

EMPLOYMENT LAW ISSUES FOR EDUCATION LEADERS

Presented by:

**James K. Martin
Martin Law Firm PLLC
Phone: 612-581-8450
e-mail: jmartinlawfirm@gmail.com**

This presentation was prepared by Martin Law Firm PLLC. It is not intended, nor should it be used, as a substitute for specific legal advice or opinion since legal counsel may only be given in response to inquiries regarding particular factual situations.

TOPIC 1: CONDUCTING PRE-OFFER REFERENCE CHECKS ON APPLICANTS

An overlooked and/or poorly done part of the selection process is conducting a thorough reference check on candidates for a job vacancy. Reference checks are one of the opportunities in the search process where the employer receives information about a candidate from a source other than the candidate. Reference checking is an important step to avoid claims of negligent hiring and to learn about the overall qualifications of the applicant.

I. Reference Checks

A. Reference Checking.

1. Use of reasonable care to hire safe and competent employees and to reject individuals who, because of the nature of the employment, pose a threat of injury to third parties.
2. Employers must conduct some minimal investigation of potential employees. Level of investigation is dependent upon the potential risk of harm to others.
3. Employers have a duty to retain only safe, competent employees and to conduct further investigation of an employee if previously unknown facts about the employee come to light.
4. Significant source of information regarding applicant's previous job performance.

B. Reference Checking Practical Tips.

1. Previous employers, especially employers prior to most recent employment.
2. References not limited to those named by the applicant.
3. Investigate "gaps" in the employment record.
4. Criminal background check should be as extensive as possible.
5. See attached documents for suggested areas of inquiry. (*See end of outline*).
6. Request information about public information pursuant to the Data Practices Act on applicant.
 - a. Has the applicant been subject to a complaint or charge?
 - b. Did the applicant resign during the course of an investigation?
 - c. Has the applicant been subject to discipline?

d. Would you rehire the applicant?

C. Check Certifications

1. Confirm Licensure through the MDE
2. For teachers and other licensed employees check with the Minnesota Board of Teaching or Minnesota Board of School Administrators for public information regarding action on an applicant's license.

II. Practice Tips

- A. Do not make an offer until reference checks are completed. Do not make an offer “contingent on the reference check results.”
- B. Do not limit reference checks to those identified by the candidate.
1. Contact the current employer and former employer.
 2. Insist on contacting the current employer.
 3. Contact persons you know who might know the candidate.
- C. The person giving the reference may be limited in what information can be disclosed to one seeking a reference. Other than asking illegal questions, a person checking a reference can ask anything.

Topic 2: Independent Contractor v. Employee. How Do You Tell The Difference?

I. THE IMPORTANCE OF PROPER CLASSIFICATION

- A. Issues arise when an organization hires workers and misclassifies the workers as independent contractors.
- B. Where is proper classification important?
1. Wage and Hour
 2. Payroll Taxes
 3. Unemployment Benefits
 4. Workers' Compensation
 5. Civil Rights Statutes

II. IS A WORKER AN INDEPENDENT CONTRACTOR OR AN EMPLOYEE? HOW DO YOU DECIDE?

A. Various Tests

1. All are variants of a common test of whether or not the employer "controls" the work of the worker.
2. What constitutes control?
Approval of the outcome of the work vs. whether the worker must perform duties in a particular way, using particular methods at particular times, even if assignments are given only occasionally.

B. IRS 20 Factor Test

1. Instructions: An Employee receives instructions about when, where and how the work is to be performed. *An Independent Contractor does the job his or her own way with few, if any, instructions as to the details or methods of the work.*
2. Training: Employees are often trained by a more experienced employee or are required to attend meetings or take training courses. *An Independent Contractor uses his or her own methods and thus need not receive training from the purchaser of those services.*
3. Integration: Services of an Employee are usually merged into the firm's overall operation; the firm's success depends on those Employee services. *An Independent Contractor's services are usually separate from the client's business and are not integrated or merged into it.*
4. Services Rendered Personally: An Employee's services must be rendered personally; Employees do not hire their own substitutes or delegate work to them. *A true Independent Contractor is able to assign another to do the job in his or her place and need not perform services personally.*
5. Hiring, Training and Paying Assistants: An Employee may act as a foreman for the employer but, if so, helpers are paid with the employer's funds. *Independent Contractors select, hire, pay, and supervise any helpers used and are responsible for the results of the helpers' labor.*
6. Continuing Relationship: An Employee often continues to work for the same employer month after month or year after year. *An Independent Contractor is usually hired to do one job of limited or indefinite duration and has no expectation of continuing work.*

7. Set Hours of Work: An Employee may work "on call" or during hours and days as set by the employer. *A true Independent Contractor is the master of his or her own time and works the days and hours he or she chooses.*
8. Full Time Required: An Employee ordinarily devotes full-time service to the employer, or the employer may have a priority on the Employee's time. *A true Independent Contractor cannot be required to devote full-time service to one firm exclusively.*
9. Doing Work on Employer Premises: Employment is indicated if the employer has the right to mandate where services are performed. *Independent Contractors ordinarily work where they choose. The workplace may be away from the client's premises.*
10. Order of Sequence Set: An Employee performs services in the order or sequence set by the employer. This shows control by the employer. *A true Independent Contractor is concerned only with the finished product and sets his or her own order or sequence of work.*
11. Oral and Written Reports: An Employee may be required to submit regular oral or written reports about the work in progress. *An Independent Contractor is usually not required to submit regular oral or written reports about the work in progress.*
12. Payment by Hour, Week or Month: An Employee is typically paid by the employer in regular amounts at stated intervals, such as by the hour or week. *An Independent Contractor is normally paid by the job, either a negotiated flat rate or upon submission of a bid.*
13. Payment of Business and/or Travel Expenses: An Employee's business and travel expenses are either paid directly or reimbursed by the employer. *Independent Contractors normally pay all of their own business and travel expenses without reimbursement.*
14. Furnishing of Tools and Materials: Employees are furnished all necessary tools, materials, and equipment by their employer. *An Independent Contractor ordinarily provides all of the tools and equipment necessary to complete the job.*
15. Significant Investment: An Employee generally has little or no investment in the business. Instead, an Employee is economically dependent on the employer. *True Independent Contractors usually have a substantial financial investment in their independent business.*
16. Realization of Profit or Loss: An Employee does not ordinarily realize a profit or loss in the business. Rather, Employees are paid for services rendered. *An*

Independent Contractor can either realize a profit or suffer a loss depending on the management of expenses and revenues.

17. Working for More Than One Firm at a Time: An Employee ordinarily works for one employer at a time and may be prohibited from joining a competitor. *An Independent Contractor often works for more than one client or firm at the same time and is not subject to a non-competition rule.*
18. Making Service Available to General Public: An Employee does not make his or her services available to the public except through the employer's company. *An Independent Contractor may advertise, carry business cards, hang out a shingle, or hold a separate business license.*
19. Right to Discharge Without Liability: An Employee can be discharged at any time without liability on the employer's part. *If the work meets the contract terms, an Independent Contractor cannot be fired without liability for breach of contract.*
20. Right to Quit Without Liability: An Employee may quit work at any time without liability on the Employee's part. *An Independent Contractor is legally responsible for job completion and, on quitting, becomes liable for breach of contract.*

III. CONSEQUENCES OF MISCLASSIFICATION

A. Payroll/IRS

1. Income tax liability for each misclassified employee; liability for employer's share of FICA and up to 20% of employee's share of FICA; Interest and other penalties.

B. Wage and Hour

1. Payment of overtime going back two years; penalties and interest

C. Workers' Compensation

1. Exposure to tort liability; reimbursement to state workers' compensation pool; penalties

D. Unemployment

1. Take corrective action; make missing contributions

IV. STRATEGIES FOR EMPLOYERS IF RETAINING INDEPENDENT CONTRACTORS

- A. Have the worker sign an independent contractor agreement
- B. Have the worker submit an invoice to the employer for the services rendered
- C. Require the worker procure their own workers' compensation coverage
- D. Give the worker as much independence as possible in areas such as hours worked, where the job is to be performed, etc.
- E. Have the worker provide his/her own tools, supplies, training, transportation, etc.

Topic 3: Wage and Hour Issues; Hours Worked, Overtime and Exempt v. Non-Exempt Employees

- I. Coverage
 - A. The Federal Fair Labor Standards Act requires covered employers to pay non-exempt employees overtime for all hours worked in excess of forty (40) hours per work week.
 - B. Covered employers include state and local government agencies. Public agencies include political subdivisions of a state.
- II. Minimum Wage (“MW”)
 - A. Covered, non-exempt employees must be paid not less than the MW for all hours worked. Current federal minimum wage is \$7.25 per hour. Current Minnesota minimum wage is \$9.50¹. Employees who are covered by both federal and state law must be paid the higher state minimum wage.
 - B. Each week stands by itself. No requirement to pay weekly.
- III. Overtime Pay
 - A. Overtime pay must be provided to covered, non-exempt employees.

¹ Federal minimum wage is \$7.25. Minnesota minimum wage for large employers (entity with sales or business in excess of \$500,000.00) for 2018 is \$9.65. Increases to \$9.86 on January 1, 2019. Since Minnesota minimum wage exceeds federal minimum wage, state minimum wage controls. Jurisdictions such as the City of Minneapolis and the City of St. Paul have higher minimum wage requirements.

B. Calculated at 1 and ½ times the employee’s regular rate of pay and must be paid for each hour worked in a workweek in excess of maximum allowable hours in the given type of work (usually forty (40) hours in a work week).

C. Compensatory Time Off for Public Employees (“Comp Time”)

1. Time off provided at a rate of 1 and ½ hours for each hour of overtime worked.
2. Comp Time must be provided pursuant to a collective bargaining agreement or an agreement prior to the time overtime is worked.
3. Comp Time accrual is limited to 240 hours for regular employees and 480 hours for public safety employees
4. Requests for use of Comp Time must be granted unless it unduly disrupts the operations of the department.
5. When an employee terminates employment Comp Time must be cashed out at the average rate of pay the employee received over the last three (3) years of employment or his/her final rate of pay, whichever is higher.

IV. Exemptions.

Employees who are classified as “exempt” employees are not eligible to receive overtime payment. To determine whether a job position is classified as an exempt position two tests must be met.

A. Salary Test - (Currently \$455.00 per week)

B. Duties Test – (“White Collar” Exemptions)

1. Executive Exemption
Employee’s primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the employer, customarily and regularly direct the work of at least two or more other full-time employees or their equivalent and authority to hire or fire other employees, or the employee’s suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.
2. Administrative Exemption
Employee’s primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers and the

exercise of discretion and independent judgment with respect to matters of significance

Examples of Administrative positions: tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, Internet and database administration; legal and regulatory compliance; and similar activities.

Administrative Exemption in an Educational Establishment: superintendent or other head of an elementary or secondary school system, any assistants responsible for administration of such matters as curriculum, quality and methods of instructing, measuring and testing the learning potential and achievement of students, establishing and maintaining academic and grading standards, and other aspects of the teaching program; the principal and any vice-principals responsible for the operation of an elementary or secondary school; academic counselors and other employees with similar responsibilities.

3. Professional Exemption

The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment; the advanced knowledge must be in a field of science or learning; and the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction

Teachers: Teachers fall under the Professional Exemption and are not subject to the Salary Test. Teachers are defined as: regular academic teachers; kindergarten or nursery school teachers; teachers of gifted or disabled children; teachers of skilled and semi-skilled trades and occupations; teachers engaged in automobile driving instruction; aircraft flight instructors; home economics teachers; and vocal or instrument music teachers

4. Exemption for Employees in Computer Related Occupations (salary test amount of \$913 or \$27.63 per hour).

V. Hours Worked

A. Covered, non-exempt employees must be paid for all hours worked in a work week.

B. Hours worked generally includes all of the time and employee is:

1. Required to be on duty.
2. Required to be on the employer's premises, or any other prescribed place of work.
3. Allowed (suffered or permitted) to work.

It is the duty of management to exercise its control to ensure that work is not performed if it does not want work to be performed.

C. Examples of Hours Worked

1. Attendance at meetings, lectures, training and similar activities unless all of the following criteria are met:
 - a. Attendance is outside regular working hours
 - b. Attendance is voluntary
 - c. No productive work is done during the activity
2. Work is done in the home if the employer knows or has reason to believe the work is being performed.
3. Work done during lunch periods.
4. Work done before or after scheduled hours.
5. Rest periods of twenty (20) minutes or less.
6. Get ready work prior to the start of the shift.
7. Clean up work after the end of a shift.
8. The entire meal period if the employee is not completely relieved of duties and responsibilities.
9. Transporting or delivering materials or equipment prior to the start of the workday or after the end of the workday.
10. Transporting employees to worksites, office or home either before or after the workday at the request or directive of management.
11. Travel from job site to job site during the workday.
12. "On Call" time by an employee who must remain on the employer's premises or so close that the employee cannot use the time effectively for his/her own purposes.

VI. Volunteers.

A. With Same Employer.

1. May volunteer in any capacity other than to do their normal job.
2. May not volunteer to perform services which they are employed to perform.

B. With Different Employer.

1. May volunteer to perform the same services that they are employed to perform by another employer.

VII. Recordkeeping.

- A. Records need not be kept in any particular form and time clocks are not required.
- B. Payroll records must be kept for 3 years and the time cards and wage computation records must be kept for 2 years.
- C. An accurate record of the hours worked each day and total hours worked each week is critical to avoiding hours worked problems.
- D. Required Records²

VIII. Common Errors to Avoid.

- A. Assuming that paying a salary automatically makes an employee “exempt”.
- B. Failing to pay for all hours an employee is “suffered or permitted” to work.
- C. Limiting employees to reporting 40 hours (or limited overtime) and directing them to “get the job done” and ignoring the time it takes to accomplish the task.
- D. Improperly applying an exemption.
- E. Treating an employee as an independent contractor.
- F. Not totaling work done in separate employer establishments when calculating overtime due.
- G. Making illegal deductions from wages such as shortages, drive-offs, damage, tools, uniforms, etc. that cut into the MW or OT
- H. Employee works during meal break and is not paid.
- I. Employee takes work home and the hours are not recorded or paid.
- J. Not paying for compensable travel time.
- K. Not paying for employee meetings.
- L. Paying overtime for hours worked in a day rather than hours worked in a week (unless collective bargaining agreement or employer policy requires payment of overtime for hours worked in a day).

IX. The FLSA Does Not Require.

- A. Providing employees with vacation, holiday, sick or severance pay.
- B. Meal or rest periods³, holidays off or vacations.
- C. Premium pay for weekend or holiday work.
- D. A discharge notice, reason for discharge, or immediate payment for services rendered.

² Employee’s name, home address, occupation, sex, and birth date if under 19 years of age and wage records such as hours worked, rate of pay, overtime paid, deductions, total wage and dates paid.

³ Minnesota law at Minn. Stat. §§ 177.253 and 254 require employers to provide work breaks to use the nearest convenient restroom (Section 177.253) and unpaid meal breaks (Section 177.254).

- E. Any limit on the number of hours in a day or days in a week an employee at least 16 years old may be required to work.
- F. Pay raises or fringe benefits.

Topic 4: Personnel Data Pursuant to the Minnesota Government Data Practices Act

I. Introduction

A. The Minnesota Government Data Practices Act (Minnesota Statutes Chapter 13) has been developed in an attempt to balance two major public policy concerns. One concern is the public's right to have access to information about their government. The policy of the public's right to access must be balanced against the individual's right to privacy.

B. What is data?

1. Any recorded information
2. Does not include mental impressions

II. Personnel Data

A. Provision governing the definition of Personnel Data contained in Section 13.43 of the Data Practices Act, Minn. Stat. § 13.43.

B. The balancing of the competing public policy concerns is illustrated in Section 13.43 which governs personnel data.

C. The basic assumption throughout Data Practices Act is that all data held by the government is public information unless the provisions of the Data Practices Act designate the data as non-public.

D. Section 13.43, which governs personnel data, is just the opposite. In the case of personnel data, **all data on public employees is considered private/non-public information unless it is designated public information by Section 13.43.**

D. Rule of Thumb - Data on an employee will generally be designated public information if it is the type of information the public needs in order to make professional judgments about its public servants.

III. Access to Personnel Data

A. Public Data is always accessible to the public.

B. Authorization by the Subject of the Data.

C. Court Order (usually when the employee/subject of the data is involved in litigation/legal dispute with an outside third party, for example, marriage dissolution).

D. Be cautious in making decisions to disclose; consult legal counsel if necessary.

1. In weighing possible consequences, penalties for unlawful disclosure are more severe than inadvertent failure to disclose.

2. Key Rule: “You Cannot Unring the Bell”!!

IV. Practice Tips

A. Put Data Practice Policy in place governing personnel data.

B. If possible, a request for data should be in writing.

1. Putting request in writing creates a record of the request and helps reduce confusion regarding what data is being requested.

2. If the request for data is from a person/entity who is not the subject of the data, public employer cannot ask the requestor to identify him/herself or the reasons for the request.

B. Data Practices Act Does Not Require an Immediate Response to a Request for Data

1. If the request is from someone who is not the subject of the data, response must be provided within a reasonable time.

2. If the request is from a subject of the data, response must be immediate but if not immediate, within ten (10) days.

3. If request cannot be granted (for example data is non-public or does not exist), written response must be provided describing why request cannot be granted.

4. If requested data contains both public and non-public data (example surveillance video), non-public data must be redacted. (However, *see Burks v. Metropolitan Council*, 884 N.W. 2d 338 (Minn. 2016 discussed below).

C. Inspection, Copies and Copy Costs

D. If data that is being sought is private information, employer must require production of authorization of the subject of the data and/or court order before private data can be disclosed.

V. Tennesen Warning

A. When Minnesota public entity is seeking data (for example, conducting employment investigation or student emergency contact information).

1. Why data is being collected
2. Whether individual must provide data and consequences of either providing data or not providing data
3. Individuals or entities who may have access to the data

B. Failure to provide Tennesen Warning in employee investigation may result in information that is gathered being deemed inadmissible in an arbitration hearing or other proceeding.

IX. Recent Development

A. Previously, if non-public data could not be separated from public data, then data could not be disclosed (for example, security video footage).

B. Change in law – *Burks v. Metropolitan Council*

1. Ruling in *Burks*, which related to personnel data under Minn. Stat. § 13.43, states that subject of data must be granted access to data even if non-public data cannot be redacted.
2. *Burks* creates possible conflict with disclosure of educational data governed by FERPA. As a federal law, FERPA may pre-empt the Data Practices Act.

Topic 5: Americans with Disabilities Act; Reasonable Accommodation

I. Introduction

The Americans with Disabilities Act (ADA) and the Minnesota Human Rights Act (MHRA) both require covered employees to provide “reasonable accommodations” to disabled employees.

II. When Does the Duty to Accommodate Arise?

A. The Employee Must Be Protected Under the ADA.

An individual is considered to be “disabled” pursuant to the ADA meeting the following standards.

1. Has a physical or mental impairment that substantially limits a major life activity;
2. Has a record of such impairment;
3. Is regarded as having such an impairment;
4. A physical or mental impairment is described as:
 - (a) any physiological disorder, or condition, cosmetic disfigurement or anatomical loss affecting one or more body systems;
 - (b) any mental or physiological disorder. (Examples: mental retardation, emotional or mental illness, learning disabilities)
5. A Physical or Mental Impairment Substantially Limits.

A physical or mental impairment will substantially limit and individual when the individual is:

 - (a) unable to perform a major life activity that the average person can perform;
 - (b) significantly restricted in the ability to perform a major life activity as compared to the ability of the average person to perform the same major life activity.
6. Major Life Activities.

Those basic activities that the average person population can perform with little or no difficulty. Examples of “major life activities”: caring for

oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working.

7. Qualified Individual with a Disability.

Once an individual meets the ADA's definition of disabled the individual still will not be eligible to receive a reasonable accommodation until it is determined that the person is a "qualified disabled person" within the meaning of the ADA. This requires a two step approach:

(a) The individual must meet the minimum requirements for the job such as education, licenses and skills.

(b) If, and only if the individual meets the requirements for the job the inquiry then turns to whether the individual, with or without reasonable accommodation, can perform the "essential functions" of the job.

(i) The essential functions of a job are the tasks which must be performed. Marginal functions of the job should be excluded from the analysis.

(ii) An employee is qualified if he/she can perform the "essential functions" of the job with reasonable accommodation by the employer.

B. The Employee Requests an Accommodation.

1. If an employer is not aware that an employee is disabled, the employer could not possibly have acted "because of" the employee's disability.
Beck v. University of Wisconsin Board of Regents, 75 F.3d 1130 (7th Cir. 1996).

2. A disabled employee may be held to the same standards of performance or conduct as all other employees, even if the employee's inability to meet those standards is caused by an unknown disability..
Hedberg v. Indiana Bell Telephone Co., Inc., 47 F.3d 928 (7th Cir. 1995).

3. An employer cannot ignore an obvious impairment and argue that it did not know of the impairment.

C. Interpreting Requests for Accommodation.

"To request an accommodation, an individual may use 'plain English' and need not mention the ADA or use the phrase 'reasonable accommodation.'"

1. The employee's request need not be in writing.

A request for an accommodation may be made during a conversation or in any other mode of communication. The employer may confirm the request in writing and may ask the employee requesting the accommodation to fill out a form. The employer cannot, however, ignore the original request.

2. The request need not be made by the disabled employee.

III. What is the Employer's Duty of Accommodation?

A. Identify the Essential Functions of the Job.

1. Identification of the "essential functions" of the job should occur prior to a request for accommodation through a process of developing job descriptions for all positions in the organization.

2. A job function is "essential" if the job exists to perform that function or there is a limited number of employees to perform that function. Example: Ability to type 60 words per minute can be an essential job function for a secretarial/clerical employee.

3. Factors to be considered in determining essential job functions may include: employer judgment, See Simon v. St Louis County, 563 F. Supp. 76 (E.D. Mo. 1983), job descriptions, work performed by past and present employees, time spent performing the function, employer standards.

4. The ADA is not intended to second guess an employer's judgment with regard to production standards, nor require employers to lower said standards.

B. Following a Request for a Reasonable Accommodation, the Employer Must Choose Among Available Accommodations.

1. Engage in the Interactive Process with the Employee.

2. The employer may require that the employee provide reasonable documentation.

3. The employer is entitled to choose which accommodation will be offered, as long as the accommodation offered is effective. Guidance at 5; Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278 (11th Cir. 1997). "[A]n employer need not accommodate an employee in the manner that an employee requests or provide the employee with the 'best' possible accommodation." Vande Zande v. Wisconsin Department of Administration, 2 A.D. Case 1846 (W.D. Wis. 1994).

a. As part of the interactive process of determining whether a reasonable accommodation, the employer may offer alternatives and discuss their effectiveness with the employee.

b. If there are two possible accommodations, the employer may choose the accommodation that is less burdensome or costly as long as it is effective.

4. The crucial issue is whether the accommodation was sufficient to allow the employee to perform the essential functions of the job. Davis v. York International, Inc., 2 A.D. Case 1810 (D. Md. 1993).

5. Some examples of reasonable accommodations include, but are not limited to:

- a. Making existing facilities accessible;
- b. Job restructuring;
- c. Part-time or modified work schedules;
- d. Acquiring or modifying equipment;
- e. Changing tests, training materials, or policies;
- f. Providing qualified reader or interpreters;
- g. Reassignment to a vacant position;

C. Actions Which Do Not Qualify as Reasonable Accommodations

1. The employer does not have to eliminate an essential function of the job.

2. The employer is not required to create a new position. See Howell v. Michelin Tire Corp., 860 F. Supp. 1488 (M.D. Ala. 1994). See also Ricks v. Xerox Corp., 877 F. Supp. 1468 (D. Kan. 1995) (an employer is not required to offer a promotion to a disabled employee as a reasonable accommodation.)

3. An employer is not required to displace a current employee in order to retain a disabled employee. Haysman v. Food Lion, Inc., F. Supp. 1092 (S.D. Ga. 1995).

4. An employer is not required to accept conduct by the disabled employee which would warrant discharge of a non-disabled employee.

5. An employer is not required to provide personal use items such as prosthetic limbs, a wheelchair, a hearing aid, etc., as a reasonable accommodation.

IV. Exceptions to the Duty of Reasonable Accommodation.

A. Undue Hardship

1. An “undue hardship” is defined as “an action requiring a significant difficulty or expense.”

2. In determining whether an undue hardship exists, an employer may not rely on general conclusions, but rather make an “individualized assessment of current circumstances that show a specific reasonable accommodation would cause significant difficulty or expense.”

3. Cost alone typically does not constitute an Undue Hardship

B. Direct Threat to Health and Safety

The ADA exempts employers from the duty of reasonable accommodation when the disabled employee, even with the reasonable accommodation would pose a “direct threat to health or safety.”

1. Factors which determine the existence of a direct threat to health or safety:

- a. The duration of the risk;
- b. The nature and severity of potential harm;
- c. The likelihood of the potential harm;
- d. The imminence of the potential harm.

2. Application of the above factors will vary from case to case. If the severity of the potential harm is very small, the employee will most likely not be found to be a direct threat even if the harm is quite likely to occur. On the other hand, if the threatened harm is extremely severe, a direct threat will most likely be found even if the chance of harm occurring is quite small. Example: A health care professional who is HIV positive. The likelihood of transmitting the HIV to a patient is extremely low and can be made even lower. However, the threatened harm is extremely severe. See Bradley v. University of Texas, 3 F.3d. 922, 924 (5th Cir. 1993) (“While the risk is small, it is not so small as to nullify the catastrophic consequences of an accident.”)

V. Other Issues

A. Chemical Dependency

It is not a violation of the ADA for an employer to adopt or administer policies or procedures regarding the use of alcohol and drugs in the workplace.

1. An employer may require that employees shall not be under the influence of chemicals such as drugs or alcohol at the workplace.
2. An employer may prohibit the illegal use of drugs and the use of alcohol in the workplace.

3. An employer should hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior to which other employees are held.

4. No accommodation is required for an employee who denies that he /she has a disability or a need for accommodation. Schmidt v. Safeway, Inc., 864 F. Supp. 991 (D. Or. 1994).

B. Mental Disabilities

1. Examples of recognized mental disabilities include: schizophrenia, bi-polar disorder, post-traumatic stress disorder, manic depression.

2. Certain conditions which do not constitute a disability include: kleptomania, pyromania, stress and personality traits (such as poor judgment, quick temper).

3. The law requires that an employer provide a reasonable accommodation for a *known* disability. An employer is not required to inquire as to whether a condition exists. However, an employer may not ignore an obvious condition and later argue that it did not know of the impairment. Kimbrow v. Atlantic Richfield Co., 889 F. 2d 869 (9th Cir. 1989).

4. An employee that suffers from a mental disability, is terminated, and does not notify the employer of the disability until after termination is not protected by the ADA. Miller v. Natural Gas Co., 61 F. 3d 627 (8th Cir. 1995).

5. An employer may require an employee to undergo an examination by a health care professional to determine:

- a. Whether on account of a mental impairment, the employee is still able to perform the essential functions of the job;
- b. When the employee behaves in a violent fashion, whether the employee poses a danger to himself or others in the workplace;
- c. The scope of the examination must be limited to an assessment of job related abilities and must be consistent with business necessity.

(Under the Minnesota Human Rights Act an examination may be required only under limited circumstances such as assessing the need for reasonable accommodation. Furthermore, such an examination can only be conducted with the employee's consent.)

Appendix A

Reference Checking

START WITH SOME BASIC QUESTIONS

Don't forget the obvious. The answers to these questions might help give you the facts before you begin to dig into the background of the candidates. Tested survey techniques show that you can get more effective responses to a series of questions if you start with the simple ones. They are easy to answer, so there is no pressure on the respondent. The respondents are not challenged to give opinions. After introducing yourself, begin with these basic questions:

1. I'd like to verify the dates of employment, from _____ to _____.
2. What type of work did he/she do? (Title?)
3. Were his/her earnings \$ _____ per _____?
4. Did that include bonus? Overtime? Incentives?
5. Who did he/she work for prior to joining your company?

TOUGH QUESTIONS

To find the truth, you have to ask probing questions.

1. How does the candidate compare to the person who's doing the job now? Or, what characteristics will you look for in the candidate's replacement?
2. If he or she was that good, why didn't you try to rehire him? Or, why don't you try to induce him to stay?
3. When there was a particularly urgent assignment, what steps did the candidate take to get it done on time?
4. Since none of us is perfect at everything we do, please describe some of his or her shortcomings.
5. Have you seen the candidate's current resume? Let me read you the part that describes his or her job with your organization. (Stop at each significant point, and ask the reference for a comment.)
6. Not all employees like everyone with whom they work. What kind of people did the candidate have problems with?
7. Has the candidate been subject to any complaints or charges while employed by your organization?*****
8. Did the candidate resign during the investigation of the complaints or charges?*****
9. Has the candidate been subject to disciplinary action while employed by your organization?*****
10. On the average, how many times a month is the candidate absent from work?***** And, how many times a month does he or she come in late, or leave early?
11. Who referred the candidate to your organization? (It could have been a relative or a customer or client.)

12. When the candidate was hired, were his or her references checked thoroughly? Who checked these references? And what did the references have to say?
13. Would you rehire the candidate?

**** denotes key question to ask public employers regarding public information regarding former employee.

APPENDIX B

**Sample Authorization and Release Form
For
Reference Checks**

RELEASE AUTHORIZATION

I, (please print name) _____, hereby authorize investigation of any information contained in the Application for Employment and/or supplemental materials I have submitted in consideration for the position of _____, as may be needed to arrive at an employment decision. I authorize any or all education institutions and prior employers listed in the Application for Employment to provide information they may have concerning me as it may relate to consideration of my application for this position. I understand the school district will be contacting both individuals suggested by me and others whom I may not have suggested. I release those parties from any and all liability or claims for damage that may result from such.

This release supersedes any agreement I may have previously made to the contrary with any such person, school, employer, or organization.

A photocopy or facsimile of this signed release shall have the same force and effect as the original release signed by me.

Applicant's Signature

Date