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By
Zachary D. Fasman
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Prepared and Published by the U.S. Chamber of Commerce

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

What Business Must Know About the Americans With Disabilities Act

U.S. Chamber Publication #0230

ISBN No. 0-89834-117-5

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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 than \$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.)

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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 disability. 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.

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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 nature 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



Dignity, Equality, Independence Through Employment

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January 30, 1991

Dr. Richard Leshner
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Dear Dr. Leshner:

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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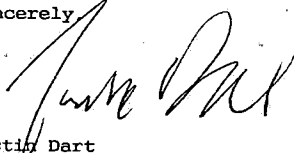
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COMMON QUESTIONS AND ANSWERS ABOUT THE ADA

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

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

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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.

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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

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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.

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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 of 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

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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 Accommodations – Effective Dates	
Discrimination	January 26, 1992*
Construction Alterations	
<i>Remodeling and Modifications</i>	January 26, 1992
<i>New Construction**</i>	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.

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 remodeling 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 is 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.

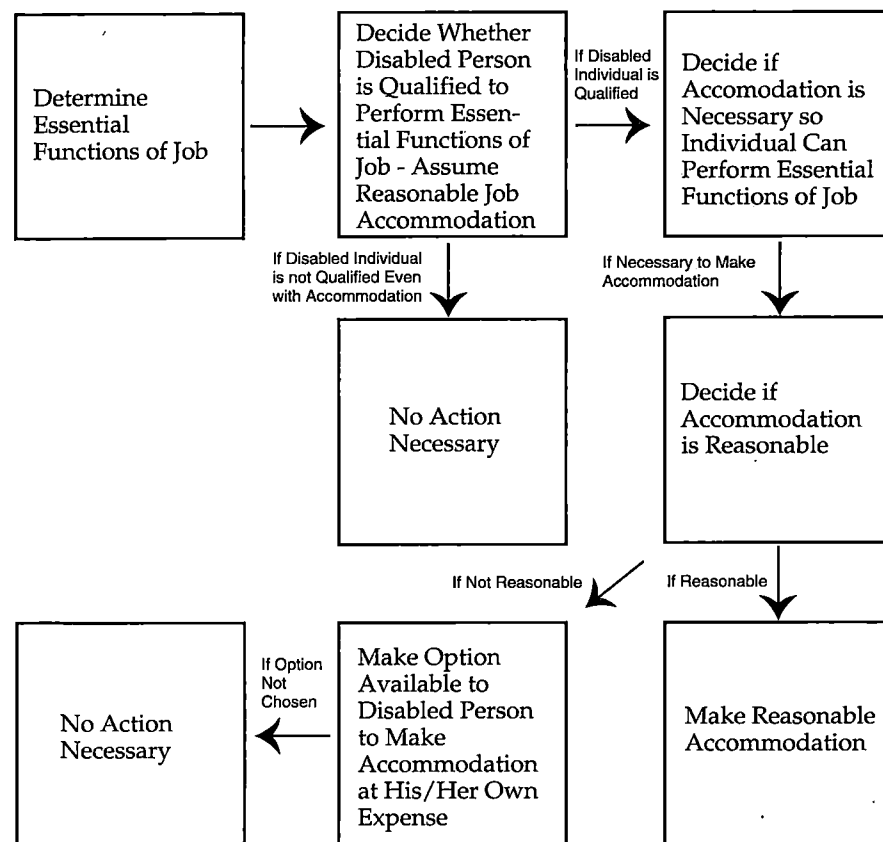
Here are some examples of barrier removals that probably are readily achievable in most settings:

- 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 individu-

tial 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, eye-glasses, 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 Tourette'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 Tourette'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 Tourette'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

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

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

¹An 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.

³Altering 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.

⁴If 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.

⁵The 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.