

# Pacific Update

## ADA and IT Center

### Pacific Disability and Business Technical Assistance Center

Serving California, Arizona, Nevada, Hawaii, & the Pacific Basin

November 2002



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## National News

### EEOC ISSUES HANDBOOK TO HELP SMALL BUSINESSES COMPLY WITH THE ADA

On August 15, 2002, the EEOC announced the issuance of *The Americans with Disabilities Act: A Primer for Small Business* - a practical, reader-friendly handbook outlining the employment provisions of the Americans with Disabilities Act of 1990 (ADA) as they relate to both employees and job applicants.

“Since Title I of the ADA was implemented a decade ago, we have seen a lot of progress, but there is still a tremendous need for education,” said Cari M. Dominguez, Chair of the EEOC. “Small businesses are a major source of jobs in this country - jobs for which people with disabilities must be given an equal opportunity to compete. Never before has the small business community had such easy access to information about the ADA.”

Offering examples, tips, and “do’s and don’ts,” the handbook covers the following:

- Who is protected by Title I of the ADA
- How to avoid mistakes when interviewing applicants with disabilities
- When an employer is permitted to ask an employee questions about a medical condition
- What to do if safety issues arise
- The obligation to make reasonable accommodations to the limitations of qualified applicants and employees with disabilities
- Tax incentives for businesses that hire and retain people with disabilities

Resource lists are included in the handbook to help small employers recruit individuals with disabilities and obtain assistance in making reasonable accommodations. According to statistics from the Small Business Administration, approximately 25 million small businesses in the United States represent 99.7 percent of all employers, employ more than 50 percent of the private work force, and generate more than half of the nation’s gross domestic product. Small businesses also provide

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67 percent of all first jobs.

The small business primer is the EEOC's second major effort undertaken in connection with President Bush's New Freedom Initiative - the government-wide program to fully integrate people with disabilities into mainstream American life.



## SUPREME COURT ROUND-UP

The Supreme Court's session wraps up with some victories for employers, but all is not lost for the workers. In a session marked by an unusually high number of employment discrimination cases, the U.S. Supreme Court has been called "pro-management" and "hostile" toward the ADA for three controversial ADA rulings.

But legal experts say that closer inspection of key decisions from the most recent session reveals cases are so distinguished by their individual circumstances that it is difficult to draw any widespread conclusions from the rulings.

In **Toyota Motor Manufacturing, Kentucky Inc. v. Williams**, 534 U.S. 184 (January 8, 2002), the Supreme Court held that to be substantially limited in the major life activity of performing manual tasks, 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. The impairment's impact must also be permanent or long-term.

The plaintiff in this case, an assembly line worker at the automobile plant, claimed to be disabled by carpal tunnel syndrome and related impairments. Claiming to be disabled from performing her automobile assembly line job by carpal tunnel syndrome and related impairments, plaintiff Williams sued her former employer, Toyota, for failing to provide her with a reasonable accommodation under the ADA.

The issue presented before the Court was to consider what is the proper standard for assessing whether an individual is substantially limited in performing manual tasks.

The Court reversed the Sixth Circuit Court, finding that it was an error to focus on plaintiff's inability to perform manual tasks associated only with her job. When addressing the major life activity of performing manual tasks, the central

inquiry must be whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with her specific job.

The Court expressed no opinion on whether a major life activity includes "working." However, the Court concluded that the performance of manual tasks unique to any particular job are not necessarily important parts of most people's lives. Therefore, courts may not consider an individual's inability to do manual work on specialized assembly line job as sufficient proof that the individual is substantially limited in performing manual tasks. Further, household chores including bathing and brushing one's teeth are among the types of manual tasks of central importance to a person's daily life and should have been part of the assessment of whether the individual was substantially limited in performing manual tasks.



In **U.S. Airways, Inc. v. Barnett** (April 29, 2002), the Supreme Court held that an employer's showing that a requested accommodation conflicts with seniority rules is ordinarily sufficient to show, as a matter of law, that an "accommodation" is not "reasonable." However, the employee remains free to present evidence of special circumstances that makes a seniority rule exception reasonable in the particular case.

In this case, the justices primarily addressed the meaning of "reasonable accommodation:" was it reasonable for a company to waive longstanding practices such as a seniority system to "accommodate" a disabled worker? The Court decided that the ADA intended to trump established employment practices, such as seniority rules.

An employer's seniority rule will usually prevail - that is, trump the duty to accommodate "in the run of cases." To avoid summary judgment in cases where a requested accommodation violates a seniority rule, plaintiff will bear the burden of proving that "special circumstances" exist. One way to do this is to show that the employer unilaterally changes its seniority system on a frequent basis, decreasing employee expectations that the system will be followed. Another special circumstances consists of a situation in which the employer's seniority system already includes numerous exceptions. The Court specifically stated that "we do not mean these examples to exhaust the kinds of showing that a plaintiff might make."

The Court ruled that *ordinarily* the ADA does not require that an employer assign a disabled employee to a particular position even though another employee is

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entitled to that position under the employer’s established seniority system. Hence, a showing that the assignment would violate the rules of a seniority system warrants summary judgment for the employer – unless there is more. The plaintiff must present evidence of that “more,” namely, special circumstances surrounding the particular case that demonstrate the assignment is nonetheless reasonable.



In **Chevron USA Inc. v. Echazabal**, (June 10, 2002), the Court unanimously upheld an EEOC regulation that allows an employer to refuse to hire a worker with a disability if performing a particular job poses risks to the worker’s own health or safety.

Echazabal, who worked at the refinery for nearly 20 years as a contract employee, was seeking a permanent job because it had better pay and benefits. Chevron Corp. refused to hire him to a permanent job at its refinery because he has chronic hepatitis C, a liver disease that could worsen if he doesn’t take the right precautions. Chevron decided that airborne toxins in the plant would make his liver worse and could kill him. Echazabal argued that he was the best judge of the risk to himself and filed suit claiming that Chevron violated the Americans with Disabilities Act in refusing to hire him, or even to let him continue working in the plant, because of his disability, his liver condition.

The Court rejected the argument that the regulation was an example of workplace paternalism, the type that the ADA was enacted to prevent. The Court reiterated with strong language that the regulation will prevent this through its demands for a particularized inquiry into the harms the employee would probably face.

“The direct threat defense must be ‘based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence,’ and upon an expressly ‘individualized assessment of the individual’s present ability to safely perform the essential functions of the job,’ reached after considering, among other things, the imminence of the risk and the severity of the harm portended.” (29 C.F.R. §1630.2(r).)

This ruling does not necessarily resolve Echazabal’s lawsuit. While Chevron’s doctors said he should not work at the refinery, he had two medical experts, including a liver specialist at UCLA Medical Center, who said the workplace would not be dangerous for him. The Supreme Court remanded back to the Ninth Circuit for review Echazabal’s claim, and Chevron will have to prove whether the job did pose a direct threat to the worker.



The Supreme Court decided two other ADA-related cases this term. In **EEOC v. Waffle House, Inc.**, (January 15, 2002), the Court held that under the ADA, a private arbitration agreement between an individual and that individual’s employer does not prevent the EEOC from filing a court action in its own name seeking the recovery of, among other things, victim-specific judicial relief, e.g. monetary damages for the individual.



In **Barnes v. Gorman**, (June 17, 2002), the Court held that punitive damages may not be awarded in private suits brought under § 202 of the ADA and §504 of the Rehabilitation Act. Gorman brought suit against petitioners – members of the Kansas City Board of Police Commissioners. The suit claimed that petitioners had discriminated against him on the basis of his disability in violation of §202 of the ADA and §504 of the Rehabilitation Act, by failing to maintain appropriate policies for the arrest and transportation of persons with spinal cord injuries.

A jury found petitioners liable and awarded over \$1 million in compensatory damages and \$1.2 million in punitive damages. The Supreme Court reversed the punitive damage award, ruling that punitive damages can never be awarded against public entities in suits brought under the ADA, or the Rehabilitation Act.

### **American Airlines Settles Discrimination Lawsuit By Implementing New Policy**

Airline Industry Information. American Airlines is set to implement a policy to improve notification to job applicants with disabilities regarding the status of their applications. In a lawsuit filed last year, the EEOC alleged that the airline violated the ADA by failing to hire a man for the position of reservations agent because of his disability, quadriplegia. The EEOC alleged that the man did not receive information as to whether a reasonable accommodation would be made to allow him to perform the reservations job.

**FOR ADA Technical Assistance call 1-800-949-4232 (V/TYY) OR go to our website: [www.pacdbtac.org](http://www.pacdbtac.org)**

## Super Shuttle International, Inc. To Improve Service For Travelers Who Use Wheelchairs Under Agreement With Justice Department



WASHINGTON, D.C. - The Department of Justice and Super Shuttle International, Inc. have signed a settlement agreement designed to ensure that the nation's largest door-to-door airport shuttle company provides the same level of service to wheelchair users as it provides to the general public. This is the first agreement reached with a national company that provides transportation on demand, as opposed to transportation along a fixed route on a fixed schedule.

The Department opened a nationwide compliance review of Super Shuttle after receiving complaints against its Dallas/Ft. Worth subsidiary for failing to provide accessible transportation. The settlement covers the company's 11 facilities in Phoenix, Los Angeles, Sacramento, San Francisco, Orange County, Baltimore, Washington, D.C., New York City, Denver, Dallas/Ft. Worth and Tampa Bay.

"It is important to ensure that the level of service available to customers who use wheelchairs is equal to that enjoyed by the general public" said Ralph F. Boyd Jr., Assistant Attorney General for Civil Rights. "SuperShuttle has fully cooperated with the Department and as a result will improve its much needed service to travelers who use wheelchairs."

The settlement requires Super Shuttle to acquire additional accessible vehicles at its 11 corporately owned facilities, to collect comparative data on the timeliness and quality of service, and to revisit with the Department after 18 months whether additional action is necessary in order to maintain an equivalent level of service for individuals who use wheelchairs.

Under the agreement, the company will have two accessible vehicles at each of the 11 locations within a year, as well as standing subcontracts with accessible transportation providers to meet overflow demand. It will track the timeliness of pick-ups for the general public as compared to wheelchair users and will conduct quarterly customer surveys of each group of riders in each city. Additional vans and/or subcontracts may be required if a review of the data after 18 months indicates that the traffic in any locality warrants such action. Title III of the Americans with Disabilities Act gives people with disabilities the right

to full and equal enjoyment of public transportation services provided by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce.

## Regional News

### Ninth Circuit Rules City Sidewalks Covered By ADA

The U.S. Court of Appeals for the Ninth Circuit ruled in **Barden v. City of Sacramento** that the City of Sacramento's sidewalks are covered under title II. The plaintiffs, a group of individuals who are blind or use wheelchairs, filed suit alleging that Sacramento had violated the ADA by failing to install curb ramps at intersections on newly constructed or altered streets and by failing to remove other obstructions (for example, benches, sign posts, and guy wires) that made some existing sidewalks inaccessible. Dismissing part of the plaintiff's lawsuit, the lower court ruled that the midblock portion of a sidewalk that connects one intersection to another is not a program, service, or activity of the City of Sacramento and, therefore, is not covered by the ADA. On appeal, the Department argued in its amicus brief that providing, constructing, and maintaining a system of sidewalks is a government service covered by title II. The Ninth Circuit agreed and allowed the case to continue to trial. It asserted that the requirement for curb ramps would be meaningless if the sidewalks between the curb ramps were inaccessible. The court noted that the City will have the opportunity at trial to present evidence concerning any undue financial and administrative burden.



### CALIFORNIA LAW

In September 2000, Governor Gray Davis signed into law a series of amendments to California's Fair Employment and Housing Act ("FEHA"), which significantly broadened the protections afforded to California employees with disabilities. Effective January 1, 2001, Assembly Bill 2222 ("AB 2222") clarifies and expands FEHA's definition of disability. The changes to the FEHA reflect the California Legislature's intention to provide "broader coverage" for disabled individuals than exists under federal law.

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Some of the key provisions under the FEHA:

• **An Impairment Need Only “Limit” a Major Life Activity**

— Under California law, an individual who suffers from a “physical disability” or “mental disability” is protected under the statute if the disability “limits” a major life activity. An impairment “limits” a major life activity under the FEHA when it “makes the achievement of the major life activity difficult.” (Cal. Gov’t Code, §§ 12926(i)(1)(b); 12926(k)(1)(B); and 12926.1(c) and (d).)

• **No Mitigating Measures**

— AB 2222 makes clear that whether a mental or physical condition “limits” an individual’s ability to participate in major life activities, and thereby constitutes a disability shall be determined without regard to mitigating measures such as medications, assistive devices, or reasonable accommodations, unless the mitigating measure itself limits an individual’s ability to participate in major life activities.

• **Major Life Activities Broadly Construed**

— AB 2222 makes clear that the term “major life activities” shall be broadly construed to include physical, mental, social activities, and working.

• **Interactive Reasonable Accommodation Process Required**

— AB 2222 specifies that it is an unlawful employment practice for an employer to fail to timely respond in good faith to an employee’s request for accommodation.

• **Employers with 5 or more employees are covered entities**

• **One-year to file a complaint with the Department of Fair Employment and Housing**



**INFORMATION TECHNOLOGY IN EDUCATIONAL SETTINGS**

**STUDENTS WITH DISABILITIES PREPARING FOR POSTSECONDARY EDUCATION: KNOW YOUR RIGHTS AND RESPONSIBILITIES.** This pamphlet contains information for high school students with disabilities who plan to continue their education in postsecondary schools. For a copy, call 800-949-4232.

**ACCESS TO COMPUTER-BASED TESTING FOR STUDENTS WITH DISABILITIES.** Computer-based assessment might seem like a cost-effective, less labor-intensive solution to meeting the increased testing demands of the No Child Left Behind Act (NCLB), but a new report from the University of Minnesota’s National Center on Education Outcomes (NCEO) warns that simply transferring a paper-and-pencil test to a computer will not do. The Aug. 5 report says poorly designed computer-based tests could reduce the validity of assessment results and exclude some groups of students—especially persons with disabilities—from completing the exams. Read the Report at <http://education.umn.edu/NCEO/onlinepubs/synthesis45.html>

**ADOBE OFFERS ON LINE SEMINAR ON CREATING ACCESSIBLE FORMS.** Adobe now offers a live, interactive, online seminar on converting paper-based form processes to dynamic, interactive online forms, including instructions on making the online forms accessible to people with disabilities. The seminar is free. To register, you can call 1-877-303-9422 or access online at [www.adobe.com/formssolutions](http://www.adobe.com/formssolutions)

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- A Webcourse For One-Stop Center Staff
- Welcoming Customers with Disabilities

It can be accessed at:  
[www.wiawebcourse.org](http://www.wiawebcourse.org)

## What does Section 255 of the Telecommunications Act require?

Section 255 of the Telecommunications Act, which took effect in 1996, requires telecommunications products and services to be accessible to people with disabilities to the extent access is “readily achievable,” meaning easily accomplishable, without much difficulty or expense. If manufacturers cannot make their products accessible, then they must design them to be compatible with adaptive equipment used by people with disabilities, where readily achievable. Examples of products Section 255 covers include telephones, pagers, fax machines, modems, and telephone company switching equipment. The Federal Communications Commission (FCC) enforces Section 255.



More information about Section 255 can be found at: The Access Board’s Bulletin #7: [Access To Telecommunications](http://www.access-board.gov/telecomm/bulletin.htm), <http://www.access-board.gov/telecomm/bulletin.htm>. The Access Board’s article [About the Telecommunications Act Accessibility Guidelines](http://www.access-board.gov/telecomm/about%20telecomm.htm) <http://www.access-board.gov/telecomm/about%20telecomm.htm> and The FCC’s [Section 255 Telecommunications Access for People with Disabilities](http://www.fcc.gov/cgb/consumerfacts/section255.html) <http://www.fcc.gov/cgb/consumerfacts/section255.html>. To obtain copies of any of these documents, please call (800) 949-4232.

## Section 508 Facts *Understanding Section 508 and the Access Board’s Standards*

### Purpose

*Section 508 requires Federal departments and agencies that develop, procure, maintain, or use electronic and information technology to ensure that Federal employees and members of the public with disabilities have access to and use of information and data, comparable to that of the employees and members of the public without disabilities—unless it is an undue burden to do so.*

### Who is Covered?

- Federal departments and agencies including the U.S. Postal Service
- Contractors providing services or products to Federal agencies must provide Section 508 compliant deliverables

*Exceptions include some military functions, products owned by contractors incidental to a contract, and “back-office” equipment.*

### What is Covered?

- Electronic and information technology products procured, developed, maintained, or used by a Federal agency

*Complaints and lawsuits can only be filed against products that are procured.*

- Electronic and information technology includes products that store, process, transmit, convert, duplicate, or receive electronic information
- Copiers, computers, fax machines, information kiosks, software, operating systems, websites and telecommunications products

*Federal agencies are not required to “retrofit” existing technologies.*

## What are the Technical Standards?

Section 508 standards are technical specifications and performance-based requirements which focus on the functional capabilities covered by technologies. The standards are organized into six sections:

- Software Applications and Operating Systems
- Web-based Intranet and Internet Information and Applications
- Telecommunications Products
- Video and Multimedia Products
- Self Contained, Closed Products
- Desktop and Portable Computers

If you would like additional information about Section 508 of the Rehabilitation Act, please call the Pacific ADA and IT Center at (800) 949-4232.



**Speech-To-Speech (STS)** services are mandated by the FCC. STS is a form of Relay Services that provides Communications Assistants (CAs) for people with speech disabilities who have difficulty being understood on the phone. STS CAs are trained individuals familiar with many different speech patterns and language recognition skills. The CA makes the call and repeats the words exactly. Individuals using STS include those with cerebral palsy, Parkinson’s disease, a laryngectomy, ALS, stuttering, muscular dystrophy, stroke, and other conditions affecting clarity of speech. Call the number in your state and ask the CA to dial the number you wish to call.

Call these toll free phone numbers to access STS in your area:

- Arizona: 1-800-842-6520
- California: 1-800-854-7784
- Hawaii: 1-808-643-0787
- Nevada: 1-888-326-5658

## AAA Gets with Accessibility

### Guidebooks Make Travel Easier for Mature and Disabled, AAA Says

ORLANDO, Fla.—Visiting new and exciting places is fun but even savvy travelers can become exasperated by unexpected inconveniences. Travelers with disabilities and mature travelers face these difficulties and more every time they travel, according to AAA.

“Mature travelers and travelers with disabilities are hindered by challenges with transportation, lodging and many other necessities of travel,” said Bill Wood, director, AAA Publishing Product Development. “In an effort to provide more vital information to this travel segment, AAA developed a new travel guidebook series called Barrier-Free Travel.”

Barrier-Free Travel offers information about various types and levels of accessibility in lodgings, restaurants and attractions for travelers with disabilities. Symbols are used to express the types of accessibility including hard of hearing or deaf, visually impaired or blind, dexterity and three levels of mobility.

In addition, each book lists the criteria used to assess the property’s accessibility allowing users to formulate reasonable expectations before they arrive. Even with a great guidebook in hand, AAA always recommends that all travelers call ahead to ensure their needs will be met.

These comprehensive guidebooks include general travel information such as major points of interest, things to see and do, and major theme parks as well as listing healthcare providers, transportation options, medical suppliers and medical equipment availability.

Restaurants and lodgings listed in the Barrier-Free Travel series have all been previously rated by AAA’s professional staff of 65 evaluators using AAA’s Diamond Rating System.

AAA began working on the series in 1998, and met extensively with industry and advocacy representatives in the United States and Canada. Independent hoteliers, 19 lodgings chains and the American Hospitality and Lodging Association participated in the development of this series.

Numerous advocacy groups also assisted in the development of the series including Access-Able Travel Source, Accessible San Diego, Access Northern California, Beyond Ability International, Duncan Consulting and Society for Accessible Travel and Hospitality.

The first two titles in the series, Central Florida and California, have been published and another four are planned for this year: Washington, D.C., Las Vegas, New York City and Hawaii. The Central Florida book covers Orlando, the Space Coast and the Tampa Bay area. The California book includes the Los Angeles, San Diego and San Francisco areas.

Barrier-Free Travel is available at AAA club offices and online at <http://www.aaa.com>. It is also available in bookstores and other retail outlets for \$12.95 US/\$19.50 CDN.

As North America’s largest motoring and leisure travel organization, AAA provides 45 million members with travel, insurance, financial and automotive-related services. Since its founding in 1902, the not-for-profit, fully tax-paying AAA has been a leader and advocate for the safety and security of all travelers.

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# Materials Available From Pacific DBTAC



Your Guide to the American's With Disabilities Act:  
Brochures available on the following topics:

- ◆ Car Sales & Service
- ◆ Fun & Fitness Centers
- ◆ Grocery Stores
- ◆ Medical Offices
- ◆ Retail Stores
- ◆ Professional Offices
- ◆ Restaurants & Bars
- ◆ Shops & Services
- ◆ Travel & Tour Agents



- Recreation Guidelines
- Guide to Temporary Events



From EEOC:

- Revision to the Enforcement Guidance on Reasonable Accommodation
- Revised addendum to the ADA Technical Assistance Manual

**Call for Pricing: 1-800-949-4232**

*For a copy of these documents, contact Pacific DBTAC at 1-800-949-4232 (V&TTY)  
This newsletter is available in large print, audio tape, and computer disk formats.*

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