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Series: Related Materials
Subseries: Speeches

OA/ID Number: 52090
Folder ID Number: 52090-002

Folder Title:
ADA Speech Stuff [1990-1996]

Stack: **Row:** **Section:** **Shelf:** **Position:**

History
Current States
Challenges for the future

WW II -- Antibiotics / treated infections / rehab
Polio / rehab - community care
1968 - Architectural Barriers Act - Hugh Gallagher

1972 -- Rehab Act of 73 -- IL / 504

1972 -- CIL

1975 -- IDEAS
ACCD -- including PVA
1978 -- Title VII / NCD

1980 -- regulations revolutions

1983 -- Rehab Act Ammendments / NCD

1986 -- Toward Independence

1988 -- ADA introduced

1990 -- ADA passed

1992 -- ADA regulations

1994 -- elections / conservative revolution

1996 -- Assaults on ADA, IDEA, others

Maslow -- needs: housing, food, clothing
education, work, self actualization

1960s were about survival
1970s were about shelter
1980s were about rights
1990s are about full participation
21s century will begin either about new roles
or about survival

Questions about costs -- Kevorkian / Hot Euthanasia
Institutions versus community or ??
Questions about roles

Progress in science and medicine must parallel
progress in social values and practices.

GROUNDWORK DISABILITY LEGISLATION FOR ADA

The Architectural Barriers Act of 1968 — Federal government buildings must be accessible to people with disabilities ... compliance body established in 1973 was the Architectural and Transportation Barriers Compliance Board. Prompted formation of Uniform Accessibility Standards.

Education for All Handicapped Children Act of 1975 — Public Law 94-142 addressed primarily the exclusion of children with disabilities from public schools and inappropriate educational program for many attending school.

Developmental Disabilities Act of 1975 — Made federal grant money available to states which comply with certain procedures for care and treatment programs for people with severe or long-term disabilities occurring prior to age 22.

Rehabilitation Act (Sections 501 & 503) of 1973 — Requires affirmative action programs with goals, targeted disabilities and advancement for people with disabilities in federal agencies and in federal government contractors.

Rehabilitation Act (Section 504) — Major conceptual foundation of ADA prohibits discrimination against "otherwise qualified individuals with handicaps" in any program or activity receiving federal financial assistance.

Air Carrier Access Act of 1986 — Prohibits discrimination of people with disabilities by all air carriers.

Voting Accessibility Act 1984 — Makes accessible all polling places and registration facilities for federal elections.

Fair Housing Amendments Act 1989 — Expanded enforcement mechanisms of Fair Housing Act prohibiting discrimination in the sale or rental of private housing to include people with disabilities.

AMERICANS WITH DISABILITIES ACT

ADA

TEXAS

"TAKING CARE OF BUSINESS"

Texas Rehabilitation Commission
4900 North Lamar Blvd.
Austin, Texas 78751-2316

512 / 483-4761
1-800-RELAY TX (TDD Access)
1-800-442-9502

ADA Fact Sheet

Employment

Employers may not discriminate against a person with a disability in hiring or promotion if the person is otherwise qualified for the job.

Employers can ask about one's ability to perform a job, but cannot inquire if someone has a disability or subject a person to tests that tend to screen out people with disabilities.

Employers will need to provide "reasonable accommodation" to people with disabilities. This includes steps such as job restructuring and modification of equipment.

Employers do not need to provide accommodations that impose an "undue hardship" on business operations.

Transportation

New public transit buses ordered after August 26, 1990, must be accessible to individuals with disabilities.

Transit authorities must provide comparable paratransit or other special transportation services to people with disabilities who cannot use fixed route bus services, unless undue burden would result.

Existing rail systems must have one accessible car per train by July 26, 1995.

New rail cars ordered after August 26, 1990, must be accessible.

New bus and train stations must be accessible.

Public Accommodations

Private entities such as restaurants, hotels, and retail stores may not discriminate against individuals with disabilities.

Auxiliary aids and services must be provided to people with vision or hearing impairments or other people with other disabilities, unless an undue burden would result.

Physical barriers in existing facilities must be removed, if removal is readily achievable. If not, alternative methods of providing the services must be offered, if they are readily achievable.

All new construction and alterations of facilities must be accessible.

State and Local Government

State and local governments may not discriminate against qualified people with disabilities.

All government facilities, services, and communications must be accessible consistent with the requirements of section 504 of the Rehabilitation Act of 1973.

Telecommunications

Companies offering telephone service to the general public must offer telephone relay services to people who use telecommunications devices for the deaf (TDD's) or similar devices.

Source: U. S. Department of Justice

AMERICANS WITH DISABILITIES ACT
ADA
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Americans with Disabilities Act Statutory Deadlines

Employment

The ADA requirements become effective on:
July 26, 1992, for employers with 25 or more employees.
July 26, 1994, for employers with 15-24 employees.

Public Accommodations

The ADA requirements become effective on:
January 26, 1992, generally.
August 26, 1990, for purchase or lease of new vehicles that are required to be accessible.
New facilities designed and constructed for first occupants later than January 26, 1993, must be accessible.

Transportation

Public bus systems

ADA requirements become effective on:
January 26, 1992, generally.
August 26, 1990, for purchase or lease of new buses.

Public rail systems —light, rapid, commuter, and intercity (Amtrak) rail

ADA requirements become effective on:
January 26, 1992, generally.
August 26, 1990, for purchase or lease of new rail vehicles.
By July 26, 1995, one car per train accessibility must be achieved.
By July 26, 1993, existing key stations in rapid, light, and commuter rail systems must be made accessible with extensions of up to 20 years (30 years, in some cases, for rapid and light rail).

Privately operated bus and van companies

ADA requirements become effective on:
January 26, 1992, generally.
July 26, 1996 (July 26, 1997, for small providers) for purchase of new over-the-road buses.
August 26, 1990, for purchase or lease of certain new vehicles (other than over-the-road buses).

State and Local Government Operations

ADA requirements become effective on:
January 26, 1992.

Telecommunications

ADA requirements become effective on:
January 26, 1993, for provision of relay services.

Source: U.S. Department of Justice

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Tips for Employer Compliance with ADA (Title I)

1. Job Descriptions

All essential job functions or tasks should be included; nonessential or occasional duties should not be included.This should be done before recruiting and interviewing because such descriptions are evidence of essential job functions and can provide a defense if hiring decisions are later challenged by an individual deemed unqualified to do the job.

2. Job Application Forms

Review job application forms to eliminate any potentially discriminatory questions about disability or medical status. Any forms containing questions seeking self identification of people with disabilities for employer affirmative action efforts to redress past discrimination should be physically separate from application forms. If used, these forms should be stored separately, not in the person's regular personnel file to avoid the possibility or impression of misuse of the disability information.

3. Job Application Process

People who are involved in the application and hiring process—including receptionists, personnel directors, hiring managers and supervisors, and others who may participate in interviews—should be aware of good practices under the ADA. People with disabilities should be welcomed. Reasonable care should be taken to assure that applicants have good access to the interview premises, such as making sure there is a clear path to the entry door and the interview rooms. During the interview process, arrange to accommodate the communication or mobility needs of any applicant who is known to have limitations in those areas.

4. Interviews

Interview questions should focus on employment tasks and objectives. They should elicit the ability of any applicant to get the job done, without assuming that there is only one way to do it.

Example: For a job that requires frequent lifting of 50 pounds, ask, "Can you lift 50 pounds?" not "Have you ever had a back problem?"

Example: In evaluating candidates for a job that requires out-of-office meetings in other cities, the essential prerequisite is the ability to get to the meeting, not to drive there oneself or possess a car and driver's license.

5. Testing and Medical Exams

Any tests or screening criteria must be job-related and consistent with business necessity. Tests should be valid for the purposes given and reasonable accommodations offered to meet the needs of people with limitations such as vision or mobility impairments or learning disabilities. Employers may require medical examinations only after a conditional offer of employment has been made, provided that such exams are required of all entering employees in the job category. The examining physician should be provided with a job description that reflects the essential functions of the job or a list of essential job tasks and asked to evaluate whether a applicant can perform those tasks. The results of such medical exams must be kept confidential.

6. Hiring Decisions

Hiring decisions should be based on an individual's qualifications for the essential duties of the position. The need for reasonable accommodation is not an excuse not to hire an individual who meets those qualifications. However, it is still permissible to hire the more qualified applicant.

Example: Two individuals apply for a typing job. One has a disability and types 50 word per minute. The other types 75 words per minute. The employer may hire the better typist.

7. Benefits

Workers with disabilities are entitled to employment benefits that are the same as or equal to those provided by a particular employer for workers who have no disabilities. Such benefits, may include leave of absence, sick leave or any other leave, fringe benefits, employer financial support for training, and employer-sponsored activities, including social or recreational programs.

Health Insurance. An employer may not refuse to hire an otherwise qualified person with a disability because the cost of the employer's group health insurance program would increase. However, employer-sponsored insurance policies that do not cover preexisting conditions or do not cover particular disabilities are not barred by the ADA.

Worker's Compensation. An employer could not contract with an insurance company that refused to cover accidents to persons with disabilities.

8. Working Conditions

Arrange activities in an integrated manner so that employees with disabilities are not placed in separate work areas or otherwise segregated from other employees or otherwise treated less favorably based on their disability. Access to all facilities or alternative comparable facilities should be available to employees with disabilities. Flexible work schedules or flexible use of leave time may be used to accommodate the need of individuals with disabilities.

Example: A worker with a particular health condition needs to take medication or rest at specific times. The employer can accommodate the worker's disability-related needs by using a flexible schedule or granting medical leave as an accommodation, unless such changes would pose an undue hardship to the business.

9. Raises and Promotions

A routine process for evaluating the work of all employees according to pre-established criteria can provide objective information about the performance and capabilities of all employees, those with disabilities and those without. This information can be used in making decisions about promotions and raises. Good employment practices, such as posting vacancies and an application process that is open to all workers within an organization who meet the basic qualification helps avoid or eliminate segregation of workers with disabilities in to "dead-end" jobs which offer little opportunity for advancement.

10. Reasonable Accommodations

The employer has a duty to make reasonable accommodation to known disabilities of employees or applicants. Good employment practices under the ADA include a process whereby employees or applicants may request reasonable accommodations, with review based on legal requirements. Evaluation of a request for reasonable accommodation is a four-step process to determine what changes might be made so that a qualified worker with a disability can perform the essential functions of a particular job:

(a) Identify barriers to equal employment opportunity by: job analysis (determination of essential job tasks);evaluation of the work-related abilities and limitations of the

individual;determining the tasks or work environment factors that prevent the individual from effectively performing essential job tasks.
(b) Identify accommodation options that would allow the worker with a disability to perform the essential job tasks;
(c) Assess how "reasonable" each accommodation option is in terms of effectiveness the worker and his/her equal opportunity.
(d) Initiate the most effective reasonable accommodation which does not impose undue hardship on the employer.

"Undue hardship" is measured by evaluating four factors:

- o the nature and cost of accommodation needed
- o the overall financial resources of the business or organization
- o the number of persons employed there,
- o the effect of the accommodation on its operations;
- o the structure and type of operations of the parent company/organization, including the relationship of the particular worksite to the larger unit.

Although most accommodations involve little or no cost, any employer may refuse to provide accommodation for a worker with disabilities if making such accommodation would constitute an undue hardship in the particular employer's circumstances. In situations where there are two effective accommodations, an employer may choose the method that is less expensive or easier to accomplish so long as it results in equal employment opportunity for the employee or applicant with a disability. If a current employee's work performance is slipping and the reason appears to be disability-related, an employer may initiate efforts to improve the employee's performance, including making accommodations. It is advisable to document all efforts to accommodate an individual's disability and to review the effectiveness of accommodations provided.

The Texas Rehabilitation Commission, the Texas Commission for the Blind and the Texas Commission for the Deaf are good sources of information about practical methods for making reasonable accommodations. They can also help businesses identify resources to help in tailoring their work places for employees with disabilities. In addition, the Job Accommodation Network (JAN), operated by the President's Committee on Employment of People with Disabilities, can also provide technical assistance in the reasonable accommodation process. For JAN assistance, call 1-800-JAN-7324.

Source: Nancy F. Earsy, general counsel, Massachusetts Rehabilitation Commission

This publication is designed to provide a general overview of the Americans with Disabilities Act. The information contained herein is provided with the understanding that ADA Texas is not engaged in rendering legal advice. If legal assistance is required, the services of an attorney should be sought.

AMERICANS WITH DISABILITIES ACT

ADA

TEXAS

"TAKING CARE OF BUSINESS"

Texas Rehabilitation Commission
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Austin, Texas 78751-2316

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1-800-442-9502

Q & A

1. Who is a "person with a disability" protected by ADA?

The term "disability" means physical or mental impairment that substantially limits one or more of the major life activities, a record of such an impairment, or being regarded as having such an impairment.

2. In terms of ADA, who is a "qualified person with a disability"?

A "qualified person with a disability" means a person with a disability who, with or without reasonable accommodation, can perform the essential functions of a job.

3. Which employment practices are made unlawful by ADA?

ADA covers discrimination on the basis of disability. Discrimination includes limiting, segregating or classifying a job applicant or employee with a disability in a way that adversely affects his/her opportunities or status. These limitations apply to such areas as contractual agreements, testing, benefits, reasonable accommodations, uniform standards, among others.

4. Can an employer ask whether an applicant or an employee has a disability? If not, how can an employer determine whether an applicant with a disability is qualified for a particular position?

No. An employer may not ask about the existence, nature, or severity of a disability either on an application form or in an interview. An employer may, however, ask questions about an applicant's ability to perform job-related duties.

5. Must an employer choose job applicants with a disability over applicants without a disability?

No. ADA is not an affirmative action statute.

6. What is reasonable accommodation?

Reasonable accommodation means changes in existing facilities, procedures, rules or operations so that facilities, services, and job opportunities for otherwise qualified people with disabilities are equivalent to those available to people without disabilities, unless the accommodation would present an "undue hardship".

Reasonable accommodation may include accessible work facilities, job restructuring, modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials, or policies, qualified readers or interpreters and other similar accommodations.

7. How can an employer tell whether a particular accommodation would impose an "undue hardship?"

"Undue hardship" means an action requiring significant difficulty or expense in terms of the cost of the accommodation, the overall financial resources and the impact on the particular site or operation.

8. How costly are accommodations?

Depending on the nature of the accommodation, 69 per cent of accommodations for people with disabilities cost less than $500 and 50 per cent cost less than $50.

According to Job Accommodation Network figures on accommodations:

31% .....cost nothing
19% .....cost between $1 and $50
19% .....cost between $50 and $500
19% .....cost between $500 and $1000
11% .....cost between $1000 and $5000
-1% .....cost more than $5000

JAN can assist in determining accommodation cost as well as helping you decide what types of accommodations might be appropriate. For specific information call 1-800-JAN-7234.

9. How does ADA affect employee health insurance benefits?

Employers may not deny health insurance coverage completely to an individual based on the person's diagnosis or disability. Certain limitations do apply, but generally speaking, the intent of the law seems to be for all people with disabilities to have equal

access to health insurance coverage provided by the employer.

10. Can I require a person with a disability to take a medical exam?

Pre-employment inquiries about health and medical condition are prohibited. Interview questions, testing and application forms should focus on the applicant's job qualifications. Medical examinations can only be required after an offer of employment is made. Any medical examinations must be job related and consistent with business necessity. They must also be required for all applicants, not just people with disabilities.

11.What establishments are covered by the public accommodation of ADA?

Virtually all private entities are public accommodations if their operations affect commerce. The Act prohibits public accommodations from discriminating based on disability. It lists 12 general categories of businesses: lodging, food service establishments, places of entertainment, public forums, places of public display, parks and zoos, private schools, public transportation terminals, recreation facilities, retail sales establishments, service businesses and social services.

Providing full and equal enjoyment of goods, services, facilities privileges, advantages and accommodations, in the most integrated setting possible, is an essential goal of ADA.

12. Must public places make their buildings accessible to people with disabilities?

Barriers to access must be removed if such removal is "readily achievable." Such factors as overall size of the business, the site, and the nature and cost of the action needed, taken on a case by case basis, should be used in making this determination. Major renovation and new construction, on the other hand, must be fully accessible.

13. Must public accommodations offer additional services to people with disabilities?

Providing full and equal enjoyment of goods, services, facilities, privileges, advantages and accommodations in the most integrated setting possible is an essential goal of ADA. In some circumstances, additional aids and services may be necessary for people with disabilities to take full advantage of the goods or services provided, unless the additional services create an undue burden on the business.

14. What is telecommunications relay service and what does ADA require?

A telecommunications relay service enables people who are deaf, hard of hearing, or speech impaired to use the telephone to talk to you. Relay service is telephone access. Sprint Services provides this service in Texas. Specially-trained operators speak to hearing persons via traditional voice lines for people with special communication needs.

ADA requires that telecommunication relay systems providing nationwide telephone service be usable by people with special communication needs.

15. Will I be able to get assistance in complying with ADA?

The ADA provides for technical assistance plans to be drawn up by the various federal agencies charged with implementing the Act. This assistance will be offered to businesses and other organizations affected by ADA to ensure quick and efficient compliance before the law goes into effect. Technical assistance will continue past the deadline dates to help with continued compliance. Currently, federal agencies are publishing proposed plans in the Federal Register asking for feedback to make sure the final plans for technical assistance meet the need.

Sources:

Bureau of National Affairs, Inc. publication: The Americans with Disabilities Act: A Practical and Legal Guide to Impact, Enforcement and Compliance.

Nancy F. Earsy, general counsel, Massachusetts Rehabilitation Commission

This publication is designed to provide a general overview of the Americans with Disabilities Act. The information contained herein is provided with the understanding that ADA Texas is not engaged in rendering legal advice. If legal assistance is required, the services of an attorney should be sought.

Employer Incentives

Texas Rehabilitation Commission
4900 North Lamar Blvd.
Austin, Texas 78751-2316

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1-800-RELAY TX (TDD Access)
1-800-442-9502

AMERICANS WITH DISABILITIES ACT
ADA
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The following chart summarizes some of the federal, state and local incentives that employers can tap when considering job applicants with disabilities.

Program	Incentive	Restrictions	More Information
Targeted Jobs Tax Credit (TJTC)	Tax credit of: 40% of first $6,000 earned per employee provided the employment lasts at least 90 days or 120 hours.	May not claim TJTC and On-the-Job Training (OJT) for same wages.Certification must be requested on or before first day of work.	IRS (see publication 906) State Employment Service, Private Industry Council, State or local committees on employment of people with disabilites (check State and city governments for governments for local TJTC)
Job Accomodation Network (JAN)	Free consulting service on available aid, devices, adjustments and placement information.	None	Call 1-800-JAN-7234, Voice or TDD
Disabled Access Credit	Tax credit for small businesses that seek to comply with the Americans with Disabilities Act. Equal to 50% ot the eligible access expenditures which exceed $250, but do not exceed $10,250.	"Eligible small business" is any person whose gross receipts did not exceed $1 million for the preceding taxable year, or who employed not more than 30 full time employees.	Internal Revenue Service
Tax Credit on Architectural and Transportation Barriers	Tax deduction on up to $15,000 spent to make a workplace more accessible for employees and customers.	Improvements must meet Treasury Department standards.	Internal Revenue Service State or local committees on employment of people with disabilities
Association for Retarded Citizens of the USA	Reimbursement of: 50% of entry wage for first 160 hours of on-the-job training. 25% of entry wage for second 160 hours.	Worker must be mentally retarded with IQ below 70, at least 16 years old, underemployed or unemployed over 7 days. Position must be at least 20 hours a week, pay minimum wage, and the employer intent must be to hire that individual on a part time basis. All males between the ages of 18-30 must be registered with Selective Service.	Association for Retarded Citizens of the USA Local Association of Retarded Citizens
Vocational Rehabilitation On-the-Job Training Program	Shared payment of disabled employee's wages for limited time on a negotiated schedule.	Worker must be a VR client. Position must be permanent, full-time, pay minimum wage.	Local Vocational Rehabilitation

Job Training and Partnership Act (JTPA)	Reimbursement of: (OJT) 50% of first 6 months wages per employee. Customized training or retraining.	Employer must hire trainee with intent of permanent full-time position	Private Industry Council Chamber of Commerce City or State government State or local committees on employment of people with disabilities.
Minimum Wage Exemption Certificate	Certificate allowing employer to pay 75% of minimum wage 50% for most severly disabled workers.	Wage must adequately reflect worker's productive capacity. Annual renewal required.	U.S. Department of Labor Wage and Hour Division Regional Office
Horticulture	Free personnel services: job analysis, employee recruitment and screening	Employer / or group of employers must have 10 or more job positions. Services provided by 6 area offices and through national referral program.	Horticulture Hiring the Disabled, 1-800-634-1603 or 1-301-948-3010

This publication is designed to provide a general overview of the Americans with Disabilities Act. The information contained herein is provided with the understanding that ADA - Texas is not engaged in rendering legal advice. If legal assistance is required, the services of an attorney should be sought.

DREDF Disability Rights Education and Defense Fund, Inc.

Law, Public Policy, Training and Technical Assistance

TRAINING OUTLINE

AMERICANS WITH DISABILITIES ACT OF 1990

A. Context of the ADA in Civil Rights and Disability Rights Law

1. Civil Rights Act of 1964

2. Section 504 of the Rehabilitation Act of 1973

3. The Education for All Handicapped Children's Act of 1975 (EHA, or PL 94-142)

4. Issuance of 504 Regulations in 1977

5. Threatened deregulation of Section 504 and PL 94-142 in early 1980's

6. Air Carriers Access Act of 1986

7. Civil Rights Restoration Act of 1988

8. Fair Housing Amendments Act of 1988

9. Americans with Disabilities Act of 1990

A not-for-profit public benefit corporation dedicated to the Independent Living Movement and the Civil Rights of Persons with Disabilities

1616 "P" Street N.W., Suite 100
Washington, D.C. 20036
(202) 328-5185
(voice or TDD)

2212 Sixth Street
Berkeley, California 94710
(415) 644-2555
(TDD) 644-2629

B. Definition of Disability

Three prongs of the definition:

1. A person with a physical or mental impairment that substantially limits a major life activity
2. A person with a record of such an impairment
3. A person who is regarded as having such an impairment

Individuals who use illegal drugs are not covered.

C. Employment

1. Qualified Individual With a Disability
2. Direct Threat
3. Medical Examinations and Inquiries
4. Reasonable Accommodation and Undue Hardship
5. General Discrimination Prohibitions
6. Medical Insurance
7. Regulations by the Equal Employment Opportunity Commission
8. Enforcement

D. Transportation

I. TRANSPORTATION PROVIDED BY PUBLICLY FUNDED ENTITIES

1. Newly Purchased Vehicles
2. Used Vehicles
3. Remanufactured Vehicles
4. Paratransit
5. Communities Operating Demand Responsive Systems for the General Public
6. Rail Transit - Intercity (Amtrak)
   a. New Rail Cars
   b. Stations
   c. Other Requirements
7. Rail Transit - Commuter, Rapid, and Light Rail
   a. New Rail Cars
   b. Key Stations
   c. Other Requirements
8. Regulations by the Secretary of Transportation and the Architectural and Transportation Barriers Compliance Board
9. Enforcement

II. TRANSPORTATION PROVIDED BY PRIVATELY FUNDED ENTITIES

1. Private Entities Primarily in the Transportation Business
2. Intercity Bus Service (Greyhound)
3. Private Entities Not Primarily in the Transportation Business
4. Regulations by the Secretary of Transportation and the Architectural and Transportation Barriers Compliance Board
5. Enforcement

E. Public Accommodations

1. Definition

2. General Discrimination Prohibitions

3. Auxiliary Aids and Services

4. Licensing and Certifications

5. Architectural Access

   a. Existing Facilities

   b. New Construction

   c. Facilities That Are Altered

6. Regulations by the Attorney General and the Architectural and Transportation Barriers Compliance Board

7. Enforcement

F. Telecommunications

1. Telecommunications Relay Services

2. Regulations and Enforcement by the Federal Communications Commission

3. Closed Captioning of Public Service Announcements

G. State and Local Government

1. Requirements like Section 504

2. Regulations and Enforcement

H. Other Provisions

Beware of Schemes!

AMERICANS WITH DISABILITES ACT QUESTIONS AND ANSWERS!

The new Americans with Disabilities Act (ADA) will be taking effect on Jan. 26, 1992. And we know that already there are schemers who will take advantage of the law to scare businesspeople into spending hundreds or thousands of dollars for *"protection"* against dangers that *don't exist!*

WHAT THE LAW REQUIRES... HIRING DECISIONS

It's simple. Employers with 15 or more employees may not discriminate against qualified individuals with disabilities. (For the first two years, the law applies to firms with 25 or more employees.)

Employers must reasonably accommodate the disabilities of qualified applicants unless an undue hardship would result. But they may reject applicants or fire those who pose a direct threat to the health or safety of others in the workplace. And applicants and employees are *not protected* from personnel actions based on their current illegal use of drugs. Drug testing is not affected!

Religious organizations may give preference in employment to their own members and they may require applicants & employees to confirm to their religious tenets.

PUBLIC ACCOMMODATIONS

Public accommodations such as restaurants, hotels, theaters, doctors' offices, pharmacies, retail stores, museums, libraries, parks, private schools, and day care centers, may not discriminate on the basis of disability, effective Jan. 26, 1992. Reasonable changes in policies, practices and procedures must be made to avoid discrimination. Private clubs and religious organizations are exempt.

Physical barriers in existing facilities must be removed if it is readily achievable. This means **"easily accomplishable and able to be carried out without much difficulty or expense."** If removal isn't accomplished easily, alternative methods of providing the services must be offered (if they are readily achievable).

All new construction in public accommodations, as well as in "commercial facilities" such as office buildings, must be accessible. Elevators are generally not required in buildings under 3 stories or with less than 3,000 sq. ft. per foot, unless the building is a shopping center, mall, or professional office of a health care provider. Alterations also must be accessible and a path of travel to the altered area (and bathrooms, phones and drinking fountains) must be provided to the extent that the added accessibility costs are not disproportionate to the overall costs of the alterations.

Entities such as hotels that also offer transportation must provide equivalent service to the disabled. New fixed-route vehicles ordered on or after August 26, 1990, and capable of carrying more than 16 passengers must be accessible.

TRANSPORTATION

Public bus systems, rail systems, and transit authorities have a number of requirements for new equipment and station upgrading. Privately operated bus & van companies need to order accessible equipment when purchasing after July 26, 1996, (or 1997 if a small company).

SCHEMES TO PROTECT AGAINST

#1) "CRISIS" SEMINARS. You are contacted by a firm which implies that the ADA will *"shut you down"* unless you attend their expensive seminar(s) and/or buy their educational materials.

FACT is, most of the ADA provisions are common sense and written in simple English. Many sources of advice and help are available free. Your BBB has pamphlets with valuable information and we will be holding our own - very inexpensive seminars soon. Don't be fooled!

#2) "CRISIS REMODELING. You are approached with tales of disaster if you don't install expensive ramps, lower equipment, etc. The firm explains that you get a $5,000 tax credit for remodeling, and all of it's "suggestions" seem to cost $4,999.

FACT. Some remodeling MAY be necessary, but perhaps not! ***One firm*** that was told it had to lower all the water fountains to make them wheelchair-accessible instead discovered all that was needed was to place a paper cup dispenser nearby. ***A dry-cleaner*** who was worried that he needed expensive ramps discovered that he could take care of disabled customers by simply providing curbside pickup and delivery. ***A clothing store*** worried that it needed to provide Brailled price tags but learned that its sales people could provide price information orally upon request. Same for ***a bookstore*** which feared being forced to have a sign language interpreter on staff to communicate with deaf customers. All it needed was employees who were willing to communicate by pen and notepad when necessary. Don't panic! The answers may be simpler and less expensive than some may lead you to believe.

#3) "ADA CERTIFIED CONSULTANTS" or similar claims. Already we have seen firms telling you (and even advertising) that they are *"certified," "approved,"* or *"official"* experts on the ADA. One even invented its own official-looking "seal" which it used in ads. This is news to the U.S. Equal Employment Opportunity Commission and U.S. Department of Justice, neither of which "certify" anybody as "ADA consultants."

The BBB is working with local, state and national agencies to provide information and advice to allow you to comply with ADA as comfortably as possible. If a dispute arises, we have ***mediation*** and ***binding arbitration*** programs that may help resolve the situation without need to hire lawyers and go to court. We'll have more details in future newsletters.

THE BETTER BUSINESS BUREAU

*From the October 1991 BBB News (BBB/Toledo)

Title III Highlights

I. Who is Covered by title III of the ADA

II. Overview of Requirements

III. "Individuals with Disabilities"

IV. Eligibility for Goods and Services

V. Modifications in Policies, Practices, and Procedures

VI. Auxiliary Aids

VII. Existing Facilities: Removal of Barriers

VIII. Existing Facilities: Alternatives to Barrier Removal

IX. New Construction

X. Alterations

XI. Overview of Americans with Disabilities Act Accessibility Guidelines for New Construction and Alterations

XII. Examinations and Courses

XIII. Enforcement of the ADA and its Regulations

XIV. Technical Assistance

I. Who is Covered by Title III of the ADA

- The title III regulation covers --
  - Public accommodations (i.e., private entities that own, operate, lease, or lease to places of public accommodation),
  - Commercial facilities, and
  - Private entities that offer certain examinations and courses related to educational and occupational certification.
- Places of public accommodation include over five million private establishments, such as restaurants, hotels, theaters, convention centers, retail stores, shopping centers, dry cleaners, laundromats, pharmacies, doctors' offices, hospitals, museums, libraries, parks, zoos, amusement parks, private schools, day care centers, health spas, and bowling alleys.
- Commercial facilities are nonresidential facilities, including office buildings, factories, and warehouses, whose operations affect commerce.
- Entities controlled by religious organizations, including places of worship, are not covered.
- Private clubs are not covered, except to the extent that the facilities of the private club are made available to customers or patrons of a place of public accommodation.
- State and local governments are not covered by the title III regulation, but rather by the Department of Justice's title II regulation.

II. Overview of Requirements

- Public accommodations must --
  - Provide goods and services in an integrated setting, unless separate or different measures are necessary to ensure equal opportunity.
  - Eliminate unnecessary eligibility standards or rules that deny individuals with disabilities an equal opportunity to enjoy the goods and services of a place of public accommodation.
  - Make reasonable modifications in policies, practices, and procedures that deny equal access to individuals with disabilities, unless a fundamental alteration would result in the nature of the goods and services provided.
  - Furnish auxiliary aids when necessary to ensure effective communication, unless an undue burden or fundamental alteration would result.

- Remove architectural and structural communication barriers in existing facilities where readily achievable.

- Provide readily achievable alternative measures when removal of barriers is not readily achievable.

- Provide equivalent transportation services and purchase accessible vehicles in certain circumstances.

- Maintain accessible features of facilities and equipment.

- Design and construct new facilities and, when undertaking alterations, alter existing facilities in accordance with the Americans with Disabilities Act Accessibility Guidelines issued by the Architectural and Transportation Barriers Compliance Board and incorporated in the final Department of Justice title III regulation.

➤ A public accommodation is not required to provide personal devices such as wheelchairs; individually prescribed devices (e.g., prescription eyeglasses or hearing aids); or services of a personal nature including assistance in eating, toileting, or dressing.

➤ A public accommodation may not discriminate against an individual or entity because of the known disability of a person with whom the individual or entity is known to associate.

➤ Commercial facilities are only subject to the requirement that new construction and alterations conform to the ADA Accessibility Guidelines. The other requirements applicable to public accommodations listed above do not apply to commercial facilities.

➤ Private entities offering certain examinations or courses (i.e., those related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes) must offer them in an accessible place and manner or offer alternative accessible arrangements.

III. "Individuals with Disabilities"

➤ The Americans with Disabilities Act provides comprehensive civil rights protections for "individuals with disabilities."

➤ An individual with a disability is a person who --

- Has a physical or mental impairment that substantially limits one or more "major life activities," or

- Has a record of such an impairment, or

- Is regarded as having such an impairment.

- Examples of physical or mental impairments include, but are not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech, and hearing impairments; cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism. Homosexuality and bisexuality are not physical or mental impairments under the ADA.

- "Major life activities" include functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

- Individuals who currently engage in the illegal use of drugs are not protected by the ADA when an action is taken on the basis of their current illegal use of drugs.

IV. Eligibility for Goods and Services

- In providing goods and services, a public accommodation may not use eligibility requirements that exclude or segregate individuals with disabilities, unless the requirements are "necessary" for the operation of the public accommodation.

    - For example, excluding individuals with cerebral palsy from a movie theater or restricting individuals with Down's Syndrome to only certain areas of a restaurant would violate the regulation.

- Requirements that tend to screen out individuals with disabilities, such as requiring a blind person to produce a driver's license as the sole means of identification for cashing a check, are also prohibited.

- Safety requirements may be imposed only if they are necessary for the safe operation of a place of public accommodation. They must be based on actual risks and not on mere speculation, stereotypes, or generalizations about individuals with disabilities.

    - For example, an amusement park may impose height requirements for certain rides when required for safety.

- Extra charges may not be imposed on individuals with disabilities to cover the costs of measures necessary to ensure nondiscriminatory treatment, such as removing barriers or providing qualified interpreters.

V. Modifications in Policies, Practices, and Procedures

- A public accommodation must make reasonable modifications in its policies, practices, and procedures in order to accommodate individuals with disabilities.

- A modification is not required if it would "fundamentally alter" the goods, services, or operations of the public accommodation.

- For example, a department store may need to modify a policy of only permitting one person at a time in a dressing room if an individual with mental retardation needs the assistance of a companion in dressing.

➤ Modifications in existing practices generally must be made to permit the use of guide dogs and other service animals.

➤ Specialists are not required to provide services outside of their legitimate areas of specialization.

- For example, a doctor who specializes exclusively in burn treatment may refer an individual with a disability, who is not seeking burn treatment, to another provider. A burn specialist, however, could not refuse to provide burn treatment to, for example, an individual with HIV disease.

VI. Auxiliary Aids

➤ A public accommodation must provide auxiliary aids and services when they are necessary to ensure effective communication with individuals with hearing, vision, or speech impairments.

➤ "Auxiliary aids" include such services or devices as qualified interpreters, assistive listening headsets, television captioning and decoders, telecommunications devices for deaf persons (TDD's), videotext displays, readers, taped texts, brailled materials, and large print materials.

➤ The auxiliary aid requirement is flexible. For example, a brailled menu is not required, if waiters are instructed to read the menu to blind customers.

➤ Auxiliary aids that would result in an undue burden, (i.e., "significant difficulty or expense") or in a fundamental alteration in the nature of the goods or services are not required by the regulation. However, a public accommodation must still furnish another auxiliary aid, if available, that does not result in a fundamental alteration or an undue burden.

VII. Existing Facilities: Removal of Barriers

➤ Physical barriers to entering and using existing facilities must be removed when "readily achievable."

➤ Readily achievable means "easily accomplishable and able to be carried out without much difficulty or expense."

➤ What is readily achievable will be determined on a case-by-case basis in light of the resources available.

- The regulation does not require the rearrangement of temporary or movable structures, such as furniture, equipment, and display racks to the extent that it would result in a significant loss of selling or serving space.

- Legitimate safety requirements may be considered in determining what is readily achievable so long as they are based on actual risks and are necessary for safe operation.

➤ Examples of barrier removal measures include --

- Installing ramps,
- Making curb cuts at sidewalks and entrances,
- Rearranging tables, chairs, vending machines, display racks, and other furniture,
- Widening doorways,
- Installing grab bars in toilet stalls, and
- Adding raised letters or braille to elevator control buttons.

➤ First priority should be given to measures that will enable individuals with disabilities to "get in the front door," followed by measures to provide access to areas providing goods and services.

➤ Barrier removal measures must comply, when readily achievable, with the alterations requirements of the ADA Accessibility Guidelines. If compliance with the Guidelines is not readily achievable, other safe, readily achievable measures must be taken, such as installation of a slightly narrower door than would be required by the Guidelines.

VIII. Existing Facilities: Alternatives to Barrier Removal

➤ The ADA requires the removal of physical barriers, such as stairs, if it is "readily achievable." However, if removal is not readily achievable, alternative steps must be taken to make goods and services accessible.

Examples of alternative measures include --

- Providing goods and services at the door, sidewalk, or curb,
- Providing home delivery,
- Retrieving merchandise from inaccessible shelves or racks,
- Relocating activities to accessible locations.

➤ Extra charges may not be imposed on individuals with disabilities to cover the costs of measures used as alternatives to barrier removal. For example, a restaurant may not charge a wheelchair user extra for home delivery when it is provided as the alternative to barrier removal.

IX. New Construction

- All newly constructed places of public accommodation and commercial facilities must be accessible to individuals with disabilities to the extent that it is not structurally impracticable.

- The new construction requirements apply to any facility occupied after January 26, 1993, for which the last application for a building permit or permit extension is certified as complete after January 26, 1992.

- Full compliance will be considered "structurally impracticable" only in those rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features (e.g., marshland that requires construction on stilts).

- The architectural standards for accessibility in new construction are contained in the ADA Accessibility Guidelines issued by the Architectural and Transportation Barriers Compliance Board, an independent Federal agency. These standards are incorporated in the final Department of Justice title III regulation.

- Elevators are not required in facilities under three stories or with fewer than 3,000 square feet per floor, unless the building is a shopping center, shopping mall, professional office of a health care provider, or station used for public transportation.

X. Alterations

- Alterations after January 26, 1992, to existing places of public accommodation and commercial facilities must be accessible to the maximum extent feasible.

- The architectural standards for accessibility in alterations are contained in the ADA Accessibility Guidelines issued by the Architectural and Transportation Barriers Compliance Board. These standards are incorporated in the final Department of Justice title III regulation.

- An alteration is a change that affects usability of a facility. For example, if during remodeling, renovation, or restoration, a doorway is being relocated, the new doorway must be wide enough to meet the requirements of the ADA Accessibility Guidelines.

- When alterations are made to a "primary function area," such as the lobby or work areas of a bank, an accessible path of travel to the altered area, and the bathrooms, telephones, and drinking fountains serving that area, must be made accessible to the extent that the added accessibility costs are not disproportionate to the overall cost of the original alteration.

    - Alterations to windows, hardware, controls, electrical outlets, and signage in primary function areas do not trigger the path of travel requirement.

    - The added accessibility costs are disproportionate if they exceed 20 percent of the original alteration.

- Elevators are not required in facilities under three stories or with fewer than 3,000 square feet per floor, unless the building is a shopping center, shopping mall, professional office of a health care provider, or station used for public transportation.

XI. Overview of Americans with Disabilities Act Accessibility Guidelines for New Construction and Alterations

- New construction and alterations must be accessible in compliance with the ADA Accessibility Guidelines.

- The Guidelines contain general design ("technical") standards for building and site elements, such as parking, accessible routes, ramps, stairs, elevators, doors, entrances, drinking fountains, bathrooms, controls and operating mechanisms, storage areas, alarms, signage, telephones, fixed seating and tables, assembly areas, automated teller machines, and dressing rooms. They also have specific technical standards for restaurants, medical care facilities, mercantile facilities, libraries, and transient lodging (such as hotels and shelters).

- The Guidelines also contain "scoping" requirements for various elements (i.e., it specifies how many, and under what circumstances, accessibility features must be incorporated).

- Following are examples of scoping requirements in new construction --

  - At least 50 percent of all public entrances must be accessible. In addition, there must be accessible entrances to enclosed parking, pedestrian tunnels, and elevated walkways.

  - An accessible route must connect accessible public transportation stops, parking spaces, passenger loading zones, and public streets or sidewalks to all accessible features and spaces within a building.

  - Every public and common use bathroom must be accessible. Only one stall must be accessible, unless there are six or more stalls, in which case two stalls must be accessible (one of which must be of an alternate, narrow-style design).

  - Each floor in a building without a supervised sprinkler system must contain an "area of rescue assistance" (i.e., an area with direct access to an exit stairway where people unable to use stairs may await assistance during an emergency evacuation).

  - One TDD must be provided inside any building that has four or more public pay telephones, counting both interior and exterior phones. In addition, one TDD must be provided whenever there is an interior public pay phone in a stadium or arena; convention center; hotel with a convention center; covered shopping mall; or hospital emergency, recovery, or waiting room.

  - One accessible public phone must be provided for each floor, unless the floor has two or more banks of phones, in which case there must be one accessible phone for each bank.

- Fixed seating assembly areas that accommodate 50 or more people or have audio-amplification systems must have a permanently installed assistive listening system.

- Dispersal of wheelchair seating in theaters is required where there are more than 300 seats. In addition, at least one percent of all fixed seats must be aisle seats without armrests (or with movable armrests). Fixed seating for companions must be located adjacent to each wheelchair location.

- Where automated teller machines are provided, at least one must be accessible.

- Five percent of fitting and dressing rooms (but never less than one) must be accessible.

➤ Following are examples of specific scoping requirements for new construction of special types of facilities, such as restaurants, medical care facilities, mercantile establishments, libraries, and hotels --

- In restaurants, generally all dining areas and five percent of fixed tables (but not less than one) must be accessible.

- In medical care facilities, all public and common use areas must be accessible. In general purpose hospitals and in psychiatric and detoxification facilities, ten percent of patient bedrooms and toilets must be accessible. The required percentage is 100 percent for special facilities treating conditions that affect mobility, and 50 percent for long-term care facilities and nursing homes.

- In mercantile establishments, at least one of each type of counter containing a cash register and at least one of each design of check-out aisle must be accessible. In some cases, additional check-out aisles are required to be accessible (i.e., from 20 to 40 percent) depending on the number of check-out aisles and the size of the facility.

- In libraries, all public areas must be accessible. In addition, five percent of fixed tables or study carrels (or at least one) must be accessible. At least one lane at the check-out area and aisles between card catalogs, magazine displays, and stacks must be accessible.

- In hotels, four percent of the first 100 rooms and approximately two percent of rooms in excess of 100 must be accessible to persons with hearing impairments (i.e., contain visual alarms, visual notification devices, volume-control telephones, and an accessible electrical outlet for a TDD) and to persons with mobility impairments. Moreover, an identical percentage of additional rooms must be accessible to persons with hearing impairments.

- Technical and scoping requirements for alterations are sometimes less stringent than those for new construction. For example, when compliance with the new construction requirements would be technically infeasible, one accessible unisex bathroom per floor is acceptable.

XII. Examinations and Courses

- Certain examinations or courses offered by a private entity (i.e., those that are related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes) must either be given in a place and manner accessible to persons with disabilities, or be made accessible through alternative means.

- In order to provide an examination in an accessible place and manner, a private entity must --

  - Assure that the examination measures what it is intended to measure, rather than reflecting the individual's impaired sensory, manual, or speaking skills.

  - Modify the examination format when necessary (e.g., permit additional time).

  - Provide auxiliary aids (e.g., taped exams, interpreters, large print answer sheets, or qualified readers), unless they would fundamentally alter the measurement of the skills or knowledge that the examination is intended to test or would result in an undue burden.

  - Offer any modified examination at an equally convenient location, as often, and in as timely a manner as are other examinations.

  - Administer examinations in a facility that is accessible or provide alternative comparable arrangements, such as providing the examination at an individual's home with a proctor.

- In order to provide a course in an accessible place and manner, a private entity may need to -

  - Modify the course format or requirements (e.g., permit additional time for completion of the course).

  - Provide auxiliary aids, unless a fundamental alteration or undue burden would result.

  - Administer the course in a facility that is accessible or provide alternative comparable arrangements, such as provision of the course through video tape, audio cassettes, or prepared notes.

XIII. Enforcement of the ADA and its Regulations

- Private parties may bring lawsuits to obtain court orders to stop discrimination. No monetary damages will be available in such suits. A reasonable attorney's fee, however, may be awarded.

- Individuals may also file complaints with the Attorney General who is authorized to bring lawsuits in cases of general public importance or where a "pattern or practice" of discrimination is alleged.

- In suits brought by the Attorney General, monetary damages (not including punitive damages) and civil penalties may be awarded. Civil penalties may not exceed $50,000 for a first violation or $100,000 for any subsequent violation.

XIV. Technical Assistance

- The ADA requires that the Federal agencies responsible for issuing ADA regulations provide "technical assistance."

- Technical assistance is the dissemination of information (either directly by the Department or through grants and contracts) to assist the public, including individuals protected by the ADA and entities covered by the ADA, in understanding the new law.

- Methods of providing information include, for example, audio-visual materials, pamphlets, manuals, electronic bulletin boards, checklists, and training.

- The Department issued for public comment on December 5, 1990, a government-wide plan for the provision of technical assistance.

  The Department's efforts focus on raising public awareness of the ADA by providing--

  - Fact sheets and pamphlets in accessible formats,
  - Speakers for workshops, seminars, classes, and conferences,
  - An ADA telephone information line, and
  - Access to ADA documents through an electronic bulletin board for users of personal computers.

- The Department has established a comprehensive program of technical assistance relating to public accommodations and State and local governments.

  - Grants will be awarded for projects to inform individuals with disabilities and covered entities about their rights and responsibilities under the ADA and to facilitate voluntary compliance.
  - The Department will issue a technical assistance manual by January 26, 1992, for individuals or entities with rights or duties under the ADA.

For additional information, contact:

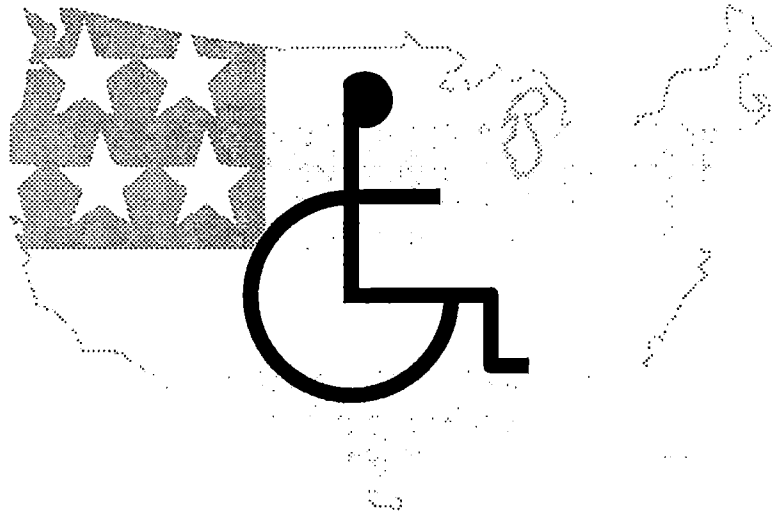
Office on the Americans with Disabilities Act
Civil Rights Division
U.S. Department of Justice
P.O. Box 66118
Washington, D.C 20035-6118
(202) 514-0301 (Voice)
(202) 514-0383 (TDD)
(202) 514-6193 (Electronic Bulletin Board)

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Texas Young Lawyers Association
Office of Law Related Education
P. O. Box 12487
Austin, Texas 78711

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The Americans with Disabilities Act



An Overview

Produced as a Public Service by the Texas Young Lawyers Association

For additional copies of this handbook, please contact the *Texas Young Lawyers Association, P. O. Box 12487, Austin, Texas, 78711, (512) 463-1446.* Copies of this handbook are also available in Braille and on audiotape.

The Americans with Disabilities Act

An Overview

Published and Distributed as a
Public Service Project
by the
Texas Young Lawyers Association

This handbook is not a substitute for the advice of a lawyer, but is designed to inform people of their legal rights under the Americans with Disabiltities Act.

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Section 504 of the Rehabilitation Act and the ADA

Section 504 of the Rehabilitation Act of 1973 bars discrimination against persons with disabilities by public or private entities (i.e., colleges and universities) receiving federal financial assistance. The ADA extends the general protections to all individuals regardless of whether the private or public entity receives federal financial assistance.

The ADA does amend the Rehabilitation Act in the following ways:

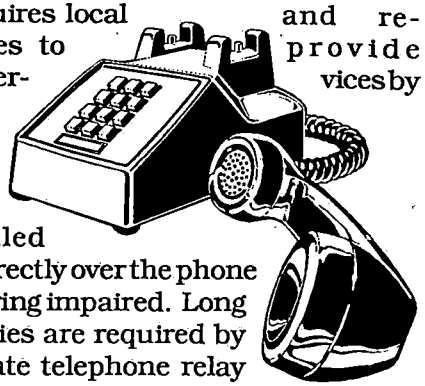
(1) persons who are currently involved in illegal drug use are no longer considered "handicapped," and therefore are not entitled to the protections of the law;
(2) persons who are former drug users and are in the process of being rehabilitated are entitled to the law's protection;
(3) persons who are mistakenly regarded as being illegal drug users are also protected by the law;
(4) only health services and services provided under Titles I, II, and III of the Rehabilitation Act are available to current users of illegal drugs;
(5) local educational agencies may take disciplinary action based upon illegal use of drugs and alcohol; and,
(6) the term *handicapped* does not apply to an employee who is an alcoholic and whose use of alcohol prevents him or her from performing their job duties or who would constitute a direct threat to the health or safety of others.

Resources

The Texas Young Lawyers Association gratefully acknowledges the contributions of Advocacy, Inc. in the preparation of this handbook.

For more information or for copies of the Rehabilitation Act or the Americans with Disabilities Act, contact *Advocacy Inc., 7800 Shoal Creek Boulevard, Suite 171-E, Austin, Texas, 78757, (512) 454-4816 or 1-800-223-4206, voice or TDD.*

Telecommunications



Title IV of the ADA requires local and regional telephone companies to provide telecommunication relay services by July 26, 1993. This service will enable persons who are hearing and speech impaired to use their telecommunication devices (called TDDs) for communicating directly over the phone with people who are not hearing impaired. Long distance telephone companies are required by the ADA to provide interstate telephone relay services by July 26, 1993.

Under Title IV, public service announcements aired on television and produced or funded in part with federal money must include closed captioning for the hearing impaired.

The Federal Communications Commission (FCC) is to promulgate rules by July 26, 1991. Individuals who feel they are aggrieved may file complaints with the FCC.

Miscellaneous

Title V of the ADA contains miscellaneous provisions which:

(1) describe the new law's relationship to other laws;
(2) explain insurance issues;
(3) prohibit state immunity;
(4) prohibit retaliation and coercion against employees;
(5) set regulations and timelines for the Architectural and Transportation Barriers Compliance Board to issue guidelines for accessible design of buildings, facilities, and vehicles;
(6) provide a right to attorneys' fees for both administrative and court proceedings;
(7) describe the coverage of the ADA to Congress and agencies of the legislative branch;
(8) explain implementation of each of the ADA's titles; and,
(9) note amendments to the Rehabilitation Act of 1973.

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INTRODUCTION

The Texas Young Lawyers Association (TYLA) has a long history of working to assure that the rights of each citizen are protected and that all citizens have the opportunity to achieve their ambitions, goals and desires. TYLA believes knowledge of one's rights is an important first step in this achievement. This handbook, which provides an overview of the Americans with Disabilities Act (ADA), is part of TYLA's effort.

The ADA was signed into law on July 26, 1990. Described by its sponsors as "the most significant civil rights bill to pass Congress in a quarter century" and the "Emancipation Proclamation for those with disabilities," the new law will provide civil rights protections and open up opportunities to an estimated 43 million Americans with disabilities. Consisting of five major sections, the ADA will bar discrimination by both private business and state and local governments in employment, public accommodations, public services, transportation and telecommunications.

TYLA hopes the handbook will be useful to you.

Martin Thompson, Chair
TYLA Texans with
Disabilities Committee
1990-1991

Kirk P. Watson, President
Texas Young Lawyers
Association
1990-1991

made readily accessible to and usable by people with disabilities and new train stations serving intercity rail and commuter rail systems also must be made readily accessible to and usable by people with disabilities.

Other private transportation operations including station facilities must be readily accessible to and usable by people with disabilities except where it is structurally impractical to do so.

Title II does not require that alterations must be made to existing bus station facilities or to primary function areas of train stations in order to make them accessible; however, when alterations are made, an accessible path to bathrooms, telephones, and drinking fountains must be provided.

Exemptions

Businesses employing 25 or fewer employees and having gross receipts of $1,000,000 or less are exempt from civil liability for violating new construction and alteration provisions of the ADA until July 26, 1992. Businesses employing 10 or fewer employees and having gross receipts of $500,000 or less are exempt from civil liability for violating these same provisions until January 26, 1993.

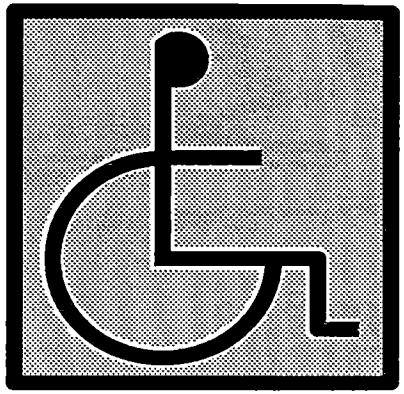
If You Are Discriminated Against

It is discriminatory not to make reasonable modifications in policies, practices, and procedures that would permit people with disabilities both access to and use of public accommodations. For example, it would be discriminatory not to alter a "no pets" rule for a person with a vision impairment who uses a guide dog.

Individuals who are disabled may bring private lawsuits to stop discrimination but are limited to injunctive relief. However, the Justice Department, on its own, can initiate actions against a "pattern of practice" of discrimination and the court can award money damages and impose civil penalties of up to $50,000 for the first violation and $100,000 for subsequent violations.

Private clubs and religious organizations are exempt from Title III.

Physical barriers in existing public accommodations must be removed and made structurally accessible, provided the changes can be done without much difficulty or expense.



All new construction in both public accommodations and commercial facilities, such as office buildings, must be readily accessible and usable by persons with disabilities by January 26, 1993. Elevators are not generally required in buildings under three stories or with fewer than 3,000 square feet per floor, but the U. S. Attorney General can determine otherwise. Shopping centers, malls, and the offices of health care providers are the exception to this general rule. Elevators must be furnished even in these buildings under three stories, or with fewer than 3,000 square feet per floor.

Alterations to public accommodations must be readily accessible to and usable by persons with disabilities, including those who use wheelchairs, by January 26, 1992. The path of travel to these altered areas including bathrooms, telephones, and drinking fountains must be provided where the costs for the added accessibility are not disproportionate to the overall cost of the operations.

Auxiliary aids and services must be provided to individuals with vision or hearing impairments so that they can have an equal opportunity to participate in or benefit from services. Auxiliary aids and services include interpreters, readers, taped texts, and similar services. An expectation exists when these auxiliary aids and services will cause an undue burden or fundamentally alter the nature of the program.

Under Title II, on or after January 26, 1992, *newly* constructed facilities serving public bus systems must be

Who Qualifies as Disabled Under the ADA

The ADA defines a person with a disability as someone with a physical or mental impairment and includes individuals who have a record or history of an impairment, or are regarded as having a physical or mental impairment that substantially limits one or more major life activities.

Definitions

A *physical impairment* means any physiological disorder or corrective, cosmetic disfigurement, or an anatomical loss affecting one or more of the following body systems: neurological; musculo-skeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin and endocrine. A substantial limitation of a *major life activity* includes limiting such things as walking, talking, seeing, hearing, caring for oneself, or working. *Mental impairment* includes mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Persons regarded as having a physical or mental impairment would, for example, include an individual who has been cured of cancer or who has a disfiguring scar and is considered by others as being impaired. In addition, it includes people with AIDS or infected with the HIV virus, as well as alcoholics and drug abusers who have undergone treatment and been rehabilitated. The ADA excludes people with such disorders as compulsive gambling, kleptomania, pyromania, pedophilia, and those who are currently using illegal drugs.

Employment Under Title I of the ADA

Title I governs the employment section of the ADA. Employers, employment agencies, labor unions, and joint labor-management committees are prohibited from discriminating against a "qualified individual with a disability" in hiring, job application, advancement, discharge, compensation, training, or other terms or conditions of employment.

Definitions

A *qualified individual* for purposes of the ADA means one who with or without a reasonable accommodation is able to perform essential functions of a particular job. A *reasonable accommodation* by the employer would include making existing facilities accessible, job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modification of work policies, and other similar accommodations. If the necessary modification would be unduly burdensome because of either the difficulty or expense involved, the employer may not be required to make the accommodation. The burden is on the employer to show that an accommodation would impose an undue hardship on the business.

Restrictions on Employers

Pre-employment inquiries by the employer concerning a prospective employee's ability to perform job-related functions are permitted. However, the employer may not inquire as to the nature or severity of the person's disability.



After the job offer has been made, the employer may require a medical examination. The offer of employment may be conditioned on the results of that examination, provided:

(1) all new employees are subjected to examination; and,
(2) the examination is job-related and consistent with business necessity.

Information obtained through the hiring process must be kept confidential and maintained in separate medical files.

Employers may test prospective employees for illegal drug use and may require all employees to conform to the Drug-Free Workplace Act of 1988. Individuals who have

viewed in its entirety, provides an equivalent level of services to persons with disabilities as it does to the general public. Under this section, minivans are treated the same whether they are operated over a fixed route or a demand response system.

If You Are Discriminated Against

The Secretary of Transportation must issue regulations implementing Title II by July 26, 1991. Under Title II, public transportation systems can be sued by individuals under Sections 504 and 505 of the Rehabilitation Act of 1973, which provides for injunctive relief.

The Secretary of Transportation is required to issue regulations implementing most sections of Title III by July 26, 1991. Under Title III, besides injunctive relief, the Justice Department on its own can initiate actions and seek money damages and civil penalties. (See Title III).

Public Accommodations

Title II of the ADA prohibits discrimination by state and local governments against qualified persons with disabilities in public services, programs or activities. Beginning January 26, 1992, all government facilities, services and communications must be accessible and consistent with Section 504 of the Rehabilitation Act. This will mean, for example, that local and state governments will be required to construct curb cuts on public streets for persons using wheelchairs. Other services will require local and state government to ensure that emergency telephone numbers to police and fire departments can be used by people with speech and hearing impairments.

What is Included

Title III of the ADA prohibits discrimination against persons with disabilities in their use of public accommodations, such as restaurants, hotels, theatres, doctors' offices, pharmacies, grocery stores, shopping centers, museums, auditoriums, social service centers, schools, parks, zoos, and other similar establishments, effective January 26, 1992.

according to a fixed schedule) must insure that all new and leased vehicles acquired on or after August 26, 1990, are readily accessible to and usable by persons with disabilities, including people using wheelchairs. If new or leased vehicles are not accessible, then the business must provide equivalent service that is accessible. This requirement applies to vehicles with a seating capacity in excess of 16 passengers. Examples of such vehicles would include: hotel airport shuttle services and shuttle operations at an amusement park, zoo or ski resort.

Private businesses not primarily engaged in the business of transporting people, but that provide public transportation to less than 16 passengers (including the driver) on a fixed route system will be in violation of the ADA if, when viewed in its entirety, persons with disabilities (including those using wheelchairs) are not adequately served. This would mean, for example, that a hotel that provides fixed route shuttle service to the airport would have to buy new vehicles that are accessible to people with disabilities unless alternate and equivalent service is available.

A private business like a taxi service that is primarily engaged in the business of providing public transportation cannot discriminate against persons with disabilities. A taxi driver cannot refuse to pick up a person on the basis of the person's disability. For example, it would be discriminatory not to pick up someone using a wheelchair.

New vehicles, whether purchased or leased on or after August 16, 1990, by a private business primarily engaged in providing public transportation on a fixed route system must be readily accessible to persons with disabilities, including people using wheelchairs. This requires that on or after August 26, 1990, all new purchased or leased vehicles must be accessible.

A private business that is primarily engaged in the business of providing public transportation and that purchases or leases a new van with a seating capacity of less than eight passengers (including the driver) must be accessible to people with disabilities, including people using wheelchairs. The exception to this requirement is if the system, when

been rehabilitated or who are participating in a supervised rehabilitation program are protected by the ADA and must be considered for employment.

Employers are allowed to transfer workers with contagious diseases out of food handling positions but such persons must be reasonably accommodated by an offer of alternate employment.

Exemptions

Religious institutions are exempt from this law and may give preference in employment to their own members and may require applicants and employees to conform to their religious tenets.

Title I will be phased in over the next four years and will affect employers with 25 or more employees starting July 26, 1992, and employers with 15-24 employees beginning July 26, 1994.

If You Are Discriminated Against

Who To Contact

Individuals who are disabled and believe they have been discriminated against in employment should contact the Equal Employment Opportunity Commission (EEOC).

When To Contact

Charges must be filed with the EEOC within 180 days of the alleged discriminatory act. The EEOC has 180 days after the charges are filed to either initiate proceedings against the employer or issue a right-to-sue letter to the individual. Once a right-to-sue letter has been issued, the individual then has 90 days to file a lawsuit in court. The EEOC is required to issue regulations implementing Title I by July 26, 1991.

What The Court May Order

Once a suit has been filed, the court can order injunctive relief, back pay, and attorneys fees.

Transportation Under Titles II and III of the ADA

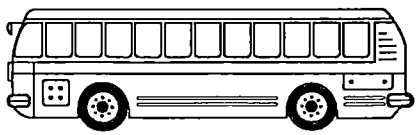
Title II covers most forms of transportation provided by public entities, including bus, rail, taxi and limousine. All new buses, trains or other vehicles must be made accessible, including accessible to people using wheelchairs. Vehicles will have to be equipped with lifts, ramps, and wheelchair spaces or seats. If the transportation carrier can demonstrate that no lifts are available, it may be exempted from this requirement.

Buses

Public bus systems (i.e., city or county transit systems) that purchase or lease new buses on or after August 26, 1990, and operate a fixed route system (operated along a prescribed route according to a fixed schedule) must be accessible to persons with disabilities. Public bus systems that operate a fixed route system and that are not accessible to people with disabilities must provide paratransit or other special transportation services. The level of service must be comparable to the regularly scheduled service. There is an exception if the paratransit service would impose an undue financial burden—the extent of services could be limited so that it would not impose an undue financial burden. Paratransit services must be available on or after January 26, 1992.

A public entity that operates a demand response system (other than a fixed route system) is required on or after August 26, 1990, to purchase or lease only vehicles that are readily accessible to and usable by people with disabilities, including people who use wheelchairs. The exception to that requirement is if the demand response system, where reviewed in its entirety, provides an equivalent level of services to persons with disabilities as it does to the general public.

Privately operated over-the-road (i.e., Greyhound) bus systems will, in general, not be required to make their vehicles accessible for persons with disabilities until final regulations become effective, which will not be



until July 26, 1997. Small privately operated systems may be given an additional year until July 26, 1998, to become accessible. During this period, it will not be considered discriminatory for a private entity to purchase or lease a new bus that is not wheelchair-equipped or to which a boarding chair or ramp is not provided for boarding.

Trains and Rail Systems

Public commuter and interstate rail systems like Amtrak must be made accessible to persons with disabilities as soon as practicable from the ADA's July 26, 1990, enactment date. However, at least one passenger car per train should be made accessible to persons with disabilities. No later than July 26, 1995, all rail systems must have one accessible car per train.

Intercity and commuter rail services must also provide a certain number of seats for persons with disabilities. Amtrak, for example, must have half the number of accessible seats as would have been available if every train car were built accessible. As a result, an eight-car train will be required to have four accessible seats by July 26, 1995. Within 10 years, there must be the same number of accessible seats as would have been available if every car were built accessible. In the previous example, an eight-car train will be required to have eight accessible seats by July 26, 2000.

Under Title II, all intercity rail stations (Amtrak) must be accessible within 20 years of the July 26, 1990, enactment date. In contrast, designated key commuter rail stations must be made accessible to people with disabilities within three years (July 26, 1993). *Key commuter rail station* will be defined by regulations to be issued by the Secretary of Transportation. Extension to complete both intercity rail and commuter rail stations may be granted by the Secretary of Transportation for up to 20 years. Rapid and light rail stations may get extensions up to 30 years.

Shuttles and Taxi Services

Private businesses not primarily engaged in the business of transporting people but that provide public transportation along a fixed route system (operated along a prescribed route

What Business Must Know about the Americans with Disabilities Act

By
Zachary D. Fasman
Mary C. Dollarhide
Jeffrey M. Hahn

Prepared and Published by the U.S. Chamber of Commerce

0230

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What Business Must Know about the Americans with Disabilities Act

This book was prepared for the U.S. Chamber
by Zachary D. Fasman, Mary C. Dollarhide and Jeffrey M. Hahn
of Paul, Hastings, Janofsky and Walker

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13. What about the attitudes and effects upon my other employees?

One of the specific reasons for the adoption of the ADA is to eliminate stereotypes and incorrect assumptions about individuals with disabilities. The attitudes of co-workers are an integral part of any workplace, and the introduction of employees with disabilities may pose immediate reactions. But employees with disabilities have the same rights to employment opportunities as all people do. The employer has the responsibility of making sure that the workplace is free of discrimination against employees with disabilities.

14. Can an employer rely on a collective bargaining agreement in denying a reasonable accommodation?

In certain situations, yes. 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 — but without seniority — to the job. If the collective bargaining agreement has listed job tasks and requirements, these can be used in determination of whether tasks are essential functions.

15. Is a tax break available for those who provide accommodations to the disabled?

In the 1990 Budget Reconciliation Act Congress did provide limited tax relief to those who accommodate the disabled. For businesses with less that $1 million in gross receipts or with fewer than 30 full-time employees, a tax credit is available. For all other businesses, a tax deduction is available. (Reference Chapter 1, Page 2.)

ABOUT THE AUTHORS

Zachary D. Fasman is a partner in the national law firm of Paul, Hastings, Janofsky & Walker. Resident in the Washington office, Mr. Fasman chairs the Washington employment law department and concentrates in representing employers in labor and equal employment matters. He testified before Congress, on behalf of the United States Chamber of Commerce, on the Americans with Disabilities Act, and was active in the legislative process leading to this new law.

Mary C. Dollarhide is an associate with Paul, Hastings, Janofsky & Walker. She is employed in the firm's West Los Angeles office, and concentrates in representing employers in labor and equal employment matters.

Jeffrey M. Hahn was associated with Paul, Hastings, Janofsky & Walker in Washington, and now practices law with the law firm of Foley, Hoag & Eliot in Boston. He also concentrates in representing employers in labor and equal employment matters.

The authors would like to extend their thanks to the U.S. Chamber of Commerce for their assistance and support of this project, and to unlisted contributors at Paul, Hastings, Janofsky & Walker for their assistance.

FOREWORD

The recently enacted Americans with Disabilities Act is the most far reaching civil rights law in recent history. It has the potential to change the face of America. Indeed, it will change the way most businesses conduct their employment practices and will determine what actions they must take to make their facilities accessible to all people.

If you are an employer of *any* size, the American with Disabilities Act is bound to have a profound effect on the way you do business. "What Business Must Know About the Americans With Disabilities Act" was written to help you cope with and understand the intricacies of this new law.

The guide covers the employment and public access provisions of the new law. It offers recommendations on what you must do in hiring, promoting, offering health care and terminating an individual with a disiability. Also, the guide provides insight as to what alterations you may have to make in order to make your facilities accessible.

The U.S. Chamber of Commerce would like to thank the President's Committee on Employment of People with Disabilities for their valuable contribution to this guide from the perspective of the disability community. Also, special thanks are extended to Nancy Fulco, Human Resources Attorney, Carol Meyer, Senior Research Analyst and Kathy Vetter, Senior Artist all from the U.S. Chamber for the many hours they spent to make this guide possible. Additionally, we want to thank Todd Braden, an intern with the U.S. Chamber, for his contributions. Finally, the U.S. Chamber is grateful for the time and effort given by the authors, Zachary D. Fasman, Mary C. Dollarhide, and Jeffrey M. Hahn.

For further information you can write to Nancy Fulco at 1615 H Street, N.W., Washington, D.C. 20062 or phone her at (202) 463-5502.

an individual only if he or she can demonstrate that the contagious disease constitutes "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." (Reference Chapter 1, Page 31.)

10. Are persons who illegally use drugs and/or alcohol considered disabled under the ADA and how does the law relate to the requirements of the Drug-Free Workplace Act of 1988?

First, the ADA establishes that an employee's current illegal use of drugs may disqualify him or her from holding a position. Also, employers may require that employees not use or be under the influence of alcohol, or illegal use of drugs in the workplace. Additionally, employers may hold an employee who is a drug user or alcoholic to the same qualification standards for employment or job performance and conduct required of other employees, even if the employee's unsatisfactory performance or conduct is related to his or her substance abuse. Finally, employers may require that employees comply with the provisions of the Drug-Free Workplace Act of 1988 which prohibits the unlawful manufacture, distribution, dispensation, possession or use of a controlled substance in the workplace of a recipient of federal funds. (Reference Chapter 1, Page 29.)

11. If I hire someone with a disability and they do not work out, can I dismiss them without possible charges being filed?

No one can ever be sure whether charges will be filed. However, there is no requirement in the ADA that an employer must keep an incompetent or unproductive employee. It is important, though, to document the reasons for dismissal.

12. Is an employer obligated to provide health insurance to an employee with a disability?

A qualified applicant cannot be denied insurance by the employer if the employer provides insurance to all employees. Pre- existing condition clauses are valid, but only if applicable to everyone. Employers can limit the scope of coverage and possibly the number of procedures or treatments (such as a limit on the number of X-rays in a year for each employee), but, again, any such limitation must apply to every employee equally.

given to an employer's judgment in determining the essential functions of a job. (Reference Chapter 2, Page 16.)

5. What is a reasonable accommodation?

A "reasonable accommodation" is defined by the Act as follows: (1) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (2) job restructuring including hours, vacant positions, equipment (necessary as aid), policies and procedures that are reasonable and achievable. The list is not exhaustive, but designed to provide general guidance as to the nautre of the obligation. An employer does not have to provide an accommodation if it would result in "undue hardship." (Reference Chapter 2, Page 18.)

6. What is undue hardship?

"Undue hardship" is difficult to define, and like many of these variables, subject to different standards in different situations. In general, though, "undue hardship" would be present when a particular action requires significant difficulty or expense to the employer. Congressional reports make it clear that employers need not undertake actions that are unduly costly, extensive, substantial and/or disruptive. Obviously, the size and financial resources of the employer are important in the determination of what would impose an "undue hardship." (Reference Chapter 2, Page 23.)

7. What does the term undue burden mean?

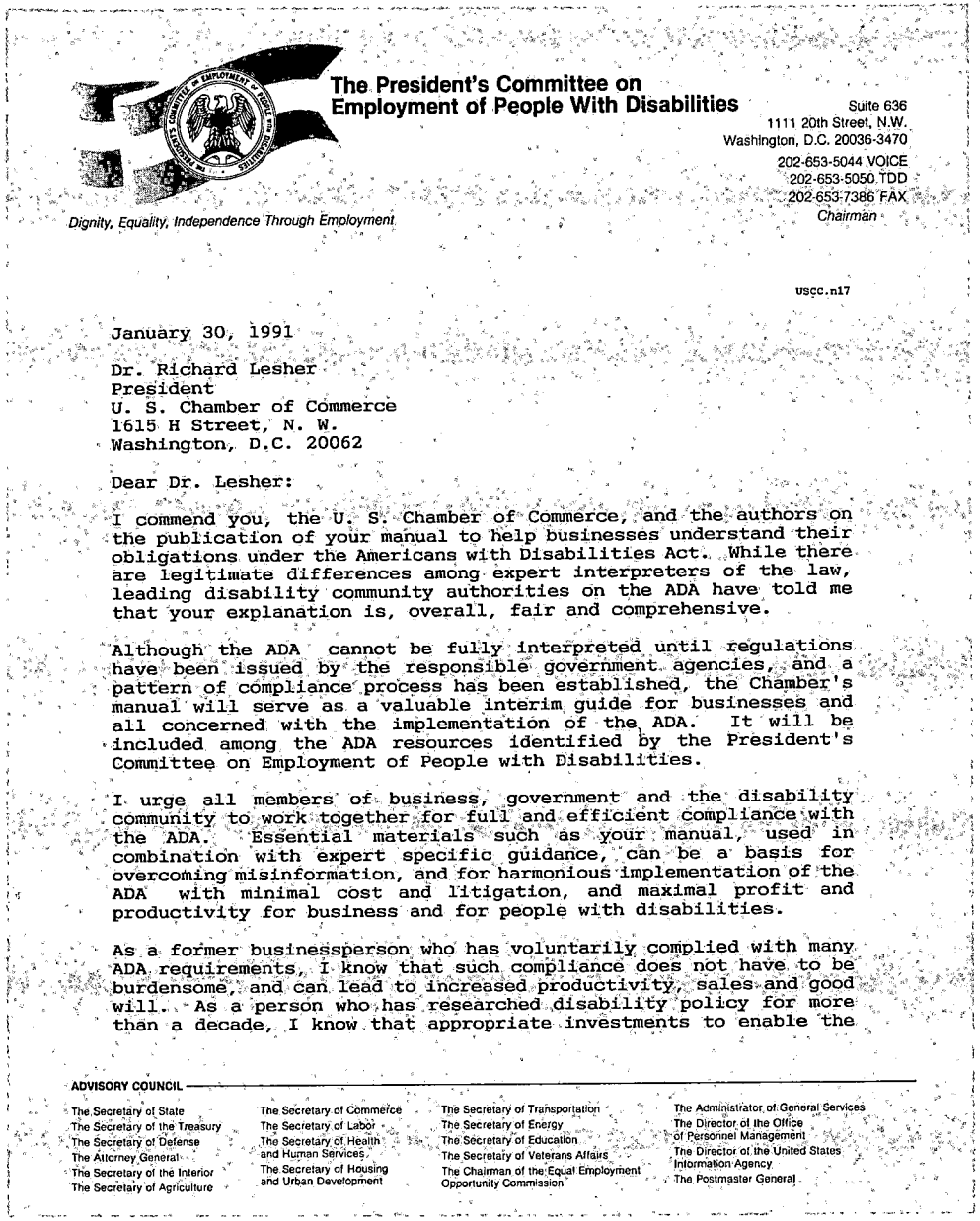
Undue burden is analogous to undue hardship. (Reference Chapter 3, Page 43.)

8. Who pays for an accommodation?

The responsibility of providing an accommodation rests with the employer, as long as it does not create an "undue hardship." If there is an undue hardship, an employer must first provide the disabled applicant with an opportunity to pay for the accommodation him- or herself before disqualifying the applicant from the job. (Reference Chart, Chapter 2, Pages 14-15.)

9. Are persons infected with AIDS covered by the act?

Under the ADA, a person suffering from a contagious disease is considered disabled. An employer may limit the job activities of such



The President's Committee on Employment of People With Disabilities

Suite 636
1111 20th Street, N.W.
Washington, D.C. 20036-3470
202-653-5044 VOICE
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January 30, 1991

Dr. Richard Lesher
President
U. S. Chamber of Commerce
1615 H Street, N. W.
Washington, D.C. 20062

Dear Dr. Lesher:

I commend you, the U. S. Chamber of Commerce, and the authors on the publication of your manual to help businesses understand their obligations under the Americans with Disabilities Act. While there are legitimate differences among expert interpreters of the law, leading disability community authorities on the ADA have told me that your explanation is, overall, fair and comprehensive.

Although the ADA cannot be fully interpreted until regulations have been issued by the responsible government agencies, and a pattern of compliance process has been established, the Chamber's manual will serve as a valuable interim guide for businesses and all concerned with the implementation of the ADA. It will be included among the ADA resources identified by the President's Committee on Employment of People with Disabilities.

I urge all members of business, government and the disability community to work together for full and efficient compliance with the ADA. Essential materials such as your manual, used in combination with expert specific guidance, can be a basis for overcoming misinformation, and for harmonious implementation of the ADA with minimal cost and litigation, and maximal profit and productivity for business and for people with disabilities.

As a former businessperson who has voluntarily complied with many ADA requirements, I know that such compliance does not have to be burdensome, and can lead to increased productivity, sales and good will. As a person who has researched disability policy for more than a decade, I know that appropriate investments to enable the

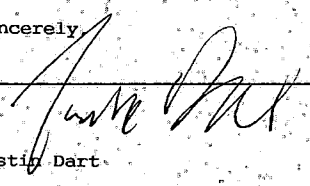
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millions of presently welfare dependent persons with disabilities to be employees and consumers, will result in billions of dollars in profits for business, people with disabilities and all taxpayers.

I deeply appreciate your valuable participation as a member of our executive committee, and I look forward to continuing to work with you for the realization of the American dream.

Sincerely,



Justin Dart

APPENDIX B

COMMON QUESTIONS AND ANSWERS ABOUT THE ADA

1. Who is a person with a disability?

Deciding who is protected by the ADA is a difficult task. It seems likely that most individuals who are materially hampered in everyday life by their physical or mental conditions will be considered "disabled" within the meaning of the law. In the absence of a specific exclusion from coverage, or a condition that more closely resembles a mere physical characteristic rather than an impairment, the safe assumption is that an individual is disabled within the meaning of the ADA. (Reference Chapter 2, Page 7.)

2. What businesses are covered under the ADA?

The ADA's employment obligations ultimately will apply to employers who have 15 or more workers. The Act's public accommodations provisions extend to virtually all privately-owned businesses that provide goods and services to customers, clients, or visitors. (Reference Chapter 2, Page 6 and Chapter 3, page 34.)

3. Do I have to hire someone simply because they have a disability?

No. The General Rule of the ADA precludes an employer from discriminating against a "qualified individual with a disability" who can perform the "essential functions of the job." If an applicant cannot perform these functions, or another applicant is more qualified for the job, the employer reserves their right to hire the most qualified applicant. (Reference Chapter 2, Page 6.)

4. What are the essential functions of a job?

The ADA does not provide a clear definition of "essential," and little practical guidance exists for employers confronted with the difficult task of determining whether a function is or is not essential. The legislative history of the ADA says that the term means job tasks that are "fundamental and not marginal." Of course, a vast range of possibilities stands between the two extremes of "fundamental" and "marginal." The ADA does provide that "consideration" should be

WISCONSIN

Dr. Judy Norman-Nunnery
Administrator, Division of Vocational Rehabilitation
Division of Health & Social Services
P.O. Box 7852
1 West Wilson, 8th Floor
Madison, Wisconsin 53702
608-266-2168

WYOMING

Ms. Joan Watson, Administrator
Division of Vocational Rehab.
Department of Health & Social Services
326 Hathaway Building
Cheyenne, Wyoming 82002
307-777-7385

PREFACE

This book is designed to help businesses understand their obligations under the Americans With Disabilities Act ("ADA" or "the Act") in two critical areas: **employment and access to goods and services offered by business.** The ADA imposes significant obligations upon businesses in other areas as well, including transportation and communications. These obligations are applicable to many businesses, and should not be overlooked. This book concentrates on the employment and public access provisions because these issues will confront virtually every business in the United States.

The employment provisions are designed to remove unnecessary barriers to the employment of people with disabilities. Employers are required both to avoid discrimination against people with disabilities, and to "reasonably accommodate" the disabilities of employees and applicants. Chapter 2 discusses these terms, contained in Title I of the ADA, in detail.

The public accommodations provisions of the ADA generally require businesses to take those steps necessary to become physically accessible to people with disabilities, and to provide goods and services in ways that allow people with disabilities to take advantage of them. Chapter 3 explores in detail the types of actions required by Title III of the ADA, and the limits that Congress created to avoid placing undue burdens on businesses.

The appendices to this guide contain many useful quick references. Appendix A contains a list of resources for obtaining further information about specific questions. Appendix B contains answers to commonly asked questions about the ADA.

This compliance guide contains general advice on how to comply with the Americans With Disabilities Act. It does not discuss enforcement proceedings, but rather concentrates on the obligations imposed on businesses by the new law. Nothing said herein should be interpreted as legal advice, provided either by the authors or the Chamber of Commerce, designed to govern any specific situation.

TENNESSEE

Ms. Patsy J. Mathews
Asst. Commissioner
Division of Rehabilitation Services
Department of Human Services
Citizen Plaza Building, 15 Floor
400 Deaderick Street
Nashville, Tennessee 37219
615-741-2030

TEXAS

Mr. Vernon M. Arrell
Commissioner
Texas Rehabilitation Commission
118 E. Riverside Dr.
Austin, Texas 78704
512-445-8108

Mr. Pat D. Westbrook
Executive Director
Texas Commission for the Blind
P.O. Box 12866, Capitol Station
Austin, Texas 78711
512-475-6810

UTAH

Dr. Judy Buffmire, Administrator
Division of Rehabilitation Services
Utah State Office of Education
250 E. 5th South
Salt Lake City, Utah 84111
801-533-5991

VERMONT

Mr. Richard C. Douglas, Director
Vocational Rehabilitation Division
Osgood Building, Waterbury Complex
103 S. Main St.
Waterbury, Vermont 05676
802-241-2189

Mr. David Mentasti, Director
Division for the Blind & Visually Impaired
Osgood Building, Waterbury Complex
103 S. Main St.
Waterbury, Vermont 05676
802-241-2211

VIRGINIA

Ms. Susan L. Urossky
Commissioner
Department of Rehabilitative Services
Commonwealth of Virginia
4901 Fitzhugh Ave.
P.O. Box 11045
Richmond, Virginia 23230
804-367-0316

Mr. Donald L. Cox, Acting Commissioner
Virginia Department for the Visually Handicapped
397 Azalea Ave.
Richmond, Virginia 23227
804-371-3140

VIRGIN ISLANDS

Mrs. Sedonie Halbert, Director
Division of Vocational Rehabilitation
Department of Social Welfare
P.O. Box 550
St. Thomas, Virgin Islands 00801
809-774-0930

WASHINGTON

Ms. Jeanne Munro, Director
Division of Vocational Rehab.
Department of Social & Health Services
OB 21 C
Olympia, Washington 98504
206-753-0293

WEST VIRGINIA

Mr. John M. Panza, Director
Division of Vocational Rehab.
State Board of Vocational Education
State Capitol Complex
Charleston, West Virginia 25305
304-766-4601

OKLAHOMA

Mr. Jerry Dunlap
Acting Asst. Director
Division of Rehabilitation and Visual Services
Department of Human Services
P.O. Box 25352
Oklahoma City, Oklahoma 73125
405-424-4311, Ext. 2840

OREGON

Mr. Joil Southwell, Administrator
Division of Vocational Rehab.
Department of Human Resources
2045 Silverton Road, N.E.
Salem, Oregon 97310
503-378-3850

Mr. Charles Young, Administrator
Commission for the Blind
535 S.E. 12th Avenue
Portland, Oregon 97214
503-238-8380

PENNSYLVANIA

Mr. Gil Selders
Executive Director
Office of Vocational Rehabilitation
Labor & Industry Building
7th and Forster Streets, Room 1300
Harrisburg, Pennsylvania 17120
717-787-5244

Mr. Norm Whitman
Commissioner
Bureau of Blindness & Visual Services
Department of Public Welfare
Capital Association Bldg.
Room 300
P.O. Box 2675
Harrisburg, Pennsylvania 17120
717-787-6176

RHODE ISLAND

Mr. John Bamford, Administrator
Department of Human Services
Services for the Blind & Visually Impaired
46 Aborn Street
Providence, Rhode Island 02903
401-277-2300

Mrs. Sherry Campenelli
Administrator
Vocational Rehabilitation Services
Department of Human Services
Division of Community Services
40 Fountain St.
Providence, Rhode Island 02903
401-421-7005

PUERTO RICO

Mr. Angel L. Gimenez
Asst. Secretary for Vocational Rehabilitation
Department of Social Services
P.O. Box 1118, Building 10
Hato Rey, Puerto Rico 00919
809-725-1792

SOUTH CAROLINA

Mr. Joseph S. Dusenbury
Commissioner
South Carolina Vocational Rehab. Department
P.O. Box 15
1410 Boston Avenue
W. Columbia, South Carolina 29171
803-822-4300

Mr. William K. James
Commissioner
Commission for the Blind
1430 Confederate Ave.
Columbia, South Carolina 29201
803-758-2595

SOUTH DAKOTA

Mr. Timothy Koehn, Acting Director
Department of Vocational Rehabilitation
Richard F. Kneip Building
700 Goveror Drive
Pierre, South Dakota 57501-2291
605-773-3125

CHAPTER ONE

INTRODUCTION

The recently enacted Americans With Disabilities Act has the potential to change the face of America. For the first time, the federal government has placed its full power behind efforts to prevent discrimination against people with disabilities and to ensure their integration into mainstream American life.

The magnitude of this new law cannot be overstated. Its effects will be felt by virtually every business. Approximately 43 million disabled Americans are covered by the Act, of which a staggering sixty-seven percent are unemployed. According to President Bush, the federal government alone currently spends approximately $200 billion each year on direct public and private payments for people with disabilities. This figure increases to $300 billion when lost taxes and lost production are included. These benefits and programs, however, are not the most desirable way of responding to a serious social problem. A 1986 Louis Harris poll found that eighty-two percent of all people with disabilities would give up their government benefits in favor of full-time employment.

Statistics show that we face an increased qualified labor shortage. People with disabilities represent a large untapped resource of qualified labor. The ADA will help provide businesses with access to qualified labor, and allow qualified labor needed access to business.

The vast majority of states already have laws governing access for people with disabilities. The ADA adds an additional tier of obligations on the private commercial sector. Prior to the ADA, the only federal legislation aimed specifically at people with disabilities, the Vocational Rehabilitation Act of 1973, imposed obligations only on federal contractors and recipients of federal financial assistance. The ADA extends basic principles underlying this law to the entire private sector, and creates a series of new obligations for which there is no counterpart.

The ADA differs from existing civil rights laws in many ways. **First**, the beneficiaries of the law are an exceptionally diverse and broad-based group. The legislative history of the Act indicates that the generic definition of "disability" in the ADA encompasses a wide range of physical and mental conditions. Covered disabilities include not only the well known disabilities (such as visual or hearing impair-

ments or loss of limbs), but also many types of medical conditions (e.g., cancer, epilepsy, heart disease and contagious diseases), learning disabilities and various psychiatric conditions. Moreover, the Act covers individuals who have recovered from a prior disability (e.g., a recovered cancer patient) as well as those who are not disabled but are regarded as having a disability (e.g., a burn victim with a cosmetic disfigurement). This broad-based definition tracks the definition under the Rehabilitation Act of 1973.

Second, the Act does not merely prohibit discrimination against people with disabilities, as Title VII of the Civil Rights Act of 1964 prohibits employment discrimination against women and minorities. It imposes additional affirmative obligations upon businesses to accommodate the needs of people with disabilities, and to facilitate their economic independence. Moreover, it is clear that Congress conceived of these affirmative duties broadly.

Compliance with the ADA will not be easy, because the scope of the new law is so unclear. While Congress mandated an accessible America, it did not require that accessibility be purchased regardless of cost. To ease the financial burden of complying with the ADA, Congress provided a limited tax break so that businesses could make physical alterations when necessary for employment and public accommodation situations. Businesses with less than $1 million in gross receipts or with fewer than 30 full-time employees will be eligible for a tax credit. These small businesses will have to pay the first $250 of any accommodation cost. Above $250, the employer would qualify for a 50%, non-refundable credit of up to $5,000. Costs above $5,000 qualify for a tax deduction of up to $15,000. All businesses not fitting into the less than $1 million or fewer than 30 full-time employees are limited to the $15,000 tax deduction. Expenditures that qualify for these tax breaks include, but are not limited to: removal of architectural, communication, transportation or other physical barriers; purchase or modification of needed equipment; and provision of technical assistance for employers and employees to comply with the Act.

Congress ordered that employers accommodate the disabilities of employees unless doing so would impose an "undue hardship"; it requires businesses to provide auxiliary aids and services for people with disabilities unless doing so would impose an "undue burden"; and it requires removal of architectural and communication barriers in existing facilities where such removal is "readily achievable." Congress did not define these terms clearly.

As with many new laws, regulations defining these terms will be

NEW HAMPSHIRE

Mr. Bruce A. Archambault, Chief
Division of Vocational Rehab.
State Department of Education
101 Pleasant St.
State Ofc. Park So.
Concord, New Hampshire 03301
603-271-3471

NEW JERSEY

Mr. Stephen Janick, III
Director
Division of Vocational Rehabilitation Services
John Fitch Plaza
Labor & Industry Building
Room 1005
Trenton, New Jersey 08625
609-292-5987

Mr. Gerald Boyle
Acting Executive Dir.
Commission for the Blind and Visually Impaired
1100 Raymond Blvd.
Newark, New Jersey 07102
201-648-2324

NEW MEXICO

Mr. Ross Sweat, Director
Division of Vocational Rehab.
Department of Education
604 W. San Mateo Street
Santa Fe, New Mexico 87503
505-827-3500

Mr. Fred Schroeder
Director
Commission for the Blind
Pera Bldg., Room 205
Santa Fe, New Mexico 87503
505-827-4479

NEW YORK

Mr. John L. Ryan, Jr.
Asst. Commissioner
State Department of Social Services
Commission for the Blind & Visually Handicapped
40 North Pearl St.
10 Eyck Office Building
Albany, New York 12243
518-473-1801

Mr. Larry Gloeckler
Deputy Commissioner for Voc. Rehab.,
The New York State Ed. Dept.
Office of Vocational Rehab.
99 Washington Ave., Room 1907
Albany, New York 12234
518-474-2714

NORTH CAROLINA

Mr. Herman O. Gruber, Director
Division of Services for the Blind
N.C. Department of Human Resources
309 Ashe Ave.
Raleigh, North Carolina 27606
919-733-9822

Mr. Claude A. Myer, Director
Division of Vocational Rehab. Services
Department of Human Resources
State Office
P.O. Box 26053
Raleigh, North Carolina 27611
919-733-3364

NORTH DAKOTA

Mr. Gene Hysjulien
Division Director
Division of Vocational Rehab.
State Capitol Building
Bismarck, North Dakota 58505
701-224-2907

OHIO

Mr. Robert L. Rabe, Administrator
Ohio Rehabilitation Servs. Commission
4656 Heaton Road
Columbus, Ohio 43229
614-438-1210

MICHIGAN

Mr. Peter Griswold, State Dir. of Rehab.
Michigan Bureau of Vocational Rehab.
Department of Education
P.O. Box 30010
Lansing, Michigan 48909
517-373-0683

Mr. Philip E. Peterson, Director
Commission for the Blind
Department of Labor
309 N. Washington Square
Lansing, Michigan 48909
517-373-2062

MINNESOTA

Mr. Richard Hokanson
Acting Director
State Services for the Blind
Division of Rehabilitation Services
Department of Jobs & Training
1745 University Ave.
St. Paul, Minnesota 55104
612-296-6080

Mr. William Niederloh
Acting Assistant
Commissioner for Division of Vocational Rehabilitation
Department of Jobs & Training
390 N. Robert St., 5th Floor
St. Paul, Minnesota 55101
612-296-1822

MISSISSIPPI

Dr. J. Elton Moore, Director
Vocational Rehabilitation for the Blind
P.O. Box 4872
Jackson, Mississippi 39216
601-354-6412

Mr. Morris Selby, Director
Vocational Rehabilitation Division
P.O. Box 1698
Jackson, Mississippi 39205
601-354-6825

MISSOURI

Dr. Don L. Gann, ED Assistant Commissioner
State Department of Education
Division of Vocational Rehab.
2401 E McCarty
Jefferson City, Missouri 65101
314-751-3251

Mr. David S. Vogel
Deputy Director
Bureau for the Blind
Division of Family Services
619 E. Capitol
Jefferson City, Missouri 65101
314-751-4249

MONTANA

Ms. Margaret Bullock
Administrator
Department of Social & Rehab. Services
Rehabilitative Services Div.
P.O. Box 4210
Helena, Montana 59601
406-444-3434

NEBRASKA

Dr. Jason D. Andrew
Asst. Commissioner & Dir.
Division of Rehabilitative Services
State Department of Education
301 Centennial Mall, 6th Floor
Lincoln, Nebraska 68509
402-471-2961

Dr. James S. Nyman, Director
Services for the Visually Impaired
Department of Public Institutions
4600 Valley Road
Lincoln, Nebraska 68510-4844

NEVADA

Mr. Steve Shaw, Acting Administrator
Rehabilitation Division
Department of Human Resources
505 E. King St.
Kinkead Building, 5th Floor
Carson City, Nevada 89710
702-885-4440

very important. Congress directed the Equal Employment Opportunity Commission (EEOC) to issue comprehensive regulations on the employment provisions of the ADA no later than one year after the Act's passage, or by July 26, 1991. The EEOC currently has solicited comments from interested groups on many significant issues. Similarly, Congress requires the Attorney General of the United States to issue comprehensive regulations interpreting the public accommodations provisions of the ADA by July 26, 1991, and comments on preliminary versions of these regulations also will be important.

Of course, even after these regulations are issued, their meaning and validity will be challenged in the courts, which will interpret the regulations and the law and decide, finally, what Congress intended when it passed the statute. This book is thus a first step in the compliance process. We have tried to offer our best judgments on the law's requirements and appropriate compliance strategies, based on the law itself and congressional debates. Much remains to be clarified, and businesses must remain alert to developments in this field.

IOWA

Mr. R. Creig Slayton, Director
Commissioner for the Blind
4th and Keosauqua
Des Moines, Iowa 50309
515-281-7999

Mr. Jerry L. Starkweather
Associate Superintendent & Director
Rehabilitation Educations Services Branch
Department of Public Instruction
510 E. 12th St.
Des Moines, Iowa 50319
515-281-4311

KANSAS

Mr. Gabriel Faimon
Commissioner of Rehabilitation Services
Department of Social & Rehabilitation Services
Biddle Building, 2nd Floor
2700 W. 6th
Topeka, Kansas 66606
913-296-3911

KENTUCKY

Mr. Carroll Burchett
Asst. Superintendent of Rehabilitation
Department of Education
Office of Rehabilitative Servs.
Capital Plaza Office Tower
Frankfort, Kentucky 40601
502-564-4440

Mr. Charles W. McDowell, Director
Bureau of Blind Services
Education and Arts Cabinet
427 Versailles Road
Frankfort, Kentucky 40601
502-564-4754

LOUISIANA

Mr. Alton Toms, Director
Division of Rehabilitation Services
Department of Social Services
P.O. Box 94371
1755 Florida Blvd.
Baton Rouge, Louisiana 70804-9371
504-342-2296

MAINE

Ms. Pamela Tetley, Director
Bureau of Rehabilitation Services
Department of Human Services
32 Winthrop St.
Augusta, Maine 04330
207-289-2266

MARIANA ISLAND

Ms. Risong Matsutaro, Chief
Vocational Rehabilitation Division
Office of the High Commissioner
Department of Education
Trust Territory of the Pacific Islands
Saipan, Mariana Island 96950
011670-987023

Mr. Manny Villagomez, Chief
Vocational Rehabilitation Division
Commonwealth of Northern Mariana Island
Saipan, Mariana Island 96950
011670-6538

MARYLAND

Mr. James S. Jeffers
Asst. State Super.
Division of Vocational Rehab.
State Department of Education
Maryland Rehabilitation Center
2301 Argonne Drive
Baltimore, Maryland 21218
301-554-3000

MASSACHUSETTS

Mr. Elmer C. Bartels
Commissioner
Mass. Rehabilitation Commisssion
Fort Point Place
27-43 Wormwood St.
Boston, Massachusetts 02210-1606
617-727-2183
1-800-245-6543 V/TDD

Mr. Charles Crawford
Commissioner
Massachusetts Commission for the Blind
88 Kingston St.
Boston, Massachusetts 02111
617-727-5550

DELAWARE

Mr. Robert Snider, Director
Division for the Visually Impaired
Department of Health & Social Services
305 W. 8th St.
Wilmington, Delaware 19801
302-571-3333

Mr. Tony Sokolowski, Director
Division of Vocational Rehabilitation
Delaware Elwyn Institutes
4th Floor
321 East, 11th Street
Wilmington, Delaware 19801
302-571-2850

DISTRICT OF COLUMBIA

Ms. Katherine Williams
Administrator
D.C. Rehab. Services Administration
Commission on Social Services
Department of Human Services
605 G Street, N.W., Room 1101
Washington, D.C. 20001
202-727-3227

FLORIDA

Dr. Calvin Melton, Director
Office of Vocational Rehabiliation
Department of Health & Rehab. Servs.
1317 Winewood Blvd.
Tallahassee, Florida 32301

Mr. Donald H. Wedewer, Director
Division of Blind Services
Department of Education
2540 Executive Center Circle W.
Douglas Building
Tallahassee, Florida 32301
904-488-1330

GEORGIA

Mr. Thomas R. Gaines, Director
Division of Rehabilitation Services
Department of Human Services
878 Peachtree Street, N.E.
Room 706
Atlanta, Georgia 30309
404-894-6670

GUAM

Ms. Rosa Salas, Director
Department of Vocational Rehab.
Government of Guam
P.O. Box 2113
Agana, Guam 96910
011671-6469468

HAWAII

Mr. Toshio Nishioka
Administrator
Division of Vocational Rehab.
& Services for the Blind
Department of Social Services
P.O. Box 339
Honolulu, Hawaii 96809
808-548-4769

IDAHO

Mr. Edward J. McHugh
Administrator
Idaho Commission for the Blind
Statehouse
Boise, Idaho 83720
208-334-3220

Mr. George Pelletier
Administrator
Division of Vocational Rehab.
Len B. Jordan Building
650 West State, Room 150
Boise, Idaho 83720
208-334-3390

ILLINOIS

Mr. Philip Bradley
Director
Illinois Department of Rehab. Services
623 E. Adams St.
Springfield, Illinois 62706
217-782-2093

INDIANA

Mr. Gary May, Director
Indiana Rehabiliation Services
150 West Market Street
P.O. Box 7083
Indianapolis, Indiana 46207-7083
317-232-1523

CHAPTER TWO

EMPLOYMENT

Overview

The ADA changes the rules for private employers in the following three areas:

I. Discrimination

Employers may not discriminate against any qualified individual with a disability in any aspect of employment. The Act requires that employers base employment decisions on the ability of the individual to perform the job, precluding reliance upon presumptions, generalizations, or assumptions about what "people with disabilities" can or cannot do. The Act further requires that employers "reasonably accommodate" individuals with disabilities, if necessary.

II. Medical Examinations and Inquiries

The Act limits the ability of employers to conduct or require medical examinations, in most instances forbidding inquiries regarding the nature or severity of the disability of any employee or applicant. Employers may ask an applicant if he or she can perform the duties of the job sought. Applicants to whom a job has been offered may be required to pass a physical examination, but only if all others who have applied for positions in the same job category are subject to the same requirement. The results of such examinations must be kept strictly confidential and may be used only to assess the ability of an employee to perform job-related functions. Post-employment physical examinations may be required only where job-related, although voluntary examinations are not forbidden.

III. Illegal Drugs and Alcohol

The Act establishes that an employee's current illegal use of drugs may disqualify him or her from coverage under the Act. An employer may hold a disabled individual who is a drug user or alcoholic to the same qualification or performance standards as other employees, even if the unsatisfactory performance or behavior is related to the individual's drug use or alcoholism. The Act also provides that employers may adopt rules designed to make

their workplaces drug and alcohol free, and that drug tests are not forbidden by the law.

These three obligations are enforceable under the mechanism established in Title VII of the Civil Rights Act of 1964.

Coverage

WHAT BUSINESSES ARE COVERED

Discrimination against people with disabilities in employment applies to:

- employers;
- employment agencies;
- labor organizations; and
- joint labor-management committees.

Also, state and local governments are covered by the Act.

> For the first two years after the Act becomes effective (July 26, 1992 to July 25, 1994), the employment provisions or Title I will apply only to entities employing 25 or more people. Thereafter, the Act's employment obligations will extend to employers of 15 or more people.

WHAT THE LAW PROHIBITS

General Rule

An employer may not discriminate against a qualified individual with a disability in any of the following ways:

- job application procedures;
- hiring or discharge;
- compensation;
- job training;
- advancement; and
- other terms, conditions, and privileges of employment.

The prohibition encompasses virtually every aspect of the employment relationship including:

- recruiting, advertising, and the processing of applications for employment;
- hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff and rehiring;
- rates of pay or any other forms of compensation and changes in compensation;

APPENDIX A

United States Department of Education
Office of Special Education and Rehabilitative Services
Rehabilitation Services Adminstration
Washington, D.C. 20202

State Vocational Rehabilitation Agencies (General & Blind)

ALABAMA

Mrs. Lamona H. Lucas, Director
Division of Rehabilitation & Crippled Children Service
P.O. Box 11586
Montgomery, Alabama 36111
205-281-8780

ALASKA

Mr. Keith Anderson, Director
Division of Vocational Rehabilitation
Pouch F, MS 0581
Juneau, Alaska 99811
907-465-2814

AMERICAN SAMOA

Mr. Pete Galea'i, Acting Director
Vocational Rehabilitation
Department of Manpower Resources
American Samoa Government
P.O. Box 3492
Pago Pago, American Samoa 96799
011684-633-1805

ARIZONA

Mr. James B. Griffith, Administrator
Rehabilitation Services Admin.
Department of Economic Security
1300 W. Washington St.
Phoenix, Arizona 85007
602-255-3332

ARKANSAS

Mr. Bobby Simpson, Deputy Director
Rehabilitation Services Division
Arkansas Department of Human Service
P.O. Box 3781
Little Rock, Arkansas 72203
501-682-6697

Mr. James C. Hudson
Commissioner
Division of Services for the Blind
Department of Human Services
P.O. Box 3237
Little Rock, Arkansas 72203
501-371-2587

CALIFORNIA

Dr. P. Cecilio Fontanoza
Director
Department of Rehabilitation
830 K St. Mall
Sacramento, California 95814
916-445-3971

COLORADO

Mr. Anthony Francavilla
Director
Rehabilitation Services
Department of Social Services
1575 Sherman Street, 4th Floor
Denver, Colorado 80203
303-866-4390

CONNECTICUT

Dr. Marilyn Campbell
Associate Commissioner
State Department of Education
Division of Vocational Rehabilitation
600 Asylum Avenue
Hartford, Connecticut 06105
203-566-4440

Mr. William E. Patton, ACSW
Director, Board of Education & Services for the Blind
170 Ridge Road
Wethersfield, Connecticut 06109
203-566-5800

CONCLUSION

The following chart summarizes the provisions of the public accommodation provisions the law:

Areas for Consideration	Requirements	Defenses/Exceptions
Eligibility Criteria	Eligibility criteria that screen out or tend to screen out disabled individuals from full and equal enjoyment are prohibited.	Eligibility criteria necessary for the provision of the goods and services provided. Direct threat to the health and safety of others that cannot otherwise be eliminated.
Policies, Practices, and Procedures	Failure to make reasonable modifications in policies, practices, or procedures that are necessary to afford goods and services to disabled individuals.	Modification would fundamentally alter the nature of the goods and services provided. Direct threat defense.
Auxiliary Aids and Services	Failure to take steps necessary to ensure that no individual with a disability is excluded, denied services, segregated, or otherwise treated differently due to the absence of an auxiliary aid or service.	Providing auxiliary aid would: (1) fundamentally alter the nature of the goods and services provided or (2) would result in undue burden. Direct threat defense.
Architectural and Communications Barriers in Existing Facilities	Remove where readily achievable	Not readily achievable. Direct threat defense.
Alternative Methods	Supply where necessary and readily achievable.	Not readily achievable. Direct threat defense.
Alterations in Existing Facilities	Alterations not affecting areas containing a primary function: — altered portions must be readily accessible and usable by individuals with disabilities, to the maximum extent feasible. Alterations affecting areas containing a primary function — path of travel to the altered area and the restrooms, telephones and drinking fountains serving the remodeled area also must be readily accessible and usable, to the maximum extent feasible.	Exception for installation of elevators in facilities that are less than three stories or that have less than 3,000 square feet per story. Disproportionate expense in some cases.
New Construction	Readily accessible and usable	Structurally impracticable

- job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;
- leaves of absence, sick leave, or any other leave;
- fringe benefits available by virtue of employment, whether or not administered by the employer;
- selection and financial support for training, including apprenticeships, professional meetings, conferences and other related activities, and selection for leave of absence to pursue training; and
- employer sponsored activities, including social or recreational programs.

NOTE: The ADA does not require a plaintiff to prove that the discrimination in employment was based *solely* on a disability. Instead, a violation occurs where discrimination on the basis of a disability is a factor. Like Title VII of the Civil Rights Act of 1964, the ADA prohibits both intentional discrimination and unintentional discrimination. A neutral employment practice that adversely impacts disabled employees ("disparate impact") may be challenged under the ADA.[1]

WHO IS PROTECTED

The first critical question is defining who is protected by the law. The obvious answer — people with disabilities — is a term of art that employers must understand.

Disability

The definition of a disability has three prongs. A person is disabled if he or she:

- has a physical or mental impairment that substantially limits one or more major life activity;
- has a record of such an impairment; or
- is regarded as having such an impairment.

An individual is disabled if he or she fits within any **one** of these three categories.

Physical or Mental Impairment

A "physical or mental impairment" under the Act includes:

- any physiological disorder or condition, cosmetic disfigurement, or anatomical loss; or
- any mental or psychological disorder.

This covers a very broad range of conditions. Among the many conditions likely to be considered examples of physical or mental impairments are the following:

- orthopedic, visual, speech and hearing impairments
- cerebral palsy
- epilepsy
- muscular dystrophy
- multiple sclerosis
- AIDS or infection with HIV (the virus that causes AIDS)
- cancer
- heart disease
- diabetes
- mental retardation
- emotional illness
- specific learning disabilities

The term does not include simple physical characteristics, such as blue eyes, black hair, or being left-handed. Indeed, such conditions would not appear to constitute an "impairment" at all. Moreover, because only **physical** or **mental** impairments are included in the definition, environmental, cultural and economic disadvantages are not covered.

Under the ADA a person suffering from a contagious disease may satisfy the "physical or mental impairment" requirement. HIV infection is an example of a covered physical impairment. An employer may be able to limit the job opportunities of individuals with contagious diseases only if it can demonstrate that the contagious disease constitutes "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation".

NOTE: Not all physical or mental impairments constitute a disability under the law. A transient injury, such as an infected finger, does not constitute a disability. The impairment must "substantially limit" one or more major life activities. For example, a paraplegic is substantially limited in the major life activity of walking; a blind person is substantially limited in the major life activity of seeing; and a person who is mentally retarded is substantially limited in the major life activity of learning.

Deciding whether a given physical or mental impairment results in a substantial limitation will occur on a case-by-case

apply, the building would have to be radically redesigned and retrofitted at considerable expense. If the new construction rules did not apply, then facilities could evade the new construction requirements merely by setting a first occupancy date prior to January 26, 1993, even if that date is completely unrealistic. For this reason, it is most likely that only a *bona fide* realistic first occupancy date would permit you to avoid the new construction rules. If this is so, the builder bears a significant risk in having its planned first occupancy date questioned as non-*bona fide*, in the event it fails to meet its previously established deadline. It therefore becomes imperative to meet the planned first occupancy date to avoid any such potential problems, and to maintain strong evidentiary support for the legitimacy of the planned occupancy date.

Public Accomodations – Effective Dates

Discrimination	January 26, 1992*
Construction Alterations	
Remodeling and Modifications	January 26, 1992
*New Construction***	January 26, 1993

*Does not apply to:
(1) for first six months after effective date, employers of 25 or fewer employees and that have gross receipts of $1,000,000 or less.
(2) for the first year after effective date, employer of 10 or fewer employees and that have gross receipts of $500,000 or less.

**For first occupancy later than 30 months after date of enactment (i.e., 1/26/93).

Unaffected State Laws

State or federal laws, including those that require businesses to make their goods and services accessible to individuals with disabilities or that control new construction or transportation services, remain unaffected by the ADA. Accordingly, your covered entities must comply with the most stringent applicable standard, whether required by state statute or federal law.

HELPFUL HINT:

Checklist for Compliance

- **Adopt a Policy of Compliance**
- **Review Existing Policies to Identify Problem Areas**
- **Use Testers**
  The use of individuals with disabilities as "testers" may provide a relatively inexpensive yet highly effective procedure to identify subtle physical barriers and screening practices faced by individuals with disabilities. Such subtle barriers are often difficult for non-disabled individuals to detect. While the use of testers may be appropriate, this step should be done only upon the advice of counsel to preserve its confidentiality.
- **Make Changes**
  You should evaluate and make changes to existing policies, practices, procedures and layouts to identify those changes that are necessary to comply with the Act in the most cost effective manner, while disrupting business operations as little as possible.
- **Train Personnel**
  You should train managers and employees on their new obligations under the Act. At least initially, litigation is most likely to arise where employees, unaware of their obligations, blatantly disregard the law's requirements. Use of testers also may help identify the mistakes that employees are most likely to make in dealing with disabled members of the public.

New Construction: Effective Date

All new construction requirements become effective on January 26, 1992. However, only new construction that calls for first occupancy after January 26, 1993, is covered.

Proving First Occupancy

Documented proof of the specific first occupancy date called for by construction plans should be maintained for any facility not being constructed in compliance with the ADA. The Act is unclear whether the new construction rules would apply in the event that first occupancy was planned for a date within 30 months from the date of enactment, but that actually falls beyond the 30-month date (January 26, 1993). If the new construction rules

basis. Courts applying other disability laws have looked at the following factors:

Number and Type of Jobs from Which Impaired Individual is Disqualified

If an individual is precluded from performing only a very narrow range of jobs, he or she may not be substantially limited. For example, an individual with a fear of heights, which precludes him from working as a telephone cable splicer, may not be substantially limited if this fear does not pose barriers to other day-to-day activities. Generally, the inability to perform one particular job will not constitute a substantial impairment.

Expectations and Training

On the other hand, where an impairment causes an inability to perform only a narrow range of jobs, but that narrow range includes the type of job for which the individual is trained and has come to expect, then the impairment may be substantial.

Geographical Area to Which Person Has Reasonable Access

If an individual is precluded from only a narrow range of jobs, but these jobs constitute the predominant type of work in the area, the impairment may be substantial.

Frequency and Duration of Impairment

If an impairment impedes an activity only infrequently, it may not constitute a substantial limitation. For example, an individual with a knee injury, who experiences no limitations in normal walking but does experience problems if he walks a distance of ten miles, may not suffer from a substantial limitation. Similarly, an individual who suffers from debilitating migraines once a year would not appear to satisfy the substantial limitation standard.

NOTE: The "substantial" impairment requirement appears to exclude those individuals who have a broad range of alternative jobs from which to choose. An individual's impairment should be assessed without considering mitigating measures; a person with severe hearing loss is "substantially impaired" even if he or she can wear a hearing aid.

Having a Record of an Impairment

The **second** prong of the "disability" definition prohibits discrimination against individuals who have a record of some physical or mental impairment. This requirement prevents employers from relying on unfounded fears that the impairment will recur. For example, an individual who has recovered from a heart condition, or who has a history of cancer in the family, cannot be treated differently because of concerns about these conditions. *Rehabilitated* drug users and alcoholics are protected under this provision.

Significantly, individuals who have been misclassified as having an impairment — for example, someone misclassified as mentally retarded — meet the definition of the second prong, and are protected against discrimination resulting from a misdiagnosis.

Being Regarded as Having an Impairment

The **third** prong of the definition reflects Congress' acknowledgement that society's accumulated myths and fears about disability and disease may be as disabling as actual physical limitations. Treatment of people with disabilities should be based on legitimate medical judgments and not misinformation or misapprehensions.

For example, individuals with cosmetic disfigurements often do not suffer from any impairment that results in a substantial limitation, but are nonetheless shunned and treated as impaired. The ADA prohibits such irrational fears from entering into employment decisions.

An employer *cannot* refuse to hire someone because of concerns about the *negative reaction of others*. For example, even if the employer does not regard an HIV-positive employee as disabled, but bases an employment decision on the belief that customers or other employees will react negatively because of a perceived disability, the employer violates the Act.

NOTE: The Act allows employers in the food service industry to remove an individual with a contagious disease or infection from a food handling position, *if* the disease or infection can be transmitted or spread through food handling and the employer cannot take other measures (e.g., gloves or masks) to prevent the problem. The Department of Health and Human Services (HHS) publishes a list of such diseases and infections.

The "readily accessible and usable" requirement is discussed below in the section discussing new construction.

NEW CONSTRUCTION

Public accommodations and commercial facilities designed and constructed for initial occupancy later than 30 months after the enactment of the ADA (or January 26, 1993) must be readily accessible and usable by people with disabilities.

Readily Accessible and Usable

New facilities must be "readily accessible and usable" by individuals with disabilities, except where it is "structurally impracticable" to meet this requirement. An elevator exception identical to that discussed above also applies to new construction.

Areas of Building Affected

The readily accessible and usable standard does not require the accessibility of every part of a facility. The accessibility requirement generally will be applied to the following areas:

- parking areas;
- routes to and from the facility;
- entrances;
- restrooms;
- water fountains; and
- public and common use areas.

Access to every parking space, restroom, or restroom stall is not required; only a reasonable number must be accessible.

Structurally Impracticable

A narrow exception to the accessibility requirement is created where ready accessibility and usability would be "structurally impracticable." This exception probably will apply only in rare and unusual circumstances. For example, the exception will apply where the unique characteristics of terrain make accessibility unusually difficult, such as a building in a flood or waterfront area that is built on stilts. Further regulations will clarify this concept.

EFFECTIVE DATE

The provisions relating to public accommodations generally become effective on January 26, 1992. This lag in the effective date provides an opportunity to assess your current status and to plan necessary changes.

that affect or could affect the usability of areas of the facility containing a "primary function." In such situations, to the maximum extent feasible, the path of travel to the altered area (that is, the doorways and the pathway to the altered area) and the restrooms, telephones, and drinking fountains serving the remodeled area also must be readily accessible and usable. Where these alterations to the path of travel and facilities would be "disproportionate" to the overall alterations in terms of cost and scope (based on criteria to be established by the Attorney General), they need not be made. The legislative history notes that 30% of the overall alteration cost *would* be considered disproportionate, but provides little other specific guidance. In both new construction and alterations, you do not need to install elevators in facilities that are less than three stories or that have less than 3,000 square feet per floor, unless the building is a shopping center, a shopping mall, the professional office of a health care provider or is within the class of facilities to be designated by the Attorney General as requiring an elevator.

What Areas Contain a Primary Function?

What constitutes an area of a facility containing a "primary function" is not clear. Unlike many state acts, the ADA links duties arising from an alteration to the functional use of the area rather than to the overall cost of the alteration project. For example, alterations to a utility room in an office building probably would not affect an area containing a "primary function," and thus a lower level of obligation would attach. On the other hand, alterations to the customer service lobby of a bank would likely affect an area of primary function because it is the principal area in the building used by the public.

Maximum Extent Feasible

The standard requiring alterations to "the maximum extent feasible" also is not well defined. It appears that Congress intended that all alterations take into account people with disabilities, and required businesses to alter remodelling plans wherever possible. Clearly, for example, if a restroom is being remodelled, it must be made accessible to individuals with disabilities. The Act does not seem to contemplate limits based solely on increased costs, when only the altered area itself if being considered, unless the increased costs are so extensive as to make the change completely impossible or unfeasible.

Exclusions

The following conditions and activities are specifically *excluded* from the definition of disability (and thus from protection under the Act):

- illegal use of drugs, when the employer acts on the basis of such use;
- homosexuality and bisexuality;
- transvestitism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other behavior disorders;
- compulsive gambling, kleptomania, or pyromania; and
- psychoactive substance use disorders resulting from current illegal use of drugs.

Summary

Deciding who is protected by the ADA is a difficult task. It seems likely that most individuals who are materially hampered in everyday life by their physical or mental conditions will be considered "disabled" within the meaning of the law. In the absence of a specific exclusion from coverage, or a condition that more closely resembles a mere physical characteristic rather than an impairment, the safe assumption is that an individual is disabled within the meaning of the Act.

SPECIFIC PROHIBITIONS

In addition to its broad prohibitions, the ADA contains several specific prohibitions that expand and clarify its scope. These prohibitions are aimed at eliminating discrimination based on stereotypes, discomfort, misconceptions, and unfounded concerns about increased costs and decreased productivity.

Limiting, Segregating or Classifying Employees

Discrimination includes "limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee." Consequently, employers must make decisions based on the abilities of individual applicants or employees, and not on the basis of presumptions or generalizations about what a class of individuals can or cannot do. Common generalized fears or presumptions about people with disabilities include concerns about:

- productivity;
- safety;
- insurance costs;
- liability exposure;
- attendance;
- costs of accommodation and accessibility; and
- acceptance by co-workers and customers.

For example, an individual with epilepsy cannot be denied a promotion based upon any general statistics about the safety record of individuals suffering from epilepsy. If the particular employee actually has demonstrated a poor job-related safety record, however, this factor legitimately may be taken into account in making employment decisions.

Contractual Relationships Having the Effect of Discriminating

An employer may not participate "in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability" to discrimination. This provision prevents an employer from indirectly violating the Act. It also has two readily apparent applications. First, any relationship with an employment or referral agency where the employer has instructed the agency to screen out qualified disabled candidates would be unlawful. Second, this section prohibits an employer from "contracting out" discriminatory benefits, training, or apprenticeship program. Under existing law an employer cannot avoid liability by delegating discriminatory programs to third parties.

NOTE: The congressional debates show that Congress intended to impose broad duties upon employers. For example, several congressional reports state that an employer contracting with a training organization must ensure that the outside organization holds its training sessions in locations accessible to people with disabilities. If a training organization plans to hold its sessions in an inaccessible site, the employer might ask the organization to move the sessions or to recommend other companies that use accessible sites. It also might pay the organization to train disabled persons one-on-one. Similarly, if an employer plans to hold a work-related function at a hotel, it could either investigate whether the hotel is accessible to all of its employees or include in its contract a clause requiring that hotel facilities be accessible to

extra efforts will go a long way toward compliance. If the alternative methods themselves are not readily achievable, the Act does not require them.

DEFENSE: Direct Threat to the Health or Safety of Others

A business is not required to permit an individual to participate in or benefit from its goods and services "where such individual poses a direct threat to the health or safety of others." This is a defense to each of the specific prohibitions listed above. Direct threat means a "significant risk" to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures or by the provision of auxiliary aids and services. As with the direct threat defense in the employment sections of the Act, the threat must be direct, significant, and non-speculative. Because the burden of proof will be on the business to demonstrate the direct threat, it is imperative for business to generate specific evidence to support this type of claim.

NEW CONSTRUCTION AND ALTERATIONS IN PUBLIC ACCOMMODATIONS AND COMMERCIAL FACILITIES

In addition to specific guidelines regarding new construction, discussed below, the Act also requires that alterations to existing facilities must be made in a manner that takes people with disabilities into account. Therefore, if remodelling or alterations take place, certain accessibility requirements are triggered.

NOTE: The requirements set forth below apply to alterations that are otherwise planned. The ADA does not require alterations except removal of architectural or communication barriers where removal is "readily achievable."

Alterations Not Affecting Areas of the Facility Containing a Primary Function

Where alterations are made to a facility that affect or could affect its usability, the altered area itself must be made, to the maximum extent feasible, "readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs."

Alterations Affecting Areas of the Facility Containing a Primary Function

An additional requirement applies when you make alterations

(2) **Make Changes**
Make all changes that can be made with little cost or difficulty.

(3) **Document Costs and Difficulties**
Document the specific costs and difficulties of any changes that are not being made because they are too expensive.

(4) **Re-Evaluate**
Continuously evaluate facilities after changes have been made to identify other access barriers not previously identified.

(5) **Create a Specific Plan**
If there are a number of changes that may be made, but are not being done immediately because of their total cost, prepare a specific plan for accomplishing achievable modifications. In such planning, grouping of like projects together should be attempted (i.e. to make the facility completely accessible for those with a given disability). **Businesses choosing between modifications should attempt to make those changes first that will benefit the largest group of disabled persons, both to comply with the Act and to limit the risk of legal challenge.**

Failure to Use Alternative Methods

Even if the removal of a barrier is not readily achievable, a business must make goods and services available through alternative methods, if such methods are readily achievable. Here are some examples of readily achievable alternative methods:

- Coming to the door of the store to receive or return dry cleaning;
- Allowing a disabled patron to be served beverages at a table even though non-disabled persons having drinks are required to drink at an inaccessible bar;
- Providing assistance to retrieve items in an inaccessible location (such as the densely packed display racks); and
- Rotating movies between the first floor accessible theater and a comparable second floor inaccessible theater.

NOTE: The alternative method provision requires that businesses not simply stop when removal of a given barrier is too expensive to be readily achievable. Alternative methods, even if they are not as effective or integrated, must be used to provide comparable service. Again, flexibility and a willingness to make

people with disabilities, thus placing the burden of accessibility upon the hotel.

Discriminatory Standards

An employer may not utilize standards or criteria that (A) have a discriminatory effect or (B) perpetuate discrimination of others. These provisions incorporate what is known as the "disparate impact" method of proving discrimination. Under this theory, a plaintiff can prove discrimination by showing that an employment practice, although not intentional, has an adverse effect upon the employment opportunities of individuals with disabilities, if the practice is not justified as a "business necessity."

Discrimination Based on Relationship or Association With a Disabled Individual

Discrimination based on a relationship or association with an individual who is disabled is forbidden. For example, an applicant or employee whose spouse has a disability may not be denied a position based upon the assumption that he or she will have to miss work or frequently leave work early in order to care for the spouse. If the employee actually violates an employer policy covering attendance or tardiness, he or she may be dismissed, even if the reason for the absences is to care for the spouse.

NOTE: This provision may have a particularly important application to employees who are related to or associated with an individual with HIV infection. Irrational fears about the contagious nature of AIDS cannot lead to adverse actions against an employee based upon his or her relationship with an HIV infected person.

Denial of Employment Opportunity Based on Need for Accommodation

An employer may not deny an employment opportunity if the denial is based on the need to make reasonable accommodation for the physical or mental impairment of the individual. In other words, the fact that the accommodation is necessary cannot be an adverse factor in the employment decision.

NOTE: If the accommodation results in "undue hardship" it is not required by the Act. But even in this situation, if the employee is willing to make his or her own arrangements for obtaining the

accommodation, an employer must provide the employee with an equal chance for the job. For example, if a reader is needed but cannot be supplied by the employer without undue hardship, and the employee will provide the reader and is the best qualified candidate, then he or she must be selected.

Tests or Criteria That Tend to Screen Out or Screen Out People With Disabilities

The Act also makes it unlawful for an employer to use tests or other selection criteria that screen out or tend to screen out people with disabilities, unless the test is "job related" and can be justified by "business necessity." People with disabilities may not be excluded from job opportunities unless they are actually unable to do the job. An employer relying upon a selection criterion that has an adverse impact on disabled employees has the burden of demonstrating that it is both job-related and consistent with business necessity. If you rely upon selection criteria that have an adverse impact on disabled employees you should ask the following questions:

- Do the criteria measure the ability to perform essential and non-marginal aspects of the job?
- Can the criteria be satisfied by the employee or applicant if a reasonable accommodation is provided?

Employment Tests

The ADA further requires that tests be administered fairly to people with disabilities. For example, an employee suffering from dyslexia may have trouble taking a written test that in no way reflects his ability to perform the job. A reasonable accommodation, such as a reader for the test taker, may have to be provided to ensure that the test actually measures the ability to do the job and does not merely reflect the employee's impaired ability to read.

APPLICATION OF THE GENERAL RULE

The ADA precludes an employer from discriminating against a "qualified individual with a disability" who can perform the "essential functions of the job." To comply with these rules, the employer must determine:

- the essential functions of the job;
- whether a disabled person, with or without accommodation, is qualified to perform these duties; and

NOTE: Such rearrangements could exceed what is "readily achievable." A department store with display racks that are tightly bunched together, making wheelchair access difficult, may find it impossible to rearrange those display racks without expanding the square footage of the store or reducing the amount of inventory displayed. Such extensive restructuring is not required under the readily achievable standard. On the other hand, the department store should not ignore the possibility of using a different style of display rack that allows for the display of more items in less space. For a large and profitable department store, the purchase of such new display racks may be readily achievable, especially if renovations or the replacement of existing fixtures is planned.

Costs

In general, costs will be an effective guide to determining whether an alteration is readily achievable, and a cost justification analysis would be appropriate. No magic cut-off number will provide a definite yes or no answer as to when a revision is readily achievable, because the size of business is a significant factor. A $1,000 revision may be readily achievable for a large company, but not for one that is smaller or less profitable.

Another unanswered issue is whether the given alteration must be evaluated in isolation or along with similar alterations. For example, at a single facility or location, the widening of a door that would cost $500 might seem to be readily achievable. If, however, there are 50 other revisions that must be made at a similar cost, the $25,000 total might far exceed the limited concept of readily achievable for that particular business, especially if the business is relatively small. The best approach would probably be to make those changes that are financially reasonable (e.g., readily achievable) for the first year, and delay other changes until the second, third and following years. In other words, a business should consider what is readily achievable in the context of each fiscal year.

HELPFUL HINT:

Checklist for Removal of Barriers

(1) **Evaluate Existing Facilities**

Assess current facilities to identify existing barriers.

It is your obligation to demonstrate undue burden, and a well documented and non-speculative case will provide you with the best chance of prevailing.

Failure to Effect Removal of Architectural and Communication Barriers in Existing Facilities

The Act requires that you remove architectural and communication barriers in existing facilities when the removal is "readily achievable."

Readily Achievable

The phrase "readily achievable" has no counterpart in current law. It is a new concept that attempts to mediate between the extremes of requiring businesses to rebuild or retrofit all existing facilities and vehicles, and allowing them to take *no* action to remove access barriers. It is defined by the Act as "easily accomplishable and able to be carried out without much difficulty or expense." Factors to consider, as in other areas already discussed, include the size and type of the business or facility, its overall and local financial resources, and the nature and cost of the action needed.

NOTE: "Readily achievable" is not the same as "undue burden" or "undue hardship." Those two standards impose significantly greater burdens upon employers and businesses. The "readily achievable" standard is significantly less stringent, and was designed to prevent businesses from being forced into broad-scale and costly modifications.

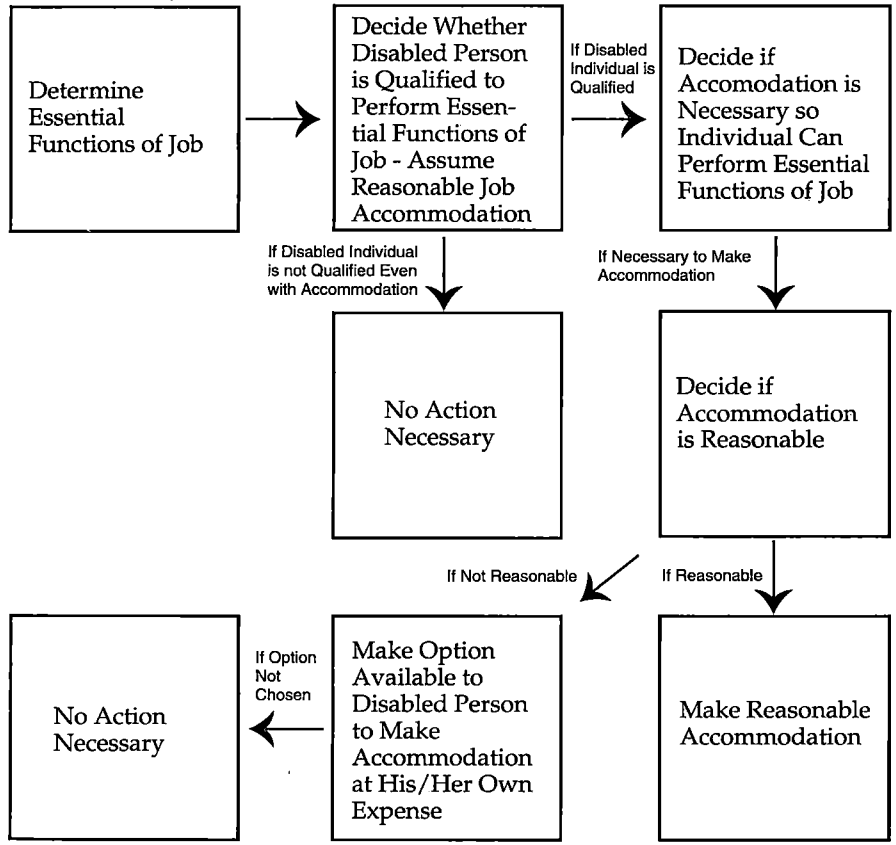
Here are some examples of barrier removals that probably are readily achievable in most settings:

- addition of grab bars;
- "simple" ramping of a few steps;
- lowering of telephones;
- addition of raised letters and braille markings on elevator control buttons; and
- addition of flashing alarms.

For example, a business may be required to rearrange furniture, equipment, and display racks. A restaurant may need to rearrange its tables and a department store adjust the layout of display racks and shelves.

- whether a reasonable accommodation can be made for a qualified individual, if needed.

These three interrelated concepts are discussed at length below, and are the key to understanding the general obligations under ADA's employment provisions. The following flow chart outlines this concept.



Essential Functions

A "qualified individual with a disability" must be able to perform the "essential functions" of the job. If a disabled employee cannot perform the essential functions of a job he or she need not be hired, promoted or retained. Deciding which job tasks are "essential" is central to determining other employment obligations under the ADA.

Unfortunately, the law does not provide a clear definition of "essential," and little practical guidance exists for employers confronted with the difficult task of determining whether a function is or is not essential. The legislative history of the ADA says that the term means job tasks that are "fundamental and not marginal." Of course, a vast range of possibilities stands between the two extremes of "fundamental" and "marginal."

The Act does provide that "consideration" should be given to an employer's judgment in determining the essential functions of a job. The Act explicitly provides that job descriptions prepared before advertising the job or interviewing applicants also will be evidence of the essential functions of a particular job. Collective bargaining agreements defining job duties also are possible sources for determining what is "essential."

HELPFUL HINT:

The "essential functions" test is one of the least clear provisions of the ADA, and this is troublesome because it is so important. Until its scope becomes better defined, it will create difficulties for employers.

Here are some steps to consider in deciding what functions of a job are "essential":

- *Document All Important Job Functions*

In the best of all worlds, an employer should maintain current detailed job descriptions that set forth each important job function of each position. Pre-established essential functions avoid the appearance that an employer is merely rationalizing the rejection of an individual with a disability.

- *Be Accurate and Realistic*

Job descriptions or definitions should describe the actual duties of the position rather than an "ideal" set of duties. Individuals who wish to inflate their importance to the company may exaggerate the extent of their duties, or those of their subordinates, and may not be a reliable source for a description of essen-

als being denied auxiliary aids, the more difficult it becomes to show an undue burden. By contrast, some aids may not ever rise to the level of "necessity" so as to trigger any employer obligations. In situations where the consequences are significant, you may have to bear the burden of the costs, rather than having disabled individuals screened out from important goods, services or activities.

- *Administrative Burden*

The administrative burdens required in providing auxiliary aids — for example, rearranging schedules to make sure a reader is always available — will not go far in demonstrating an undue burden. In all likelihood, only administrative burdens that seriously threaten to disrupt the flow of services will be given decisive weight.

- *Efforts Made by Others in the Industry*

To the extent that other comparable businesses in similar industries have provided auxiliary aids and services, it will be more difficult to show undue burden.

HELPFUL HINT:

You must have solid evidence to show undue burden. A business that attempts to modify its practices and finds the attempt unworkable will be better off than those that refuse to try, especially when the costs and burdens of the aids are not clear. Thus, companies should consider the following guidelines in assessing undue burden:

- **Document Costs**

Firmly establish the costs of providing a given auxiliary aid by actually obtaining quotations on prices, and attempting to find the cheapest vendor.

- **Maintain Records**

Maintain complete records of actual expenditures made to accommodate individuals with disabilities.

- **Obtain Data**

Obtain (if available) accurate, non-speculative data on the likely use of the auxiliary aids at issue.

- **Document Financial Information**

Be able to provide an accurate picture of the financial well-being of the company and the facility.

- **Document Efforts of Others**

Reliable evidence of the efforts made by other similar businesses should be obtained, if possible.

As discussed in Chapter Two above, the ADA specifies that the resources of a local facility, as well as those of the overall business, are to be "given consideration" and "weighed" in determining "undue hardship." It is not clear how the courts will weigh national versus local resources in a given case.

It also is not clear whether the factors listed above are the only considerations. Courts construing other federal laws generally have not restricted their undue burden inquiry to these factors. Until more specific regulations are issued, the following considerations might be useful guides to the concept of undue burden and might shape the arguments businesses could use in maintaining that they have met the "undue burden" standard.

- *Size of the Business*
  An undue burden for a small business may not be troublesome for a large business. The Act clarifies that courts should look to both the size of the particular facility and the size of the company as a whole in determining undue burden. For larger businesses, the ability to make site-specific arguments will make it easier to show undue burden.
- *Financial Solvency of the Company*
  Companies on the verge of bankruptcy may be able to demonstrate undue burden more readily than healthy, profitable companies.
- *Past Efforts and Expenditures of the Entity*
  To the extent that businesses already have expended large sums in removing barriers to equal access, additional expenditures may be more of a burden. On the other hand, what has proven reasonable for some disabilities may provide the basis for treatment of other conditions.
- *Level of Use by Individuals with Disabilities*
  If a given auxiliary aid is not likely to be used much, large expenditures to provide it may be considered more of an undue burden. Remember, however, that use of many auxiliary aids will be low, because individuals with a given disability generally do not make up a significant percentage of the population. You should be extremely wary of relying on "low usage" to deny an auxiliary aid, if it is foreseeable that such an aid is essential to enjoyment of the service and would be used with at least some frequency.
- *Costs and Consequences to Disabled Individuals If Auxiliary Aid is Not Provided*
  The more serious the costs and results to disabled individual job functions. Job descriptions that easily can be called into question by those who know the workplace are of little or no value.
- *Stay Current*
  Many jobs change rapidly. Job descriptions should be reviewed and updated periodically to ensure their accuracy.
- *Be Flexible*
  In describing the essential functions of a job, employers should be flexible and should not take a "that is the way it always has been done" attitude. Tasks that easily can be transferred to another person and are not necessarily the heart of the job are unlikely to constitute "essential" elements. Employers that are able to pare their jobs down to core elements are more likely to prevail in litigation than those who insist that every traditional element of every job is "essential."
- *Job Descriptions Should be Reviewed with Employees*
  It is always a good idea for employees to understand exactly what is expected of them. The essential functions of a job should be reviewed with employees to solicit their input and increase accuracy. Employee agreement with the description of essential job functions should be documented.

This list assumes that employers wish to create and maintain job descriptions, an action that many employers consciously have avoided. Unfortunately, successful defense of an action under the ADA may depend in large measure upon the employer's ability to establish what job duties are "essential," and written evidence of this (such as formal or informal job descriptions) will be important. Employers can attempt to prove "essential" duties through testimony rather than documentary evidence, but such attempts may flounder because in many situations, employees may perform a variety of tasks that are not strictly within their "normal" job functions. The ADA provides a strong impetus for employers to create and maintain job descriptions, even if it imposes no such legal requirement.

Qualified Individual With A Disability

The Act prohibits discrimination only against *qualified* individuals with a disability. An employer may reject individuals who would not be qualified even if they were provided with a reasonable accommodation. Moreover, an employer is free under the Act to select the most qualified applicant,[2] as long as that

decision is unrelated to the existence or consequence of a disability. A disabled applicant or employee need not be preferred over a better qualified person. Of course, this proposition must be tempered by an employer's duty to provide disabled individuals with "reasonable accommodations." A comparison of relative qualifications assumes that all reasonable accommodations will be provided to an employee with a disability. If the accommodation is provided, and a person with a disability still comes up second best, the employer is free to hire or promote the better qualified candidate.

Reasonable Accommodation

The Act imposes affirmative obligations upon employers to make "reasonable accommodations" unless this would impose an "undue hardship." This is one of the most complex provisions of the ADA to understand and apply. In many ways, compliance with this provision is the key to complying with the Act.

The Act defines "reasonable accommodation" as follows:

a. making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

b. job restructuring, part time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustments or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

The list is not exhaustive, but is designed to provide general guidance as to the nature of the obligation. Neither does it suggest that employers must take all of these actions in any particular case. Whether an accommodation is required in a given situation depends upon the particular facts of that case.

Examples of Accommodations

Accessible Facilities: Changes in working spaces may be required to reasonably accommodate an individual with a disability. These changes in working space need not be made if they would result in an "undue hardship".

Job Restructuring: Job restructuring frequently will accommodate the impairments of disabled individuals. Like many of the some examples of auxiliary aids and services that in most settings would not be unduly burdensome:

- reading of menus by waiters or other restaurant personnel;
- salespersons providing the costs of an item;
- bookstores making a special order of braille books;
- salespersons helping to reach items that are out of reach of a person using a wheelchair;
- hotels of a certain size being required to have closed caption decoders available; and
- a museum providing audio cassettes and cassette players for audio-guided tours that include braille adhesive labels for operation

The following auxiliary aids or services would not appear to be required:

- braille menus if waiters will read the menu;
- braille price tags if salespeople can tell a blind person the cost of an item;
- lowered shelves if a salesperson will provide items to a customer; and
- open captioning of feature films.

Undue Burden

There is a range of alternatives and "undue burden" is the key concept in deciding what is required. Unfortunately, "undue burden" is not defined in the Act, although the legislative history states that it is "analogous" to the phrase "undue hardship" used in the employment section of the Act (Chapter 2).

HELPFUL HINT:

Factors Used To Determine Undue Burden

Existing law offers some guidance in this area. Under current law, "undue burden" depends upon:

- the overall size of the program or business, and of the local facility, with respect to number of employees, number and type of facilities, and size of budget;
- the type of operation, including the composition and structure of the workforce; and
- the nature and cost of the accommodation needed.

the President's Committee on Employment of People with Disabilities, a simple "how can I help" may be the most effective means of dealing with potentially troublesome situations. For example, instructing service personnel to read menus to the visually impaired offers a satisfactory result with little or no effort.

Failure to Provide Auxiliary Aids and Services

One of the fundamental changes implemented by the ADA is the requirement of providing auxiliary aids and services. Businesses must take steps necessary to ensure that individuals with disabilities are not excluded, denied services, segregated or otherwise treated differently because of the absence of auxiliary aids and services. A business may refuse to provide necessary auxiliary aids and services only by demonstrating "that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in undue burden."

Specific examples of auxiliary aids and services include:

- readers;
- braille documents;
- interpreters;
- telephone handset amplifiers;
- telephones compatible with hearing aids;
- telecommunication devices for the deaf;
- closed captions;
- decoders;
- taped texts;
- audio recordings; and
- large print materials.

Whether any or all such aids are "necessary" to the full enjoyment of goods and services depends upon the nature of the goods and services and the nature of the individual's disability. Although arguments will be made that specific aids are not "necessary" but merely desirable, the clear intent of the law is to make auxiliary aids broadly available.

Defenses

These auxiliary aids must be provided unless the business can demonstrate either that the goods and services would be fundamentally altered or that an undue burden would result. Here are

Act's provisions, the **key** to job restructuring is employer flexibility. While essential functions need not be eliminated, nonessential elements may be assigned to another employee. For example, if a clerk must deliver mail to an office located in another facility, and this is only a small portion of the job, a disabled individual who does not have a driver's license still might be qualified as a clerk if the delivery task can be assigned to another employee.

Part-time or Modified Work Schedule: Flexible work schedules also will be an important method for complying with the reasonable accommodation requirement. Persons who need regular medical treatment may benefit from flexible or adjusted work schedules. Disabled persons may require modified work schedules because they must depend on a public transportation system that limits their hours of travel.[3]

Reassignment to a Vacant Position: If an employee no longer can perform the essential functions of the job, and another reasonable accommodation will not enable the employee to perform the job, an employer has a duty to offer a transfer to a vacant position for which the employee is qualified. For this reason, the inability of a current employee to perform the essential functions of his or her job does not automatically justify discharge. An employer first must attempt other accommodations to keep the employee in his or her position before transferring the individual to another position. Necessary reassignments need only be to a vacant position; bumping another employee out of a position is not required. **According to the congressional debates, reassignment as a reasonable accommodation is not required for job applicants.**

Acquisition or Modification of Equipment or Devices: An employer has a duty to provide reasonable accommodations in the form of special or modified equipment or devices, including:

- electronic visual aids;
- braille materials;
- talking calculators;
- magnifiers;
- audio recordings;
- telephone handset amplifiers;
- telecommunications devices for deaf persons;
- mechanical page turners; and
- raised or lowered furniture.

Of course, only reasonable accommodations need be provided; equipment-related modifications that create an undue hardship

for the employer need not be supplied. In addition, items that have a personal use not related to the job (hearing aids, eyeglasses, or a seeing-eye dog) need not be provided by the employer.

Modification of Examinations, Training Materials or Policies: Employer policies may create unnecessary barriers for individuals with disabilities. The reasonable accommodation concept thus requires modification of such policies. For example, many employers have a policy that applicants for certain positions must have a driver's license, on the theory that someone who drives will be on time for work or will be available to run occasional errands. Such a policy must be modified when applied to a person with a disability who can perform the essential functions of the job, but cannot drive. But, if driving is an essential function of the job, as with a truck driver, a license may be required.

Qualified Readers or Interpreters: In some situations, readers, interpreters, or other "attendants" may constitute a reasonable accommodation. The ADA does not appear to require readers or interpreters in every case (e.g., 2 for 1 hiring). But if an interpreter or reader is required by an applicant or employee on only a part-time basis, and the reader or interpreter is a qualified employee and otherwise may perform other work for the employer, his or her services may be reasonable. Because readers and interpreters are among the most expensive of the accommodations required by the Act, the key to assessing whether they must be provided is the concept of undue hardship, discussed below.

The Process of Supplying an Appropriate Accommodation

The reasonable accommodation requirement is best understood as a "problem solving approach" in which particular tasks or aspects of the work that limit performance are identified and then addressed, focusing on the needs of the particular individual and the nature of the particular job. This problem solving approach should directly involve the employee in attempting to fashion an appropriate reasonable accommodation.

Employers should consider two central issues when addressing the issue of appropriate accommodations for current or prospective employees. **First**, assuming that all reasonable accommodations will be provided, is the applicant or employee minimally qualified for the position? The duty to make a reasonable accommodation applies only to individuals who, except for their disability, are "otherwise qualified" to perform the job. For example, if a

EXAMPLES:

A rehabilitation clinic designed to focus specifically on alcohol addiction would not violate the Act by refusing to modify its admission policy to accept an individual suffering from a drug dependency. This is a clear-cut example of a "fundamental alteration." On the other hand, a movie theater that has a policy of removing patrons who are making excessive noise faces a difficult decision in dealing with an individual who suffers from Tourrette's Syndrome and thus involuntarily makes loud noises. The individual in question may interfere significantly with the enjoyment of the movie by other patrons. Yet it is not clear whether it would "fundamentally alter" the entertainment service being provided if the policy is modified to allow individuals with Tourrette's to make noise during the movie.

HELPFUL HINT:

Guidelines to Follow

Until the scope of this requirement is clarified, businesses should consider the following suggestions.

- **Be Flexible**
  Refusal to bend the rules because "that is our policy" is not enough. You must train your personnel to be willing to modify normally applicable rules or procedures when necessary to accommodate individuals with disabilities.
- **Avoid Presumptions and Generalizations**
  One obvious pitfall in the example of the movie theater and the customer with Tourrette's Syndrome would be to exclude automatically any individual waiting in line for admittance to the theater who is demonstrating signs of this condition. It may well be that this individual does not make loud utterances and would not disturb other patrons in any way. Each situation should be evaluated individually and generalizations or presumptions about behavior of people with disabilities should be avoided.
- **Ask the Patron What Modification is Needed**
  One especially important means of dealing with situations where your rules or procedures may impose a barrier to a person with a disability is to ask the individual involved how you can accommodate his or her needs. According to

- **Necessary in Terms of the Purpose of the Service**
  A doctor specializing in treatment of visual problems could refuse patients with hearing or other impairments.
- **Costs, Safety, and Other Patrons**
  Some safety concerns have no factual or medical foundation and are based upon precisely the types of stereotypes intended to be eliminated by the ADA. Those concerns — for example, fears about the risk of associating with an HIV-infected individual in a setting where there is no reasonable possibility of contagion — would not prove "necessity." Safety-based exclusion of a broad class of individuals, with no specific inquiry as to the individual situation, appears to be the type of generalization prohibited by the Act. There is no indication that cost is to be a factor when determining whether a given action is necessary. Judicial decisions under the Civil Rights Act of 1964, however, take cost into account in defining business necessity, and a similar interpretation would be logical under the ADA. The fear of unfounded stereotypes by the public almost never will provide a foundation for a "necessity" defense under the ADA, because the purpose of the law is to strike at those very stereotypes.

Failure to Undertake Reasonable Modification of Policies, Practices, and Procedures

A business must make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford goods and services to individuals with disabilities, unless making such modifications would "fundamentally alter" the nature of the goods and services. This requirement is broader than the reasonable accommodation requirement, and in essence requires that businesses remain flexible when applying their rules. For example, a public accommodation that does not allow dogs must modify that rule for a blind person with a seeing-eye dog, a deaf person with a hearing-ear dog, or a person with some other disability who uses a service dog.

- **Fundamental Alteration Defense**
  You may justify a failure to make reasonable modifications if the modifications would fundamentally alter the nature of the goods and services. This appears to be a stringent requirement, but its precise scope is not yet clear.

blind applicant for an attorney position does not have a law degree, then he or she is not "otherwise qualified" and no duty to accommodate exists.

Second, the Act only requires that reasonable accommodations be made to the "known" physical or mental limitations of an otherwise qualified individual. As discussed below, the Act severely limits inquiries into disabilities. The duty to accommodate generally is triggered by a request from an employee or applicant, consistent with the Act's limitations on employer requests for medical information. An employer is required to advise employees and applicants of its willingness to make accommodations, and is required to post notices on the ADA (similar to Title VII requirements). If a person with a known disability demonstrates a limited ability to perform his or her job, it may be appropriate for the employer to discuss the need for a reasonable accommodation with the employee. In the absence of a request for an accommodation, however, it likely will be improper to force one on an employee.

It is unclear what an employer should do if a disabled individual demonstrates job performance problems, but does not request an accommodation once those problems are discussed with the employee. If no accommodation is requested by the employee, there is no indication in the ADA or congressional reports that the employer must provide an accommodation and the employer is free to apply objective job performance standards. Given the possibility that a performance-related discharge of a disabled employee may result in litigation, employers are well advised to document repeated discussions of the possibility of reasonable accommodation prior to taking any adverse performance-related action against a disabled employee.

Handling Requests for Accommodation

Once a request for an accommodation is made by an employee, the process of providing an appropriate accommodation should involve the individual with the disability. The individual with a disability often will know precisely what accommodation he or she needs to perform a job, and this accommodation may be simpler and less expensive than one devised by the employer acting alone. Moreover, in the event of litigation, an employer's proof of "reasonableness" will depend upon a comparison between the action offered and that requested. Such a comparison is impossible unless the employee's desires are determined initially.[4]

HELPFUL HINT:

Four-Step Process for Providing a Reasonable Accommodation

Step One: Identify Barriers to Performance

The process of accommodation begins with identifying barriers that make it difficult for a person with a disability to perform his or her job. This assessment should include identification of both essential and non-essential elements of the job. (If non-essential elements pose insurmountable problems, they may be reassigned to other employees or eliminated.) The particular limitations that the employee faces should be identified with his or her input. Aspects of the work environment that cause these limitations should be identified as well.

Step Two: Identify Possible Accommodations

All possible accommodations that will help solve the limitations should be identified. A number of sources may prove helpful in this step.

- The Employee — The employee often will be the best source for possible accommodations.
- State Vocational Rehabilitation Service Agency — State agencies may be familiar with the types of problems faced by individuals with disabilities and may provide ideas.
- Job Accommodation Network — The President's Committee on Employment of People with Disabilities operates a Job Accommodation Network that may be able to provide some useful ideas.
- The Union.
- Other Employers — Other businesses, especially those in the same industry, may have faced similar issues and may have helpful approaches readily available.
- Directory of Other Sources. (See Appendix A.)

Step Three: Assess Reasonableness

The "reasonableness" of each possible accommodation should be assessed in terms of effectiveness and equal opportunity. A reasonable accommodation should be effective in eliminating the limitation; it should be reliable and capable of being provided in a timely manner. The accommodation also should provide a meaningful employment opportunity; it should allow the individual to attain the same level of performance as an individual without a disability who has similar skills and abilities.

Step Four: Choose an Appropriate Reasonable Accommodation

The Act does not specify whose choice, the employer's or the

- **Attempt to identify unnecessarily the existence of a disability**
  A department store processing a credit application cannot inquire whether an individual has epilepsy, has ever been hospitalized for mental illness, or has some other disability. This also would appear to restrict inquiries into whether a client or customer has AIDS or is HIV-infected. Inquiries into disabilities must be necessary and have a legitimate, non-discriminatory connection with the goods or services being offered.
- **Adopt criteria that impose additional requirements or burdens on people with disabilities**
  A theater or restaurant may not require individuals who use wheelchairs to be chaperoned by an attendant.
- **Impose criteria that limit participation**
  A restaurant may not require individuals with Downs Syndrome to sit at the counter instead of at a table in the dining room.
- **Diminish an individual's opportunity to participate**
  Seemingly neutral criteria may violate the Act by "tending" to screen out disabled individuals. For example, even if a bar requires a driver's license for admission of every individual, whether disabled or not, that eligibility criterion may tend to screen out individuals with visual impairments or other disabilities that prevent them from obtaining a driver's license. The bar need not abandon its identification requirement entirely, but should accept other reasonable methods of proving age when dealing with individuals with disabilities.

Necessity Defense

An employer may attempt to justify use of a discriminatory eligibility criteria by proving that it is "necessary" for offering goods or services. The concept of necessity most likely will be applied strictly, requiring proof that the eligibility criteria are required by the nature of the business or the goods and services being offered. Here are some likely examples of a "necessary" standard:

- **Necessary as a Matter of Law**
  A car rental company must be allowed to rent cars only to those individuals with a valid driver's license.

second aspect is far less clear, and may impose affirmative duties on connected businesses — for example, upon the parent of a subsidiary corporation — to ensure that the latter's facilities are fully accessible to people with disabilities.

- **Discrimination Against People Related to or Associated with Disabled Individual**
  It is unlawful to deny goods or services to an individual or an entity because of the known disability of someone with whom the individual or entity is known to have a "relationship or association." This provision may have been prompted by public concern over associating with relatives or others close to people with AIDS. The prohibition has broad applicability, however. For example, it would appear to prevent a car rental company from refusing to rent a car to a non-disabled person because of the known disability of that person's spouse. The exact parameters of the required "relationship or association" are not clear. The prohibition is broader than family relationships and appears to include business, personal, or social associations.

Specific Prohibitions

The specific prohibitions establish standards to judge the validity of steps taken to accommodate people with disabilities. The specific standards are generally phrased and by themselves provide little useful guidance on the many difficult issues you may encounter while trying to comply with the Act. The prohibitions likely will be construed broadly. **For the most part, the standards prohibit all actions that result in discrimination, whether intentional or inadvertent, against disabled individuals by denying them access to goods or services.**

Discriminatory Eligibility Criteria

The ADA prohibits the use of eligibility criteria that screen out or tend to screen out individuals with disabilities from fully and equally enjoying goods and services, unless the criteria are necessary for provision of the goods and services. It is a violation to:

- **Exclude Persons with Disabilities**
  Outright exclusion is the most blatant form of discrimination prohibited by this section. For example, the Act prohibits a grocery store from imposing a rule that no blind persons are allowed in the store, or a video dating service from refusing to serve individuals with Downs Syndrome.

employee's, prevails among the available accommodations. It thus is not clear whether an employer may insist upon the less expensive or easier of two accommodations, or whether the expressed choice of the applicant or employee for a particular accommodation must be indulged. This conflict will be resolved through regulation or litigation. Until that time, employers should be entitled to insist upon an effective but less expensive accommodation. Nonetheless, an employer who does so assumes some risk, and should document carefully the reasons why a particular accommodation was chosen.

Undue Hardship

An employer does not have to provide a reasonable accommodation if it can demonstrate that the accommodation would impose an undue hardship on the operation of the business. The ADA is less than precise in defining this vital term, stating only that an "undue hardship" is "an action requiring significant difficulty or expense." Congressional reports make it clear that employers need not undertake actions that are "unduly costly, extensive, substantial, disruptive . . . ."

The Act itself describes the factors that should be considered in determining an undue hardship:

- the nature and cost of the accommodation;
- the overall financial resources of the facility or facilities involved in providing the reasonable accommodation; the number of persons employed at the facility; the effect on the expenses, resources, or the impact of such accommodation upon the operation of the facility;
- the overall financial resources of the business; its size with respect to the number of its employees, and the number, type, and location of its facilities; and
- the type of operation or operations of the business, including the composition and structure of the workforce; the geographic separateness, administrative, and fiscal relationship of the facility or facilities in question to the business.

HELPFUL HINT:

At least some aspects of this concept are clear. **First**, for "undue hardship" to exist, the employer must show that an accommodation costs more than a small amount of money or results in more than minor inconvenience. This standard is

different than the less expansive "de minimis" accommodation standard developed in religious discrimination cases under Title VII.

Second, the type of accommodation that is "reasonable" and does not cause "undue hardship" depends on the type of business in question. For example, it may be difficult to make a construction site accessible to employees who use wheelchairs, because of the varying heights and narrowness of surfaces of the work site. Each accommodation must be assessed on an individual basis.

Third, even if an accommodation is not "reasonable" because it poses an "undue hardship," the employer must advise the employee of the reason for rejecting the potential accommodation. If the employee chooses to pay for all or part of the accommodation, the employer must provide the opportunity for its use. For example, if the job requires a reader or interpreter, and the employer can show that it reasonably cannot afford a reader or interpreter, the employee still must be offered the option of providing a reader or interpreter. Moreover, if the hardship issue is cost, the employer has an obligation to pay for that part of the accommodation that is reasonable. If public funding is available, the employer's obligation extends to investigating and obtaining that funding.

Undue Hardship — Unanswered Questions

The Act leaves unanswered many vital questions surrounding "undue hardship". For example, the ADA provides that undue hardship will be judged, at least in part, on the basis of the resources of the facility involved in the case. This provision was supposed to ensure that large companies operating numerous small facilities across the country are not held to an unreasonably high standard of care due to their overall size. But the ADA states only that the courts should "look at" and "may weigh" local resources in judging undue hardship. The financial resources of the entire enterprise also should be "looked at" and "weighed," and no formula exists for deciding which is more important.

Until this tension is resolved, large employers might consider across-the-board planning to illustrate that the purchasing power of the large entity has been used to provide otherwise unavailable accommodations. For example, a large corporation may be able to purchase cheaply devices commonly used to accommodate people with disabilities (e.g., telephone amplifiers, flashing telephone

Public accommodations may not provide disabled individuals with goods or services that are different or separate from those provided to other individuals unless such action is "necessary" to provide disabled individuals with a good or service that is as effective as those provided to others.

- **Integrated Settings Required**
  Goods and services must be available to individuals with disabilities or an individual with a disability "in the most integrated setting appropriate to the needs of the individual." This rule appears to require "mainstreaming" or non-segregation of disabled individuals. For example, the rule seems to require that individuals with disabilities must be able to watch movies in a theater along with the rest of the public, rather than in a separate section for people with disabilities.

The extent of the "integrated setting" requirement is far from clear. The language of this requirement does not limit the efforts required of businesses by the costs or burdens involved, and thus could be deemed to require businesses to create "integrated settings" without regard to cost. The specific prohibitions, however, expressly attempt to define the efforts that businesses must make, and thus should meaningfully limit the efforts required.

- **Opportunity to Choose Mode of Participation**
  If a separate or different program or activity is created to provide equal service to individuals with disabilities, they must have the option to choose between the separate and the generally available program or activity. For example, a blind person may decline a special museum tour that permits disabled persons to touch sculptures and instead tour the exhibits at his or her own pace with the museum's standard recorded tour. **Modified participation for individuals with disabilities is intended to be an available choice, not a requirement.**
- **Discriminatory Administrative Methods Prohibited**
  It is unlawful to use standards, criteria or methods of administration that have the effect of discriminating on the basis of a disability, or that perpetuate discrimination by others who are subject to "common administrative control." The first aspect of this prohibition makes it illegal to use criteria that have a disparate impact upon people with disabilities. The

- small, owner-occupied inns (five or fewer rooms rented).

DISCRIMINATION BY PUBLIC ACCOMMODATIONS

The Act's prohibition of discrimination by "public accommodations" creates the following three-tiered system of standards:

- general rule;
- general prohibitions; and
- specific prohibitions.

In the event of any conflict between the general and specific prohibitions, the specific prohibitions control.

General Rule

The Act broadly prohibits discrimination against individuals on the "basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation by any person who owns, leases (or leases to) or operates a place of public accommodation."

General Prohibitions

The general prohibitions amplify the general rule, but do not establish specific standards governing particular areas of conduct. They prohibit exclusion and segregation of individuals with disabilities and the denial of equal opportunities enjoyed by others based on, among other things, presumptions, patronizing attitudes, fears, and stereotypes about individuals with disabilities.

The general prohibitions create a web of obligations that provide a framework for application and interpretation of the more specific standards. The general prohibitions include the following:

- **Denial of Participation**
  Individuals with a disability may not be denied, either directly or through contractual, licensing, or other arrangements, the opportunity to participate in or benefit from goods, services, facilities, privileges, advantages, and accommodations ("goods and services").
- **Unequal Benefits**
  Individuals with a disability must be provided opportunities to participate in or benefit from a good or service equal to the opportunities provided to non-disabled individuals.
- **Separate Benefits**

lights, etc.) These then can be made available to local facilities that would not need to spend more than the local independent businesses with which they compete.

Undue hardship must be measured on a case-by-case basis, but aggregate accommodation costs may play a role in the test. For example, an employer might earmark a certain portion of its earnings for accommodations — create an annual "accommodations budget" — and spend that amount on a first-come, first-served basis. Several expensive accommodations occurring early in the year might render the employer unable to respond to later requests, even though these may be less costly than those already undertaken. Yet an employer's inability to establish some overall limits on expenditures counsels against any relatively expensive undertaking, for fear of establishing a floor for all future accommodations. This balance is a vital issue for employers, but is not addressed by the Act or the legislative debates.

HELPFUL HINT:

Remember, the employer has the burden to prove undue hardship. Here are some guidelines that might be helpful in determining whether you meet this test:

Avoid Jumping to Conclusions and Demonstrate a Willingness to Try

If you are uncertain whether the accommodation will succeed, or how much of a hardship will result, try the accommodation on an experimental basis, unless there is a serious health or safety risk. In this way, actual problems with the accommodation may be demonstrated. Actual experience with problems almost always will prove more valuable than hypothetical arguments about what might result.

Document the Process

Each stage of the four step process of providing a reasonable accommodation should be documented. This demonstrates your flexibility, the projected or actual costs, the lack of available alternatives and your reasonableness. If an alternative is offered but rejected by the employee, document this and the reasons for rejection. Also, note whether you are willing to pay for part of the accommodation.

Maintain Records on All Accommodations

Accommodations that have been made in the past should be documented. This will show that you take your obligations seriously and will help support a claim of undue hardship.

Be Consistent

If other accommodations have been made that caused more hardship than the accommodation under consideration, a claim of undue hardship may be more difficult to prove. It will appear that something about this particular employee makes you unwilling to accommodate. **Consistency is vital**, because past actions may well establish a standard for future cases.

Document Attempts to Obtain Public Funding

You should ensure that all sources of public funding have been investigated and exhausted.

Document Aspects of Employer's Size, Budget, or Operations Resulting in Undue Hardship

If size, budget, or the nature of your operations makes the accommodation an undue hardship, precise documentation supporting this claim must be maintained. You must show more than that the accommodation will make things more difficult; that much is inherent in the reasonable accommodation requirement. Absent clear proof of the specific problems that will be caused by the accommodation — the impact on other employees or the public, the consequences of a significant loss of efficiency, or the cost in relation to the facility's overall budget — an undue hardship claim will be difficult to sustain.

MEDICAL EXAMINATIONS AND INQUIRIES

The Act also imposes new rules on employers regarding inquiries into employee disabilities and the use of medical examinations. The general prohibition against discrimination applies fully to medical examinations and inquiries.

Pre-employment Examinations

The ADA significantly restructures the types of pre-employment medical examinations and inquiries that employers may utilize. The Act categorically prohibits requests for an applicant's physical or mental condition in an employment application form

(10) a nursery, elementary, secondary, undergraduate, post graduate private school, or other place of education;
(11) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center; and
(12) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

NOTE: Congress intended that these twelve categories of covered public accommodations would be construed broadly. The legislative reports indicate that while specific types of facilities are identified in the statute, the identified entities are merely examples of broader categories of institutions to which Title III of the ADA applies. For example, while subsection (8) above extends application of Title III to a "park or a zoo", the legislative debates indicate that Congress intended subsection (8) to extend coverage to "places of recreation." Consistent with this intent, many of the subsections listed above expressly extend coverage to broader groupings of facilities (e.g., clauses extending Title III to "other establishments" of various types).

New Construction and Alterations: Commercial Facilities

The new construction and alteration requirements apply not only to public accommodations, but also to "commercial facilities." These are facilities intended for nonresidential use and whose operations will affect commerce. Thus, the requirements apply to essentially all new commercial buildings in the United States and all commercial buildings which undergo renovation.

Those Not Covered

The following facilities are exempt from the public accommodation requirements:

- apartments or other residential facilities covered by the Fair Housing Act of 1968;
- facilities operated by federal, state, or local governments (these are covered by Title II of the ADA and/or the Rehabilitation Act of 1973;
- private clubs and other establishments not open to the public (as defined by case law under Title II of the Civil Rights Act of 1964);
- religious organizations or entities controlled by religious organizations; and

related provisions of the Act place some requirements on all public accommodations that use certain transportation vehicles, and more substantial requirements on entities, other than air carriers, engaged primarily in the business of transporting people. The Act's transportation-related requirements are substantial, affecting both existing policies, practices, and facilities and newly purchased transportation vehicles. Because of their specialized nature, this general compliance guide does not address these requirements.

WHO IS COVERED

Discrimination by Public Accommodations

Virtually all privately-owned businesses that provide goods and services to customers, clients, or visitors fall within the Act's definition of "public accommodation" and must comply with the non-discrimination provisions. **Significantly, Congress did not enact a "small business" exemption to the public access provisions, which apply fully to virtually all businesses, regardless of size.**

"Public accommodations" include 12 categories of privately operated entities:

(1) an inn, hotel, or other place of lodging (except for an establishment located within a building that (a) contains not more than five rooms for rent or hire and (b) is actually occupied by the proprietor as a residence);
(2) a restaurant, bar, or other establishment serving food or drink;
(3) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
(4) an auditorium, convention center, lecture hall or other place of public gathering;
(5) a bakery, grocery store, clothing store, hardware store, shopping center, or other retail or sales establishment;
(6) a laundromat, dry cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
(7) a terminal used for public transportation;
(8) a museum, library, gallery, or other place of public display or collection;
(9) a park, zoo or other place of recreation;

or during an interview. Generic inquiries *cannot* be couched in non-job-related terms such as: "describe the state of your health," or "are you in good health?" You may inquire only about the ability to perform specific job-related functions. For this reason you must know the specific position that the applicant seeks *before* making any such inquiries.

EXAMPLE:

You may ask all applicants for a construction job whether each is capable of working outside for 8 hours a day in any weather, *but* not if the person has a heart condition or any other disability. A company hiring a word processor may ask all applicants whether each can use a word processor, but not whether the person has a visual impairment. Even a generic question that asks "do you have any physical or mental conditions that would prevent you from performing your job functions?" cannot be asked. Only inquiries about the ability to perform specific job-related functions — "can you do x?" — are permissible.

Pre-employment inquiries into disabilities are permissible only when the employer is taking remedial action to overcome the effects of past discrimination or is seeking to comply with other affirmative action requirements. In such circumstances, however, the applicant must be told:

- why the information is being sought;
- that the information will be used only for this purpose;
- that the applicant need not supply the information;
- that, if supplied, the information will be kept confidential; and
- that a refusal to provide the information will not adversely affect the applicant.

Post-offer Medical Examinations

You have more latitude in examining the physical and mental status of an individual after you have extended a conditional job offer to the individual. You may condition an offer of employment on the results of a medical examination, if you (the employer) meet the following requirements:

- *Non-discriminatory Use*: All entering employees in a particular job classification or category must be subject to the examination, regardless of actual or suspected disability. For example,

examinations may be required of all assembly line workers, even if they are not required for office workers.

- *Confidentiality*: Information obtained during the medical examination or history of the applicant must be collected and maintained on separate forms and in medical files which are kept separate from the person's general personnel files. This information must be treated as confidential except that:
  - supervisors and managers may be informed of necessary restrictions on the work or duties of the employee and necessary accommodations;
  - first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and
  - government officials investigating an employer's compliance with the ADA may be provided with relevant information on request.
- *Use*: The results of the physical examination may be used only in accordance with other rules established by the Act. For example, medical examinations may not be used to deny employment based on an inability to perform a non-essential job function. The examination may not result in rejection unless it shows that the disability would create a "high probability of substantial harm" in the particular job function. The possibility of future harm is not enough; neither are fears that a condition may be exacerbated by stress sufficient. A risk assessment made by the employer may be challenged by the employee's physician. The same generic standard applicable to contagious diseases is used here; **absent a direct threat to the health and safety of others, it is improper to limit the employment opportunities of the applicant or employee**.

Job-Related and Consistent with Business Necessity: The result of any pre-employment medical examinations can be used only if the employer can demonstrate that the applicant thereby does not meet qualification standards that are job-related and consistent with business necessity.

Examinations and Inquiries of Current Employees

As with applicants, inquiries into whether an employee is able to perform job-related functions always are permissible. Inquiries into a disability, or the nature or severity of the disability — "do you have or suffer from x impairment?" — are permissible only

CHAPTER THREE

PUBLIC ACCOMMODATIONS AND SERVICES OPERATED BY PRIVATE ENTITIES

Overview

Title III of the ADA requires public accommodations to be accessible to people with disabilities in these areas:

- **Non-discrimination by businesses serving the public in the goods, services, facilities, privileges, advantages and accommodations they provide**. The Act both requires affirmative efforts by businesses to remove physical barriers to the full and equal enjoyment of goods and services by individuals with disabilities, and prohibits a vast array of conduct that inhibits such equal enjoyment. These rules affect not only the physical lay-out of facilities open to the public, but also the policies, procedures, and practices that businesses utilize in providing goods and services to the public.

- **Mandatory accessibility and usability in all newly-constructed public accommodations and commercial facilities and those facilities that undergo structural alterations.** Where facilities renovate primary function areas (e.g., lobby, or main employee spaces of a bank; the dining area or lobby of a restaurant), the path of travel to that area, and to restrooms, telephones and drinking fountains serving that area, must be made accessible to people with disabilities, unless the cost of the accessibility changes is disproportionate to the cost of the alteration. All newly constructed public accommodations and commercial facilities must comply with rigorous standards of accessibility and usability. Construction standards previously applied only to public facilities now will apply to the design of all newly constructed, privately-operated facilities.

- **Non-discrimination in public transportation services provided by privately operated entities**. The transportation-

EFFECTIVE DATES

The employment section becomes effective on July 26, 1992 for employers of 25 or more. On July 26, 1994, the coverage extends to employers of 15 or more.

Employment Section -- Effective Dates	
Employers of 25 or more	July 26, 1992
Employers of 15 or more	July 26, 1994

ENDNOTES

[1]An exception to this rule was created for health insurance coverage. An employer may not deny health insurance coverage to an individual based on the person's diagnosis or disability; for example, it is unlawful for an employer to deny all health coverage to a person with epilepsy, if such coverage is available to other employees. Limits on particular services or procedures may be adopted, however, as long as they apply equally to all employees. For example, an across-the-board limitation on the number of covered x-rays would be permissible, even if this has an adverse impact on certain disabled employees; it also would be lawful to limit the number of annual paid blood transfusions, even though this might have an impact on employees with hemophilia. Pre-existing condition exclusions (clauses excluding coverage of conditions arising prior to employment) may be included in health care coverage, as long as they are applied to all employees and are not adopted with an intent to discriminate.

[2]"Most qualified" or "better qualified" applicant as used throughout this section means the most qualified individual with respect to the requirements of a particular job.

[3]Altering shifts to accommodate disabled personnel may cause problems for employers faced with conflicting provisions in a collective bargaining agreement. Neither the language nor the legislative debates surrounding the ADA clarify how an employer is supposed to balance conflicting needs in this situation. The congressional debates suggest that employers negotiate freedom to make necessary modifications in future collective bargaining agreements. Unless and until such freedom is obtained, or regulations clarify exactly the scope of an employer's obligations, wisdom suggests seeking an alternative accommodation if at all possible.

[4]If the employee is, or will be, represented by a union, the employer may be obligated to discuss the accommodations issue with the union before taking steps to implement any changes to existing working conditions.

[5]The ADA amends the Vocational Rehabilitation Act of 1973 with regard to illegal drug use. Thus, the standards set forth above apply to all federal laws dealing with disability discrimination.

when they are job-related and consistent with business necessity. For example, if an employee starts to lose his hair, the employer cannot ask if he is suffering from cancer, as cancer itself would not preclude the ability to do most jobs.

Medical examinations of current employees may be required only if the employer can demonstrate that they are job-related and consistent with business necessity. For example, an assembly-line worker who keeps passing out and disrupts work on the line may be required to have a medical examination. Indeed, such a medical examination may prove useful in making reasonable accommodations. Generalizations, fears and presumptions *cannot* form the basis for the examination. For example, when a cancer patient begins to lose hair but shows no inability to do the job, there is no basis for a medical exam. **Medical examinations should be required only when actual performance is problematic.**

Nothing in the Act precludes voluntary examinations, such as those offered to check cholesterol levels. Moreover, mandatory medical examinations of employees are permissible where required by government standards. For example, the OSHA lead standard requires periodic tests of the blood lead levels of certain employees. In this case, and in the case of other mandatory safety-related medical examinations, actions necessary for compliance are permissible.

ILLEGAL DRUGS AND ALCOHOL

The Act provides that anyone, disabled or not, may be excluded from employment because of his or her **current** illegal use of drugs. Thus, an employer is not required to provide a rehabilitation program as a reasonable accommodation for a current drug user if that person demonstrates performance problems. **An addict who formerly used drugs, but is not a current user, or an alcoholic, is protected by the Act.**[5]

HELPFUL HINT:

Workplace Rules Regarding the Use of Illegal Drugs and Alcohol Prohibition of Use: Employers may require that employees not use or be under the influence of alcohol, or illegal use of drugs (including the abuse of prescription or over-the-counter drugs) in the workplace.

Drug-Free Workplace Act of 1988: Employers may require that employees comply with the provisions of the Drug-Free Work-

place Act of 1988, which prohibits the unlawful manufacture, distribution, dispensation, possession or use of a controlled substance in the workplace of a recipient of federal funds.

Transportation, Defense & Nuclear Regulatory Commission (NRC) Employees: Employers may require employees who fall within categories established by the Departments of Transportation, Defense and the NRC to meet requirements established by the relevant agencies with respect to drugs and alcohol.

Qualification Standards and Job Performance: Employers may hold an employee who is a drug user or alcoholic to the same qualification standards for employment or job performance and conduct required of other employees, even if the employee's unsatisfactory performance or conduct is related to his or her substance abuse. Thus, an employer may take whatever steps it normally would take in dealing with performance problems, even though the performance problem arises from drug use.

Drug Testing

The Act contains two provisions regarding drug testing:

Medical Examinations: Tests to determine the use of illegal drugs are not medical examinations and none of the examination rules apply.

ADA Neutrality: The ADA states that it should not be construed to encourage, prohibit, or authorize the conducting of drug testing of job applicants or employees or the making of employment decisions based on the results of such tests.

While an employer may test for illegal drugs under the ADA, this freedom is qualified by the employer's obligation not to identify (even inadvertently), through a medical examination, the existence of a disability **prior to** a conditional job offer. This distinction is important because people with certain disabilities (e.g., epilepsy, HIV disease) may take drugs that are identified through common drug tests. To comply with the ADA's preemployment medical provisions, employers either must assure that the required drug test identifies **strictly** the illegal use of drugs (e.g., by requiring that the lab report all *illegal* drugs revealed through the test), *or* can require successful passage of a drug test only of all applicants who have received a conditional job offer.

EMPLOYER DEFENSES

Job-Related and Consistent with Business Necessity

The Act makes it clear that an employer may use neutral qualification standards, tests, or selection criteria, even if they have a disparate impact on people with disabilities, so long as they are necessary to measure actual ability to perform the essential functions of the job. In addition, an employer may use a qualification standard that **directly** screens out a person with a disability, if the employer can prove that the standard is necessary for the person's actual performance on the job. In all cases, an employer has a duty of reasonable accommodation that must be met before an employee or applicant may be adversely affected by a failure to meet a qualification standard, test or selection criterion that is job-related and consistent with business necessity.

Contagious Diseases Posing a Direct Threat to Others

The Act creates an employer defense where it can be demonstrated that an individual with a currently contagious disease or infection poses a significant risk to the health or safety of other individuals in the workplace and that exposure to the disease cannot be limited by a reasonable accommodation.

HELPFUL HINT:

The Act precludes employment decisions based on fearful, reflexive actions, and requires decisions based on reasoned and sound medical judgments. For this reason, to have any chance of sustaining a defense that an employee with a contagious disease poses a substantial threat to the health and safety of others, you **must have** sound, medical proof of an actual, specific and non-speculative risk. Your proof should be obtained before any employment decision is made. **Remember, every situation should be evaluated on a case-by-case basis.**

NOTE: Employers in the food service and related industries may rely upon a list developed by the Department of Health and Human Services ("HHS"), specifying what diseases or infections may be transmitted through food handling. Food service employers will be able to reassign individuals with diseases or infections on the HHS list to other positions, so long as no other reasonable accommodation will allow the individual to remain on the job. The list will be updated annually.