**12.11 ADA—Defenses—Business Necessity**

 Business necessity is a defense to a claim of discrimination under the ADA.

 If you find that the defendant’s application of a standard, criterion, or policy has [the effect of screening out or otherwise denying a job or benefit to individuals with plaintiff’s disability] [a disparate impact on individuals with plaintiff’s disability], the defendant must prove, by a preponderance of the evidence, each of the following four elements regarding that standard, criterion, or policy:

First, it is uniformly applied;

Second, it is job-related;

Third, it is consistent with business necessity; and

Fourth, it cannot be met by a person with plaintiff’s disability even with a reasonable accommodation.

 If you find that each of the elements on which the plaintiff has the burden of proof has been proved, your verdict should be for the plaintiff, unless you also find that the defendant has proved each of the elements of this affirmative defense, in which event your verdict should be for the defendant.

**Comment**

 *See* 42 U.S.C. § 12113(a) (describing defenses and terms) and 29 C.F.R. § 1630.15(b)(1999) (describing the four elements a defendant must prove to satisfy burden). For a discussion of the business necessity defense as it applies to an across-the-board employer qualification standard (hearing test for package car drivers), *see Bates v. UPS, Inc.,* 511 F.3d 974, 994-98 (9th Cir. 2007) (*en banc*). For an analysis of business necessity as it applies when an employer requires an employee to undergo a medical examination under 42 U.S.C. § 12112(d)(4)(A), *see Brownfield v. City of Yakima*, 612 F.3d 1140, 1146 (9th Cir. 2010) (holding that standard may be met even before employee’s work performance declines if employer has significant evidence that could cause reasonable person to inquire whether employee is still capable of performing job; finding police officer exhibiting erratic behavior could be referred for fitness for duty examination); *see also Indergard v. Georgia-Pacific Corp.*, 582 F.3d 1049 (9th Cir. 2009) (defining medical examination).

 The Supreme Court has recognized that the “direct threat” affirmative defense (*i.e*., whether an employee poses a threat to others or to the employee himself or herself) is consistent with “business necessity” principles encompassed in the ADA (§ 12113) and the EEOC regulations (29 C.F.R. § 1630.15(b)(2) (2001). *Chevron U.S.A., Inc. v. Echazabal,* 536 U.S. 73, 76-77 (2002).

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