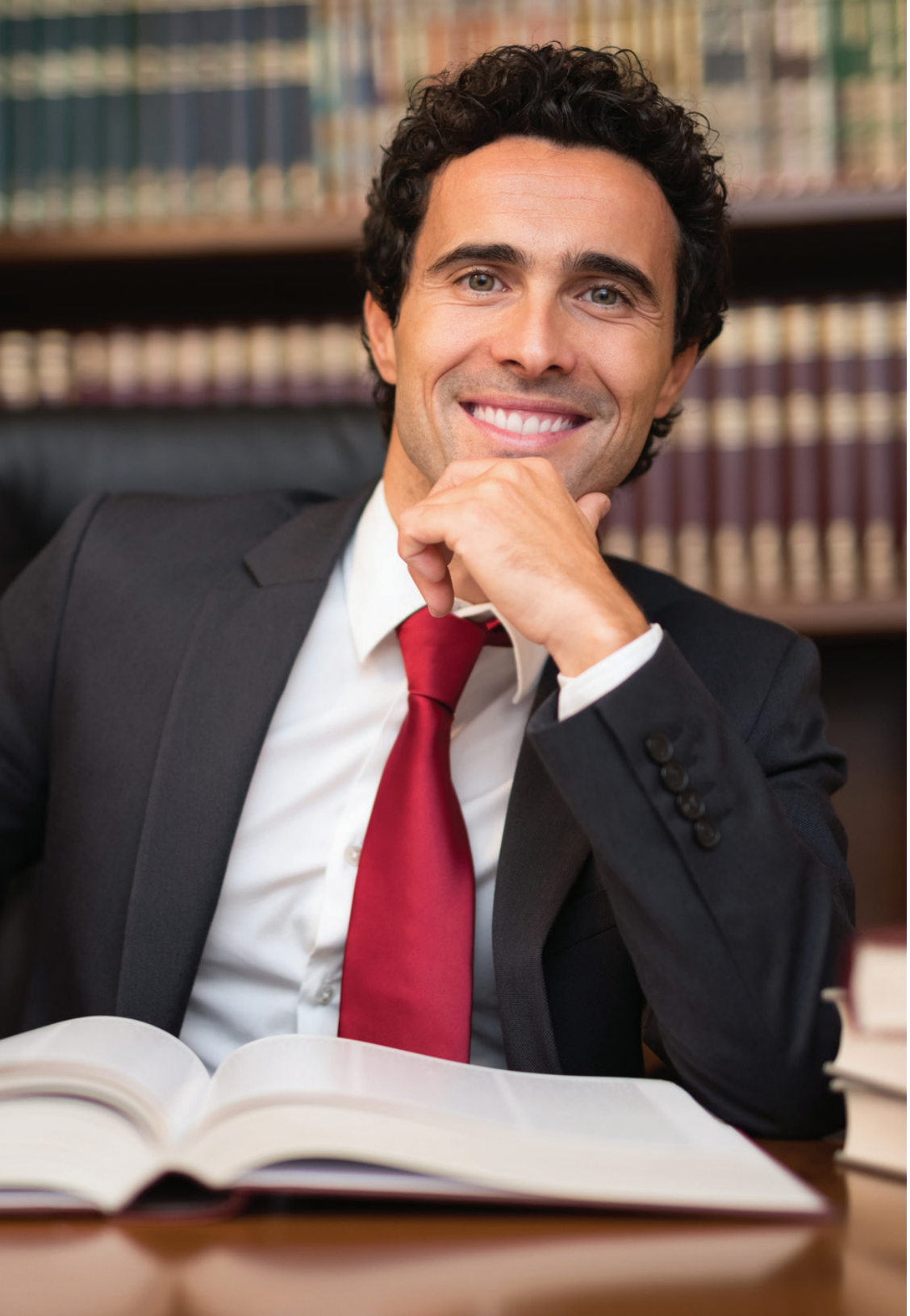

ADA(AA) & FMLA 101: A Primer on Employment Law for Employment Testing Providers

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Healthcare Professionals performing Employment Tests are not expected to possess the degree of knowledge comparable to an Employment Law Attorney or Human Resources professional, but he or she needs to understand the basic provisions of The Americans with Disabilities Act (ADA), The Amendments Act (ADAAA), and The Family Medical Leave Act (FMLA). Even though The Provider is a ***service*** provider and not the individual tasked with writing the employer's hiring or return to work policies, The Provider needs to understand the legal landscape (Federal and State) over which he or she is providing this service. Otherwise, he or she can expose their employer-client or themselves to liability.

What follows are the ***basic provisions*** of the ADA(AA) and FMLA laws offered at the depth of knowledge important for the employment test provider. This is ***not to be construed as legal advice*** but a general set of guidelines to assist the employment test provider in implementing a legally compliant testing program. The employment test provider should always encourage an employer client to consult legal counsel to assist them in determining or defending issues relative to hiring, termination, or the ADA.

Like any other skill area, the provider's fund of knowledge with regard to employment law and its frequent changes should be supplemented with continuing education, and continued contact with the Human Resources and Legal professionals.

The Americans with Disabilities Act and the Amendments Act

Much of this information was taken from: Virginia Commonwealth University National Institute on Disability and Rehabilitation Research (#H133A060087-01) and from 30 years of experience in this arena.

The original Americans with Disabilities Act (ADA) was signed into law by George Herbert Walker Bush in 1991. The original intent was ***"to protect qualified individuals with a "disability" from being prevented from being hired for jobs so long as they could perform those jobs with or without reasonable accommodation"***. Since that time, several U.S. Supreme Court rulings have been made that have been favorable to business concerning the definition of "disability" for purposes of ADA coverage. President George W. Bush signed into law a measure that amended the original ADA, The ADA Amendments Act of 2008 (ADAAA) and this became effective on January 1, 2009. This law will reverse several U.S. Supreme Court rulings in the years to follow.

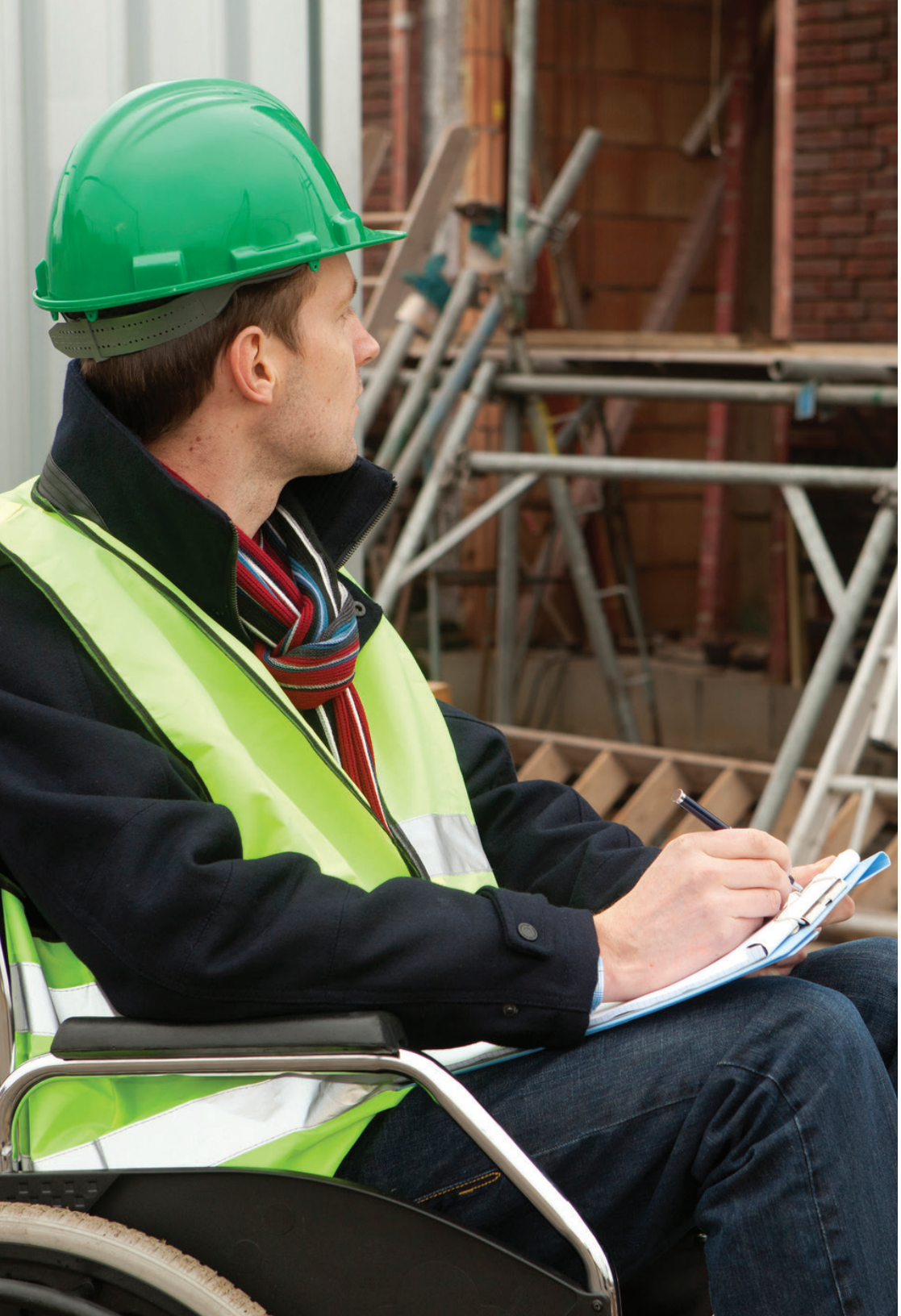
- ***The main change*** is that the definition of "disability" is broadened in favor of individuals under the ADA.
- Another change is a provision that substantially limits one major life activity from limiting other major life activities to be considered a "disability".
- An impairment that is episodic or in remission will still be considered a "disability" under the new law if it would substantially limit a major life activity when active (Employment Law Authority, Nov/Dec, 2008).

This new Act will affect some of the existing ADA provisions outlined in the following text. The extent to which these provisions will be affected will be through new case law relative to the changes in the Act. The employment test provider and employer will need to watch for these new case law decisions. This may not happen for years.

From an employment test provider's standpoint, the most important provisions of the ADA will be discussed. They are taken from the EEOC Technical Assistance Manual (TAM): Title I of the Americans with Disabilities Act. Items from relevant chapters of the TAM will be outlined in this chapter, ***but the employment test provider is encouraged to read the entire TAM I and it's addendums before beginning to provide this service***.

It is also recommended that the employment test provider meet and discuss the specifics of their program with his/her own legal counsel prior to implementing the ET service program for employer clients. TAM is available through the U.S. Government Printing Office or at many sites online. Key sections are:

- Definition of a disability
  (Chapter 2, TAM I)
- Identifying Essential Functions of a job via job analysis
  (Chapter 2, TAM I)
- Reasonable Accommodation
  (Chapter 3, TAM I)
- Establishing nondiscriminatory (job-related, physical) qualification standards and selection criteria, and direct threat
  (Chapter 4, TAM I)
- Post-offer Medical Examinations and Fit-For-Duty Testing
  (Chapter 6, TAM I)



Disability

The ADA has a three-part definition of "disability." This definition, based on the definition under the Rehabilitation Act, reflects the specific types of discrimination experienced by people with disabilities. It is not the same as the definition of disability in other laws, such as state workers' compensation laws or other federal or state laws that provide benefits for people with disabilities and disabled veterans.

Under the ADA, an ***"individual with a disability"*** is a person who:

1. has a physical or mental impairment that substantially limits one or more major life activities;
2. has a record of such an impairment; or
3. is regarded as having such an impairment.

Impairment

Physical "impairment" is defined by the ADA as:

"Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine."

Mental "impairment" is defined by the ADA as:

"[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."

Neither the statute nor the regulations list all diseases or conditions that make up "physical or mental impairments," because it would be impossible to provide a comprehensive list, given the variety of possible impairments.

“Substantially Limits v. “Significantly Restricted

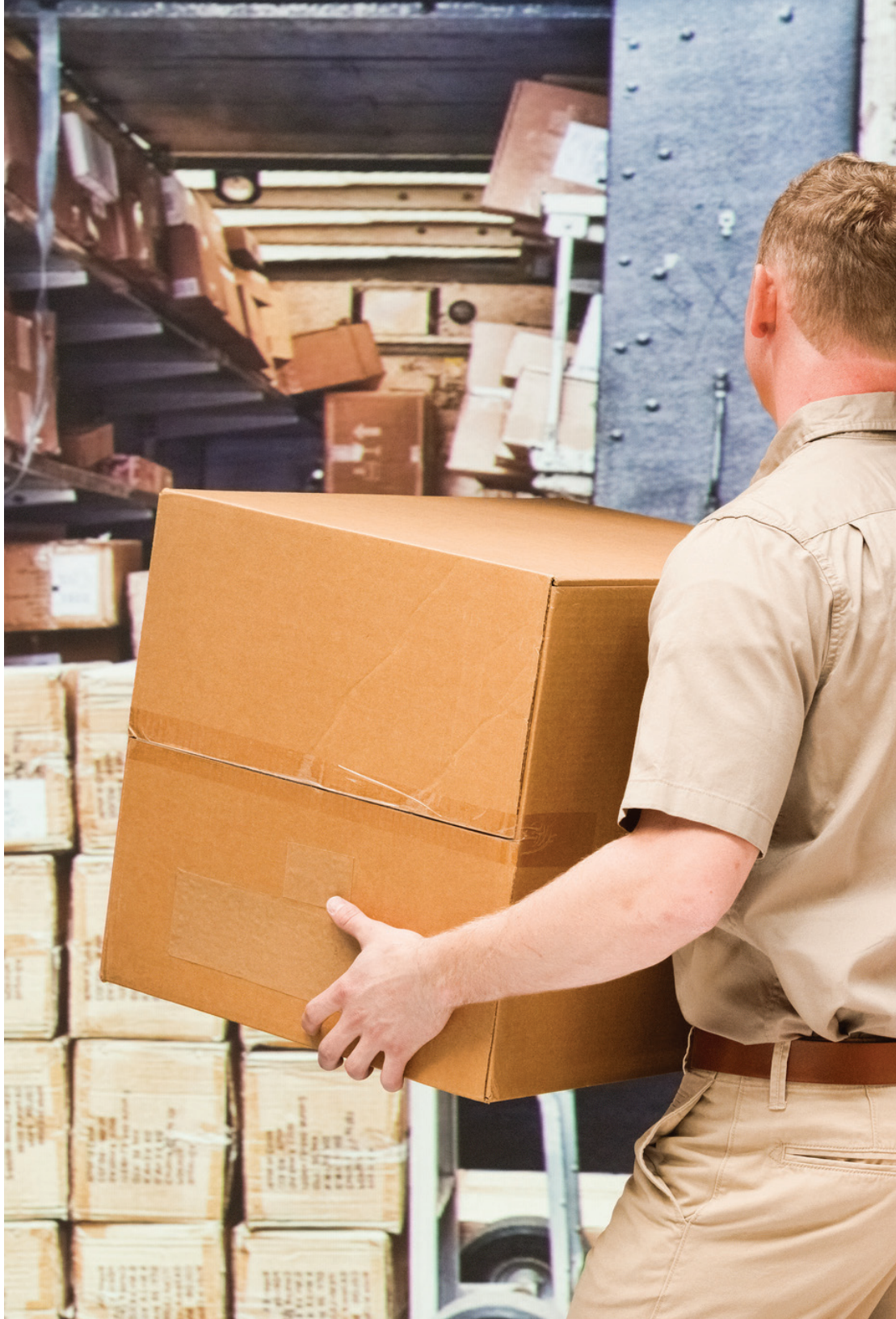
The Act directed the Equal Employment Opportunity Commission (EEOC) to revise current regulations that define “substantially limits” as “significantly restricted.” The new definition is to have a meaning that is consistent with the ADAAA.

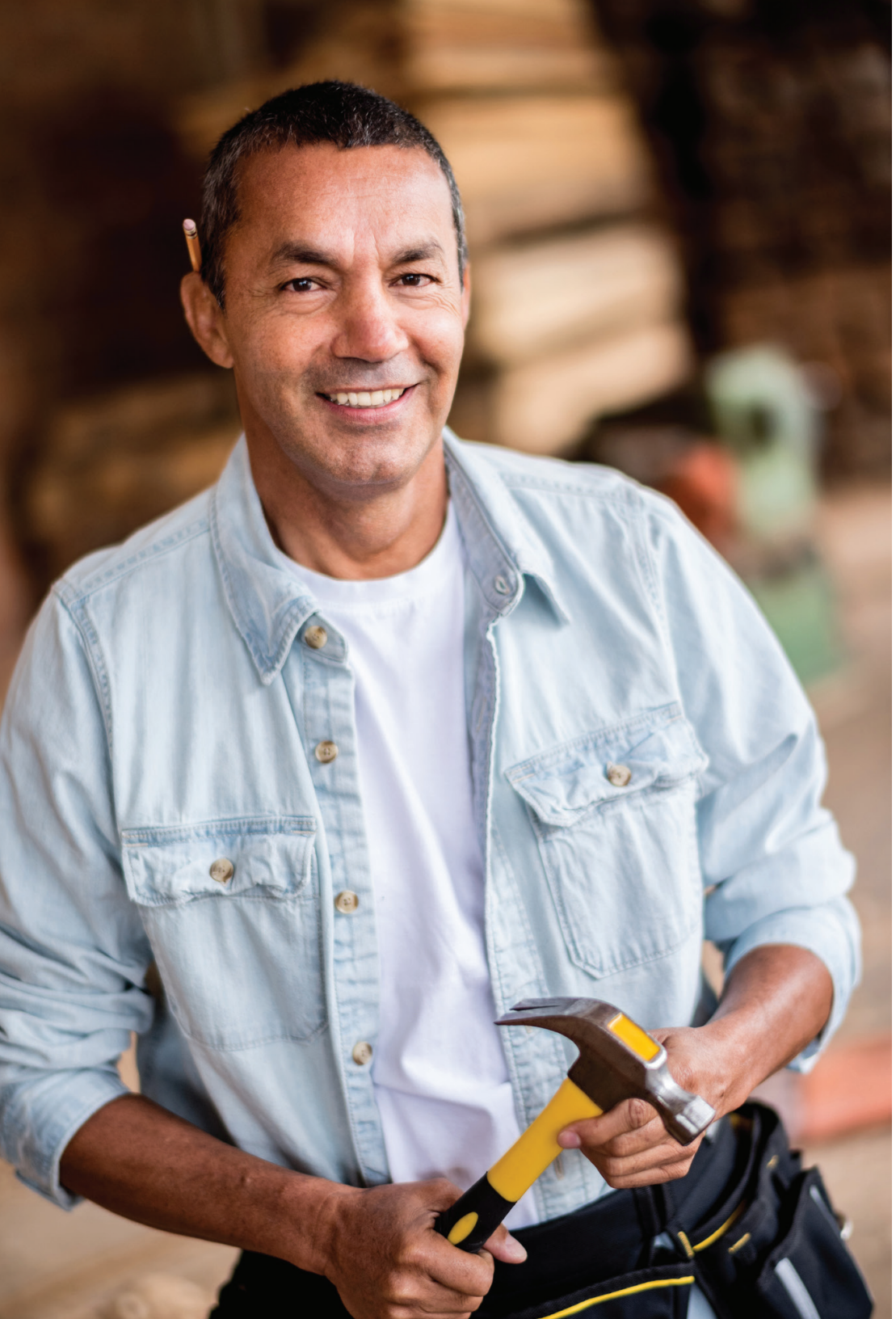
The impairment “must be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA, and should not require extensive analysis.” Major life activities now include “***major bodily functions***”, mitigating measures such as medications and devices that people use to reduce or eliminate the effects of an impairment (i.e. prosthesis, hearing aids, etc.) are not to be considered when determining whether someone has a disability; and impairments that are episodic or in remission such as epilepsy, cancer, and many kinds of psychiatric impairments, are disabilities if they would “substantially limit” major life activities when active.

“Major Life Activities v. “Major Bodily Functions

“Major Life Activities” are activities that an average person can perform with little or no difficulty but now includes, but is not limited to “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communication and working.”

“Major Bodily Functions” include, but are not limited to “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions.”





A Record of Such Impairment

This part of the definition protects people who have a ***record or history*** of a disability from discrimination, ***whether or not they currently are substantially limited*** in a major life activity. It protects people with a history of cancer, heart disease, or other debilitating illness, whose illnesses are either cured, controlled or in remission. It also protects people with a history of mental illness. This part of the definition also protects people who may have been misclassified or misdiagnosed as having a disability.

Is Regarded As Having Such Impairment

1. The individual may have an impairment that is not substantially limiting but is ***perceived by the covered entity*** as constituting a substantially limiting impairment. The individual need not show s/he has a substantial limitation in a major life activity – only that s/he had impairment (perceived or actual).

2. The individual may have an impairment that is only substantially limiting because of the ***attitudes of others*** toward the impairment.

3. The individual may have no impairment but may be ***regarded by the employer*** or other covered entity as having a limiting impairment.

This part of the definition protects people who are "perceived" as having disabilities from discriminatory decisions based on ***stereotypes, fears, or misconceptions***." This does not apply to impairments that are transitory (6 months or less) or minor. The employer is not obligated to provide a "reasonable accommodation" to individuals who are "regarded as disabled."

Otherwise Qualified Individual with a Disability

The regulations define an "***otherwise qualified individual with a disability***" as a person with a disability who, "satisfies the requisite work, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation can perform the essential functions of the job."

When determining if an individual is "***otherwise qualified***" under ADA:

- Determine if the individual ***meets necessary prerequisites*** for the job, such as: education, skills, experience, licenses, training certificates, job-related requirements, such as good judgment or ability to work with other people

If an individual meets all job prerequisites except those that s/he cannot meet because of a disability, and alleges discrimination because s/he is "otherwise qualified" for a job, the employer has to show that the requirement that screened out this person is "job related/consistent with business necessity."

- Determine if the individual ***can perform essential functions of the job***, with or without reasonable accommodation.
  - Identify the "essential functions of the job"
  - Consider whether the person with a disability can perform these functions, unaided or with a "reasonable accommodation."

The ADA requires an employer to ***focus on the essential functions*** of a job to determine whether a person with a disability is qualified. This does not include marginal functions.

If an individual with a disability who is otherwise qualified cannot perform one or more essential job functions because of his or her disability, ***the employer*** must consider whether there are reasonable accommodations that would enable the person to perform these functions.

Essential Functions

The initial step in performing a physical demands analysis is to identify a job's essential functions. The TAM lists several reasons why a function could be considered essential:

- The position exists to perform the function
- There are a limited number of employees available to perform the function, or among whom the function can be distributed.
- The function is highly specialized and the person hired in the position is hired for special expertise or ability to perform it.

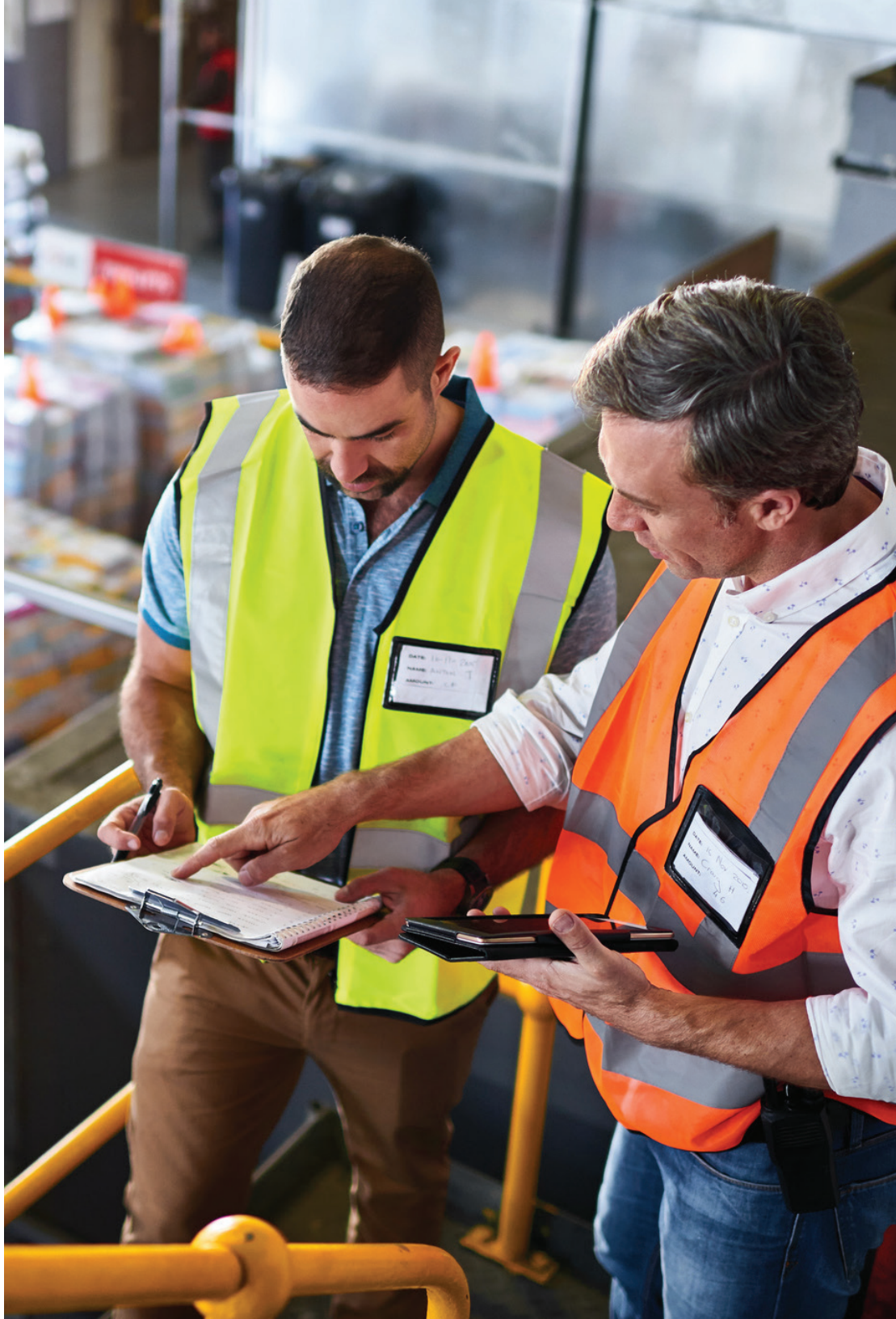
Some rules of evidence to determine if a function is essential are:

- the employer's judgment,
- a written job description,
- the amount of time spent performing the function,
- the terms of a collective bargaining agreement,
- work experience of people who've performed a job in the past
- work experience of people who currently perform similar jobs

Job Analysis & Essential Functions of a Job

If an employer is going to set standards for hiring and return-to-work, then those standards must be established by way of a job analysis. According to Ghorpade (1988), ***"job analysis describes knowledge, skills, abilities, and other characteristics necessary for job performance".*** To the employer, physician, and attorney, job analysis should identify and describe:

- what the workers do,
- how the work is done, and
- the results of the work.



Reasonable Accommodation

A Reasonable Accommodation is any ***modification or adjustment to a job***, an employment practice, or the work environment that makes it possible for an individual with a disability to perform the essential functions of a job. This may include modifications to make facilities or areas accessible or tools or equipment to enable an individual to perform essential functions.

The statute and EEOC's regulations provide examples of common types of accommodation that an employer may be required to provide. The employer may be required to provide an accommodation so long as accommodation doesn't impact other employees. These include:

- making facilities readily accessible to and usable by an individual,
- restructuring a job by reallocating or redistributing marginal functions,
- altering when or how an essential job function is performed,
- part-time or modified work schedules,
- obtaining or modifying equipment or devices,
- modifying examinations, training materials or policies,
- providing qualified readers and interpreters,
- reassignment to a vacant position,
- permitting use of accrued paid leave or unpaid leave for treatment,
- providing reserved parking for a person with a mobility impairment

Information about reasonable accommodation obligation can be included in job application forms, job vacancy notices, and in personnel manuals, and may be communicated orally.

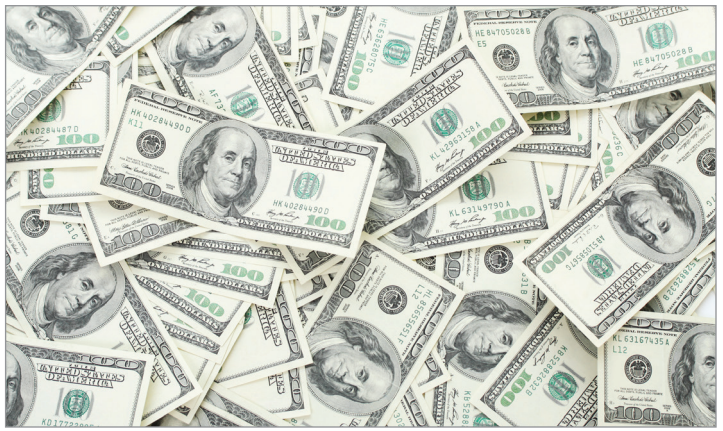
The EEOC has instructed, "In general, it is the responsibility of the applicant or employee with a disability to inform the employer that an accommodation is needed to participate in the application process, to perform the essential job functions or to receive equal benefits and privileges of employment. An employer is not required to provide an accommodation if unaware of need."

Undue Hardship

An employer cannot deny an employment opportunity to a qualified applicant or current employee because of the need to provide reasonable accommodation unless it would cause an undue hardship or adversely impact another employee. If a particular accommodation would impose an undue hardship, the employer must consider whether there are alternative accommodations that would not impose such hardship. An undue hardship is an action that requires ***"significant difficulty or expense"*** in relation to the size of the employer, the resources available, and the nature of the operation.

Accordingly, whether a particular accommodation will impose an undue hardship must always be determined on a case-by-case basis. In general, a larger employer would be expected to make accommodations requiring greater effort or expense than would be required of a smaller employer. The concept includes any action that:

- is unduly costly, extensive, substantial, disruptive,
- would alter the nature or operation of the business,
- would adversely impact another employee.



Establishing Selection Criteria

ALERT: PROVIDERS – THIS IS WHERE YOU COME IN…

The ADA does not prohibit an employer from establishing ***job-related qualification standards***, including education, skills, work experience, and ***physical***/mental standards ***necessary for job performance***, health/safety.

The Act does not interfere with an employer's authority to establish appropriate job qualifications to hire people who can perform jobs effectively and safely, and to hire the best qualified person for a job. ADA requirements are designed to assure that people with disabilities are not excluded from jobs that they can perform.

ADA requirements apply to all selection standards/procedures, including:

- education and work experience requirements,
- ***physical***, mental, and safety ***requirements***,
- paper and pencil tests,
- ***physical*** or psychological ***tests***, interview questions

Qualification standards or selection criteria that screen out or tend to screen out an individual with a disability on the basis of disability ***must be job- related and consistent with business necessity*** – a legitimate measure for the specific job it is being used for that reflects the essential functions of the job. This is accomplished ***via job analysis***.

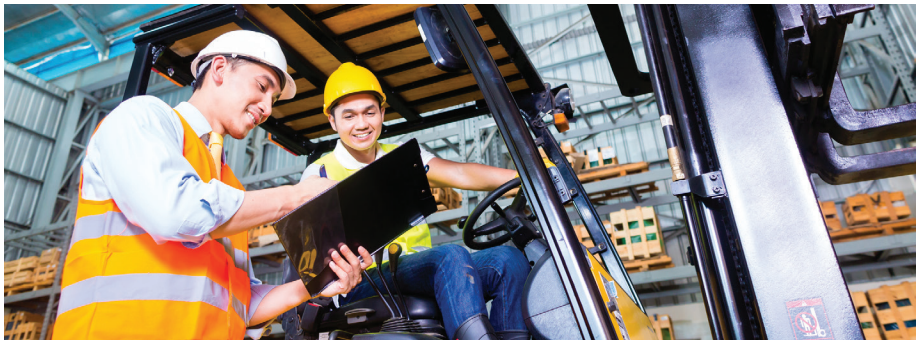
An employer is not required to lower existing production standards applicable to the quality or quantity of work for a given job in considering qualifications of an individual with a disability, if these standards are uniformly applied to all applicants and employees in that job.

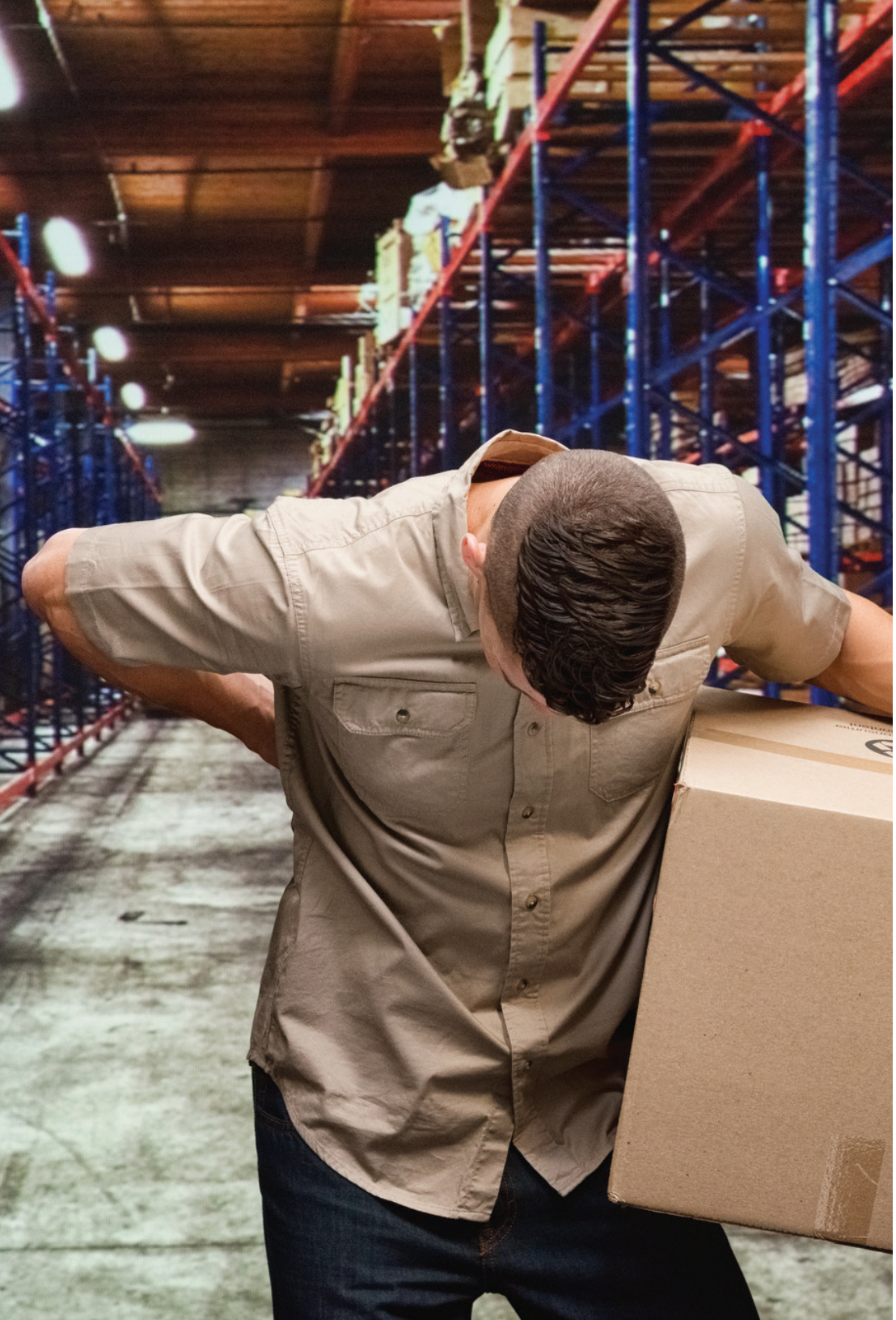
An employer may establish physical or mental qualifications that are necessary to perform specific jobs (for example, jobs in the transportation and construction industries; police and fire fighter jobs; security guard jobs) or to protect health and safety.

"However, as with other job qualification standards, if a physical or mental qualification standard screens out an individual with a disability or a class of individuals with disabilities, the employer must be prepared to show that the standard is: job-related and consistent with business necessity."

Even if a physical or mental qualification standard is job-related and necessary for a business, if it is applied to exclude an otherwise qualified individual with a disability, the employer must consider whether there is a reasonable accommodation that would enable this person to meet the standard. ***"The employer does not have to consider such accommodations in establishing a standard, but only when an otherwise qualified person with a disability requests an accommodation."***

For example: An employer has a forklift operator job. The essential function of the job is mechanical operation of the forklift machinery. The job has a physical requirement of ability to lift a 70 pound weight, because the operator must be able to remove and replace the 70 pound battery which powers the forklift. This standard is job-related. However, it would be a reasonable accommodation to eliminate this standard for an otherwise qualified forklift operator who could not lift a 70 pound weight because of a disability, ***if other operators or employees are available*** to help this person remove/replace the battery. This should be identified in the job analysis or description for this job.





Direct Threat

The ADA recognizes legitimate employer concerns and the requirements of other laws for health and safety in the workplace. ***An employer is not required to hire or retain an individual who would pose a "direct threat" to health or safety.*** But the ADA requires an ***objective assessment*** of a particular individual's current ability to perform a job safely and effectively.

To meet the defense, employers must be prepared to:

- show significant risk of substantial harm
- identify the specific risk
- show it is a current risk, not one that is speculative or remote
- the assessment of risk must be based on ***objective medical*** or other factual evidence regarding a particular individual;
- even if a genuine significant risk of substantial harm exists, the employer must consider whether the risk can be eliminated or reduced below the level of a "direct threat" by reasonable accommodation.

Pre-Offer v. Post-Offer Employment Tests

Relative to the employment test provider, there are 2 types of employment tests that may be used to assess a new-hire candidate's ability to perform the essential functions of a job. These are Pre-Employment, Pre-Offer or "Agility Tests" and Pre-Employment, Post-Offer or "Medical Examinations".

Pre-Employment, Pre-Offer or "Agility Tests" are performed before a job is offered to an applicant. If an employer is using an Agility Test for a particular job, they must be administered to ***all applicants*** in that particular job classification. The employer does not have to retroactively test all employees in that position. Examples of these tests are obstacle courses for Police and Firefighters or typing tests for Transcriptionists. ***No medical testing*** can be included in this type of employment test, therefore they have limited utility.

Pre-Employment, Post-Offer or "Medical Examinations" can include medical tests. These are performed ***after a new-hire candidate is given a conditional job offer, but before the candidate starts work.*** That condition is demonstrating he/she is capable of performing a test of the job's essential functions. If an employer is using a Post-Offer Medical Examination for a particular job, they must be administered to ***all new-hire candidates for that particular job classification*** per an established policy. The employer does not have to retroactively test all employees in that position.

Under the ADA, "medical" documentation concerning the qualifications of an individual with a disability, or whether this individual constitutes a "direct threat" to health and safety, does not mean only information from medical doctors. It may be necessary to obtain information from other sources, such as rehabilitation experts, occupational or physical therapists, psychologists, and others knowledgeable about the individual and the disability concerned. It also may be more relevant to look at the individual's previous work history in making such determinations than to rely on a physician examination.

Some examples of post-offer decisions that might be job-related and justified by business necessity, and/or where no reasonable accommodation was possible:

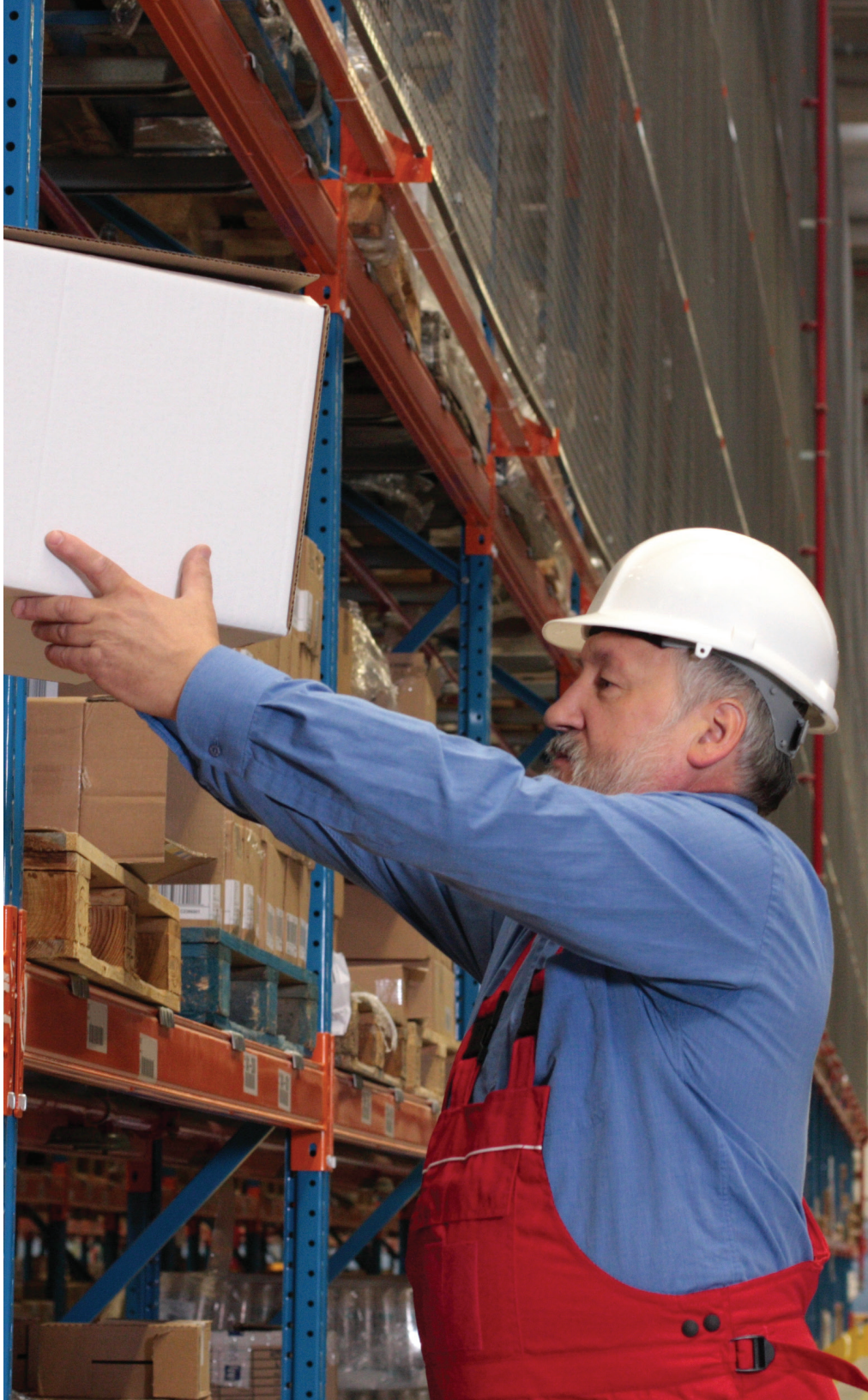
- A medical history reveals that the individual has suffered ***serious multiple re- injuries to his back doing similar work***, which have progressively worsened the back condition. Employing this person in this job would incur significant risk that he would further re-injure himself.
- A workers' compensation history indicates ***multiple claims in recent years*** which have been denied. An employer might have a legitimate business reason to believe that the person has submitted fraudulent claims. Withdrawing a job offer for this reason would not violate the ADA, because the decision is not based on disability.
- A medical examination reveals ***an impairment that would require the individual's frequent lengthy absence from work*** for medical treatment, and the job requires daily availability for work and regular attendance. In this situation, the individual is not available to perform the essential functions of the job, and no accommodation is possible.

Incumbent Fit-For-Duty Evaluations use the same set of qualification standards for existing employees. If used, they should be used consistently per an established policy. Job-related circumstances in which an employer may use Fit-For-Duty Examinations include:

- When a working employee is ***having difficulty performing his/her job effectively***.
- Existing employee whom has ***returned to work after FMLA*** and demonstrating or complaining of difficulty performing the job.
- When an employee is ***off work for an extended period of time*** due to a work-related injury or illness.

In the case of a FMLA return-to-work, the employer must allow the employee to return to work once released by their treating physician. An employer or employer's physician may provide a detailed job description and request a conference with the treating physician to discuss whether the employee can indeed perform the essential job functions.

An employer cannot force the employee whom has been medically certified safe to perform the job's essential functions to undergo a FFD Evaluation unless the employee's post-leave behavior justifies it (Albert v. Runyon 1998, Routes v. Henderson 1999, Underhill v. Willamina 1999). Since we are on the subject, let's take a more detailed look into FMLA.



The Family and Medical Leave Act

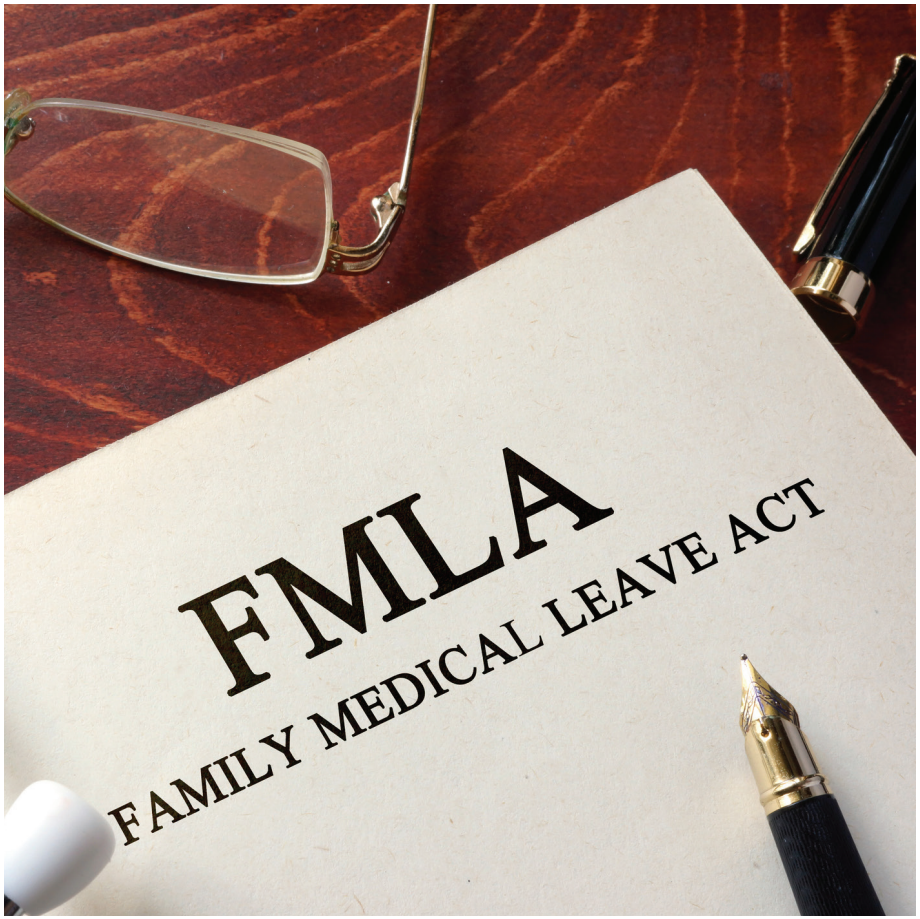
This allows existing employees of employers with 50 or more employees with 12 months of employment (or 1,250 hours worked during the previous 12 months) to take unpaid time off work for 12 weeks per year for any of the following reasons:

- Birth of an employee's child or to care for the newborn.
- Placement with the employee of a child for adoption or foster care.
- Care for a child, spouse, or parent with a serious health condition.
- A health condition that makes the employee unable to perform his or her job (involving inpatient care or continuing treatment).

The employee must provide the employer with at least 30 days advance notice before FMLA leave is to begin if the need is foreseeable, or as soon as practicable. The employer should give notice of a requirement for medical leave certification before leave starts if possible.

An employer may require an employee returning from FMLA to present a "fitness for duty certificate." This certificate must be signed by a health care provider and certifies that an employee is healthy enough to resume work. There are specific guidelines in the statute regarding required components to this certification. The Employer may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job. Because the ADA prohibits an employer from making medical inquiries to employees unless they are job-related and consistent with business necessity, an employer may seek fitness for duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. Further, "full duty" release requirements cannot be imposed under the ADA if the employee can otherwise perform the essential functions of the job with reasonable accommodation.

After the employee submits a complete certification signed by the healthcare provider, the employer may not request additional information from the employee's health care provider. An employer may provide the healthcare provider with a job description outlining the physical demands of the job and may include a request for consideration to perform a Fit-For-Duty Test, but the employee must consent to this procedure. Under the new 2009 regulations, an employer's representative contacting the employee's health care provider must be a health care provider, human resources professional, a leave administrator, or a management official, but in no case may it be the employee's direct supervisor.



Convergence and Divergence of Laws

Under workers' compensation statutes, an employer is permitted to require an employee receiving disability payments to submit to an examination by a physician of the employer's choosing.

Under ADA(AA), this examination would be permissible because it would be job-related and consistent with business necessity given its limited scope and that the employee is claiming inability to work – but the examination must be confined to the particular injury for which the disability benefits are being sought. ***In both of these cases,*** a Fit-For-Duty Test can be performed as an automatic part of the return to work process.

Not so with FMLA as we have previously discussed.

So, the laws can converge or diverge. Fit-For-Duty Tests provided by the employment test provider can be a part of the ADA(AA) or Workers' Compensation return to work process automatically. With FMLA, it's a bit more complicated.

Other Reasons Fit-For-Duty Tests May Be Performed

- When an existing employee requests an accommodation on the basis of disability.
- When medical examinations, screening and monitoring is required by other laws: DOT for interstate bus and truck drivers, railroad engineers, pilots, etc., OSHA or MSHA (OSHA for mines)
- Part of a voluntary wellness and health screening program.

References & Links

The Americans with Disabilities Act Technical Assistance Manual Title I:
http://askjan.org/links/ADAtam1app.html

Addendum to the ADA TAM I:
https://www.eeoc.gov/policy/docs/adamanual_add.html

For a full text of the ADAAA:
https://www.eeoc.gov/laws/statutes/adaaa_info.cfm

To stay informed on new case law:
https://www.eeoc.gov/

To learn more about FMLA:
https://www.eeoc.gov/policy/docs/fmlaada.html