MEMORANDUM

State of Alaska
Department of Law

TO: The Honorable Robert Poe, Jr., Commissioner
Department of Administration

DATE: December 2, 1999

FILE NO: 661-00-0212

TEL. NO: 269-5169

SUBJECT: Reassignment as a Reasonable Accommodation under the Americans with Disabilities Act

FROM: David T. Jones
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Governmental Affairs - Anchorage

You have asked whether the state should give force of law to the United States Equal Employment Opportunity Commission's (EEOC) March 2, 1999, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act*. The short answer to your question is no; enforcement guidance does not constitute law. However, the enforcement guidance does provide clarifying interpretation of the requirements of the Americans with Disabilities Act (ADA) from the federal agency charged with enforcing the ADA. Thus, at the very least, the enforcement guidance offers insight into the enforcement posture that the EEOC is likely to adopt in seeking employers' compliance with the ADA. Furthermore, courts frequently look to the EEOC's enforcement guidance in interpreting the ADA. Accordingly, while the enforcement guidance is not legally binding on the state, applying the EEOC's enforcement guidance to determine the state's accommodation duties is highly likely to avoid violations of the ADA.

You have also asked how the state should integrate the preferential noncompetitive "reassignment" appointment provisions of the EEOC's enforcement guidance with existing statutes, regulations, or collective bargaining agreements that currently provide preferential noncompetitive appointment rights (e.g., pregnancy transfer rights under AS 23.10.510, injured worker reemployment rights under AS 39.25.158, and layoff recall rights under the Personnel Rules and labor agreements). Unfortunately, there is not a simple answer to this question. The state's obligations under the ADA require it to make "reasonable" accommodations that do not create an "undue hardship." Whether conflicting

obligations under other statutory or contractual provisions make reassignment under the ADA unreasonable or an undue hardship in a particular case will depend on the circumstances of that case. However, where reassignment under the ADA would directly and unavoidably conflict with obligations under other statutes, regulations, or contracts, reassignment may not be a reasonable accommodation.

The Statutory Basis for Accommodation by Reassignment

The duty to consider reassignment to a vacant position as a possible accommodation is rooted in the provisions of the ADA itself. The ADA prohibits covered employers from discriminating against "a qualified individual with a disability because of the disability of such individual in regard to . . . terms, conditions, and privileges of employment."[1] The ADA defines "discriminate" to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity."[2] In defining "reasonable accommodation," the ADA

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[1] 42 U.S.C.A. § 12112(a) (1995).

[2] 42 U.S.C.A. § 12112(b)(5)(A) (1995). The ADA defines "undue hardship" as follows:

> **(10) Undue hardship**
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> **(A) In general**
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> The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).
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> **(B) Factors to be considered**
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> In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include --
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> **(i)** the nature and cost of the accommodation needed under this chapter;
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> **(ii)** the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the

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specifically provides that it may include "reassignment to a vacant position."[3]

Congressional committee reports concerning the ADA shed some light on Congress' intent. For example, the House Education and Labor Committee Report (May 15, 1990)[4] explains that "the decision as to what reasonable accommodation is appropriate is one which must be determined based on the particular facts of the individual case."[5] With regard to reassignment as a reasonable accommodation, the report states,

> Reasonable accommodation may also include reassignment to a vacant position. If an employee, because of disability, can no longer perform the essential functions of the job that she or he has held, a transfer to another vacant job for which the person is qualified may prevent the employee from being out of work and employer from losing a valuable worker. Efforts should be made, however, to accommodate an employee in the position that he or she was hired to fill before

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> impact otherwise of such accommodation upon the operation of the facility;
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> **(iii)** the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
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> **(iv)** the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

42 U.S.C.A. § 12111(10) (1995).

[3] 42 U.S.C.A. § 12111(9)(B) (1995).

[4] Reprinted in Edmund D. Cooke, Jr. and Peter S. Gray, *The Disability Law Rptr. Serv.* at App. G (1992).

[5] *Disability Law Rptr. Serv.* at G-62.

> reassignment is considered. The Committee also wishes to make clear the reassignment need only be to a vacant position -- "bumping" another employee out of a position to create a vacancy is not required.
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> The section 504 regulations provide that "a recipient's obligation to comply with this subpart [employment] is not affected by any inconsistent term of any collective bargaining agreement to which it is a party." 45 CFR 84.11(c). The policy also applies to the ADA. Thus, an employer cannot use a collective bargaining agreement to accomplish what it otherwise would be prohibited from doing under this Act. For example, a collective bargaining agreement that contained physical criteria which caused a disparate impact on individuals with disabilities and were not job-related and consistent with business necessity could be challenged under this Act.
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> The collective bargaining agreement could be relevant, however, in determining whether a given accommodation is reasonable. For example, if a collective bargaining agreement reserves certain jobs for employees with a given amount of seniority, it may be considered as a factor in determining whether it is a reasonable accommodation to assign an employee with a disability without seniority to the job. However, the agreement would not be determinative on the issue.
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> . . .
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> Conflicts between provisions of a collective bargaining agreement and an employer's duty to provide reasonable accommodations may be avoided by ensuring that agreements negotiated after the effective date of this title contain a provision permitting the employer to take all actions necessary to comply with this legislation.[6]

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[6] *Id.* at G-63. The Senate Labor and Human Resources Committee Report (Aug. 30, 1989) contains, in substantial part, identical language. *Id.* at I-31 to I-32. The House Education and Labor Committee Report also explains that "[t]he weight given to each factor in making the determination as to whether a reasonable accommodation constitutes an 'undue hardship' will vary depending on the facts of a particular situation and turns on the nature and cost of the accommodation in relation to the employer's resources and operations." *Id.* at G-67. Similarly, the House Judiciary Committee Report (May 15, 1990) explains that "the definition of 'undue hardship' in the ADA is intended to convey a significant, as opposed to a *de minimis* or insignificant, obligation on the part of

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Clearly, then, Congress intended that employers consider reassignment to a vacant position as a possible accommodation of last resort and envisioned a case-by-case determination of whether that particular accommodation is available and reasonable.

The Role of the EEOC's Enforcement Guidance

Based on the statutory framework that Congress provided, the EEOC has fleshed out the ADA with interpretive advice in several forms. Congress gave the EEOC the authority to provide such guidance by giving the EEOC responsibility for enforcing Title I (the employment provisions) of the ADA and the express authority to adopt regulations interpreting Title I.[7] In addition to adopting regulations, the EEOC has issued interpretive guidance (as an appendix to the regulations), a technical assistance manual, and enforcement guidance on various aspects of the ADA.

While the EEOC's enforcement guidance interpreting the ADA is not binding law, it does "'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'"[8] Consequently, absent a controlling court decision directly addressing the particular circumstances that may arise, the EEOC's enforcement guidance provides useful assistance in determining the state's obligations under

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employers." *Disability Law Rptr. Serv.* at F-19.

[7] 42 U.S.C.A. §§ 12116, 12117(a) (1995).

[8] *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1165-66 n.5 (10th Cir. 1999) (en banc) (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65, 106 S. Ct. 2399, 2404 (1986) (where Court addressed EEOC guidelines on sexual harassment)); *see also McAlindin v. County of San Diego*, 192 F.3d 1226, 1233 n.6 (9th Cir. 1999) (applying EEOC enforcement guidance on the ADA and psychiatric disabilities; "we continue to look to the EEOC regulations and interpretive commentary for guidance"); *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1301 (D.C. Cir. 1998) (also quoting *Meritor* and noting that "we are understandably reluctant to adopt a reading of the ADA that is so at odds with those guidelines"); *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 693 n.7 (7th Cir. 1998) ("The interpretation of the ADA by the enforcing agency is entitled to deference."); *Olson v. Dubuque Community Sch. Dist.*, 137 F.3d 609, 612 (8th Cir. 1998) (EEOC's interpretation of ADA in enforcement guidance entitled to deference); *Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667, 673 (1st Cir. 1995) (EEOC's enforcement guidance "is not binding law, but as a detailed analysis of the relevant ADA provisions, it aids our interpretation of the statute").

the ADA. The state can reasonably expect that courts will, at the very least, consider the EEOC's enforcement guidance in determining whether the state has fulfilled its obligations under the Act. Furthermore, the Alaska State Commission for Human Rights has, by regulation, indicated that it "considers instructive, but not binding, relevant federal case law, statutes, regulations, and guidelines if they do not limit the commission's obligation to construe AS 18.80 liberally."[9] Thus, the guidance might also influence the commission's or a court's interpretation of the state's obligations under Alaska's anti-discrimination laws.

Although the ADA took effect more than seven years ago, there are many issues involving employers' obligations under the Act that remain unresolved. While various courts have interpreted the Act's requirements, their interpretations have not always been consistent with the interpretations that other courts have adopted. Consequently, employers may not always be certain of the nature and extent of their obligations under the ADA.

Until Congress or the courts resolve these issues, the EEOC's enforcement guidance provides assistance to employers that seek to fulfill their obligations under the ADA and avoid liability. Although it is certainly possible that courts may later conclude that some aspects of the EEOC's guidance overstate employers' obligations under the Act, abiding by the guidance is very likely to reduce substantially employers' exposure to liability under the ADA. Therefore, in answer to your first question, the EEOC's enforcement guidance does not have the force of law, but does provide interpretive assistance.

The Effect of Conflicting Obligations

Your second question concerns how managers might apply the guidance on reassignment to vacant positions in the face of conflicting provisions of statutes, regulations, or collective bargaining agreements. Your question pertains particularly to the answers to questions 27 and 29[10] in the EEOC's enforcement guidance, which indicate that (1) an employer's duty to offer reassignment to a vacant position to an employee with a disability is not limited to vacancies within the employee's office, branch, agency, department, facility, or personnel system; and (2) the duty to reassign as a reasonable accommodation does not

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9 6 AAC 30.910(b).

10 The enforcement guidance has, in substantial part, a question-and-answer format.

mean that an employee gets to compete for the vacant position, but rather that the employee *gets* the position.[11]

Whenever there are competing obligations arising from other laws, regulations, or contracts, those competing obligations may affect the reasonableness of reassigning an employee to a vacant position. Courts have recognized that there may be no duty to reassign under the ADA if the reassignment would violate, for example, a legitimate seniority policy.[12] Thus, determining whether the ADA requires reassignment to a vacant position in any particular case involves analysis of the specific circumstances of that case to determine whether reassignment is reasonable under those circumstances or constitutes an "undue hardship." As the Tenth Circuit Court of Appeals has stated,

> a process of consideration is necessarily a component of the act of reassignment itself. Only through consideration in a reasonably interactive way can it be determined whether an employee desires reassignment; whether there are vacant positions available at an equivalent or lesser position; whether such positions are truly vacant; whether reassignment would interfere with the rights of other employees or important business policies of the company, etc. The right to reassignment after all is not absolute. It requires deliberative consideration, and depending upon many factors, may or may not rise to a right to reassign. On the other hand, after considering all of the

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[11] EEOC, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act* (Mar. 2, 1999) (found at http://www.eeoc.gov/docs/accommodation.html)

[12] *See Barnett v. U.S. Air, Inc.*, 1999 WL 976709 at *10-12 (9th Cir. Oct. 28, 1999) and cases cited therein; *Smith v. Midland Brake, Inc.*, 180 F.3d at 1170, 1175-76 ("if other employees within the company have a legitimate contractual or seniority right to a vacant position, it is not considered vacant for reassignment to the disabled employee"; "an existing position would not truly be vacant, even though it is not presently filled by an existing employee, if under a collective bargaining agreement other employees have a vested priority right to such vacant positions"; "Because reasonableness is our guide, there may be other important employment policies besides protecting rights guaranteed under a collective bargaining agreement that would make it unreasonable to require an employer to reassign a disabled employee to a particular job. . . . On the other hand, other policies of an employer might have to be subordinated to an employer's reassignment obligation under the ADA because to do otherwise would essentially vitiate the employer's express statutory obligation to employ reassignment as a form of reasonable accommodation.").

> relevant factors, it may very well be determined that reassignment is a reasonable accommodation under all of the circumstances.[13]

Consequently, it is not possible to determine, in the abstract, all instances in which the ADA might require reassignments to vacancies across departmental lines. Where there is a true conflict with other statutory or contractual requirements, for example, reassignment may be an unreasonable accommodation. On the other hand, if the state could find a means of satisfying the other requirements while reassigning the employee to a vacant position, doing so might constitute a reasonable accommodation.

Certainly, it would be more helpful to managers to have a clear, objective formula to apply in determining priority for filling vacant positions. However, the current state of the law does not afford us that benefit. Accordingly, because of the uncertainty that prevails in interpreting the ADA, we continue to advise that managers use the EEOC's enforcement guidance to aid their determination of the state's obligations under the ADA.[14] However, where application of the guidance would seem to require an accommodation that is unreasonable or that would create an undue hardship, managers should consult with the appropriate ADA coordinator and assistant attorney general to determine how to proceed.

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[13] *Smith v. Midland Brake, Inc.*, 180 F.3d at 1166.

[14] For the sake of clarification, I am not sure of the source of the statement (in your memorandum requesting this opinion) that I gave oral advice that the State "must" follow the EEOC's enforcement guidance. While I believe that it is prudent and advisable for the State to apply the enforcement guidance in determining its obligations under the ADA, I neither believe nor recall stating that the state must abide by the guidance.