

pursuant to paragraph (b) of this section.

(b) A complainant, agent of the class or individual class claimant under this section may file a civil action against the Board pursuant to §268.506 of this part in a United States District Court should the complainant, agent of the class or individual class claimant believe he or she has been denied equal pay.

(c) The Board shall preserve any records that are made in the regular course of business which relate to the payment of wages, wage rates, job evaluations, job descriptions, merit systems, seniority systems, description of practices, or other matters which describe or explain the basis for payment of any wage differential to employees of the opposite sex, and which may be pertinent to the determination of whether such differential is based on a factor other than sex. Such records are to be kept for at least 3 years.

(d) Wages withheld in violation of §268.202(c) of this part have the status of unpaid minimum wage or unpaid overtime compensation.

**§268.303 Rehabilitation Act.**

(a) *General policy.* The Board shall give full consideration to the hiring, placement and advancement of qualified individuals with a disability who are physically or mentally disabled. The Board shall be a model employer of individuals with a disability. The Board shall not discriminate against individuals with a disability who are physically or mentally disabled.

(b) *Reasonable accommodation.* (1) The Board shall make reasonable accommodation to the known physical or mental limitations of an employee or applicant for employment who is a qualified individual with a disability unless the Board can demonstrate that the accommodation would impose an undue hardship on its operations.

(2) Reasonable accommodation may include, but shall not be limited to:

(i) Making facilities readily accessible to and usable by individuals with a disability; and

(ii) Job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, appropriate adjustment or modi-

fication of examinations, the provision of readers and interpreters, and other similar actions.

(3) In determining whether, pursuant to paragraph (b)(1) of this section, an accommodation would impose an undue hardship on the operation of the Board, factors to be considered include:

(i) The overall size of the Board's operations with respect to the number of employees, number and type of facilities and size of budget;

(ii) The type of Board operation, including the composition and structure of the Board's work force; and

(iii) The nature and the cost of the accommodation.

(c) *Employment criteria.* (1) The Board shall not make use of any employment test or other selection criterion that screens out or tends to screen out qualified individuals with a disability or any class of individuals with a disability unless:

(i) The test score or other selection criterion is job-related for the position in question and consistent with business necessity; and

(ii) There are no available alternative job-related tests that do not screen out or tend to screen out as many individuals with a disability.

(2) The Board shall select and administer tests concerning employment so as to insure that, when administered to an employee or applicant for employment who has a disability that impairs sensory, manual, or speaking skills, the test results accurately reflect the employee's or applicant's ability to perform the position or type of position in question rather than reflecting the employee's or applicant's impaired sensory, manual, or speaking skill (except where those skills are the factors that the test purports to measure).

(d) *Pre-employment inquiries.* (1) Except as provided in paragraphs (d)(2) and (3) of this section, the Board shall not conduct a pre-employment medical examination and shall not make pre-employment inquiry of an applicant as to whether the applicant is an individual with a disability or as to the nature or severity of a disability. The Board may, however, make pre-employment inquiry into an applicant's ability to meet the essential functions of the job, or the medical qualification

requirements if applicable, with or without reasonable accommodation, of the position in question, i.e., the minimum abilities necessary for safe and efficient performance of the duties of the position in question.

(2) Nothing in this section shall prohibit the Board from conditioning an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty, provided that:

(i) All entering employees are subjected to such an examination regardless of disability or when the pre-employment medical questionnaire used for positions that do not routinely require medical examination indicates a condition for which further examination is required because of the job-related nature of the condition; and

(ii) The results of such an examination are used only in accordance with the requirements of this part.

(3) Nothing in this section shall be construed to prohibit the gathering of pre-employment medical information for the purpose of hiring individuals with a disability.

(4) To enable and evaluate affirmative action to hire, place or advance individuals with a disability, the Board may invite employees and applicants for employment to indicate whether and to what extent they are disabled, if:

(i) The Board states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used, that the information requested is intended for use solely in conjunction with affirmative action; and

(ii) The Board states clearly that the information is being requested on a voluntary basis, that refusal to provide it will not subject the employee or applicant for employment to any adverse treatment, and that it will be used only in accordance with this part.

(5) Information obtained in accordance with this section as to the medical condition or history of the employee or applicant for employment shall be kept confidential except that:

(i) Managers, selecting officials, and others involved in the selection process or responsible for affirmative action may be informed that the employee or

applicant for employment is an individual with a disability;

(ii) Supervisors and managers may be informed regarding necessary accommodations;

(iii) First aid and safety personnel may be informed, where appropriate, if the condition might require emergency treatment;

(iv) Government officials investigating compliance with laws, regulations, and instructions relevant to equal employment opportunity and affirmative action for individuals with a disability shall be provided information upon request; and

(v) Statistics generated from information obtained may be used to manage, evaluate, and report on equal employment opportunity and affirmative action programs.

(e) *Physical access to buildings.* (1) The Board shall not discriminate against employees or applicants for employment who are qualified individuals with a disability due to the inaccessibility of its facility.

(2) It shall be the policy of the Board to comply with the provisions of the Rehabilitation Act, the Architectural Barriers Act of 1968 (42 U.S.C. 4151 *et seq.*) and the Americans With Disabilities Act of 1990 (42 U.S.C. 12183 and 12204).

(f) *Reassignment.* When a non-probationary employee becomes unable to perform the essential functions of his or her position even with reasonable accommodation due to a disability, the Board shall offer to reassign the individual to a funded vacant position at the same grade level, the essential functions of which the employee would be able to perform with reasonable accommodation if necessary unless the reassignment would impose an undue hardship on the operation of the Board. In the absence of a position at the same grade level, an offer of reassignment to a vacant position at the highest available grade level below the employee's current grade level shall be made, but availability of such a vacancy shall not affect the employee's entitlement, if any, to disability retirement pursuant to any retirement plan in which the employee is enrolled.

If the Board has already posted a notice or announcement seeking applications for a specific vacant position at the time the Board has determined that the nonprobationary employee is unable to perform the essential functions of his or her position even with reasonable accommodation, then the Board does not have an obligation under this section to offer to reassign the individual to that position, but the Board shall consider the individual on an equal basis with those who applied for the position.

(g) *Exclusion from definition of “individual with a disability”*—(1) *Illegal use of drugs.* (i) The term “individual with a disability” shall not include an individual who is currently engaging in the illegal use of drugs, when the Board acts on the basis of such use. The term “drug” means a controlled substance, as defined in Schedules I through V of Section 202 of the Controlled Substances Act (21 U.S.C. 812). The term “illegal use of drugs” means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act, but does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of federal law. This exclusion, however, does not exclude an individual with a disability who:

(A) Has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(B) Is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(C) Is erroneously regarded as engaging in such use, but is not engaging in such use.

(ii) Except that the Board may adopt and administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraphs (g)(1)(i) (A) and (B) of this section is no longer engaging in the illegal use of drugs.

(2) *Alcoholism.* The term “individual with a disability” does not include an employee who is an alcoholic whose

current use of alcohol prevents the employee from performing the duties of his or her job, or whose employment by reason of such current alcohol use, would constitute a direct threat to the property or safety of others. In this regard, alcoholics shall meet the same performance and conduct standards to which all other Board employees must satisfy, even if an unsatisfactory performance is related to the alcoholism of the employee.

(3) *Infectious and communicable diseases.* If an individual with a disability has one of the listed diseases as determined by the Secretary of Health and Human Services under the Americans with Disabilities Act (42 U.S.C. 12113(d)(1)) and works in or applies for a position at the Board in food handling, the Board will seek reasonable accommodation under paragraph (b) of this section to eliminate the risk of transmitting the disease through the handling of food. If the individual with a disability is a nonprobationary employee and a reasonable accommodation cannot be made, the provisions contained in paragraph (f) of this section shall apply.

#### § 268.304 Employment of noncitizens.

(a) *Definitions.* The definitions contained in this paragraph (a) shall apply only to this section.

(1) *Intending citizen* means a citizen or national of the United States, or a noncitizen who:

(i) Is a protected individual as defined in 8 U.S.C. 1324b(a)(3); and

(ii) Has evidenced an intention to become a United States citizen.

(2) *Noncitizen* means any person who is not a citizen of the United States.

(3) *Sensitive information* means:

(i) (A) Information that is classified for national security purposes under Executive Order No. 12356 (3 CFR, 1982 Comp., p. 166), including any amendments or superseding orders that the President of the United States may issue from time to time;

(B) Information that consists of confidential supervisory information of the Board, as defined in 12 CFR 261.2(b); or

(C) Information the disclosure or premature disclosure of which to unauthorized persons may be reasonably