fine.[429] State law may also limit the scope of medical inquiries.[430]

Takeaway: Passing muster under the ADA may not be sufficient to avoid liability under state law. In evaluating risks under state law of implementing physical ability testing, it is advisable to evaluate the scope of state nondiscrimination law to determine whether state law is more expansive than the ADA.

C. Age Discrimination in Employment Act

ADEA prohibits discrimination against individuals age 40 years or older in any aspect of employment. ADEA does allow employers to favor workers age 40 years and older, even when doing so may adversely affect a younger worker who is age 40 years or older.

[423] Conroy v. City of Phila., 421 F. Supp. 2d 879 (E.D. Penn. 2006). *See also* Andrews & Risher, *supra* note 31, at 23, 24 www.aele.org/andrews2006.pdf,; United States v. N.Y. State Dep't of Motor Vehicles, 82 F. Supp. 2d 42 (E.D.N.Y. 2000) (fact that state agencies' regulations, basis for bus company's refusal to hire amputee, were invalidated under ADA and couldn't have interfered with employment relationship between the driver/bus company/school district, didn't preclude agencies from being liable to driver under ADA where agencies intended to enforce regulations).

[424] Guardians Ass'n v. Civil Serv. Comm'n of N.Y., 630 F.2d 79, 105 (2d Cir. 1980) (quoting 42 U.S.C. § 2000e-7 (1976)).

[425] *See* STUART M. SPEISER, CHARLES F. KRAUSE, & ALFRED W. GANS, 5 THE AMERICAN LAW OF TORTS, at ch. 17, Tort Claims Acts; Liability of Public Sovereignties or Bodies (1988). See §§ 17:23 and 17:24 for discussion of state tort claims acts in some 30 states.

[426] Bothum v. State Dep't of Transp., 134 Wis. 2d 378, 396 N.W.2d 785 (1986).

[427] *Id*. at 383, 787.

[428] Smith v. Des Moines Civil Serv. Comm'n, 561 N.W.2d 75 (Iowa 1997). In *Smith* a firefighter failed a stress test recommended by a consultant to the city for pulmonary function testing of firefighters required to wear a self-contained breathing apparatus (SCBA). Four other doctors found the firefighter fit for duty. Because the stress test requirement had not been formally adopted, the court reviewed the individual circumstances of the plaintiff, found that the totality of the evidence showed that the plaintiff was physically capable of performing fire suppression duties as required, and ordered the plaintiff reinstated in his job. The same plaintiff had unsuccessfully sued the City of Des Moines under the ADEA and ADA. Smith v. City of Des Moines, Iowa, 99 F.3d 1466 (8th Cir. 1997) (holding the city met its burden on establishing test was necessary to safe and effective job performance; rejecting as not probative the opinion of other physicians who had examined plaintiff; finding plaintiff not disabled under ADA).

[429] ARIZ. REV. STAT. 11-3-203. Medical examination as condition of employment, *see* Arkansas Laws relating to Labor, Ark. DOL, Oct. 2008, at 50, www.arkansas.gov/labor/pdf/laws_relating_labor.pdf; N.D.C.C. 34-01-15, Employer to pay for medical examination—Penalty for violation, www.legis.nd.gov/cencode/t34c01.pdf; R.I. GEN. LAWS § 28-6.2-1 Cost of physical examination [preemployment], www.rilin.state.ri.us/Statutes/TITLE28/28-6.2/28-6.2-1.HTM.

[430] Under California law employees are not required to disclose diagnosis to their employer. LA Metro response to report questionnaire, § IV.A, Tests and standards for current employees: In general.

ADEA applies to any employer with 20 or more employees, including state and local governments, although states may not be sued for money damages under ADEA.[431]ADEA is enforced by the EEOC.

The Supreme Court has recognized the existence of disparate-impact claims under the ADEA, but with substantially narrower coverage than under Title VII because the *Wards Cove* analysis remains applicable to ADEA cases and the ADEA permits otherwise prohibited actions where differentiation between the plaintiffs and other employees is based on reasonable factors other than age.[432] Moreover, the burden of establishing a *prima facie* case of disparate impact under ADEA may remain substantial.[433]

D. Family and Medical Leave

The FMLA is intended to help employees balance work and family obligations. The Act is intended to provide eligible employees with a measure of job security when they attend to specified family and medical obligations, while accommodating the legitimate interests of employers.[434] One of those obligations is dealing with the employee's own "serious health condition," as that term is defined under the statute, when such condition makes the employee unable to perform the functions of the employee's job. An impairment may qualify as a serious health condition under the FMLA without qualifying as a disability under the ADA.[435] The FMLA is enforced by the Department of Labor (DOL).[436]

The FMLA applies to all private, state, and local government employees of covered employers[437] at covered locations. The FMLA allows eligible employees[438] to take up to 12 workweeks of unpaid, job-protected leave in a 12-month period when the employee is unable to work because of a serious health condition.[439] Under some circumstances, the employee may take leave on a reduced leave schedule or intermittently.[440] If an employee's leave is protected under the FMLA, the leave cannot be denied, health benefits must be maintained, and the employee's job is protected.[441] It is the employer's responsibility to determine whether requested leave qualifies as FMLA leave, based only on information provided by the employee.[442] The Fifth Circuit has held that to be covered under the FMLA due to a serious health condition, the employee must establish that he is incapacitated, at least temporarily.[443]

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[431] Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000).

[432] Smith v. City of Jackson, 544 U.S. 228, 125 S. Ct. 1536, 161 L. Ed. 2d 410 (2005).

[433] Donald J. Spero, *Smith v. City of Jackson: Does It Really Open New Opportunities for ADEA Plaintiffs to Recover Under a Disparate Impact Theory?,* 36 U. OF MEM. L. REV. 183 (2005).

[434] 29 U.S.C. § 2601(b), Purposes, http://frwebgate.access.gpo.gov/cgi-bin/usc.cgi?ACTION=RETRIEVE&FILE=$$xa$$busc29.wais&start=4594087&SIZE=4802&TYPE=PDF. Leave is protected for several reasons. 29 U.S.C. § 2612(a)(1), Entitlement to leave, http://frwebgate.access.gpo.gov/cgi-bin/usc.cgi?ACTION=RETRIEVE&FILE=$$xa$$busc29.wais&start=4606287&SIZE=7085&TYPE=PDF; 29 C.F.R. 825.112–Qualifying reasons for leave, general rule, www.dol.gov/dol/allcfr/Title_29/Part_825/29CFR825.112.htm. Only leave due to the employee's own health condition, that is leave relevant to physical ability testing, is discussed in this report.

[435] EEOC, the Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964, Question 8, www.eeoc.gov/policy/docs/fmlaada.html.

[436] U.S. Department of Labor, Wage and Hour Division, Fact Sheet No. 28: The Family and Medical Leave Act of 1993, www.dol.gov/whd/regs/compliance/whdfs28.pdf.

[437] "Any person engaged in commerce or in any industry or activity affecting commerce, who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year" and "any 'public agency,' as defined in section 203(x) of this title." 29 U.S.C. § 2611(4), http://frwebgate.access.gpo.gov/cgi-bin/usc.cgi?ACTION=RETRIEVE&FILE=$$xa$$busc29.wais&start=4599194&SIZE=7087&TYPE=PDF; "Public agencies are covered employers without regard to the number of employees employed." 29 C.F.R. 825.104–Covered employer, www.dol.gov/dol/allcfr/Title_29/Part_825/29CFR825.104.htm.

[438] To be eligible, an employee must have worked for the employer for a total of 12 months, worked at least 1,250 hours in the previous 12 months, and worked at a location where at least 50 employees are employed within 75 mi. 29 U.S.C. § 2611(2), http://frwebgate.access.gpo.gov/cgi-bin/usc.cgi?ACTION=RETRIEVE&FILE=$$xa$$busc29.wais&start=4599194&SIZE=7087&TYPE=PDF; 29 C.F.R. 825.110–Eligible employee, www.dol.gov/dol/allcfr/Title_29/Part_825/29CFR825.110.htm.

[439] A serious health condition is an "illness, injury, impairment or physical or mental condition that involves—(A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider." 29 U.S.C. § 2611(11), http://frwebgate.access.gpo.gov/cgi-bin/usc.cgi?ACTION=RETRIEVE&FILE=$$xa$$busc29.wais&start=4599194&SIZE=7087&TYPE=PDF. The terms "inpatient care," "continuing treatment," and "serious health condition" are further defined under DOL regulations. 29 C.F.R. 825.114–Inpatient Care, www.dol.gov/dol/allcfr/Title_29/Part_825/29CFR825.114.htm; 29 C.F.R. 825.115–Continuing Treatment, www.dol.gov/dol/allcfr/Title_29/Part_825/29CFR825.115.htm; 29 C.F.R. 825.113–Serious Health Condition, www.dol.gov/dol/allcfr/Title_29/Part_825/29CFR825.113.htm.

[440] 29 U.S.C. § 2612(b), Leave taken intermittently or on reduced leave schedule, http://frwebgate.access.gpo.gov/cgi-bin/usc.cgi?ACTION=RETRIEVE&FILE=$$xa$$busc29.wais&start=4606287&SIZE=7085&TYPE=PDF; 29 C.F.R. 825.202–Intermittent leave or reduced leave schedule, www.dol.gov/dol/allcfr/Title_29/Part_825/29CFR825.202.htm. Breaks for diabetic individuals to eat to maintain their blood sugar have been held to be intermittent breaks under the FMLA. Collins v. U.S. Playing Card Co., 466 F. Supp. 2d 954 (S.D. Ohio 2006).

[441] 29 C.F.R. § 825.100, www.dol.gov/dol/allcfr/Title_29/Part_825/29CFR825.100.htm.

[442] 29 C.F.R. § 825.301, www.dol.gov/dol/allcfr/Title_29/Part_825/29CFR825.301.htm.

[443] Mauder v. Metro. Transit Auth. of Harris County, Tex., 446 F.3d 574 (5th Cir. 2006).

Employers may require employees to submit medical certification supporting the request for leave under the Act,[444] and an employee's failure to provide requested supporting information specified under the FMLA is a basis for finding the employee was not entitled to FMLA leave.[445] However, if the employee's medical certification meets FMLA requirements, the employer may not deny leave based on agency requirements that are more restrictive than the requirements of the FMLA.[446]

Employers may require return-to-work certifications that are related to the medical condition for which the employee took leave, subject to any valid state or local law or collective bargaining agreements governing return to work.[447] The certification requirement must be uniformly applied, that is, every one in the same occupation with the same medical condition must meet the same requirements. The FMLA does not authorize an employer to require a fitness-for-duty examination for an employee to return to work from FMLA leave. Moreover, the FMLA "does not authorize an employer to make an independent assessment of the employee's medical condition. Instead, the employer should determine whether the provided information demonstrates that the diagnosed condition is a serious health condition within the meaning of the FMLA."[448]

Medical testing can be required following FMLA leave only if the employer can establish that the testing would have been required absent the medical leave.[449] Testing may be required because of questions about the employee's ability to perform essential functions of the job, independent of the fact of having taken leave.[450] Any such medical testing performed following leave under the FMLA must comply with the ADA, that is, be job related and consistent with business necessity.[451] The Seventh Circuit has held that a collective bargaining agreement may impose stricter return-to-work restrictions than those otherwise incorporated into the FMLA.[452]

An employee returning from FMLA leave is not entitled to restoration under the FMLA if the employee is unable to perform an essential function of the position because of a physical condition.[453] Therefore, although the DOL regulation does not directly address physical ability testing, such testing should be allowed provided that it is job related and consistent with business necessity. This FMLA issue does not affect any obligations the employer may have under such circumstances under the ADA, however.[454]

The Supreme Court has held that states are subject to suit for violations of the FMLA, ruling that the FMLA constitutionally abrogates states' immunity from suit.[455]

Takeaway: An employer may require all employees returning from FMLA to provide a return-to-work certification attesting to the fact that the condition that required leave no longer prevents the employee from performing essential functions of the job, provided that such requirement is uniformly applied. An employer should be able to require physical ability testing of an employee returning from FMLA leave if there is an objective reason to believe, based on the employee's condition upon return, that the employee may have some difficulty in performing essential functions of the job. Such testing may not be required merely because the employee is returning from FMLA leave.

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[444] 29 U.S.C. § 2614(a)(4), http://frwebgate.access.gpo.gov/cgi-bin/usc.cgi?ACTION=RETRIEVE&FILE=$$xa$$busc29.wais&start=4617929&SIZE=7059&TYPE=PDF; 29 C.F.R. 825.306–Content of medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member, www.dol.gov/dol/allcfr/Title_29/Part_825/29CFR825.306.htm; 29 C.F.R. 825.307–Authentication and clarification of medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member; second and third opinions, www.dol.gov/dol/allcfr/Title_29/Part_825/29CFR825.307.htm.

[445] Mauder v. Metro. Transit Auth. of Harris County, Tex., 446 F.3d 574 (5th Cir. 2006).

[446] Albert v. Runyon, 6 F. Supp. 2d 57, 67 (D. Mass. 1998). More restrictive state or local laws or collective bargaining agreement provisions do justify more stringent standards than those of the FMLA. *Id*.

[447] However, rights afforded under the FMLA cannot be diminished by collective bargaining agreements. 29 U.S.C. § 2652, http://frwebgate.access.gpo.gov/cgi-bin/usc.cgi?ACTION=RETRIEVE&FILE=$$xa$$busc29.wais&start=4656175&SIZE=1603&TYPE=PDF.

[448] *Runyon*, 6 F. Supp. 2d at 64.

[449] *Id*. at 65.

[450] *Id*. at 66–69 (D. Mass. 1998). *See* Silver, *supra* note 12, at 641.

[451] 29 C.F.R. § 825.312–Fitness-for-duty certification, www.dol.gov/dol/allcfr/Title_29/Part_825/29CFR825.312.htm. For a discussion of one approach to developing a return-to-duty protocol for a physically demanding job, see Craig B. Clinton, Developing a Return to Duty Procedure Following an Extended Medical Leave, www.usfa.dhs.gov/pdf/efop/efo43353.pdf (accessed Nov. 16, 2009).

[452] Harrell v. United States Postal Serv., 445 F.3d 913, 927 (7th Cir. 2006) (holding that requiring employee to comply with return-to-work provisions in employee handbook incorporated into collective bargaining agreement—provide medical documentation outlining nature and treatment of illness or injury, inclusive dates employee was unable to work, and any medicines taken—did not violate FMLA).

[453] 29 C.F.R. § 825.216–Limitations on an employee's right to reinstatement, subsection (c), www.dol.gov/dol/allcfr/Title_29/Part_825/29CFR825.216.htm.

[454] 29 C.F.R. § 825.216–Limitations on an employee's right to reinstatement, subsection (c), www.dol.gov/dol/allcfr/Title_29/Part_825/29CFR825.216.htm.

[455] Nev. Dep't of Human Resources v. Hibbs, 538 U.S. 721, 740, 123 S. Ct. 1972, 1984, 155 L. Ed. 2d 953, 971 (2003). *See* Gina M. Kulig, *Constitutional Law—The Family and Medical Leave Act: Abrogation of States' Immunity from Suit—Nevada Department of Human Resources v. Hibbs,* 538 U.S. 721 (2003), 38 SUFFOLK U. L. REV. 231 (2004).

Some state and local governments have their own family and medical leave laws. (See Appendix A, State Family and Medical Leave Statutes.) Where such laws exist, employers must comply with any state or local requirement that provides greater rights than the Federal FMLA.[456] For example, state laws may apply to employers with less employees than under federal law,[457] expand the definition of covered family members,[458] or broaden the categories of reasons for taking leave.[459]

E. Search and Seizure[460]

Government-mandated drug and alcohol tests[461] are clearly searches under federal and state constitutions: government-mandated testing programs may be subject to challenge on the grounds that they constitute unreasonable—and thus unlawful—searches. The constitutionality of drug testing requires a fact-based analysis of the governmental interests and individual privacy interests in question, so that the types of job categories covered by the testing, the reasons for testing, whether testing is conducted pre- or post-employment, and testing procedures used will all affect the outcome of the analysis.[462] Since state constitutions may provide broader protection than the Federal Constitution,[463] and hence broader protection against government searches, the standards for determining the constitutionality of the testing may differ under federal and state law.

1. Fourth Amendment

Drug/alcohol testing has been held to be a search subject to the Fourth Amendment, but has been allowed under exceptions to the requirements for a warrant and individualized suspicion. The Supreme Court found that drug tests required under the FRA's general authority to prescribe regulations governing railroad safety were searches subject to the Fourth Amendment but were permissible under a special needs analysis, holding that the government's interest in regulating the conduct of railroad employees to ensure safety constituted a special need beyond normal law enforcement. In so doing the Court stressed the safety-sensitive tasks of the employees subject to the testing. The Court reviewed the compelling government interest, balanced the government interest against the privacy interests at stake, and found that the government interest justified the limited intrusion on those privacy interests, even absent a warrant or individualized suspicion.[464] In a case argued and decided the same day as *Skinner*, the Court found that drug testing implemented by the Customs Service also constituted a search subject to the Fourth Amendment but was also justified under the special needs analysis.[465]

While the Supreme Court has not addressed the specific issue of drug and alcohol testing of transit employees, numerous lower courts have done so. For example, not long after *Skinner* was decided, a New York district court applied the special needs analysis to NYCT's drug testing.[466] A class of plaintiffs including both applicants and employees challenged the testing on grounds both

[456] State of Wisconsin Department of Workforce Development, Equal Rights Division, Civil Rights Bureau, Comparison of Federal and Wisconsin Family and Medical Leave Laws, www.dwd.state.wi.us/dwd/publications/erd/pdf/erd-9680-p.pdf.

[457] *E.g.*, Oregon: 25 or more persons. OR. REV. STAT. 659A.153 Covered employers, www.leg.state.or.us/ors/659a.html.

[458] *E.g.*, Rhode Island: family member means parent, spouse, child, mother-in-law, father-in-law, or the employee himself or herself, and with respect to employees of the state as defined in subsection (3)(ii), shall include domestic partners as defined in § 36-12-1(3). R.I. GEN. LAWS § 28-48-1(5), www.rilin.state.ri.us/Statutes/TITLE28/28-48/28-48-1.HTM.

[459] *E.g.*, Connecticut: Leave may be taken to serve as an organ or bone marrow donor. CONN. CEN. STAT. § 31-51ll(a)(2)(C), http://search.cga.state.ct.us/dlsurs/sur/htm/chap557.htm#Secs31-51cc%20to%2031-51gg.htm.

[460] *See* HIRSCH, *supra* note 49, at 5–6; JOCELYN WAITE, THE CASE FOR SEARCHES ON PUBLIC TRANSPORTATION 27, 60 (Transit Cooperative Research Program, Legal Research Digest 22 2005) (discussing Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989) (upholding warrantless, suspicionless drug testing of railroad employees involved in train accidents)).

[461] Silver, *supra* note 318, at ch. 13, *Alcohol, Drugs, Aids, & Other Testing*.

[462] *E.g.,* Loder v. City of Glendale, 715, 14 Cal. 4th 846, 877, 927 P.2d 1200, 1219, 59 Cal. Rptr. 2d 696 (Cal. 1997) (upholding suspicionless drug testing for all job applicants as part of reasonably administered lawful preemployment medical examination required of all job applicants, but only for safety-related incumbent employees).

[463] *See e.g.*, Leonel v. Am. Airlines, Inc., 400 F.3d 702, 711 (9th Cir. 2005); Ellison v. State, 383 P.2d 716, 718 (Alaska 1963) (Alaska's search and seizure clause is stronger than federal protection).

[464] Skinner v. Rwy. Labor Executives' Ass'n, 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989). The regulations in question mandated drug and alcohol testing following a major train accident, and allowed railroads to require such testing after reportable accidents or incidents where a supervisor had reasonable suspicion that an employee's acts or omissions contributed to the occurrence or severity of the accident or incident. Permissive testing was also authorized in the event of certain rule violations such as excessive speeding. The Court found that both the mandatory and permissive testing were subject to the Fourth Amendment. Prior to *Skinner*, a federal district court, noting that the Supreme Court had never determined the proper Fourth Amendment analysis for drug and alcohol testing of public employees, had found random drug testing of transit employees to violate the Fourth Amendment. Amalgamated Transit Union v. Sunline Transit Agency, 663 F. Supp. 1560, 1566 (1987).

[465] Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 109 S. Ct. 1384, 103 L. Ed. 2d 685 (1989). The drug testing was required for any employee meeting one or more of three criteria: direct involvement in drug interdiction or enforcement of related laws, requirement that the incumbent carry firearms, and/or requirement for the incumbent to handle "classified" material.

[466] Burka v. N.Y. City Transit Auth., 739 F. Supp. 814 (S.D.N.Y. 1990).

of unreasonable search and seizure and due process. The court considered the privacy interests normally protected by the warrant requirements and analyzed the mitigation of intrusion on those interests that is afforded by notice and lack of discretion on the part of administering officials, as well as the government's interest in preventing drug users from engaging in safety-sensitive tasks in public transportation. The court also discussed which positions were safety-sensitive, which would justify their being subject to drug testing.[467] The court ultimately held that NYCT's interest in drug testing non-safety-sensitive employees outweighed the privacy interests requiring a warrant, so that the failure to obtain a warrant before drug testing even non-safety-sensitive employees did not violate the Fourth Amendment. However, due to the higher expectation of privacy for non-safety-sensitive employees and the reduced government interest in testing such employees, the court found that to satisfy the Fourth Amendment reasonableness requirement, the agency must have reasonable suspicion of drug use to test non-safety-sensitive employees. The court found that testing upon return to work after an extended absence, an application for promotion or to become an NYCT employee, or a periodic physical did not meet the reasonable suspicion standard. Testing after an incident was found to meet the standard. For safety-sensitive employees, a "bare reasonableness" standard was found to be sufficient. Finally, the court examined the drug testing procedures used to determine the reasonableness of post-incident testing, finding that because of the government's interest in testing safety-sensitive employees, the balancing analysis for such testing led to a finding that the Fourth Amendment was not violated. However, the government's interest in testing non-safety-sensitive-employees did not outweigh the procedural flaws in the post-incident testing, so that such testing did violate the Fourth Amendment.

Another New York district court subsequently found that the NYCT could test employees without prior notice following return to work after a positive drug test, as well as testing safety-sensitive employees or applicants when "(1) they apply for employment; (2) they have their routine physical examination; (3) they are seeking promotion to another safety-sensitive position; (4) they return to work after an extended absence or suspension; and (5) they resume work after an incident while on duty."[468]

The Ninth Circuit upheld drug and alcohol testing of transit employees, albeit in an unpublished opinion.[469] The plaintiffs were a bus dispatcher and a transit operations supervisor/instructor. The district court had engaged in the balancing test for special needs drug testing, considering "(1) the nature of the privacy interest involved; (2) the character of the intrusion; and (3) the 'nature and immediacy' of the government's need for testing and the efficacy of the testing for meeting it."[470] The decision turned on the third factor, whether the safety aspects of the plaintiffs' jobs justified the intrusion on their Fourth Amendment rights. The district court held that because the plaintiffs only infrequently performed safety-sensitive duties, their jobs had a minimal impact on safety and the intrusion on their privacy was not justified under the Fourth Amendment. The court of appeals held this result was inconsistent with Ninth Circuit precedent, finding that frequency was not relevant.[471]

The D.C. Circuit has found that even direct observation testing under the USDOT regulation is constitutional, because of the diminished expectation of privacy of the employees to whom direct observation applies: employees who fail or refuse a drug test and are returning from a drug treatment program to safety-sensitive positions.[472]

Physical exams also constitute searches,[473] so physical exams required by governmental entities must be free from components that constitute unreasonable searches. Drug testing as part of a required physical

[467] The court found the following positions to be safety sensitive:

> train operators, bus operators, train conductors, conductor-flagmen, and tower operators; the Station and Revenue Department's booth clerks, station cleaners and collection agents; the Car Equipment Department's road car inspectors; the Track Division's track walkers, track equipment maintainers, chauffeur specialists, and crane operators; the Structure and Line Equipment Divisions' heating plant workers; the Electrical Power Department's workers directly involved with maintenance of the power; the Signals Division's employees; the Communications Divisions' telephone maintainers, electronic maintainers and helpers; and the Surface Department's quality control dispatchers and employees who drive buses in public.

Burka v. N.Y. City Transit Auth., 739 F. Supp. 814, 826 (S.D.N.Y. 1990).

[468] Laverpool v. N.Y. City Transit Auth., 835 F. Supp. 1440, 1456 (E.D.N.Y. 1993).

[469] Gonzalez v. Metro. Transp. Auth., 73 Fed. Appx. 986 (9th Cir. 2003). As an unpublished opinion issued before 2007 but after 2002, this opinion may be cited in the First, Third, Fifth, Sixth, Tenth, Eleventh, and D.C. Circuits. Citation is discouraged, but permitted if there is no published opinion on point in the Fourth and Eighth Circuits and prohibited in the Second, Seventh, and Ninth Circuits.

[470] *Id*. at 988.

[471] *Id*. at 989, citing Int'l Bd. of Elec. Workers, Local 1245 v. United States Nuclear Reg. Comm'n, 966 F.2d 521, 526 (9th Cir. 1992) (upholding random testing of clerical workers in protected areas of nuclear plant where their union could not establish that workers "did not engage in any safety-sensitive work" and at least some workers entered vital areas and may have safety-related responsibilities); AFGE Local 1533 v. Cheney, 944 F.2d 503, 506 (9th Cir. 1991) (upholding random testing of engineers who were required to hold top secret access clearances, even though they might not ever actually handle classified information).

[472] BNSF Rwy. Co. v. U.S. Dep't. of Transp., 566 F.3d 200, 386 U.S. App. D.C. 17 (D.C. Cir. 2009).

[473] Schmerber v. State of Cal., 384 U.S. 757, 766–70, 86 S. Ct. 1826, 1836, 16 L. Ed. 2d 908, 917–19 (1966); State v. Hand, 101 N.J. Super. 43, 60, 242 A.2d 888 (Law Div. 1968) (holding that physical examination by a doctor constitutes search within meaning of Fourth Amendment).

exam has also been upheld against Fourth Amendment challenges, either for job applicants[474] or for employees, where a sufficient nexus exists between the test and the employer's legitimate safety concerns.[475] For example, a New Jersey court has held that the Fourth Amendment "does not require individualized reasonable suspicion for drug testing of transportation workers as part of a bona fide annual physical examination."[476] A number of federal district courts have also upheld drug screening as part of routine physicals or return-to-work physicals, based on balancing the transit agencies' compelling safety interests, diminished expectation of privacy of safety-sensitive employees, and limited intrusiveness of the procedure.[477] The government interest in testing job applicants has been held to be higher than that for testing incumbent employees, while the expectation of privacy for job applicants, particularly as regards preemployment physical exams, has been held to be lower than that for incumbent employees.[478]

2. State Constitutions

Government-compelled drug and other testing has been held to be a search under the search and seizure requirements of various state constitutions.[479] However, state constitutions may offer greater protection against unreasonable search and seizures than the Fourth Amendment,[480] but not always. In *Burka, supra,* the court also held that the New York state constitution did not provide greater constitutional protection than the Fourth Amendment for purposes of assessing the drug testing in question, so that drug testing safety-sensitive employees is subject to the same special needs constitutional analysis under the state constitution as under the Fourth Amendment. The court also ruled on a due process challenge to the drug testing policy, that NYCT had taken adverse action without the requisite procedural due process. The court found that only permanent employees had enough of a property interest in job security to have any sort of due process interest. The court found various defects in NYCT's drug testing procedure, including lack of timely notice to employees of positive results and lack of notice of the option for independent testing, sufficient to constitute lack of procedural due process under the Fourteenth Amendment and Article I, Section 6, of the New York State Constitution, noting that the standard of due process scrutiny under the New York Constitution was no higher than under the Federal Constitution.

Physical exams have also been held to be searches under state constitutions. A lower New Jersey Court has held that although medical exams are a managerial prerogative, they still must meet the requirements under the New Jersey Constitution that individuals be free from unreasonable government searches.[481] That court found the testing to be justified under the administrative search exception. The California Supreme Court has held that drug testing as part of a preemployment medical examination is permissible under the California constitution.[482]

IV. OTHER ISSUES

A. Tort/Workers Compensation Liability for Injuries Suffered During Physical Ability Test

One of the risks of conducting physical ability testing is that an applicant or employee may be injured during the test. While the risk of injury is likely to be less than during the more strenuous tests conducted for police and firefighters, the risk for transit operator and other non-law-enforcement-position tests nonetheless exists.

A threshold question is whether a transit agency is subject to tort liability at all, which will depend on state law.[483] Assuming that the agency is subject to tort liability, the enforceability of a release from liability for injuries suffered during a physical ability test will also depend on state law. State statutes may prohibit contracts that purport to exempt a party from his or her own negligence. The Connecticut Supreme Court, without reference to state statutes, has held that exculpatory agreements in the employment context violate Connecticut public policy.[484] It is unclear whether this ruling would apply to job applicants as well. An Illinois court held that an exculpatory agreement signed by a fire department trainee before taking the department's physical agility test was unenforceable due to lack of consideration.[485] The court held that the fire department was required by law to administer the test, and the trainee had a legal right to participate: given that the act of

[474] Loder v. City of Glendale, 14 Cal. 4th 846, 927 P.2d 1200, 59 Cal. Rptr. 2d 696 (Cal. 1997).

[475] Amalgamated Tr. Union v. Cambria County Transit Auth., 691 F. Supp. 898, 902 (W.D. Pa. 1988); N.J. Transit PBA Local 304 v. N.J. Transit Corp., 895 A.2d 472, 384 N.J. Super. 512 (N.J. Super. 2006) (mandatory annual physical exam for transit police, including request for medical history and blood and urine testing, does not violate Fourth Amendment or Article 1, paragraph 7 of the New Jersey Constitution).

[476] Fed'n of Prof'l & Technical Eng'rs, Local 194A v. Burlington County Bridge Comm'n, 240 N.J. Super. 9, 11, 572 A.2d 204 (App. Div.).

[477] Moxley v. Reg'l Transit Servs., 722 F. Supp. 977 (W.D.N.Y. 1989); Holloman v. Greater Cleveland Reg'l Trans. Auth., 741 F. Supp. 677 (N.D. Ohio 1990).

[478] *Loder*, 927 P.2d 1200.

[479] *See e.g.*, N.J. Transit PBA Local 304 v. N.J. Transit Corp., 151 N.J. 531, 543, 701 A.2d 1243, 1249 (1997).

[480] *E.g.*, *id.* at 555–56, 1255. *See* WAITE, *supra* note 460, at 37–45 (discussing state constitutional issues related to search and seizure).

[481] N.J. Transit PBA Local 304 v. N.J. Transit Corp., 476, 384 N.J. Super. 512, 895, A.2d 472 (App. Div. 2005).

[482] *Loder*, 927 P.2d 1200.

[483] *See* JOCELYN WAITE, TRANSIT BUS STOPS: OWNERSHIP, LIABILITY, AND ACCESS 4–6 (Transit Cooperative Research Program, Legal Research Digest 24, 2008).

[484] Brown v. Soh, 280 Conn. 494, 909 A.2d 43 (2006).

[485] White v. Village of Homewood, 256 Ill. App. 3d 354, 628 N.E.2d 616 (1st Dist. 1993).

signing arose from a preexisting legal duty, there was no consideration. The court rejected the argument that another Illinois case, in which an exculpatory agreement related to police training was enforced, was controlling, finding that the existence of consideration was not raised as an issue in that case. The court also found that the disparity in bargaining power between the parties made the agreement void as against public policy, noting the economic compulsion for those seeking employment. Finally, the court noted the similarity in the relationship between potential employer and applicant and the relationship between employer and employee, and the fact that exculpatory agreements in the latter context relieving the employer from liability for the employer's own negligence have long been considered to be against public policy.

On the other hand, a New Jersey court has held that an exculpatory agreement signed by a police trainee was valid and enforceable.[486] In its opinion the court noted that disparate bargaining power alone will not invalidate an exculpatory agreement, as such a requirement would swallow the rule. The court found that an exculpatory agreement was in fact in the public interest because the dangerous nature of the police training course made injures likely and because striking down the exculpatory agreement would have a negative effect on the training program, encouraging those who run the program to act out of fear of lawsuits rather than in effective preparation of police officers. The court also found there was no "positive duty" to protect trainees from harm as expressed in a specific affirmative law or regulation. In addition, the court found that the fact that the trainee had to sign the agreement to participate in the training was not a sufficient basis for finding the agreement unconscionable: the employment context did not supply the requisite degree of economic compulsion for unconscionability.

Courts are split over the question of whether an applicant injured during a physical ability test is covered by workers' compensation. One line of opinions holds that the applicant is not an employee and therefore is not covered.[487] Other courts have held that the physical ability testing is required for the employer's benefit, so that a constructive employer/employee relationship exists.[488] The West Virginia Supreme Court of Appeals has held that where an offer of employment is conditioned on the applicant completing a physical agility test administered under the direction and control of the employer, participation in the test constitutes acceptance of the offer and creates a contract of employment, entitling the applicant to workers' compensation coverage for injury sustained during the test.[489]

B. Legal Ramifications of Lifestyle Restriction

In the context of this report, the term "lifestyle" refers to physical habits/conditions that could directly affect fitness for duty or other work-related issues (such as cost of health care) and for which an employer could test its employees via physical ability tests. This section discusses smoking and obesity, two habits/conditions that can both affect job performance and be tested for with relative ease.[490]

Tests for the presence of nicotine in the bloodstream or to measure BMI[491] are almost certain to be considered medical examinations and thus must comply with the requirements under the ADA, *supra*, for medical exams. Nonmedical personnel could check an employee's weight, but if done as part of a lifestyle program, such weight checking would almost certainly be medically driven and so subject to the same constraints as nicotine testing and BMI measurement. Thus such lifestyle-related testing would be much easier to justify from a legal standpoint if conducted on job applicants rather than on incumbent employees. Moreover, if included as part of a preemployment physical exam, the nicotine testing would be much less intrusive than if required as a separate test, and so less vulnerable to challenges on grounds of invasion of privacy.

1. Smoking[492]

Many workplaces prohibit smoking on company premises, and in fact state laws may limit or prohibit smoking in the workplace.[493] A more difficult question is whether employers can lawfully prohibit employees from smoking at all.

None of the transit operators surveyed for this report indicated that they impose bans on off-duty use of to-

[486] Marcinczyk v. State of N.J. Police Training Comm'n, 406 N.J. Super. 608, 968 A.2d 1205 (App. Div. 2009).

[487] *E.g.*, Younger v. City and County of Denver, 810 P.2d 647 (Colo. 1991); Boyd v. City of Montgomery, 515 So. 2d 6, 7 (Ala. Civ. App. 1987). *Cf.* Standring v. Town of Skowhegan, 2005 ME 51, 870 A.2d 128 (2005) (finding heart attack suffered by reserve police officer during physical agility test for promotion to full-time police officer may have arisen out of and in course of employment, so as to be eligible for workers' compensation benefits). The *Standring* court cited the factors in Comeau v. Maine Coastal Servs., 449 A.2d 362, 365–67 (Me. 1982), *id*. at 10.

[488] Laeng v. Workmen's Compensation Appeals Bd., 6 Cal. 3d 777, 494 P.2d 1, 100 Cal. Rptr. 377 (1972).

[489] Dodson v. Workers' Compensation Div., 210 W. Va. 636, 558 S.E.2d 635 (W. Va. 2001).

[490] There are other causes of general ill health or sleepiness on the job, such as eating junk food or intentionally not getting enough sleep, but it is difficult to conceive of physical ability tests for such habits.

[491] Body mass index (BMI) is a measure of body fat based on height and weight that applies to adult men and women. Calculate Your Body Mass Index, Department of Health and Human Services, National Institutes of Health, www.nhlbisupport.com/bmi/.

[492] *See* ROTHSTEIN, CRAVER, SCHROEDER & SHOBEN, *supra* note 109, at § 1.27, Cigarette Smoking.

[493] *E.g.*, Iowa Smokefree Air Act, www.iowasmokefreeair.gov/laws.aspx; www.iowasmokefreeair.gov/; Minnesota Clean Indoor Air Act, MINN. STAT. §§ 144.411–144.417, www.health.state.mn.us /divs/eh/indoorair/mciaa/ftb/mciaa.pdf.

bacco as a condition of hiring or employment. However, health concerns—including the cost of health care—have led some employers to institute such bans. For example, Weyco, a Michigan insurance benefits provider, banned smoking among its employees. The company provided a 15-month period for employees to quit smoking and then began random nicotine testing. Twenty employees quit smoking, and four were fired for refusing to take breathalyzer tests for nicotine.[494] Weyco was apparently the first company to actually test for nicotine use of current employees.[495] The Scotts Company also banned employee smoking, although the requirement of being nicotine-free was implemented as a condition of employment for new hires, not for existing employees. A new hire who was fired for failing the nicotine screen sued unsuccessfully.[496]

Public employers who have banned tobacco use for all new hires include the City of North Miami; Lee County, Florida, Sheriff's Office;[497] and St. Cloud, Coral Gables, and Lighthouse Point, Florida.[498] The St. Cloud ordinance required job applicants to sign an affidavit like the one required by the City of North Miami, *infra*. The St. Cloud policy allowed the city to require new hires to undergo medical testing to ensure that they are complying with the nonsmoking requirement.[499] However, St. Cloud also rescinded its policy in 2006, because the policy did not have the hoped-for effect on insurance costs and inhibited hiring.[500]

Potential grounds for challenging nonsmoking hiring and employment policies under federal law include violations of the ADA, disparate treatment, disparate impact, and violation of the right to privacy. Generally, neither smoking nor nicotine addiction have been held to be disabilities under the ADA.[501] Other courts have rejected arguments that smokers are disabled within the meaning of the ADA.[502] It also appears that there is not sufficient disparity in smoking rates between ethnic groups to mount a successful disparate-impact challenge to a nonsmoking hiring policy.[503]

The Tenth Circuit Court of Appeals rejected a constitutional challenge to a smoking ban for firefighter trainees in Oklahoma City.[504] The plaintiff had signed an agreement that he would not smoke a cigarette on or off duty for a period of 1 year after beginning work; he was fired for taking three puffs from a cigarette while on break. The plaintiff argued that the smoking ban interfered with his rights of liberty and privacy under the Constitution, and that the government may not unreasonably infringe on an employee's freedom of choice in non-job-related personal matters. The defendants argued that there was no infringement of liberty or privacy interests and that since smoking was not a fundamental right under the Constitution, no balancing of interests was required. However, the Seventh Circuit

[494] Jeremy W. Peters, *Company's Smoking Ban Means Off-Hours, Too*, N.Y. TIMES, Feb. 5, 2005, www.nytimes.com/2005/02/08/business/08smoking.html (accessed Oct. 23, 2009).

[495] Edelman, *Finding Wealth Through Wellness: How Engaging Employees in Preventive Care Can Reduce Healthcare Costs*, *An Executive Guide to Corporate Wellness Programs*, Fall 2006, www.edelman.com/image/insights/content/Wellness_White_Paper.pdf, at 11.

[496] Jonathan Saltzman, *Smoker Who Lost Job Loses in Court*, BOSTON GLOBE, Aug. 8, 2009, www.boston.com/news/local/massachusetts/articles/2009/08/08/smoker_who_lost_job_loses_in_court/ (accessed Oct. 24, 2009). The plaintiff alleged that the anti-smoking policy violated his right to privacy and 29 U.S.C. § 1140, Interference with protected rights. The court ruled that the plaintiff did not have a privacy interest because he had smoked openly, and was not protected under § 1140 because he was not yet a bona fide employee.

[497] *Lee Sheriff Bans New Hires Who Smoke*, ST. PETERSBURG TIMES, Oct. 23, 2002, www.sptimes.com/2002/10/23/State/Lee_sheriff_bans_new_.shtml (accessed Dec. 1, 2009).

[498] April Hunt & Susan Jacobson, *Tobacco Users Need Not Apply*, THE ORLANDO SENTINEL, Mar. 27, 2002, http://articles.orlandosentinel.com/2002-03-27/news/0203270291_1_sue-luglio-tobacco-smokers.

[499] *Id.*

[500] Linda Florea, *St. Cloud Hires Smokers Again*, THE ORLANDO SENTINEL, May 24, 2006, at D7.

[501] *Employer on Good Footing with Smoking Ban, Experts Say*, Feb. 3, 2005, http://hr.blr.com/news.aspx?id=10761; Thomas Benjamin Huggett, *You Smoke, You're Fired: Assessing the Legal Risks of Smoking-Restriction Hiring Policies*, Morgan, Lewis & Bockius LLP, Labor and Employment Law Seminar, Oct. 27, 2005, www.morganlewis.com/pubs/LEPG05_Smoke_Fired.pdf; Joe Robinson, *Light Up, Lose Your Job*, LA TIMES, Feb. 19, 2006, http://articles.latimes.com/2006/feb/19/opinion/op-robinson19 (accessed Oct. 24, 2009). *See* Brashear v. Simms, 138 F. Supp. 2d 693 (D. Md. 2001); Ranger Fuel Corp. v. West Va. Human Rights Comm'n, 180 W.Va. 260, 376 S.E.2d 154 (1988) (use or abuse of tobacco in absence of medically verifiable addiction not physical or mental impairment). However, if a prima facie case were established, it could be argued that reducing costs by banning smoking is not permissible under the ADA:

> A desire to reduce costs associated with smokers that is predicated on the assumption that employees who smoke have more health-related conditions, which lead to greater insurance claims, greater absenteeism and increased injuries, is unlikely to be successful. Under ADA law, an argument can be made that this asserted legitimate nondiscriminatory business reason is, in fact, still a violation of the ADA because an employer would be using smoking as a proxy for other disabling medical conditions to which the employer apparently believes the smoker is susceptible, such as lung cancer or emphysema.

Huggett, at 3–9.

[502] Micah Berman & Rob Crane, Tobacco Law Symposium, *Mandating a Tobacco-Free Workforce: A Convergence of Business and Public Health Interests*, 34 WM. MITCHELL L. REV. 1651, 1661 (2008).

[503] Nate Kowalski & Chris Milligan, *Banning Off-Duty Smoking*, CALIFORNIA LAWYER, 36, 37 (Aug. 2007), www.aalrr.com/files/Publication/7d561ca8-81d6-4e57-bbee-03c6b6f77128/Presentation/PublicationAttachment/01533eb7-409a-48a7-9abd-04f781822ebc/mcle.pdf (accessed Dec. 6, 2009).

[504] Grusendorf v. City of Oklahoma City, 816 F.2d 539 (10th Cir. 1987).

looked to the approach of *Kelley v. Johnson*,[505] in which the Supreme Court assumed a liberty interest in personal appearance, but recognized interests of state and local governments as employers that are stronger than interests those governments have vis-à-vis the general population. Thus, employment requirements need not meet the standard of other regulatory requirements: a government employee challenging a government employment requirement must show that there is no rational relationship between the requirement and safety of persons and property. In applying those principles to the smoking ban, the Seventh Circuit both assumed a liberty interest protecting the trainees' right to smoke and presumed the regulation to be valid. The court noted considerations of health, particularly for firefighters exposed to smoke, sufficient to establish a *prima facie* rational basis for the regulation. The court also noted the questionable aspect of banning smoking for first-year firefighters but not for other firefighters, but declined to examine an equal protection argument not raised by the parties. The court then found that the plaintiff had not demonstrated that the requirement was irrational. Accordingly the court upheld the regulation.

As to privacy claims, the Florida Supreme Court rejected a constitutional challenge to a smoking ban imposed by the City of North Miami on job applicants.[506] The city had made a policy decision to reduce the number of employees who smoke tobacco to reduce costs and increase productivity. To do so, the city required all job applicants to sign an affidavit attesting that they had not smoked for a year, with the goal of gradually reducing the number of smoking employees through attrition. Once hired, there was no requirement regarding smoking. The Florida court rejected the argument that the inquiry into smoking status violated the job applicant's reasonable expectation of privacy concerning smoking. However, the court specifically reserved the question of whether a government agency could require an incumbent employee to stop smoking under the Florida Constitution. The court found that there is no federally-protected right to smoke under the penumbra of privacy of the federal constitution, citing *Grusendorf*, and that even if there was, there was sufficient rational basis for the regulation to support its constitutionality.

The legality of absolute bans on the use of tobacco will depend on whether state law prohibits controlling employee conduct outside of the workplace and whether state law provides that employment is at will. Almost half the states allow restrictions on use of tobacco outside of work. Seventeen states specifically prohibit making employment decisions based on off-duty use of tobacco, seven states based on off-duty legal activity or consumption of legal products, and another three for reasons that would cover the use of tobacco.[507] North Dakota's statute was intended to protect a range of nonwork conduct, including "an employee's weight and smoking, marital, or sexual habits."[508] Even laws protecting off-duty tobacco use may have exceptions for job-related smoking bans.[509] Moreover, the state laws may protect incumbent employees but not job applicants.[510]

For over 2 decades, Massachusetts has banned smoking off or on the job for police and firefighters.[511] The personnel administration rules implementing this legislation require the termination of an employee violating the requirement.[512] The Massachusetts Supreme Judicial Court upheld both the statute and implementing regulation, holding there was no discretion as to whether to terminate an offending employee. The court found that the legislature had made the judgment that police and firefighters were already at high risk of developing hypertension and heart disease due to the nature of their jobs, and that to decrease the risk of such employees needing to retire with disability benefits, had banned an activity that would increase that risk.[513] Florida state law also prohibits firefighters from using tobacco,[514] a provision that was supported by at least one

[505] 25 U.S. 238, 96 S. Ct. 1440, 47 L. Ed. 2d 708 (1976).

[506] City of North Miami v. Kurtz, 653 So. 2d 1025 (Fla. 1995). The City of North Miami has reportedly since repealed the ban because of the ban's affect on the organization's ability to hire otherwise qualified workers. Daniel Schorn, Whose Life Is It Anyway? Are Employers' Lifestyle Policies Discriminatory?, *60 Minutes* (CBS television broadcast July 16, 2006), www.cbsnews.com/stories/2005/10/28/60minutes/main990617_page3.shtml?tag=contentMain;contentBody (accessed Oct. 24, 2009).

[507] *See* ROTHSTEIN, CRAVER, SCHROEDER & SHOBEN, *supra* note 109; Berman & Crane, supra note 502, at 1651. *See also* Jill Yung, *Big Brother IS Watching: How Employee Monitoring in 2004 Brought Orwell's 1984 to Life and What the Law Should Do About It*, 36 SETON HALL L. REV. 163, 193, n.139, [list of states with such statutes], citing Marisa Anne Pagnattaro, *What Do You Do When You Are Not at Work?: Limiting the Use of Off-Duty Conduct as the Basis for Adverse Employment Decisions*, 6 U. PA. J. LAB. & EMP. L. 625, 628 (2004).

[508] Pagnattaro, *supra* note 507, at 659, citing Hougum v. Valley Mem'l Homes, 1998 ND 24, P 40, 574 N.W.2d 812, 821.

[509] *See* ROTHSTEIN, CRAVER, SCHROEDER & SHOBEN, *supra* note 109; Berman & Crane, *supra* note 502, at 1659, 1662, 1664.

[510] Berman, at 1662, citing Christopher Valleau, *If You're Smoking You're Fired: How Tobacco Could Be Dangerous to More than Just Your Health*, 10 DEPAUL J. HEALTH CARE L. 457, 479 (2007). *But see* ROTHSTEIN, CRAVER, SCHROEDER & SHOBEN, *supra* note 492, citing 18 state laws protecting applicants.

[511] MASS. GEN. LAWS c. 41, § 101A, www.mass.gov/legis/laws/mgl/41-101a.htm.

[512] Town of Plymouth v. Civil Serv. Comm'n, 426 Mass. 1, 3, 686 N.E.2d 188, 189 (1997).

[513] *Id*. at 191.

[514] FLA. STAT. § 633.34 Firefighters; qualifications for employment, www.leg.state.fl.us/STATUTES/index.cfm?App_mode=Display_Statute&Search_String=&URL=Ch0633/SEC34.HTM&Title=-%3E2009-%3ECh0633-%3ESection%2034#0633.34.
Applicants for positions as a firefighter in Florida must sign a tobacco affidavit. *See also Florida's firefighters support dollar a*

firefighter's union and the state insurance commissioner.[515] California law prohibits an employer from rejecting job applicants or discharging employees because of lawful conduct occurring off duty, but provides an exception for firefighters and tobacco consumption.[516] Moreover, California courts have held that these provisions do not provide independent bases for a public policy claim.[517]

Where state law prohibits nonsmoking policies, transit agencies may consider incentive programs. Such programs must comply with the requirements under the Health Insurance Portability and Accountability Act (HIPAA)[518] that employees not be charged higher premiums or otherwise discriminated against in provision of health insurance based on a health factor. HIPAA provides parameters under which an incentive program can be established without constituting discrimination under HIPAA.[519]

Where state law does not prohibit nonsmoking policies, the employer must keep in mind the requirements of the Employee Retirement Income Security Act of 1974 (ERISA).[520] ERISA prohibits terminating an employee from an ERISA plan because of higher health care costs; a policy that prohibited smoking among current employees could be vulnerable to an ERISA challenge, as one of the rationales for a nonsmoking policy is the negative health effects of smoking. However, the ERISA prohibition does not apply to job applicants, so a policy screening out smokers during the hiring process would appear not to present any ERISA liability.

Takeaway: Absent state law to the contrary, a ban on off-duty use of tobacco is likely to survive constitutional challenges and stands a good chance of surviving a privacy claim, particularly if the nicotine test is part of an already authorized medical exam. Some state laws that protect the right to use tobacco off duty contain an exemption for firefighters or law enforcement personnel because of the connection between tobacco use and health problems. That same connection provides a safety rationale for prohibiting transit operators from using tobacco off duty, particularly given the CDL requirement concerning conditions related to cardiac failure, but would not have the same force as a statutory exemption.

Takeaway: In drug testing cases, courts often note the fact that drug tests that are part of a lawful medical examination, so that the test for a controlled substance is merely an additional test run on blood or urine collected in any event, are less intrusive and so less objectionable from a constitutional standpoint than stand-alone drug tests. Similarly, nicotine tests that are part of lawful medical exams, such as preemployment physicals, should be deemed less intrusive than stand-alone tests, and thus less vulnerable to legal challenge.

2. Obesity[521]

Federal.—The Supreme Court has explained that the ADA "allows employers to prefer some physical attributes over others and to establish physical criteria….[A]n employer is free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment such as one's height, build, or singing voice are preferable to others."[522] This part of *Sutton* does not appear to be affected by the ADAAA.

Thus, for the most part, weight is not a legally protected characteristic. The Second Circuit, for example, has held that a fire department did not engage in unlawful discrimination in establishing weight restrictions and requiring firefighters who did not meet those restrictions to either meet a body fat measurement requirement or take an alternative physical fitness exam.[523] The *Francis* court held that "no cause of action lies against an employer who simply disciplines an employee for not meeting certain weight guidelines."[524] Cases upholding an employer's ability to impose appearance and grooming standards suggest that weight restrictions—absent countervailing state law—should be permissible, provided that they are applied equally as to race, national origin, and gender.[525]

If, however, an employer imposes weight restrictions that differentiate based on sex or race, such restrictions would be impermissible. Airline weight requirements imposed solely on female flight attendants or imposed

pack increase for safer and healthier Florida, Mar. 26, 2009, www.iaff747.com/docs/FPF%20Release%203-26-09.pdf.

[515] *Group Seeks Ban for Smoking Firefighters*, GAINESVILLE SUN, Mar. 14, 1989, http://news.google.com/newspapers?id=1QgSAAAAIBAJ&sjid=L-oDAAAAIBAJ&pg=1598,4783880&hl=en (accessed Dec. 6, 2009).

[516] CAL. LAB. CODE §§ 96(k) and 98.6, www.leginfo.ca.gov/cgi-bin/displaycode?section=lab&group=00001-01000&file=79-107.

[517] Nate Kowalski & Chris Milligan, *supra* note 503, at 38, citing Barbee v. Household Automotive Finance Corp., 113 Cal. App. 4th 525, 6 Cal. Rptr. 3d 406 (2003), Grinzi v. San Diego Hospice Corp., 120 Cal. App. 4th 72, 14 Cal. Rptr. 3d 893 (2004).

[518] 104 Pub. L. No. 199, 110 Stat. 2419 (1996).

[519] Kowalski & Milligan, *supra* note 503, at 38.

[520] 29 U.S.C. §§ 301 *et seq.*

[521] A bus company in Manchester, England, recently instituted a 23 stone (333 lb) weight limit for bus drivers, based on the maximum safe working loads for bus seats set by the manufacturers. Dean Kirby, *Bus Drivers Given 23 Stone Weight Limit*, MANCHESTER EVENING NEWS, Oct. 3, 2009, www.manchestereveningnews.co.uk/news/s/1154242_bus_drivers_given_23_stone_weight_limit (accessed Dec. 10, 2009).

[522] Sutton v. United Airlines, 527 U.S. 471, 490, 119 S. Ct. 2139, 2150, 144 L. Ed. 2d 450, 467 (1999). Moreover, the EEOC Guidelines state that obesity is rarely found to be a disability. 29 C.F.R. pt. 1630 app. § 1630.2(j). *See* III.B.2., *Definition of Disability*, *supra* this digest.

[523] Francis v. City of Meriden, 129 F.3d 281 (2d Cir. 1997).

[524] *Id.* at 286.

[525] Jespersen v. Harrah's Operating Co., Inc., 444 F.3d 1104 (9th Cir. 2006) (upholding requirement for female bartender to wear makeup, finding grooming standards posed equivalent burdens on male and female employees).

more rigorously on female flight attendants, for example, have been held to violate Title VII.[526]

It is also possible that an enforcement agency would accept a charge alleging that height/weight requirements have an adverse impact on a protected class, such as women or certain ethnic groups.[527] A finding of adverse impact would mean that such requirements would have to be justified as job related and consistent with business necessity. For example, a showing that a threshold BMI made it likely that an employee would suffer from obstructive sleep apnea and thus be vulnerable to falling asleep on the job might justify requiring vehicle operators meeting that threshold to be tested for obstructive sleep apnea.[528] The NTSB has recommended that bus drivers be screened for obstructive sleep apnea.[529] It is uncertain whether such a requirement would be considered job related for a non-safety-related employee.

Testing for obstructive sleep apnea based on BMI may be more defensible if the FMCSA or FTA issues regulations requiring screening. FMCSA guidelines describe sleep apnea as disqualifying,[530] but there are no FMSCA requirements for screening for obstructive sleep apnea. As of October 2009, there do not appear to be any existing programs that routinely screen bus or rail operators for obstructive sleep apnea.[531]

State.—Michigan's Elliott-Larsen Civil Rights Act specifically includes height and weight in the list of prohibited bases for discrimination in employment.[532] Although it appears that Michigan is the only state to prohibit discrimination based on weight, San Francisco and Santa Cruz, California, also prohibit discrimination based on weight.[533] The District of Columbia Human Rights Law prohibits discrimination based on personal appearance, which requirement could affect weight standards.[534] Absent such prohibitions, simple weight restrictions should be permissible.[535]

In 2007, a candidate sued LA Metro alleging that LA Metro had failed to hire her based on her perceived disability of obesity.[536] Having lost at the trial court level, the plaintiff appealed the disability ruling and raised an equal protection argument. The plaintiff had applied for a position as a bus operator. The preemployment physical revealed her BMI to be 57.55 percent, which required her to undergo the BOCAT, a functional seat

[526] Gerdom v. Cont'l Airlines, Inc., 692 F.2d 602 (9th Cir. 1982) (strict weight restrictions imposed on female employees but not on male employees performing substantially similar duties held to violate Title VII); Frank v. United Airlines, Inc., 216 F.3d 845 (9th Cir. 2000) (finding weight restriction policy facially discriminatory where employer did not use equivalent ranges within height and weight tables to determine maximum allowable weights for male and female employees).

[527] Response to TCRP Questionnaire from Cynthia Hyatt, Legal Counsel, State of Rhode Island Commission for Human Rights, June 15, 2009; Nina G. Stillman, *The Unbearable Heaviness of Hiring: Assessing the Legal Risks of Weight-Restriction Hiring Policies*, Morgan, Lewis & Bockius LLP Labor and Employment Law Seminar, Oct. 27, 2005, at 3-1, www.morganlewis.com/pubs/LEPG05_Smoke_Fired.pdf (accessed Oct. 22, 2009). Stillman raises the possibility of actions under § 510 of the Employee Retirement Income Security Act (Pub. L. No. 93-406, Sept. 2, 1974) and the Health Insurance Portability and Accountability Act (Pub. L. No. 104-191, Aug. 21, 1996), topics which are beyond the scope of this digest. It appears that the risk of adverse impact of a weight restriction is greater under Title VII (for members of ethnic groups with a propensity to being overweight) than under the ADA (given the requirement for physiological cause of obesity), although the change in the requirement for being "regarded as disabled" could affect that calculus.

[528] The Joint Task Force of the American College of Chest Physicians, American College of Occupational and Environmental Medicine, and the National Sleep Foundation has identified screening recommendations for commercial drivers with possible or probable sleep apnea. These include having two or more of: BMI greater than 35 kg/m; a neck circumference greater than 17 in. in men, 16 in. in women; or hypertension. Natalie Hartenbaum, Nancy Collop, Ilene M. Rosen, Barbara Phillips, Charles F.P. George, James A. Rowley, Neil Freedman, Terri E. Weaver, Indira Gurubhagavatula, Kingman Strohl, Howard M. Leaman, Gary L. Moffitt & Mark R. Rosekind, *Sleep Apnea and Commercial Motor Vehicle Operators*, JOEM, vol. 48, no. 9, Supplement Sept. 2006, www.acoem.org/uploadedFiles/JOEM%20Sept%2006%20-%20Sleep%20Apnea%20Supplement.pdf.

[529] NTSB, Safety Recommendation R-09-9, *supra* note 22, at 5; Joan Lowy, *Safety Board Issues Wake-up Call on Sleep Disorder*, THE SEATTLE TIMES, Oct. 21, 2009, http://seattletimes.nwsource.com/html/politics/2010104008_apusntsbsleepapnea.html?syndication=rss (accessed Oct. 24, 2009).

[530] Frequently Asked Questions (FAQ)—Medical: 26. Is Sleep Apnea Disqualifying? www.fmcsa.dot.gov/rules-regulations/topics/medical/faqs.aspx?#question26.

[531] National Transportation Safety Board, Safety Recommendation H-09-15 and -16, Oct. 20, 2009, www.ntsb.gov/recs/letters/2009/h09_15_16.pdf.

[532] MCL 37.2102 Recognition and declaration of civil right; action arising out of discrimination based on sex or familial status, www.michigan.gov/documents/act_453_elliott_larsen_8772_7.pdf. A Michigan court has held that a minimum height requirement for firefighters, without showing that minimum height to be a BFOQ, violates this provision. Because height itself is a protected characteristic, a showing of disparate impact on a protected class is not required. Rather a height requirement, whether for men or women, is only allowed if it can be shown to be a BFOQ. Micu v. City of Warren, 147 Mich. App. 573, 382 N.W.2d 823 (1986).

[533] Edelman, *Finding Wealth Through Wellness: How Engaging Employees in Preventive Care Can Reduce Healthcare Costs*, *An Executive Guide to Corporate Wellness Programs*, Fall 2006, at 11, www.edelman.com/image/insights/content/Wellness_White_Paper.pdf.

[534] D.C. CODE §§ 2-1401.01–1403.17 (2001 & Supp. 2007). Ivey v. District of Columbia, 949 A.2d 607 (D.C. App. 2008).

[535] Ohio state troopers fight weight limit rule, June 2, 2009, www.msnbc.msn.com/id/31069019/ns/health-diet_and_nutrition/ (accessed Oct. 29, 2009).

[536] Hines v. L.A. County Metro. Transp. Auth., B208389 (Cal. App. 2009, Nov. 6, 2009).

test.[537] The plaintiff had failed the BOCAT because her torso touched the steering wheel and her thighs hung over the side of the seat, which prevented her from accessing bus controls in the prescribed manner. When she had taken the test shortly thereafter she had again failed. The plaintiff then sued under the California nondiscrimination statute, alleging physical disability and genetic characteristic discrimination, harassment, and retaliation, both counts premised on her obesity. LA Metro argued that obesity is not a disability under California law unless it has a physiological cause.[538] The court agreed that either for actual disability or being regarded as having a disability, the underlying condition must have a physiological cause to be protected under California law. However, the court held that the plaintiff was not required to show that the employer believed that her obesity was the result of a physiological condition, merely that the obesity was so caused.

The plaintiff also argued that LA Metro's administration of the BOCAT violated the equal protection clauses of the California and federal constitutions because LA Metro required obese job applicants to pass the BOCAT, but did not require employees who became obese after being hired to pass the BOCAT, thus treating job applicants differently than incumbent employees. This argument rested on the premise that job applicants and incumbent employees are similarly situated. LA Metro argued that it was justified in treating applicants differently than incumbent employees, because LA Metro can monitor its employees through passenger complaints, performance monitoring by supervisors, mystery rider reports, and fitness-for-duty exams, so that decreases in functionality become readily apparent, whereas applicants are not subject to monitoring other than through preemployment testing. LA Metro relied on *Loder*, *supra*, in its argument that it was permissible to distinguish between applicants and employees under these circumstances. The plaintiff argued that *Loder* was distinguishable because there the employer showed a connection between substance abuse and employee productivity or absenteeism, while LA Metro had allegedly failed to show a connection between the BOCAT and safety.

The appellate court did not rule on the plaintiff's equal protection claim because she had failed to raise it at the trial level. The equal protection clause is meant to prevent the government from arbitrarily discriminating among its citizens, requiring instead that similarly situated persons must be treated equally under the law.[539] Thus an equal protection challenge to a testing requirement that applies to job applicants but not to incumbent employees rests on the assertion that applicants and employees are similarly situated and that it is arbitrary to treat them differently in terms of testing requirements. The BOCAT test does appear to differ from testing in say, *Lanning*, where a requirement was imposed on applicants that incumbent employees were not required to meet. In LA Metro's situation, the BOCAT purportedly applies a standard that is also required for incumbent employees, but measured through other means.

V. TRANSIT AGENCY PRACTICES

The author queried 21 of the largest bus properties about various aspects of physical ability testing: preemployment tests (requirements and limitations), periodic employee tests (requirements and limitations), post-incident tests (requirements and limitations), school bus requirements, drug and alcohol policies, post-illness testing, and lifestyle testing. Fourteen of the agencies responded to the questionnaire (see Appendix C); a 15th did not complete the questionnaire but provided information about physical ability testing at the agency. At least for these respondents, spirometry and mandated drug and alcohol testing are the most prevalent forms of physical testing. Several of the respondent agencies do engage in other physical ability testing, as described below. None of the responding agencies indicated that they impose lifestyle restrictions such as nonwork use of tobacco or weight limits (except as BMI implicates sleep apnea or as weight is directly related to equipment requirements, as described below).[540] None of the responding agencies indicated that state school bus requirements applied to their drivers. Preemployment physicals appear more broad-based than employee physicals, which seem to be more limited to CDL holders and safety-related employees. Fit testing seems to be imposed on job applicants rather than incumbent employees. Other testing, such as isokinetic testing of required job movements, may be required of incumbent employees under specified circumstances, such as return from back injury when the agency conducts testing to measure back muscle functionality.

The descriptions of transit agency practices in this section are based on questionnaire responses, as well as additional primary and secondary research on the practices of respondents and other transit agencies. The author was not able to determine the prevalence nationally of any of the practices described in this section. In fact, as responsibilities for conducting employment testing are sometimes diffuse within an organization,

[537] *See* V. *Transit Agency Practices*, *infra* this digest.

[538] Hines v. L.A. County Metro. Transp. Auth., B208389 (Cal. App. 2009, Nov. 6, 2009), at 3–18, citing Cassista v. Cmty. Foods, Inc., 5 Cal. 4th 1050, 22 Cal. Rptr. 2d 287 (Cal. 1993).

[539] Cooley v. Superior Court, 29 Cal. 4th 228, 253, 57 P.3d 654, 127 Cal. Rptr. 2d 177, 196 (Cal. 2002).

[540] While details were not available, the MBTA reported addressing obesity for both applicants and incumbent employees if obesity could be related to sleep apnea. Response to TCRP Questionnaire from Kate LeGrow, Director, Occupational Health Services, Questions II.B., *Source of requirements for conducting pre-employment tests: Specific pre-employment tests and standards for rail/bus operators*; II.C. *Source of requirements for conducting pre-employment tests: Specific pre-employment tests and standards for mechanics;* and IV.B., *Tests and standards for current employees: Specific employee tests and standards*.

particularly for the larger transit agencies, the agencies cited below may conduct other testing that respondents were not aware of. Nonetheless, the descriptions do provide illustrations of different possible approaches to physical ability testing.

Tests in use range from relatively simple fit testing—that is, conducting tests to literally determine whether the applicant can fit comfortably in the driver compartment; make necessary adjustments to the seat, steering wheel, and mirrors' and safely operate controls as required—to tests designed by industrial medicine professionals to measure physical ability.

A. Chicago Transit Authority[541]

The Chicago Transit Authority (CTA) (www.transitchicago.com/) has begun a process of measuring job applicants' physical capability compared with physical job demands using isokinetic testing. For each covered position an ergonomist performed a job evaluation and quantified movements required for essential job functions. The screening test is performed by a consultant who uses isokinetic equipment to measure the job applicant's ability to make the required movements. The physical areas tested are limited to the back, knees, and shoulders, the areas where most on-the-job injuries occur. Applicants who do not receive a passing score on the test are not eligible to proceed with the hiring process. Thus far there has been a 7 percent failure rate. CTA is unaware of any legal challenges to this testing program in the approximately 30 months it has been in operation.

Thus far the positions of bus operator, trackmen, and several other positions are subject to screening. CTA's goal is to have a total of 10 positions certified for this isokinetic screening by the end of 2010. The screening is not used for return-to-work due to the agency's collective bargaining agreement. From a physical perspective, CTA believes they are getting a higher quality of applicants since members of the applicant pool have become aware of these new requirements.

CTA also requires additional physical ability testing during training for jobs with specific strenuous physical requirements. These tests are generally conducted using actual job equipment. For example, if a job requires an employee to lift a 100-lb bucket as a job requirement, that lifting will be included as a mandatory requirement during training. Conducting this testing during the training process allows CTA to ensure that probationary hires are trained on the appropriate techniques for performing lifting and other potentially difficult tasks. Probationary hires that are not able to perform the physical requirements after training are not retained.

In addition, CTA buses have a 400-lb limit for the driver's seat, so applicants for bus operator positions cannot exceed 400 lb in weight.

B. Denver Regional Transportation District[542]

Per agency policy, Denver Regional Transportation District (www-rtd-denver.com/) (RTD) has implemented physical ability testing requirements for rail and bus operators, mechanics, service and cleaning employees, sign maintainers, rail laborers, track maintainers, and farebox workers. The tests are intended to reduce work-related injuries by ensuring that applicants and employees have the physical ability to perform specific essential job tasks that have been shown to cause injuries.

The agency contracted with a physical therapy and rehabilitation group to develop and administer the tests, which are criterion-based. The contractor used job descriptions and direct observation to break down the movements required to perform essential job tasks that may lead to work-related injury. The contractor then determined the required force or flexibility needed to perform those tasks. The tests are performed using physical therapy equipment that measures the force or flexibility needed for each required task. Bus and rail operators are tested for strength, agility, and sit-and-reach ability; mechanics are tested for those abilities and grasping ability. Testing requirements for those and all other positions tested are based on specific job requirements, including being able to physically make the required movements for the job (e.g., squeeze into a tight space, fit through a manhole, climb ladders, etc.).

The tests are used as a screening mechanism before a conditional offer of employment is made. Physical ability tests are also required if an employee is injured—whether or not the injury is work-related—and is out of work for more than 30 days or requires surgery due to the injury. Sick leave alone is not a trigger for physical ability testing.

As of November 2009, there had been no legal challenge to Denver RTD's physical ability testing program. Workers' compensation costs have been reduced by 50 percent over 5 years.

C. Intercity Transit[543]

Intercity Transit, Olympia, Washington (www.intercitytransit.com/Pages/default.aspx), conducts a short fit test as a screening for potential bus operators. The test is conducted once annually when the agency accepts new operator applications. Using in-service buses and vans, the agency requires candidates to demonstrate that they can fit in the driver compartment (adjust the seat and mirror) and that they can kneel down and se-

[541] Information based on CTA's response to TCRP Questionnaire and telephone interviews with Larry Wall, General Manager, CTA's Wellness Services, Nov. 20, 2009, and Dec. 10, 2009.

[542] Information based on RTD's response to TCRP Questionnaire and telephone interview with Jim Jacobsen, RTD Manager of Wellness & Rehabilitation, Nov. 9, 2009.

[543] Information is based on telephone interviews with Ed Ruttledge, HR Manager, Nov. 2, 2009.

cure a wheelchair appropriately. Lifting the wheelchair manually is not required.

D. King County Metro Transit[544]

King County Metro Transit, Seattle (http://metro.kingcounty.gov/), had required a transit operator preemployment work test (now discontinued for budgetary reasons) as part of its preemployment physical. The test included a series of tasks related to essential job functions. The tasks replicated or simulated actual work tasks. For example, the test included a treadmill test that simulated the walk from job check-in to the bus, carrying a wheel block and securing it behind a tire, doing a trolley pulley and crank simulation, and walking for 60 ft in less than 18 seconds to simulate the task of being able to walk the length of the bus.

The work test had a low failure rate, estimated between 0.5 and 0.75 percent of applicants. It is also estimated that if the work test avoided one workers' compensation claim, that reduction would pay for at least 3 years of work tests.

The agency currently requires performance-based physical capacities evaluations (PBPCEs)[545] when there is an objective concern about an employee's ability to physically perform required job functions. The PBPCE is conducted by a medical professional contracted by the agency. The need for a PBPCE is made on a case-by-case determination, based on a quantifiable observation by the employee's supervisor concerning the safety of the employee's job performance. The agency's Transit Disability Services office and legal counsel must clear a request for a PBPCE to ensure compliance with legal requirements and the agency's collective bargaining agreement. Unlike the work test, the PBPCE process applies to all job categories.

E. Lane Transit District[546]

Lane Transit District (LTD), Eugene, Oregon (www.ltd.org), includes strength and agility tests as part of its preemployment physical for bus driver, mechanics, general service workers, cleaners, and facilities maintenance workers. The tests are designed by occupational medicine professionals based on the physical requirements of the jobs in question, including direct observation of employees. They cover such abilities as strength, bending, and stooping. The purpose of the tests is to ensure that applicants have the physical capacity to perform basic job functions; the failure rate has been extremely low.

For example, the Essential Function Test for Bus Operators consists of 10 tasks performed on equipment used to simulate various essential job functions: grip strength, simulating the grip strength required to drive, steer, and use hand controls; pinch strength, simulating pinch strength required to operate controls, punch transfers, punch buttons, flip controls; range of motion, simulating flexibility required to sit, stand, reach, rotate neck, and use foot pedals while operating the vehicle; motion test, simulating repetitive use of left hand and wrist to open and close bus door; climbing 12-in. step, 20 repetitions, simulating climbing into and out of bus; timed foot reaction, simulating eye and foot coordination and speed required to drive bus and stop quickly in emergency; bend/squat/kneel with wheelchair, simulating postures required to secure a wheelchair; sit/rotate/lean/reach, simulating posture required to drive, watch for traffic, reach controls, and operate bus; depress/hold brake pedal, simulating strength required to operate foot controls; and grasp and turn steering wheel, simulating driving. The test administrators demonstrate the tasks before applicants are required to perform them. Some of the tasks, such as the wheelchair secure, allow for an unrecorded practice trial.

LTD also requires a fitness-for-duty exam for employees returning to work from a non-work-related injury after more than 30 days, where the injury is such that it might affect physical ability to perform essential job functions. Back, shoulder, or neck injuries are the major triggering injuries. The fitness-for-duty exam includes the physical ability test required for job applicants. These exams are intended to screen for problems that might result in subsequent workers' compensation claims. In the case of work-related injuries, the doctor's release to return to work is deemed sufficient.

F. LA Metro[547]

LA Metro (www.metro.net/index.asp) uses a BOCAT for bus operator trainee candidates whose physical exam results indicate they may have some difficulty with various physical requirements for operating the bus, such as adjusting mirrors, having sufficient field of vision, and being able to safely turn the steering wheel. The BOCAT is required for candidates with a BMI equal to or greater than 35 percent, who are 5 ft 2 in. and shorter or are 6 ft 3 in. and taller. The assessment

[544] Information is based on telephone interviews with Peter Hu, Transit Disability Services, King County Metro Transit Human Resources, Nov. 6, 2009, and Dec. 3, 2009, as well as a review of the physical capacities evaluation (PCE) form.

[545] The agency requires a PCE upon return from medical leave for physical injury. The PCE is an evaluation performed by the employee's physician. The PCE is based on a form developed by the Washington State Department of Labor and Industry for workers' compensation claims. The form covers a number of physical movements, such as sitting, standing, bending, stooping, and reaching to various heights. The physician evaluates whether the employee has any restrictions in performing the various movements covered by the PCE. The agency then compares the PCE to the employee's job analysis to determine whether the employee can resume full job functions.

[546] Information is based on a telephone interview with David Collier, LTD Human Resources, Nov. 9, 2009, and a review of a description of the testing provided by LTD.

[547] This summary is based on LA Metro's response to the TCRP Questionnaire, the agency's written description of the BOCAT and rail operator tests, and telephone conversations with Mary Nugent and Rosalin Chong in LA Metro's Human Resources Department on November 10, 2009.

evaluates seat adjustment; operator positioning (including whether the candidate can perform various required maneuvers without the candidate's torso touching the steering wheel); candidate performance (including maintaining appropriate position while performing tasks such as activating floor pedals and signals and releasing and applying handbrake); bus interior inspection (including manually lifting the wheelchair ramp in and out on a low-floor bus); and bus exterior inspection (including operating the bike rack and kneeling down and returning to standing position for required inspection of fuel tank and underbody). To date this test has been challenged in court, unsuccessfully.[548]

LA Metro also requires applicants for rail operational positions pass a rail physical agility test after a conditional offer of employment is made. The assessment covers the following abilities:

- Enter rail vehicle at side door.
- Exit rail vehicle from side door.
- Enter rail vehicle at "F" end door from the ballast.
- Sit in operator's chair and operate various controls, including adjusting seat.
- Operate console controls while monitoring side door activity.
- Operate emergency door controls and cut out leer.
- Manually operate track switches on mainline and yard.
- Access emergency walkway from track level.
- Open emergency exits from mainline underground tunnel.
- Climb and descend emergency stairway.
- Step over deenergized contact rail section.
- Walk guideway without fear.
- Manually raise and lower pantograph.

The candidate must also walk the enclosed tunnel length to demonstrate lack of claustrophobia and fear of the dark. The instructor must demonstrate all tasks before candidates perform them. The protocol provides instructions for each task. Some of the instructions involve some judgment on the part of the instructor, such as requiring that the candidate demonstrate that the task "can be done safely and repeatedly."

LA Metro requires a qualifying performance test for mechanics and service attendants as part of the interview process. The test measures lifting ability and technique. Applicants must sign a waiver. Both of those positions require 2 years of experience in relevant jobs, so candidates are expected to already have the skill being tested. The test requires applicants to lift a 50-lb box and carry it for a prescribed distance. LA Metro has had a very low failure rate for this test.

[548] *See* IV.B.2., *Obesity*, *supra* this digest.

G. Metro Transit[549]

Metro Transit, Minneapolis (www.metrotransit.org/), does not conduct nonmedical, functional, preemployment testing of candidates' physical capacity to perform essential job functions. The agency formerly conducted preemployment agility testing for bus operators, requiring candidates to get in the seat, deploy the wheelchair lift, put a wheelchair on the lift, and perform other driving maneuvers. The test was not considered cost effective and has been discontinued. The agency does include upper extremity and back screening as part of its post-offer preemployment physical exam. In addition, the agency's USDOT physical now includes screening for obstructive sleep apnea. Sleep studies are recommended based on patient history or on meeting two of the following three criteria: BMI (35 or greater), neck circumference (43 cm or greater), and blood pressure (uncontrolled or controlled with two or more medications). Presence of a sleep disorder, treated or untreated, will affect the duration of the medical card issued by the agency.

The agency conducts fitness for duty exams as required when an employee has been away from work for any condition that might affect safe job performance. The examining physician, a board-certified occupational medicine physician, refers to the employee's job description in conducting the exam.

H. Tri-Met[550]

Tri-Met, Portland (http://trimet.org/), requires applicants for bus operator positions to pass a Bus Operator Work Demonstration Test, conducted after a conditional offer of employment is made. The test consists of 11 tasks: adjusting the operator's seat, fastening the seat belt, maintaining proper back contact while grasping the steering wheel, properly turning the steering wheel, properly depressing the brake and accelerator pedals, properly operating the turn signals, fully disengaging and engaging the parking brake, properly removing and returning the handset, identifying the color of object held 42 in. in front of the bus, properly opening the emergency window, and securing a wheelchair within 3 minutes, as demonstrated by the test administrator. The failure rate for this test, at least from 2006 to 2009, has been low to nonexistent. Current personnel are not aware of any challenges to the test. Tri-Met does not have an equivalent preemployment work test for service

[549] Based on telephone interview with Connie DeVolder, Human Resources Manager for Occupational Health, Metropolitan Council, Nov. 6, 2009, and email, Nov. 9, 2009; telephone interview with Julie Johanson, Deputy Chief Operating Officer, Nov. 2009.

[550] Information is based on Tri-Met's response to the TCRP Questionnaire and telephone interviews with Dr. James Harris, contract provider of preemployment medical services for Tri-Met; Richard Alsos, Training Supervisor, Tri-Met Bus Transportation Department; and Carol Crossen, Tri-Met Human Resources Representative.

workers or a post-employment test for operators or service workers.

Tri-Met also assesses physical capacity to perform essential job functions based on medical evaluations, including medical history and review of musculoskeletal and general health. As indicated by the medical evaluation, a candidate may be asked to demonstrate the ability to bend, squat, or perform some other job-related maneuver, but no standardized physical capacities evaluation program is required. In the case of customer service representatives, however, the employment entrance exam includes a work test to simulate the task of lifting cases of schedules or other printed materials. Applicants are required to lift a 50-lb crate to chest height three times. As of November 2009, there has been an extremely low failure rate.

I. SamTrans[551]

SamTrans, San Mateo County, California (www.samtrans.com/), conducts fit testing as part of its interview process in hiring new bus operators. The test is conducted in actual fleet vehicles, with the applicant required to demonstrate that he or she is able to safely reach, adjust, and operate (as applicable) the brake and accelerator pedals, mirrors, steering wheel, and other controls. The applicant must be able to turn the steering wheel without having his or her torso touch the steering wheel. If an applicant is not able to pass the fit test, he or she does not reach the conditional offer stage of the hiring process.

SamTrans has conducted this test for 12 years. An estimate of the failure rate was not available. SamTrans requires the test before the conditional offer to ensure that a job applicant does not leave another job only to find out that he or she is unable to safely operate the bus.

VI. STRUCTURING PHYSICAL ABILITY TESTING POLICIES

Properly configured and administered physical ability tests may reduce a transit agency's exposure to risk by lowering on-the-job injuries and avoiding accidents caused by personnel who are not physically capable of performing their job requirements.[552] In addition, relying on the results of such tests in the recruitment process may deter legally risky practices such as reviewing an applicant's workers' compensation records as a screening mechanism. On the other hand, transit agencies may be subject to liability for implementing discriminatory tests. Reliance on state law in developing a policy is not necessarily a viable defense.

This section reviews the legal parameters that govern designing and implementing physical ability testing, discusses various issues that transit agencies may wish to consider in formulating physical ability testing policies, and poses some questions to ask in assessing the legal viability of a physical ability policy. The questions assume—as does the rest of the discussion of structuring these policies—that the transit agency does not engage in intentional discrimination in designing or implementing the policy. It is imperative that where physical ability testing is adopted, the same tests be required under the same conditions for all applicants or employees in the position for which the test is required.

Given the risks of improper design and implementation of physical ability testing, individual managers should not be responsible for these activities. Moreover, transit agencies may be advised to provide training to managers on the legal requirements for physical ability testing.

A. Summary of Legal Parameters[553]

A transit agency may choose to implement physical ability testing for job applicants and employees in physically-demanding job positions to ensure that employees are able to safely perform essential job functions. In addition to benefiting the transit agency's customers and the employees themselves, ensuring that employees are physically capable of safe job performance increases productivity and may reduce workers' compensation costs. However, physical ability testing may disproportionately screen out women, as well as disabled individuals and individuals age 40 and over. Determining whether this sort of disparate impact occurs generally requires a statistical analysis. If the agency purchases an existing test from a vendor, the vendor's documentation of validity is helpful, but does not relieve the transit agency of the legal responsibility for ensuring the test is valid. Courts will generally scrutinize test validation performed in anticipation of litigation with great care due to the possible lack of objectivity.[554]

Where such disparate impact occurs, the transit agency must be able to show that the test is job related and consistent with business necessity. (The precise standard that would be applied in case of litigation depends on the transit agency's jurisdiction, but the most conservative approach regardless of jurisdiction would be to design physical ability tests with the intent to comply with the *Lanning* standard of evaluating the minimum qualifications necessary for the successful performance of the job in question.) Moreover, if there is a less discriminatory procedure that would produce

[551] The summary is based on a Dec. 10, 2009, telephone conversation with Monica Colondres, Human Resource Director, SamTrans.

[552] For example, if a bus operator is not physically capable of properly securing a wheelchair on the bus, the improperly secured wheelchair could result in injury to the wheelchair's occupant or another passenger. In addition to any liability resulting from physical injury in such an incident, the transit agency could face additional liability for hiring an unqualified operator.

[553] *See generally*, EEOC Employment Tests and Selection Procedures, www.eeoc.gov/policy/docs/factemployment_procedures.html.

[554] Albemarle Paper Co. v. Moody, 422 U.S. 405, 433 n.32, 95 S. Ct. 2362, 2379, 45 L. Ed. 2d 280, 305 (1975).

equally effective results, it is not permissible to use the more discriminatory procedure, although if more than one alternative is available the employer is not necessarily required to adopt the least discriminatory alternative. Finally, physical ability tests must be required of all similarly situated applicants or employees. Absent a BFOQ, it is not permissible to require physical ability tests for groups of employees based on gender, disability, or age (and it is difficult to conceive of a transit position with a gender-based BFOQ). Reasonable accommodation should be provided unless the ability being tested is the ability that is impaired for a particular applicant.

In addition, a transit agency may consider increasing the requirements for physical testing already required by law, such as vision and hearing testing. Such increased requirements could disproportionately affect disabled individuals or those age 40 or older. Such requirements must also be shown to be job related and consistent with business necessity in order to avoid violating the ADA. However, if the requirements are shown to be based on a reasonable factor other than age, they will not constitute an employment practice in violation of the ADEA. In addition, applying an age-based standard from another regulation to CDL holders can only be defended if age is a BFOQ for the job in question.[555]

Although not necessarily directly implicating physical ability testing, the issue of return-to-work medical certifications is related. It is impermissible under the ADA to require employees to be "100 percent healed" to return to work. If the jurisdiction follows the Second Circuit ruling on the issue, a request for a diagnosis may only be allowed under the ADA as part of the return-to-work certification if the requirement is justified as a business necessity. Where courts apply this standard, it appears that such a requirement should be part of a uniform policy that has been shown to be required for the group of employees to whom it is applied. The transit agency should be able to provide specific justification for the requirement—general allegations about sick leave abuse are not likely to be sufficient.

A transit agency may also require a returning employee to undergo a medical examination if there is an objective reason, aside from the fact that the employee took medical leave, that the employee's medical condition will adversely affect the employee's ability to perform essential functions of the employee's job. The employer may require returning employees to demonstrate that they have the physical ability to perform essential job functions. If such tests are not uniformly required, it is important to ensure that the decision to order such tests is free from any appearance of being based on the race, gender, or age of the employee. At least in the Middle District of Tennessee, the employer may be able to require employees to use the transit agency's preferred physician for CDL examinations to, for example, ensure consistency, streamline administrative resources, and reduce costs.[556]

B. Considerations in Formulating Testing Policy

As a general matter, physical ability testing requirements should not be developed based on someone's idea of what makes sense, either in terms of the purpose of the test or actual test parameters. For example, a decision to require job applicants to meet requirements in excess of those required by USDOT standards should not be made lightly. Managers should not use physical ability tests that have not been appropriately reviewed for validity and effectiveness. Transit agencies should strongly consider requiring legal review and human resource input in the development of any physical ability tests. For example, determining the adverse impact of a test is best made with knowledge of employment testing statistics.

As noted at the outset, it is beyond the scope of this report to offer legal advice on structuring a physical ability testing policy. However, this section does discuss matters that transit agencies may want to consider in structuring such a policy. Particular issues to consider include:

Test purpose: The more attenuated the connection between the purpose of the test and specific measurements of job performance, the more difficult it is to establish that a test with disparate impacts under civil rights, disability, or age statutes is job related and consistent with business necessity. Thus the more general purpose of ensuring a healthier—and thus more productive and less costly—workforce may be achieved with less legal risk by implementing various voluntary measures, such as providing dietary counseling and offering incentives for achieving physical fitness.[557] Increased training may be another approach to reducing on-the-job injuries, thereby lowering workers' compensation claims.[558] The legal risk of conducting tests to enforce lifestyle restrictions such as smoking bans or maximum BMI measurements—assuming the tests are administered in a nondiscriminatory fashion—may depend in large part on the purpose of the underlying restrictions. If, for example, state law prohibits discriminating against employees based on nonwork activities, weight restrictions imposed for general health-related reasons may be found to be illegal. On the other hand, restrictions on BMI based on the connection between a specified BMI threshold and obstructive sleep apnea may be found to be job related and consistent with

[555] *See* ADEA: Physical Exams, Informal Discussion Letter, Dec. 20, 2004, www.eeoc.gov/eeoc/foia/letters/2004/adea_physical_exams.html (accessed Nov. 30, 2009).

[556] Broadway v. United Parcel Serv., Inc., 499 F. Supp. 2d 992, 1002 (M.D. Tenn. 2007).

[557] Incentives should be structured so as not to violate HIPAA.

[558] Matthew Santoni, *Port Authority Payout on Injury Claims Tops $3 Million*, PITTSBURGH TRIBUNE-REVIEW, Oct. 28, 2009, www.pittsburghlive.com/x/pittsburghtrib/news/pittsburgh/s_650177.html (accessed Nov. 30, 2009).

business necessity, at least for bus and rail operators. In the event such testing is challenged on privacy grounds, the purpose will be balanced against the intrusiveness of the test, so tests grounded in the safety-related nature of the job subject to testing would be easier to justify, as would tests that are conducted on blood or urine already collected for another permissible purpose.

Preemployment vs. incumbent employee testing: There are clear differences between tests and inquiries that are permissible under the ADA for job applicants and those permissible for incumbent employees. In addition to those differences under the ADA, there may be differences between job applicants and incumbent employees in the due process owed for an adverse employment action, expectations of privacy, and rights under ERISA and HIPAA, with greater rights accruing to incumbent employees. If physical ability tests are required for job applicants but not incumbent employees, applicants may challenge the tests on equal protection grounds, although absent other factors such as race- or gender-based discrimination, it does not appear that such challenges are likely to be sustained.

Perhaps a greater legal risk of not testing incumbent employees is that an employee's physical inability to perform essential job functions may lead to injury of other employees or customers. For example, if a bus operator cannot secure a wheelchair properly because the operator is unable to squat down, secure the wheelchair, and get up again, such improper securement could result in liability 1) if the person in the wheelchair is unable to ride the bus, 2) if a disabled person is injured because of improper securement, or 3) if an improperly secured wheelchair injures another passenger. A transit agency may, of course, monitor such performance issues through methods other than testing, such as supervisory inspections, passenger complaints, and mystery rides. However, such monitoring must be conducted uniformly to prevent enforcement that is deemed to rest on impermissible grounds, such as race or gender. It would be a question of fact as to whether such monitoring was as reasonable a measure of supervision as physical ability testing.

Testing method: The test should accurately measure the required ability. The more direct the connection between the test measurement and the on-the-job use of the ability, the more likely it will be that the method of measurement is accurate.

Validation: It is advisable to ensure that a screening test is validated as soon as practicable. Once the employer has been sued, courts may be skeptical of validation studies conducted to prove after the fact that the test was job related and required by business necessity. If the test is one that has been used by other transit agencies, data should be available concerning the outcomes at those agencies to help make adverse-impact determinations. However, relying on another agency's validation may not be sufficient unless the job requirements being validated are the same as those of the other agency.[559] Clearly the test should not measure any abilities that are not actually job related.

If a test is implemented in response to incidents of on-the-job injury, it is important to evaluate its effectiveness in actually reducing injury.

Validation should be done according to generally accepted professional guidelines. Going with an approach because it "makes sense" does not meet legal standards.[560] A key question is whether incumbent employees can pass the test. If not, it is more difficult to establish that the abilities being tested are required for successful job performance.

Alternatives: If a test has adverse impacts, the agency should consider whether there are alternative tests that would select qualified candidates without the adverse impact. It may also be advisable to consider whether changing equipment configuration may obviate the need for skills being tested for. For example, Pierce Transit in Washington has retrofitted all buses to adjust to all possible operator heights.[561] However, reasonableness of cost should be an issue, so changing buses to provide an increased load rating on driver's seats for overweight drivers may not be considered a reasonable alternative.

Cut-off scores: Cut-off scores should not be any higher than are necessary to ensure that personnel achieving those scores can do the job. An "expert opinion" not supported by professionally recognized methods such as norm-referenced, content-related, or criterion-related methods will not be sufficient to substantiate the cut-off score. Determining a cut-off score by averaging the score of employees already doing the job by definition will exclude personnel who can do the job, thus failing to meet the legal standard.

Documentation: It is important to empirically document the need for testing and the steps taken in developing the test to ensure compliance with legal requirements. For example, if a test is instituted to prevent on-the-job injury, the agency should document the occurrence of injury, the work behaviors that cause the injury, and the relationship of the test to the work behav-

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[559] Brooks, supra note 174, at 30. Mr. Brooks notes:

> [T]he strongest justification of the SEPTA standard is the requirement that SEPTA officers be able to run from one station to another to back up another officer. The SEPTA studies noted that their officers are required to do this on a monthly basis. Unless another agency can produce similar statistical evidence, the likelihood of justifying a similar physical standard under any business necessity requirement remains highly unlikely.

(citation omitted).

[560] Rather than determining that performing a police officer physical ability test in 90 seconds corresponded to the minimum level of ability required for successful job performance, the City of Erie used a 90 seconds passing standard "because they believed that the City would be requiring a 'medium' or 'average' level of physical ability, and that seemed 'fair' and 'the best way to go.'" United States v. City of Erie, 411 F. Supp. 2d 524, 555 (W.D. Pa. 2005).

[561] Washington State Transit Association HR Roundtable on Operator Recruiting Challenges and Solutions, Oct. 27, 2006, www.intercitytransit.com/Pages/default.aspx.

iors that are the cause of injury. This should include an independent job analysis to verify that the work behaviors being tested are required for successfully performing the job without injury.

Timing of test administration: If physical ability tests are conducted before a conditional offer of employment is extended, care should be taken not to include any medical procedures such as taking the applicant's blood pressure or asking any questions related to disability or likely to elicit information related to disability. For example, it is not acceptable, at the preoffer stage, to ask an applicant if there are any reasons that the applicant cannot perform the required tasks as opposed to asking whether the applicant can perform the required tasks.

Reasonable accommodation: If an individual with a disability requires a reasonable accommodation to take a physical ability test, accommodation should be provided unless the ability being tested is the one for which accommodation would be required.

Effect on workforce development: While not a legal issue, the effect on workforce development is obviously a consideration. DART, for example, conducted a pilot program under which 130 bus/rail operators were given physical abilities tests at the same time as their periodic physical exam. Three employees could not perform or finish walking for 750 ft on the treadmill, and one of those three could not kneel. DART did not implement the testing program.[562]

In evaluating a physical ability test under consideration, questions to consider include the following:

- What is the relationship between the physical ability test and actual job requirements?[563] This question is easiest to answer when the test simulates actual job requirements.
- Is the skill being tested "necessary for safe and efficient job performance"? Does the test itself accurately measure the needed skill?[564]
- Alternatively, does the physical ability test closely approximate actual job tasks? ("job related")
- Does the physical ability test measure actual content of the job itself? ("job related")
- Is there a rational need to perform the task being tested? ("business necessity")
- Does the test inadvertently screen out qualified applicants?
- Is there an arbitrary cutoff score that has no rational relation to job needs?
- Is there an arbitrary cutoff score that can be positively demonstrated to be needlessly high?
- Even if not tested, are incumbent employees required to meet the test standards?
- Are incumbent employees who are unable to pass the test nonetheless able to perform successfully?

C. More Is Not Necessarily Better

A perhaps intuitive, but ultimately perilous, approach to physical ability testing is the idea that if a particular requirement is necessary, exceeding that requirement will result in better employees: "more is better." Scenarios in which such an approach could be adopted include strength testing, CDL requirements for vision and hearing, and drug testing. In each scenario, "more is better" may unnecessarily, and perhaps illegally, reduce the pool of applicants or employees. Rather than using a "more is better" approach, physical ability testing should be tied to the content of the essential functions of the job or to criteria that are related to successful performance of the essential functions of the job.

Strength Testing.—Rationale: Since strength is required to operate a particular piece of equipment, stronger employees would do a better job. Based on that assumption, the manager might argue for a stringent strength test to get "better" employees. *Flaw***:** Such a test might screen out employees—including women, disabled individuals, or individuals age 40 years or older—who could manage the equipment in question and otherwise perform essential job functions.

CDL Vision and Hearing Requirements.—Rationale: Physically superior individuals will make better employees, CDL physical requirements should be imposed on other employees, or vision and hearing standards stricter than CDL requirements should be imposed. *Flaw:* Federal standards have been upheld based on procedures under which they were adopted and job relatedness of the requirements. Standards in excess of federal standards are likely to be upheld in the face of ADA challenges only upon showing that safety required exceeding the federal standards or extending the standards to other employees.

Drug Testing.—Rationale: In order to ensure a drug-free workplace, drug testing should go beyond that required by USDOT, including random testing of employees who are not in safety-sensitive positions. *Flaw:* The legal rationale for suspicionless drug testing is tied to a balancing of interests: the compelling governmental interest in conducting the test against the employee's privacy interests. A key factor in finding that the government interest is compelling is that the job function in question involves safety or some other position of trust such as dealing with illicit narcotics. Extending random drug testing to employees in nonsensitive positions would be unlikely to pass constitutional muster. In addition, transit agency drug testing should not be coordinated with law enforcement agencies.[565]

[562] Response to TCRP Questionnaire, Question VIII, *Program Effectiveness*.

[563] *See* David E. Hollar, *Physical Ability Tests and Title VII*, 67 U. CHI. L. REV. 794–96 (2000) (suggesting two-prong test: skill sought to be measured by employment test is consistent with business necessity *and* test itself is clearly job related by closely approximating an on-the-job task).

[564] *See id*. at 802.

[565] *See* Ferguson v. City of Charleston, 532 U.S. 67, 84, 121 S. Ct. 1281, 1292, 149 L. Ed. 2d 205, 220 (2001) (holding unconstitutional a drug testing scheme to test expectant mothers

D. Outlook for Employee Physical Ability Testing

The primary obstacles to physical ability testing include financial constraints, lack of proof of effectiveness, and concerns about legal liability. The effectiveness concern relates partly to expectations: if management expects a physical ability test to screen out large numbers of job applicants, the types of tests that are currently in use (and probably those tests that would be legally supportable in the transit context) are not likely to meet expectations. If, however, tests are expected to screen out those few individuals who lack the physical ability to perform essential functions of the job, then physical ability tests may serve an important purpose. As one transit human resources professional explained, avoiding one workers' compensation case by screening out a job applicant who is physically unqualified for the job is extremely cost effective.

The outlook for physical ability testing in general could improve if there were some industry-wide effort to conduct operational case studies or develop basic protocols that transit agencies could evaluate and adopt for their particular circumstances. Physical-ability testing related to sleep apnea may gain currency in any event, particularly if FMCSA or FTA issues regulations.

VII. CONCLUSIONS

The number of legal requirements to conduct specific physical ability tests—drug and alcohol testing aside—are primarily limited to CDL requirements for vision and hearing and OSHA requirements for spirometry and hearing tests. Nonetheless, a number of more general requirements for physical ability could be determined by physical ability tests. Moreover, the lack of physical ability to perform essential job functions may endanger the transit agency's customers, other employees who work with employees whose physical abilities are deficient,[566] and such employees themselves. Physical ability testing can be extremely useful in ensuring that transit employees do have the physical ability required to perform their jobs. Regardless of whether physical ability testing is based directly or indirectly on federal requirements or on transit agency policy, such testing must be designed and implemented in compliance with laws prohibiting discrimination based on race, gender, age, and disability. For the most part, race is not an issue in physical ability testing provided the testing policy is implemented uniformly.

Testing that has a disparate impact on a protected class must be justified as job related and consistent with business necessity. Thus the closer the connection to the essential functions of the job in question, the more defensible the test will be. Test design and validation should be conducted by qualified professionals, not by line management, and should be reviewed by agency human resources and legal personnel. The employer, not a test vendor, is legally responsible for test validity. In addition, physical ability testing for positions covered by collective bargain agreements must be consistent with those agreements.

Transit agencies may wish to implement physical ability testing for employees returning from leave. Such testing must comply with prohibitions against disability discrimination: testing should be based on objective reasons to believe there is a question about an employee's ability to perform essential job functions, rather than on the fact that the employee took leave or on the employee's status of being disabled. As a related matter, inquiries concerning the reason for an employee's sick leave must conform to federal and state law prohibiting discrimination based on disability and protecting the right to take sick leave.

As a matter of actual practice, testing of job applicants appears more prevalent than testing of incumbent employees, with the exception of tests required by federal law (such as testing required to ensure compliance with CDL standards and drug and alcohol testing). However, at least some transit agencies have begun functional testing that is required for both job applicants and employees returning to work after certain injuries and illnesses.

for cocaine use and use threat of law enforcement to force them into treatment; immediate goal of law enforcement and pervasive involvement of police in policy took scheme out of realm of "special needs.").

[566] For example, if a maintenance task requires a two-person lift, if one person is not physically capable of lifting properly, the other person is at risk of injury.

Appendix A: State Family and Medical Leave Statutes

Links to citations are provided for convenience; transit agencies should verify statutory language from official sources.

Alaska: Alaska Family Leave Act (AFLA) (Chapter 96 SLA 1992), Alaska Stat. 39.20.305 and Alaska Stat. 39.20.500–39.20.550.
http://touchngo.com/lglcntr/akstats/Statutes/Title39/Chapter20.htm

California: Moore-Brown-Roberti Family Rights Act, Government Code §§ 12945.2. Family care and medical leave; definitions; conditions; unlawful employment practices www.dfeh.ca.gov/DFEH/Publications/fehaDocs/FEHA_Doc.pdf; 19702.3 [prohibition against discrimination based on exercise of family care leave under § 12945.2] www.leginfo.ca.gov/cgi-bin/displaycode?section=gov&group=19001-20000&file=19700-19706 [*See* California Dept. of Personnel Administration, California Family Rights Act www.dpa.ca.gov/benefits/health/workcomp/pubs/Disability/page7.shtm]

Connecticut: Conn. Gen. Stat. [Chapter 557, Employment Regulation] §§ 31-51cc to 31-51gg. Family and medical leave: Definitions, length of leave, eligibility. Prohibition of discrimination. Regulations, report. Phase-in provisions. Report on establishment of state-wide job bank. http://search.cga.state.ct.us/dlsurs/sur/htm/chap557.htm#Secs31-51cc%20to%2031-51gg.htm

District of Columbia: Family and Medical Leave Act, §§ 32-501–32-517.
http://government.westlaw.com/linkedslice/default.asp?SP=DCC-1000

Hawaii: Hawaii Family Leave Law, Haw. Rev. Stat. Chapter 398
www.capitol.hawaii.gov/hrscurrent/Vol07_Ch0346-0398/HRS0398/HRS_0398-.htm

Illinois: Employee Blood Donation Leave Act, 820 Ill. Comp. Stat. 149/
www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=2700&ChapAct=820%26nbsp%3BILCS%26nbsp%3B149%2F&ChapterID=68&ChapterName=EMPLOYMENT&ActName=Employee+Blood+Donation+Leave+Act%2E

Iowa: Iowa Code 216.6(2) Unfair employment practices. [pregnancy leave]
http://coolice.legis.state.ia.us/Cool-ICE/default.asp?category=billinfo&service=IowaCode&ga=83

Maine: 26 Me. Rev. Stat. § 636. Family sick leave.
www.mainelegislature.org/legis/statutes/26/title26sec636.html; Family Medical Leave Requirements, 26 Me. Rev. Stat. §§ 843-849.
www.mainelegislature.org/legis/statutes/26/title26ch7sec0.html

Maryland: Flexible Leave Act, Maryland Code, Labor and Employment, §§ 3-801, 3-802.
http://michie.lexisnexis.com/maryland/lpext.dll?f=templates&fn=main-h.htm&cp

Massachusetts: Family and medical leave; enforcement, Mass. Gen. Laws ch. 149, § 52D
www.mass.gov/legis/laws/mgl/149-52d.htm

Minnesota: Minn. Rev. Stat. 181.945, Leave for Bone Marrow Donations
www.revisor.mn.gov/statutes/?id=181.945; Minn. Rev. Stat. 181.9456 Leave for Organ Donation. www.revisor.mn.gov/statutes/?id=181.9456; Minn. Rev. Stat. 181.9458, Authorization for Blood Donation Leave, www.revisor.mn.gov/statutes/?id=181.9458

Montana: Montana Maternity Leave Act, Mont. Code Ann. §§ 49-2-310. Maternity leave—unlawful acts of employers, http://data.opi.state.mt.us/bills/mca/49/2/49-2-310.htm and 49-2-311, Reinstatement to job following pregnancy-related leave of absence. http://data.opi.state.mt.us/bills/mca/49/2/49-2-311.htm

New Hampshire: N.H. Rev. Stat. Ann., 354-A:7, VI. (b), Unlawful Discriminatory Practices, http://gencourt.state.nh.us/rsa/html/XXXI/354-A/354-A-7.htm

New Jersey: Family Leave Act, N.J. Stat. Ann. 34:11B-1. *et seq*. http://lis.njleg.state.nj.us/cgi-bin/om_isapi.dll?clientID=496076&depth=2&expandheadings=off&headingswithhits=on&infobase=statutes.nfo&softpage=TOC_Frame_Pg42

Oregon: Oregon Family Leave Act, Or. Rev. Stat. §§ 659A.150 to 659A.186, www.leg.state.or.us/ors/659a.html [See Technical Assistance for Employers, www.oregon.gov/BOLI/TA/T_FAQ_Taoflaqa.shtml]

Rhode Island: Rhode Island Parental and Family Medical Leave Act, R.I. Gen. Laws, Chapters 28–48, www.rilin.state.ri.us/Statutes/TITLE28/28-48/INDEX.HTM

Tennessee: Tennessee Maternity Leave Act, Tenn. Code Ann. 4-21-408, Leave for adoption, pregnancy, childbirth and nursing an infant. www.michie.com/tennessee/lpext.dll?f=templates&fn=main-h.htm&cp

Vermont: Parental & Family Leave Act, 21 Vt. Stat. Ann. § 470 *et seq*. www.leg.state.vt.us/statutes/sections.cfm?Title=21&Chapter=005

Washington: Family Leave Act, Chapter 49.78 Wash. Rev. Code http://apps.leg.wa.gov/RCW/default.aspx?cite=49.78; Family Care Act. Wash. Rev. Code §§ 49.12.265–.295 http://apps.leg.wa.gov/RCW/default.aspx?cite=49.12; Pregnancy, childbirth, and pregnancy related conditions: Leave policies, Wash. Admin. Code 162-30-020(4), http://apps.leg.wa.gov/wac/default.aspx?cite=162-30-020

Wisconsin: Wisconsin Family and Medical Leave Act, Wis. Stats. § 103.10 Family or medical leave. www.legis.state.wi.us/statutes/Stat0103.pdf [See State of Wisconsin Department of Workforce Development, Equal Rights Division, Civil Rights Bureau, Comparison of Federal and Wisconsin Family and Medical Leave Laws, www.dwd.state.wi.us/dwd/publications/erd/pdf/ERD-9680-P.pdf]

Appendix B: State EEO Statutes, Regulations, and Agencies

Links to citations are provided for convenience; transit agencies should verify statutory language from official sources.

Alaska: Alaska Stat. Chapter 18.80. State Commission for Human Rights, http://old-www.legis.state.ak.us/cgi-bin/folioisa.dll/stattx08/query=chapter+18!2E80/doc/%7B@9173%7D?; Commission for Human Rights, http://gov.state.ak.us/aschr/

Arkansas: 11-3-203. Medical examination as condition of employment. www.arkansas.gov/labor/pdf/laws_relating_labor.pdf

California: Fair Employment and Housing Act, Government Code §§ 12900–12996, www.fehc.ca.gov/act/pdf/FEHA_Outline.pdf ; Department of Fair Employment and Housing www.dfeh.ca.gov/DFEH/default/

Colorado: Colo. Rev. Stat. § 24-34-402, www.dora.state.co.us/civil-rights/Statute_Regulations_Rules/2008Statutes.pdf ; Colorado Civil Rights Division, www.dora.state.co.us/civil-rights/

Connecticut: Connecticut Fair Employment Practices Act (CFEPA), §§ 46a-51 *et seq*. cited. 4 CA 423; 44 CA 446, www.cga.ct.gov/2005/pub/Chap814c.htm ; Connecticut Commission on Human Rights and Opportunities, www.ct.gov/chro/site/default.asp

Delaware: Delaware Discrimination in Employment Act, Title 19, Labor, Chapter 7, Employment Practices, Subchapter II. Discrimination in Employment http://delcode.delaware.gov/title19/c007/sc02/index.shtml; Delaware Discrimination in Employment Act, Title 19, Labor, Chapter 7, Employment Practices, Subchapter III, Handicapped Persons Employment Protections http://delcode.delaware.gov/title19/c007/sc03/index.shtml

District of Columbia: District of Columbia Human Rights Act of 1977, as amended, District of Columbia Official Code Section 2-1401.01 *et seq*. http://ohr.dc.gov/ohr/frames.asp?doc=/ohr/lib/ohr/pro_acts_of_discrimination.pdf; District of Columbia Office of Human Rights, http://ohr.dc.gov/ohr/site/default.asp?ohrNav=|

Florida: Florida Commission on Human Relations, http://fchr.state.fl.us/

Georgia: The Fair Employment Practices Act of 1978, as amended, Ga. Code Ann. 45-19-20 *et seq*. www.gceo.state.ga.us/FEPA.htm; Georgia Commission on Equal Opportunity, Equal Employment Division, www.gceo.state.ga.us/

Hawaii: Haw. Rev. Stat. Chapter 378, Part I (anti-discrimination in employment) www.capitol.hawaii.gov/hrscurrent/Vol07_Ch0346-0398/HRS0378/HRS_0378-.htm; Hawaii Civil Rights Commission, http://hawaii.gov/labor/hcrc/

Idaho: Idaho Commission on Human Rights, http://humanrights.idaho.gov/

Illinois: Illinois Human Rights Act, 775 Ill. Comp. Stat. 5/ www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=2266&ChapAct=775%A0ILCS%A05/&ChapterID=64&ChapterName=HUMAN+RIGHTS&ActName=Illinois+Human+Rights+Act; Illinois Department of Human Rights, www.state.il.us/dhr/

Indiana: Indiana Civil Rights Law, Ind. Code 22-9 www.in.gov/legislative/ic/code/title22/ar9/ch1.html; Indiana Civil Rights Commission, www.in.gov/icrc/2432.htm

Iowa: Iowa Civil Rights Act of 1965, http://coolice.legis.state.ia.us/Cool-ICE/default.asp?category=billinfo&service=IowaCode&ga=83#216.6; Iowa Admin. Code 161—8.1(216) General provisions—employee selection procedures, www.legis.state.ia.us/aspx/ACODocs/DOCS/4-22-2009.161.8.pdf ; Iowa Civil Rights Commission www.state.ia.us/government/crc/index.html

Kansas: Kansas Act Against Discrimination and Kansas Age Discrimination in Employment Act, Kan. Stat. Ann. 44-1001 et seq. www.khrc.net/resources.html ; Kansas Human Rights Commission, www.khrc.net/

Kentucky: The Kentucky Civil Rights Act, Ky. Rev. Stat. 344.010 *et seq*., www.kchr.ky.gov/about/kycivilrightsact.htm ; Kentucky Commission on Human Rights, www.kchr.ky.gov/

Louisiana: Prohibition of age discrimination; exceptions, RS 23:312, www.legis.state.la.us/lss/lss.asp?doc=83868 ; Discrimination [Disability], La. Rev. Stat. 23:323, www.legis.state.la.us/lss/lss.asp?doc=83874; Intentional discrimination in employment, RS 23:332, www.legis.state.la.us/lss/lss.asp?doc=83879 ; Louisiana Commission on Human Rights, http://gov.louisiana.gov/HumanRights/humanrightshome.htm

Maine: Human Rights Act, Me. Rev. Stat. Title 5, Chapter 337, www.mainelegislature.org/legis/statutes/5/title5ch337sec0.html ; Maine Human Rights Commission, www.state.me.us/mhrc/index.shtml

Maryland: MSA § 20–601 *et seq*. http://mlis.state.md.us/asp/web_statutes_2010.asp?gsg&20-601 ; Maryland Commission on Human Relations, www.mchr.state.md.us/

Massachusetts: Fair Employment Practices Law, Mass. Gen. Laws c. 151B, s. 4 www.mass.gov/legis/laws/mgl/151b-4.htm ; Massachusetts Commission Against Discrimination, www.mass.gov/mcad

Michigan: Elliott-Larsen Civil Rights Act, Mich. Comp. Laws 37.2101 *et seq*. www.michigan.gov/documents/act_453_elliott_larsen_8772_7.pdf; Department of Civil Rights, www.michigan.gov/mdcr

Minnesota: Minnesota Human Rights Act, Minn. Stat. 363A.001, https://www.revisor.leg.state.mn.us/statutes/?id=363A; Department of Human Rights, www.humanrights.state.mn.us/

Missouri: Missouri Human Rights Act, Mo. Rev. Stat. Chpt. 213 www.moga.mo.gov/STATUTES/C213.HTM; Missouri Commission on Human Rights, www.dolir.mo.gov/hr/

Montana: Montana Human Rights Act, Mont. Code Ann. 49-2-303. Discrimination in employment. http://data.opi.state.mt.us/bills/mca/49/2/49-2-303.htm; Department of Labor and Industry, Subchapter 6, Proof of Unlawful Discrimination, http://erd.dli.mt.gov/humanright/documents/24.9.pdf; Human Rights Bureau, http://erd.dli.mt.gov/humanright/hrhome.asp

Nebraska: Nebraska Fair Employment Practice Act (FEPA) www.neoc.ne.gov/laws/fepatext.htm; Neb. Admin. Code, Title 138, Nebraska Fair Employment Practice Act, Rules and Regulations, Chapters 1–14, www.neoc.ne.gov/laws/fepa.htm; Nebraska Equal Opportunity Commission www.neoc.ne.gov/

Nevada: Nev. Rev. Stat. 613.330 Unlawful employment practices: Discrimination on basis of race, color, religion, sex, sexual orientation, age, disability, or national origin; interference

with aid or appliance for disability; refusal to permit service animal at place of employment, http://leg.state.nv.us/NRS/NRS-613.html#NRS613Sec330; Nevada Equal Rights Commission, http://detr.state.nv.us/nerc.htm

New Hampshire: Law Against Discrimination: Equal Employment Opportunity, Section 354-A:6, http://gencourt.state.nh.us/rsa/html/XXXI/354-A/354-A-6.htm, and 354-A:7 Unlawful Discriminatory Practices. http://gencourt.state.nh.us/rsa/html/XXXI/354-A/354-A-7.htm; Commission for Human Rights, www.nh.gov/hrc/

New Jersey: Law Against Discrimination (LAD), N.J. Stat. Ann. 10:1-3. Exclusions based on race, creed, color, national origin, ancestry, marital status, or sex unlawful, http://lis.njleg.state.nj.us/cgi-bin/om_isapi.dll?clientID=9937402&Depth=2&depth=2&expandheadings=on&headingswithhits=on&hitsperheading=on&infobase=statutes.nfo&record={36A0}&softpage=Doc_Frame_PG42

New Mexico: Human Rights Act [28-1-1 N.M. Stat. Ann. 1978] www.conwaygreene.com/nmsu/lpext.dll?f=templates&fn=main-h.htm&2.0; N.M. Stat. Ann. 28-1-7. Unlawful discriminatory practice. www.conwaygreene.com/nmsu/lpext.dll?f=templates&fn=main-h.htm&2.0; Human Rights Bureau, www.dws.state.nm.us/dws-humanrights.html

New York: New York State Executive Law, Article 15, Human Rights Law www.dhr.state.ny.us/doc/hrl.pdf; New York State Division of Human Rights, www.dhr.state.ny.us/offices_and_executive_staff.html

North Carolina: North Carolina General Statutes, Article 6, Equal Employment and Compensation Opportunity; Assisting in Obtaining State Employment: § 126-16, Equal opportunity for employment and compensation by State departments and agencies and local political subdivisions. www.ncga.state.nc.us/EnactedLegislation/Statutes/PDF/ByArticle/Chapter_126/Article_6.pdf

North Dakota: North Dakota Human Rights Act (N.D. Century Code Chapter 14-02.4) www.legis.nd.gov/cencode/T14C024.pdf, North Dakota Administrative Code, Chapter 46-04-01 Human Rights Practice and Procedure, www.legis.nd.gov/information/acdata/html/..%5Cpdf%5C46-04-01.pdf; North Dakota Cent. Code, Title 34: Labor and Employment, www.legis.nd.gov/cencode/t34.html

Ohio: Ohio Rev. Code 4112.02 Unlawful discriminatory practices, http://codes.ohio.gov/orc/4112.02; Ohio Civil Rights Commission, http://crc.ohio.gov/disc_employment.htm

Oklahoma: Anti-Discrimination Act, 25 Okla. Stat. § 1302; Oklahoma Human Rights Commission, www.ok.gov/ohrc/

Oregon: Or. Rev. Stat. Chapter 659A—Unlawful Discrimination in Employment, Public Accommodations and Real Property Transactions; Administrative and Civil Enforcement, www.leg.state.or.us/ors/659a.html; Oregon Bureau of Labor and Industries, Civil Rights Division, www.boli.state.or.us/BOLI/CRD/index.shtml

Pennsylvania: Pennsylvania Human Relations Act, http://sites.state.pa.us/PA_Exec/PHRC/publications/literature/PHRCLaws.pdf; Human Relations Commission, www.phrc.state.pa.us/

Rhode Island: Civil Rights of People with Disabilities, Chapter 42-87, www.rilin.state.ri.us/Statutes/TITLE42/42-87/INDEX.HTM

South Carolina: South Carolina Human Affairs Law, www.state.sc.us/schac/lawi.htm; Human Affairs Commission, www.state.sc.us/schac/

South Dakota: South Dakota Human Relations Act, http://legis.state.sd.us/statutes/DisplayStatute.aspx?Type=Statute&Statute=20-13; Division of Human Rights, www.state.sd.us/dol/boards/hr/

Tennessee: Tennessee Human Rights Act, Tenn. Code Ann. 4-21-401 through 4-21-408, www.state.tn.us/humanrights/THRC_related_statutes.pdf; Human Rights Commission, www.state.tn.us/humanrights/

Texas: Texas Labor Code, Chapter 21, Employment Discrimination, http://tlo2.tlc.state.tx.us/statutes/la.toc.htm; Texas Workforce Commission, Civil Rights and Discrimination Division, www.twc.state.tx.us/customers/rpm/rpmsubcrd.html

Utah: Utah Antidiscrimination Act, Utah Code Ann. § 34A-5-106, www.le.utah.gov/UtahCode/getCodeSection?code=34A-5-106; Utah Antidiscrimination & Labor Division, www.laborcommission.utah.gov/AntidiscriminationandLabor/index.html

Vermont: 21 Vt. Stat. Ann. § 495. Unlawful employment practice, http://hrc.vermont.gov/sites/hrc/files/pdfs/laws/fepa.pdf; Vermont Human Rights Commission, http://hrc.vermont.gov/

Virginia: Virginia Human Rights Act, Va. Code Ann. Chapter 39 2.2-3900 *et seq*., www.chr.virginia.gov/act.html; Human Rights Council www.chr.state.va.us/index.html

Washington: Law Against Discrimination (Wash. Rev. Code 49.60), http://apps.leg.wa.gov/RCW/default.aspx?cite=49.60; Wash. Admin. Code 162-12 Preemployment Inquiries Guide, http://search.leg.wa.gov/wslwac/WAC%20162%20%20TITLE/WAC%20162%20-%2012%20%20CHAPTER/WAC%20162%20-%2012%20%20Chapter.htm; Wash. Admin. Code 62-16 Employment, http://search.leg.wa.gov/wslwac/WAC%20162%20%20TITLE/WAC%20162%20-%2016%20%20CHAPTER/WAC%20162%20-%2016%20%20Chapter.htm; Wash. Admin. Code 162-22 Employment and Disability Discrimination, http://search.leg.wa.gov/wslwac/WAC%20162%20%20TITLE/WAC%20162%20-%2022%20%20CHAPTER/WAC%20162%20-%2022%20%20Chapter.htm

West Virginia: West Virginia Human Rights Act, W. Va. Code § 5-11-1, *et seq*. www.legis.state.wv.us/WVCODE/Code.cfm?chap=05&art=11#11; Human Rights Commission, www.wvf.state.wv.us/wvhrc/

Wisconsin: Wis. Stat. Ch. 111, Subch. II: Fair Employment, http://nxt.legis.state.wi.us/nxt/gateway.dll?f=templates&fn=default.htm&d=stats&jd=111.31; Family and Medical Leave Act, http://nxt.legis.state.wi.us/nxt/gateway.dll/Statutes%20Related/Wisconsin%20Statutes/5189/5198?f=templates$fn=document-frameset.htm$q=[field%20folio-destination-name:'103.10']$x=Advanced#0-0-0-52595, www.dwd.state.wi.us/er/family_and_medical_leave/default.htm

Wyoming: Wyo. Stat. Chapter 9—Fair Employment Practices, http://wydoe.state.wy.us/doe.asp?ID=859; Chapter III—Fair Employment Rules, http://159.238.91.226/labor/rulesregs/Chapter%20III.pdf ; Chapter V—Disability Discrimination Rules, http://159.238.91.226/labor/rulesregs/Chapter%20V.pdf

Appendix C: Transit Agency Questionnaire

The questionnaire was sent to 22 transit agencies nationwide, of which 17 either responded to the questionnaire or provided substantive feedback concerning physical abilities testing.

* Responded to questionnaire
+Provided additional substantive feedback

New York City Transit Authority*
Los Angeles County Metropolitan Transportation Authority*
Chicago Transit Authority*
Southeastern Pennsylvania Transportation Authority*
San Francisco Municipal Transportation Agency
New Jersey Transit Corporation
Washington Metropolitan Area Transit Authority
King County DOT, Metro Transit Division (Seattle)+
Metropolitan Transit Authority of Harris County (Houston)*
Maryland Transit Administration
Miami-Dade Transit
Denver Regional Transportation District*+
Metropolitan Atlanta Rapid Transit Authority
Tri-Met (Portland)*+
Oahu Transit Services*
Orange County Transportation Authority*
Alameda-Contra Costa Transit District*
Metro Transit (Minneapolis)*+
Port Authority of Allegheny County (Pittsburgh)*
Dallas Area Rapid Transit*
Massachusetts Bay Transportation Authority*

Questionnaire for Transit Authorities

The Transportation Research Board, through its Transit Cooperative Research Program (TCRP), has authorized a project to develop legal guidance for transit agencies in determining whether and how to conduct testing of various physical abilities of transit personnel such as rail/bus operators and mechanics. The purpose of this questionnaire is to gather your agency's input to assist in developing that resource. **We recognize that the questionnaire is comprehensive: if a complete response is not feasible even a partial response would be appreciated. If there are portions of the questionnaire that should be directed to another office within the agency, please forward the questionnaire or contact us so that we can do so.**

We are trying to determine to what extent your agency requires job applicants and/or current personnel to participate in tests that measure physical abilities such as vision, hearing, strength, and agility. To the extent that you do conduct such testing, we are very interested in knowing the basis for each test: federal requirements, state requirements, local requirements, and/or transit agency personnel policy. We are interested in requirements that apply to a broad pool of applicants/personnel, including transit applicants/personnel, as well as any such requirements that apply narrowly to public transportation, and would like to include references to any such requirements in the project report. Your assistance in providing state and local references would be invaluable.

[Respondent contact information]

Please contact Jocelyn Waite if you have policies governing physical ability testing that you are willing to share: 1) for research purposes for this report, 2) to include as part of an appendix of sample policies.

In responding, please identify any information that you deem confidential. Such information will only be used to compile summaries or in other ways that does not reveal any confidential information.

Thank you for your assistance in collecting information about physical ability testing and the reasons that such testing is conducted.

I. Pre-employment Tests and Standards. A. In general:

Transit agencies may require that job applicants undergo physical exams and other tests pending a final job offer. Please indicate whether your agency requires that applicants for the positions identified below undergo pre-employment physical exams; who pays for any required exams; whether your agency sets minimum physical qualifications for the positions identified below; and whether testing is contracted out. If contractors are involved please specify whether they develop the tests and/or administer them.

Procedure/ Standard	**Exam required**	**No exam required**	**Who Pays for Exam**	**Minimum physical qualifications imposed**	**Minimum physical qualifications not imposed**	**Testing contracted out**	**No such procedure/ standard**
Physical exam for rail/bus operators							
Physical exam for mechanics							
Physical exam for other operational employees							
Minimum physical qualifications for rail/bus operators							
Minimum physical qualifications for mechanics							
Minimum physical qualifications for other operational employees							

If you require physical exams or set minimum physical qualifications for bus operators, do you differentiate based on GVW of the vehicles the drivers will be responsible for driving?

If you require physical exams or set minimum physical qualifications for other operational employees, please specify the covered employee categories:

I. Pre-employment Tests and Standards. B. Specific pre-employment tests and standards:

There are a number of specific physical abilities for which job applicants can be tested. If your agency requires a physical ability test not specified below, please indicate under other. To the extent possible, please indicate standard required under test. For example, a vision test could require 20/40 corrected vision.

Type of test	Required for rail/bus operators	Required for mechanics	Required for other operational personnel (specify personnel subject to testing)	Testing contracted out	Who pays for exam	Not required
Vision						
Hearing						
Strength						
Agility						
Sit-and-reach						
Grasping ability						
Manual dexterity						
Lifestyle: nicotine, obesity, etc. (specify)						
Other						

II. Source of requirements for conducting pre-employment tests. A. In general:

There are a range of possible requirements for conducting pre-employment physical exams and other tests. Please indicate the reason that you require that any of the procedures/standards listed below be conducted or met. Select all that apply; identify any specific information, for example the law or regulation that imposes the requirement or the agency that administers the law/regulation; indicate if state or local law imposes more stringent requirements than federal law. If available, provide citations/electronic sourcing.

Procedure/ Standard	Required by federal law (specify law)	Required by state law (specify law)	Required by local law (specify law)	Required by transit agency personnel policy	No such procedure/ standard
Physical exam for rail/bus operators					
Physical exam for mechanics					
Physical exam for other operational employees					
Minimum physical qualifications for rail/bus operators					
Minimum physical qualifications for mechanics					
Minimum physical qualifications for other operational employees					

If you require physical exams or set minimum physical qualifications for other operational employees, please specify the covered employee categories:

II. Source of requirements for conducting pre-employment tests. B. Specific pre-employment tests and standards for rail/bus operators:

There is a range of possible requirements for requiring applicants for positions as rail and bus operators to undergo specific pre-employment tests. Please indicate the reason that you require testing for any of the physical abilities listed below. Select all that apply; identify any specific information, for example the law or regulation that imposes the requirement or the agency that administers the law/regulation; indicate if state or local law imposes more stringent requirements than federal law. If available, please provide citations/electronic sourcing.

Rail/bus operators	Required by federal law (specify law)	Required by state law (specify law)	Required by local law (specify law)	Required by transit agency personnel policy	No such procedure/ standard
Vision					
Hearing					
Strength					
Agility					
Sit-and-reach					
Grasping ability					
Manual dexterity					
Lifestyle: nicotine, obesity, etc. (specify)					
Other					

If you require physical exams or set minimum physical qualifications for other operational employees, please specify the covered employee categories:

II. Source of requirements for conducting pre-employment tests. C. Specific pre-employment tests and standards for mechanics:

There is a range of possible requirements for requiring applicants for positions as mechanics to undergo specific pre-employment tests. Please indicate the reason that you require testing for any of the physical abilities listed below. Select all that apply; identify any specific information, for example the law or regulation that imposes the requirement or the agency that administers the law/regulation; indicate if state or local law imposes more stringent requirements than federal law. If available, please provide citations/electronic sourcing.

Mechanics	Required by federal law (specify law)	Required by state law (specify law)	Required by local law (specify law)	Required by transit agency personnel policy	No such procedure/ standard
Vision					
Hearing					
Strength					
Agility					
Sit-and-reach					
Grasping ability					
Manual dexterity					
Lifestyle: nicotine, obesity, etc. (specify)					
Other					

If you require physical exams or set minimum physical qualifications for other operational employees, please specify the covered employee categories:

III. Source of limitations on conducting pre-employment tests. A. In general:

Governmental agencies at all levels of government may place limitations on conducting pre-employment physical exams and other tests. Please indicate whether deferral, state, or local law places limitations on the scope of any of the procedures/standards listed below. Select all that apply; identify any specific information, for example the law or regulation that imposes the restriction or the agency that administers the law/regulation; indicate if state or local law imposes greater limitations than federal law. If available, please provide citations/electronic sourcing.

Procedure/ Standard	**Limited by federal law (specify law)**	**Limited by state law (specify law)**	**Limited by local law (specify law)**	**Limited by transit agency personnel policy**	**No such procedure/ standard**
Physical exam for rail/bus operators					
Physical exam for mechanics					
Physical exam for other operational employees					
Minimum physical qualifications for rail/bus operators					
Minimum physical qualifications for mechanics					
Minimum physical qualifications for other operational employees					

If you require physical exams or set minimum physical qualifications for other operational employees, please specify the covered employee categories:

III. Source of limitations on conducting pre-employment tests. B. Specific pre-employment tests and standards for rail/bus operators:

Governmental agencies at all levels of government may place limitations on conducting pre-employment tests of specific physical abilities. Please indicate whether deferral, state, or local law places limitations on the scope of any of the procedures/standards listed below. Select all that apply; identify any specific information, for example the law or regulation that imposes the restriction or the agency that administers the law/regulation; indicate if state or local law imposes greater limitations than federal law. If available, please provide citations/electronic sourcing.

Rail/bus operators	Limited by federal law (specify law)	Limited by state law (specify law)	Limited by local law (specify law)	Limited by transit agency personnel policy	No such procedure/ standard
Vision					
Hearing					
Strength					
Agility					
Sit-and-reach					
Grasping ability					
Manual dexterity					
Lifestyle: nicotine, obesity, etc. (specify)					
Other					

If you require physical exams or set minimum physical qualifications for other operational employees, please specify the covered employee categories:

III. Source of limitations on conducting pre-employment tests. C. Specific pre-employment tests and standards for mechanics:

Governmental agencies at all levels of government may place limitations on conducting pre-employment tests of specific physical abilities. Please indicate whether federal, state, or local law places limitations on the scope of any of the procedures/standards listed below. Select all that apply; identify any specific information, for example the law or regulation that imposes the restriction or the agency that administers the law/regulation; indicate if state or local law imposes greater limitations than federal law. If available, please provide citations/electronic sourcing.

Mechanics	Limited by federal law (specify law)	Limited by state law (specify law)	Limited by local law (specify law)	Limited by transit agency personnel policy	No such procedure/ standard
Vision					
Hearing					
Strength					
Agility					
Sit-and-reach					
Grasping ability					
Manual dexterity					
Lifestyle: nicotine, obesity, etc. (specify)					
Other					

If you require physical exams or set minimum physical qualifications for other operational employees, please specify the covered employee categories:

IV. Tests and standards for current employees. A. In general:

Please indicate whether your agency requires that employees in the positions identified below undergo physical exams and/or tests and if so for what reason (annual; periodic; post-accident; post-illness); who pays for any required exams/tests; and whether your agency sets minimum physical qualifications for the positions identified below.

Procedure/ Standard	Exam required	No exam required	Who pays for exam	Minimum physical qualifications imposed	Minimum physical qualifications not imposed	No such procedure/ standard
Physical exam for rail/bus operators						
Physical exam for mechanics						
Physical exam for other operational employees						
Minimum physical qualifications for rail/bus operators						
Minimum physical qualifications for mechanics						
Minimum physical qualifications for other operational employees						

If you require physical exams or set minimum physical qualifications for bus operators, do you differentiate based on GVW of the vehicles the drivers will be responsible for driving?

If you require physical exams or set minimum physical qualifications for other operational employees, please specify the covered employee categories:

Do you have a system for capturing information about non-work-related incidents that may affect on-the-job performance? If so, please describe.

IV. Tests and standards for current employees. B. Specific employee tests and standards:

Please indicate whether your agency requires that operational employees undergo tests for any of the physical abilities listed below and if so when such tests are required (annual; periodic; post-accident; post-illness). If your agency requires a physical ability test not specified below, please indicate under other. To the extent possible, please indicate the standard required under test. For example, a vision test could require 20/40 corrected vision.

Type of test	Required for rail/bus operators	Required for mechanics	Required for other operational personnel (specify personnel subject to testing)	Not required
Vision				
Hearing				
Strength				
Agility				
Sit-and-reach				
Grasping ability				
Manual dexterity				
Lifestyle: nicotine, obesity, etc. (specify)				
Other				

V. Source of requirements for conducting employee tests. A. In general:

Please indicate the reason that you require that any of the procedures/standards listed below be conducted or met and if required, when such tests are required (annual; periodic; post-accident; post-illness). Please select all that apply; please indicate any specific information that applies, for example the law or regulation that imposes the requirement or the agency that administers the law/regulation. If available, please provide citations/electronic sourcing.

Procedure/ Standard	Required by federal law (specify law)	Required by state law (specify law)	Required by local law (specify law)	Required by transit agency personnel policy	No such procedure/ standard
Physical exam for rail/bus operators					
Physical exam for mechanics					
Physical exam for other operational employees					
Minimum physical qualifications for rail/bus operators					
Minimum physical qualifications for mechanics					
Minimum physical qualifications for other operational employees					

If you require physical exams or set minimum physical qualifications for other operational employees, please specify the covered employee categories:

Do you require fitness for duty exams after any incident that results in an OSHA 301 Incident Report (or analogous state requirement)?

V. Source of requirements for conducting employee tests. B. Specific tests and standards for rail/bus operators.

Please indicate the reason that you require testing for any of the physical abilities listed below, and if required, when such tests are required (annual; periodic; post-accident; post-illness). Select all that apply; identify any specific information, for example the law or regulation that imposes the requirement or the agency that administers the law/regulation; indicate if state or local law imposes more stringent requirements than federal law. If available, please provide citations/electronic sourcing.

Rail/bus operators	Required by federal law (specify law)	Required by state law (specify law)	Required by local law (specify law)	Required by transit agency personnel policy	No such procedure/ standard
Vision					
Hearing					
Strength					
Agility					
Sit-and-reach					
Grasping ability					
Manual dexterity					
Lifestyle: nicotine, obesity, etc. (specify)					
Other					

If you require physical exams or set minimum physical qualifications for other operational employees, please specify the covered employee categories:

V. Source of requirements for conducting employee tests. C. Specific tests and standards for mechanics.

Please indicate the reason that you require testing for any of the physical abilities listed below, and if required, when such tests are required (annual; periodic; post-accident; post-illness). Select all that apply; identify any specific information, for example the law or regulation that imposes the requirement or the agency that administers the law/regulation; indicate if state or local law imposes more stringent requirements than federal law. If available, please provide citations/electronic sourcing.

Rail/bus operators	Required by federal law (specify law)	Required by state law (specify law)	Required by local law (specify law)	Required by transit agency personnel policy	No such procedure/ standard
Vision					
Hearing					
Strength					
Agility					
Sit-and-reach					
Grasping ability					
Manual dexterity					
Lifestyle: nicotine, obesity, etc. (specify)					
Other					

If you require physical exams or set minimum physical qualifications for other operational employees, please specify the covered employee categories:

VI. Source of limitations on conducting employee tests. A. In general.

Please indicate whether federal, state, or local law places limitations on the scope of any of the procedures/standards listed below, and if so specify the timing of tests so limited (annual; periodic; post-accident; post-illness). Select all that apply; identify any specific information, for example the law or regulation that imposes the restriction or the agency that administers the law/regulation; indicate if state or local law imposes greater limitations than federal law. If available, please provide citations/electronic sourcing.

Procedure/ Standard	**Limited by federal law (specify law)**	**Limited by state law (specify law)**	**Limited by local law (specify law)**	**Limited by transit agency personnel policy**	**No such procedure/ standard**
Physical exam for rail/bus operators					
Physical exam for mechanics					
Physical exam for other operational employees					
Minimum physical qualifications for rail/bus operators					
Minimum physical qualifications for mechanics					
Minimum physical qualifications for other operational employees					

If you require physical exams or set minimum physical qualifications for other operational employees, please specify the covered employee categories:

VI. Source of limitations on conducting employee tests. B. Specific tests and standards for rail/bus operators.

Please indicate whether federal, state, or local law places limitations on the scope of any of the tests listed below, and if so specify the timing of tests so limited (annual; periodic; post-accident; post-illness). Select all that apply; identify any specific information, for example the law or regulation that imposes the restriction or the agency that administers the law/regulation; indicate if state or local law imposes greater limitations than federal law. If available, please provide citations/electronic sourcing.

Rail/bus operators	Limited by federal law (specify law)	Limited by state law (specify law)	Limited by local law (specify law)	Limited by transit agency personnel policy	No such procedure/ standard
Vision					
Hearing					
Strength					
Agility					
Sit-and-reach					
Grasping ability					
Manual dexterity					
Lifestyle: nicotine, obesity, etc. (specify)					
Other					

If you require physical exams or set minimum physical qualifications for other operational employees, please specify the covered employee categories:

VI. Source of limitations on conducting employee tests. C. Specific tests and standards for mechanics.

Please indicate whether federal, state, or local law places limitations on the scope of any of the tests listed below, and if so specify the timing of tests so limited (annual; periodic; post-accident; post-illness). Select all that apply; identify any specific information, for example the law or regulation that imposes the restriction or the agency that administers the law/regulation; indicate if state or local law imposes greater limitations than federal law. If available, please provide citations/electronic sourcing.

Mechanics	Limited by federal law (specify law)	Limited by state law (specify law)	Limited by local law (specify law)	Limited by transit agency personnel policy	No such procedure/ standard
Vision					
Hearing					
Strength					
Agility					
Sit-and-reach					
Grasping ability					
Manual dexterity					
Lifestyle: nicotine, obesity, etc. (specify)					
Other					

If you require physical exams or set minimum physical qualifications for other operational employees, please specify the covered employee categories:

VII. Respirator testing

1. Do you require that the OSHA respirator standard be met by medical questionnaires or exams?
2. If exams, do you employ qualitative or quantitative exams? Do you employ spirometry exams?

VII. School bus; drug and alcohol; sick leave; lifestyle

3. Some states impose periodic physical testing procedures for school bus drivers, for example alcohol testing or annual physical exams. Does your state impose any such school transportation requirements? If so, are such requirements applicable to any of your employees, notably those drivers providing tripper service? Please specify which requirements apply to your employees.
4. Do you impose stricter standards for drug and alcohol use than those required under federal regulations? If so, please describe.
5. Do you require return-to-work agreements after an employee has tested positive for alcohol or a controlled substance?
6. Do you require employees to undergo physical exams following an accident? If so, do the exams include tests for any specific physical abilities, such as those noted above? If so, which abilities are tested? Do you require potential employees to pay for such exams?
7. Do you require employees to undergo physical exams when they return from sick leave for reasons other than accidents? If so, do the exams include tests for any specific physical abilities, such as those noted above? If so, which abilities are tested? Do you require potential employees to pay for such exams?
8. Do you require employees returning from sick leave to disclose conditions that if present would disqualify them from their current jobs?
9. Do you prohibit job applicants from smoking? Do you prohibit current employees from smoking?

VIII. Program effectiveness

1. If you have instituted any of the testing set forth in preceding sections, please indicate whether such testing has helped, hindered, or had no effect on hiring a skilled workforce. Also please indicate whether any of the testing has resulted in legal challenge, and if so, describe the results.
2. Please describe your rate of success in obtaining the cooperation of job applicants and current employees in conducting various types of testing.

Appendix D: State Agency Questionnaire

The questionnaire was sent to state agencies responsible for commercial driver's licensing and enforcement of nondiscrimination requirements. Responsible agencies vary by state; examples include departments of motor vehicles, departments of public safety, secretaries of state, civil rights commissions, and departments of labor. Questionnaire responses (or other substantive feedback) were received from the following state agencies:

Alabama Department of Public Safety
Colorado Department of Regulatory Agencies, Civil Rights Division
Idaho Department of Transportation
Indiana Motor Carrier Services, Department of Revenue; Civil Rights Commission
Iowa Departments of Transportation and Education
Louisiana Department of Public Safety
Maryland Motor Vehicle Administration
Michigan Department of Education
Minnesota Department of Public Safety, Driver and Vehicle Services
Nevada Equal Rights Commission
New Jersey Motor Vehicle Commission
North Dakota Commissioner of Labor
Rhode Island Commission for Human Rights
Texas Department of Transportation, Public Transportation Division
West Virginia Department of Transportation, Division of Motor Vehicles and Division of Public Transit; Department of Education

Questionnaire for State Agencies

The Transportation Research Board, through its Transit Cooperative Research Program (TCRP), has authorized a project to develop legal guidance for transit agencies in determining whether and how to conduct testing of various physical abilities of transit personnel such as rail/bus operators and mechanics. The purpose of this questionnaire is to gather your department's input to assist in developing that resource. **We recognize that the questionnaire is comprehensive: if a complete response is not feasible, even a partial response would be appreciated. If there are portions of the questionnaire that should be directed to another state department, please forward the questionnaire or contact us so that we can do so.**

We are trying to determine to what extent your state: 1) requires job applicants and/or current personnel to participate in tests that measure physical abilities such as vision, hearing, strength, and agility, for example as part of your commercial drivers license requirements; 2) limits subjecting job applicants and/or current personnel to tests that measure physical abilities such as vision, hearing, strength, and agility, for example under state equal opportunity laws; 3) regulates employers' ability to making hiring and retention decisions based on employees' lifestyle choices, to the extent that such choices can be measured by physical exams, such as nicotine testing. We are interested in state requirements that apply to a broad pool of applicants/personnel, including transit applicants/personnel, as well as any such requirements that apply narrowly to public transportation, and would like to include references to any such state requirements in the project report. If you are aware of local ordinances that either require or limit physical ability testing, such information would also be appreciated. Your assistance in providing state and local references would be invaluable.

[Respondent contact information]

Please contact Jocelyn Waite if you have policies governing physical ability testing that you are willing to share: 1) for research purposes for this report, 2) to include as part of an appendix of sample policies.

In responding, please identify any information that you deem confidential. Such information will only be used to compile summaries or in other ways that does not reveal any confidential information.

Thank you for your assistance in collecting information about physical ability testing and the reasons that such testing is conducted.

I. Pre-employment tests: requirements and limitations. A. In general:

Some states require pre-employment physical exams and other tests for transit employees. Some states also limit the scope of pre-employment physical exams and other tests for transit employees. Please indicate whether your state either requires or limits any of the procedures/standards listed below. Select all that apply; identify any specific information, for example the law or regulation that imposes the requirement or the agency that administers the law/regulation; indicate if state (or if known, local) law imposes more stringent requirements or limitations than federal law. If available, provide citations/electronic sourcing.

Procedure/ Standard	Required by state law (specify law)	Limited by state law (specify law)	Required by local law (specify law)	Limited by local law (specify law)	No such requirement or limitation
Physical exam for rail/bus operators					
Physical exam for mechanics					
Physical exam for other operational employees					
Minimum physical qualifications for rail/bus operators					
Minimum physical qualifications for mechanics					
Minimum physical qualifications for other operational employees					

If you require physical exams or set minimum physical qualifications for other operational employees, please specify the covered employee categories:

I. Pre-employment tests: requirements and limitations. B. Specific pre-employment tests and standards for rail/bus operators:

Some states require specific physical ability tests for rail/bus operator job applicants. Some states also limit the scope of specific physical ability tests for such applicants. Please indicate whether your state either requires or limits any of the tests listed below. Select all that apply; identify any specific information, for example the law or regulation that imposes the requirement or the agency that administers the law/regulation; indicate if state (or if known, local) law imposes more stringent requirements or limitations than federal law. If available, provide citations/electronic sourcing.

Rail/bus operators	Required by state law (specify law)	Limited by state law (specify law)	Required by local law (specify law)	Limited by local law (specify law)	No such requirement or limitation
Vision					
Hearing					
Strength					
Agility					
Sit-and-reach					
Grasping ability					
Manual dexterity					
Lifestyle: nicotine, obesity, etc. (specify)					
Other					

If you require testing for a physical ability not specified above, please describe the physical ability tested:

I. Pre-employment tests: requirements and limitations. C. Specific pre-employment tests and standards for mechanics:

Some states require specific physical ability tests for mechanic job applicants. Some states also limit the scope of specific physical ability tests for such applicants. Please indicate whether your state either requires or limits any of the tests listed below. Select all that apply; identify any specific information, for example the law or regulation that imposes the requirement or the agency that administers the law/regulation; indicate if state (or if known, local) law imposes more stringent requirements or limitations than federal law. If available, provide citations/electronic sourcing.

Mechanics	Required by state law (specify law)	Limited by state law (specify law)	Required by local law (specify law)	Limited by local law (specify law)	No such requirement or limitation
Vision					
Hearing					
Strength					
Agility					
Sit-and-reach					
Grasping ability					
Manual dexterity					
Lifestyle: nicotine, obesity, etc. (specify)					
Other					

If you require testing for a physical ability not specified above, please describe the physical ability tested:

II. Periodic employee tests: requirements and limitations. A. In general:

Some states require periodic physical exams and other tests for transit employees. Some states also limit the scope of periodic physical exams and other tests for transit employees. Please indicate whether your state either requires or limits any of the procedures/standards listed below. Select all that apply; identify any specific information, for example the law or regulation that imposes the requirement or the agency that administers the law/regulation; indicate if state (or if known, local) law imposes more stringent requirements or limitations than federal law. If available, provide citations/electronic sourcing.

Procedure/ Standard	Required by state law (specify law)	Limited by state law (specify law)	Required by local law (specify law)	Required by transit agency personnel policy	No such requirement or limitation
Physical exam for rail/bus operators					
Physical exam for mechanics					
Physical exam for other operational employees					
Minimum physical qualifications for rail/bus operators					
Minimum physical qualifications for mechanics					
Minimum physical qualifications for other operational employees					

If you require physical exams or set minimum physical qualifications for other operational employees, please specify the covered employee categories:

II. Periodic employee tests: requirements and limitations. B. Specific tests and standards for rail/bus operators:

Some states require specific physical ability tests for rail/bus operators. Some states also limit the scope of specific physical ability tests for such employees. Please indicate whether your state either requires or limits any of the tests listed below. Select all that apply; identify any specific information, for example the law or regulation that imposes the requirement or the agency that administers the law/regulation; indicate if state (or if known, local) law imposes more stringent requirements or limitations than federal law. If available, provide citations/electronic sourcing.

Rail/bus operators	Required by state law (specify law)	Limited by state law (specify law)	Required by local law (specify law)	Limited by local law (specify law)	No such requirement or limitation
Vision					
Hearing					
Strength					
Agility					
Sit-and-reach					
Grasping ability					
Manual dexterity					
Lifestyle: nicotine, obesity, etc. (specify)					
Other					

If you require testing for a physical ability not specified above, please describe the physical ability tested:

II. Periodic employee tests: requirements and limitations. C. Specific tests and standards for mechanics:

Some states require specific physical ability tests for mechanics. Some states also limit the scope of specific physical ability tests for such employees. Please indicate whether your state either requires or limits any of the tests listed below. Select all that apply; identify any specific information, for example the law or regulation that imposes the requirement or the agency that administers the law/regulation; indicate if state (or if known, local) law imposes more stringent requirements or limitations than federal law. If available, provide citations/electronic sourcing.

Mechanics	Required by federal law (specify law)	Required by state law (specify law)	Required by local law (specify law)	Required by transit agency personnel policy	No such procedure/ standard
Vision					
Hearing					
Strength					
Agility					
Sit-and-reach					
Grasping ability					
Manual dexterity					
Lifestyle: nicotine, obesity, etc. (specify)					
Other					

If you require testing for a physical ability not specified above, please describe the physical ability tested:

III. Post-incident tests: requirements and limitations. A. In general:

Some states require physical exams and other tests for transit employees following an accident. Some states also limit the scope of periodic physical exams and other tests for transit employees. Please indicate whether following an accident your state either requires or limits any of the procedures/standards listed below. Select all that apply; identify any specific information, for example the law or regulation that imposes the requirement or the agency that administers the law/regulation; indicate if state (or if known, local) law imposes more stringent requirements or limitations than federal law. If available, provide citations/electronic sourcing.

Procedure/ Standard	Required by state law (specify law)	Limited by state law (specify law)	Required by local law (specify law)	Required by transit agency personnel policy	No such requirement or limitation
Physical exam for rail/bus operators					
Physical exam for mechanics					
Physical exam for other operational employees					
Minimum physical qualifications for rail/bus operators					
Minimum physical qualifications for mechanics					
Minimum physical qualifications for other operational employees					

If you require physical exams or set minimum physical qualifications for other operational employees, please specify the covered employee categories:

III. Post-incident tests: requirements and limitations. B. Specific tests and standards for rail/bus operators.

Some states require specific physical ability tests for rail/bus operators following an accident. Some states also limit the scope of periodic physical exams and other tests for such employees. Please indicate whether following an accident your state either requires or limits any of the procedures/standards listed below. Select all that apply; identify any specific information, for example the law or regulation that imposes the requirement or the agency that administers the law/regulation; indicate if state (or if known, local) law imposes more stringent requirements or limitations than federal law. If available, provide citations/electronic sourcing.

Rail/bus operators	Required by state law (specify law)	Limited by state law (specify law)	Required by local law (specify law)	Limited by local law (specify law)	No such requirement or limitation
Vision					
Hearing					
Strength					
Agility					
Sit-and-reach					
Grasping ability					
Manual dexterity					
Lifestyle: nicotine, obesity, etc. (specify)					
Other					

If you require testing for a physical ability not specified above, please describe the physical ability tested:

III. Post-incident tests: requirements and limitations. C. Specific tests and standards for mechanics.

Some states require specific physical ability tests for mechanics following an accident. Some states also limit the scope of periodic physical exams and other tests for such employees. Please indicate whether following an accident your state either requires or limits any of the procedures/standards listed below. Select all that apply; identify any specific information, for example the law or regulation that imposes the requirement or the agency that administers the law/regulation; indicate if state (or if known, local) law imposes more stringent requirements or limitations than federal law. If available, provide citations/electronic sourcing.

Mechanics	Required by state law (specify law)	Limited by state law (specify law)	Required by local law (specify law)	Limited by local law (specify law)	No such requirement or limitation
Vision					
Hearing					
Strength					
Agility					
Sit-and-reach					
Grasping ability					
Manual dexterity					
Lifestyle: nicotine, obesity, etc. (specify)					
Other					

If you require testing for a physical ability not specified above, please describe the physical ability tested:

IV. Payment for physical exams and physical abilities testing.

Please indicate whether your state regulates payment for the following types of exams, and if so who is required to pay. Where payment is regulated, please provide citations to the applicable law or regulation.

Procedure/ Standard	**Paid by applicant**	**Paid by prospective employer**	**Paid by employee**	**Paid by employer**	**Not regulated**
Physical exam for rail/bus operators					
Physical exam for mechanics					
Physical exam for other operational employees					
Minimum physical qualifications for rail/bus operators					
Minimum physical qualifications for mechanics					
Minimum physical qualifications for other operational employees					
Vision tests					
Hearing tests					
Strength tests					
Agility tests					
Sit-and-reach tests					
Grasping ability tests					
Manual dexterity tests					
Lifestyle: nicotine, obesity, etc. (specify)					
Other physical ability tests					

V. School bus; drug and alcohol; sick leave; lifestyle

10. Some states impose periodic physical testing procedures for school bus drivers, for example alcohol testing or annual physical exams. Does your state impose any such school transportation requirements? If so, are such requirements considered applicable to transit employees, notably those drivers providing tripper service?
11. Does your state impose stricter standards for drug and alcohol use than those required under federal regulations? If so, please describe.
12. Does your state require return-to-work agreements after an employee has tested positive for alcohol or a controlled substance? If so, please specify law or regulation. Does your state limit such agreements? If so, please specify law or regulation.
13. Does your state require employees to undergo physical exams when they return from sick leave for reasons other than accidents? Does your state limit an employer's ability to require such exams? Do either requirements or limitations cover tests for any specific physical abilities, such as those noted above? If so, which physical abilities are covered? Does your state regulate by whom such exams are paid for?
14. Does your state regulate an employer's right to require employees returning from sick leave to disclose conditions that if present would disqualify them from their current jobs?
15. Does your state regulate an employer's right to prohibit job applicants from smoking? Does your state regulate an employer's right to prohibit current employees from smoking?
16. Does your state regulate an employer's right to require job applicants to meet other lifestyle requirements, such as meeting specified height/weight ratios? Does your state regulate an employer's right to require employees to meet other lifestyle requirements, such as maintaining specified height/weight ratios?

VI. Commercial drivers license (CDL)

3. Specify which transit employees your state requires to carry CDLs.
4. Has your state adopted the governmental entity exception set forth in 49 C.F.R. Part 390.3(f)(2)?
5. Does your state require transit employees to meet the requirements of 49 C.F.R. Part 391?
6. Do your state CDL requirements differ from those of the Federal Motor Carrier Safety Administration? If so, please specify in what regard the requirements differ.

ACKNOWLEDGMENTS

This study was performed under the overall guidance of TCRP Project Committee J-5. The Committee is chaired by **Robin M. Reitzes**, San Francisco City Attorney's Office, San Francisco, California. Members are **Rolf G. Asphaug**, Denver Regional Transportation District, Denver, Colorado; **Sheryl King Benford**, Greater Cleveland Regional Transit Authority, Cleveland, Ohio; **Darrell Brown**, Darrell Brown & Associates, New Orleans, Louisiana; **Dennis C. Gardner**, Ogletree, Deakins, Nash, Smoak & Stewart, Houston, Texas; **Clark Jordan-Holmes**, Joyner & Jordan-Holmes, P.A., Tampa, Florida; **Elizabeth M. O'Neill**, Metropolitan Atlanta Rapid Transit Authority, Atlanta, Georgia; **Ellen L. Partridge**, Chicago Transit Authority, Chicago, Illinois; and **James S. Thiel**, Wisconsin Department of Transportation, Madison, Wisconsin. **Rita M. Maristch** provides liaison with the Federal Transit Administration, **James P. LaRusch** serves as liaison with the American Public Transportation Association, and **Gwen Chisholm Smith** represents the TCRP staff.

Transportation Research Board
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Washington, DC 20001

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