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DATE:	October 1, 1997
FROM:	Charles Bradshaw Boston Public Health Commission
TEL#:	617-534-4717
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RE:	Article, FYI

It was great seeing you at the US AIDS Conference. We are all proud of you here in Boston. I thought that you would find this article of interest if you haven't seen it already. All the best.

4 pages to follow.

AIDS Policy & Law

BONUS REPORT

CIRCUIT COURTS CLASH OVER HIV IN THE WORKPLACE

When the Americans with Disabilities Act was signed into law in 1990, proponents widely believed the statute would serve a national mandate to prohibit discrimination against workers with HIV and AIDS.

The law did not specifically mention HIV disease as a protected disability. Indeed, no physical or mental condition was identified by name. Instead, the statute offered to protect those who had "a physical or mental impairment that substantially limits one or more life activities" of the person, and in addition those who had a record of a disability or were regarded as having a disability.

In the seven years since, the courts have been interpreting the law. Many of these cases have reached the federal circuit courts of appeal, the last step before the U.S. Supreme Court. The circuit courts have produced a patchwork of rulings, some of them contradictory, that offer little guidance nationwide.

Geography largely determines whether and to what extent a worker is protected against HIV-related discrimination. Employers have prevailed in many of these cases so far, but not without a few complications. Chief among these is the fact that national employers now must contend with an ADA that means one thing in one part of the country and something else in another.

The Supreme Court has yet to reconcile these clashes among the circuits.

This report examines some of the major differences of opinion between the circuits on issues affecting HIV and employment. We start with an examination of a fundamental question: Is HIV infection, without symptoms of AIDS, actually a disability under the meaning of the ADA?

Is Asymptomatic HIV a Disability?

First, it's necessary to distinguish AIDS from HIV infection. A person with AIDS may have trouble walking, seeing or working — "major life activities" that may be "substantially limited" because of the person's physical condition. On the other hand, there are people who have HIV, but are free of symptoms.

Two circuit courts, the 1st and the 4th, reached opposite conclusions on the question of whether asymptomatic HIV limits a person sufficiently so as to make the infection a protected disability.

Earlier this year, a three-judge panel of the 1st Circuit in Boston ruled in *Abbott v. Bragdon* that a plaintiff with asymptomatic HIV was covered under the ADA because she was substantially limited in a major life activity, namely reproduction *(see AIDS Policy & Law, March 27, 1997, page 1)*. In a revision of its opinion a few months later, the court also pointed out that the legislative history of the ADA suggests that Congress deemed everyone with HIV to be disabled under the ADA *(see AIDS Policy & Law, June 13, 1997, page 1)*.

The case involved a dental patient who was denied treatment because she was HIV-positive, but the principle would still apply in the employment context.

The 4th Circuit, based in Richmond, Va., has examined the matter twice.

The first case, *Ennis v. National Association of Business and Educational Radio Inc.*, involved an employee who claimed she was fired because her employer didn't want to pay for medical insurance for her adopted son, who had HIV but no symptoms of illness.

In a 1995 ruling, the *Ennis* court held that asymptomatic HIV isn't necessarily an impairment under the ADA. Instead, judges must make an "individualized assessment" to determine whether the plaintiff has an impairment that "substantially limits" a major life activity *(see AIDS Policy & Law, June 2, 1995, page 1)*.

In the second case, decided in August 1997, the court en banc went beyond the reasoning in *Ennis*. In *Runnebaum v. NationsBank of Maryland*, six of the 12 judges held that the plaintiff's asymptomatic HIV was neither an impairment nor a substantially limiting condition affecting a major life activity.

CIRCUIT COURTS CLASH OVER HIV IN THE WORKPLACE

The court even suggested that asymptomatic HIV might never be deemed a disability.

"Without symptoms," **Judge Karen J. Williams** wrote for the court, "there are no diminishing effects on the individual."

Williams likened HIV infection to genetic disorders which predispose a person to develop Alzheimer's disease or muscular dystrophy — the condition "lurks" in the body, but the person does not become impaired until a later stage in life.

A seventh judge concurred in the judgment for reasons not relevant here, giving the employer a 7-to-5 victory.

It's not clear whether Williams' views on asymptomatic HIV will be treated as precedent, since she was not speaking for a majority of judges on that one issue. However, the practical effect, the dissent pointed out, is to raise doubts about whether HIV without symptoms can ever be a disability.

In the dissent, **Judge M. Blane Michael** said Williams' opinion "amounts to a per se rule that excludes those with asymptomatic HIV from the protections of the ADA" *(see AIDS Policy & Law, Sept. 5, 1997, page 1)*.

Only one other circuit has taken up the question of whether HIV infection — as opposed to manifestations of AIDS — is a protected disability. In a case involving inmates' access to prison services, the 9th Circuit, based in San Francisco, accepted the proposition that HIV is a disability per se. The decision, in *Gates v. Rowland* in 1995, was based on the federal Rehabilitation Act, a similar statute that applies to entities that receive federal funding. However, the court did not expound on the legal basis for its finding.

One other case did not make it to the appellate level, but is worth noting. In 1994, a federal district judge in Philadelphia (3rd Circuit) held that HIV impairs the ability to procreate. In *Doe v. Kohn, Nast & Graf*, the judge also concluded that the plaintiff met the ADA's requirements based on his fevers and swollen lymph nodes — conditions that largely go unnoticed in the workplace but, according to the judge, fall within the definition of "physical impairment." The case was settled during the trial *(see AIDS Policy & Law, Sept. 16, 1994, page 1)*.

Is Reproduction a 'Major Life Activity'?

A fundamental issue in both the *Abbott* and *Runnebaum* cases is whether reproduction is a major life activity.

Regulations adopted by the **Equal Employment Opportunity Commission** for enforcement of the ADA define "major life activity" as "functions such as caring for oneself, performing manual tasks, walking seeing, hearing, speaking, breathing, learning and working." The list was not meant to exclude other functions not enumerated.

In *Abbott*, the 1st Circuit said procreation was a major life activity, but confined its ruling to the plaintiff's situation. She was a "fecund female" who chose not to procreate for fear that she would transmit the virus to her offspring. The ruling raises questions as to whether a plaintiff who had no ability or interest in procreating — a postmenopausal woman or a gay man, for instance — enjoyed the same legal protection.

The 4th Circuit in *Runnebaum* acknowledged that reproduction was a "fundamental human activity," but doubted whether it could ever be deemed a major life activity under the ADA.

Nevertheless, it decided to investigate the ramifications of the plaintiff's case, assuming for the moment that reproduction did qualify. The court concluded there was nothing physically "inherent in the virus" that prevents a person from procreating, only a "behavioral matter" involving the fear of transmitting HIV to the offspring.

In any event, the court said, the plaintiff was a gay man, so he probably was not interested in fathering a child anyway.

Two other circuit courts also have ruled on the reproduction issue, but in the context of access to fertility treatments. In *Krauel v. Iowa Methodist Medical Center*, the 8th Circuit, based in St. Louis, decided that reproduction was not a major life activity.

The plaintiff, a hospital employee who sought insurance coverage for fertility treatments through her employer-provided health-care benefits plan, argued that the EEOC's definition of "major life activities" was not meant to be finite, and that procreation was comparable to such listed human functions as caring for oneself, speaking, breathing and learning. The court found that to be "a stretch" and upheld dismissal of the case *(see AIDS Policy & Law, Oct. 18, 1996, page 1)*.

The 5th Circuit, sitting in New Orleans, upheld without comment a district court ruling on the same question in *Zatarain v. WDSU Television* in 1996. The district court employed the same rationale as the *Krauel* court.

The Chicago-based 7th Circuit hasn't ruled on the issue, but two district court decisions in that circuit found that procreation was a major life activity. The cases are *Pacourek v. Inland Steel* in 1996 and *Bielicki v. Chicago* in 1997.

Do Disability Benefits Bar Lawsuit?

Federal appeals courts also have examined what happens in the latter stages of HIV disease, when a person has symptoms so pronounced that he or she qualifies for disability benefits such as Social Security or private, employer-provided disability plans.

When a worker with AIDS is fired, often the only recourse is disability insurance. Without income, a person with AIDS cannot buy or maintain insurance for health care or prescription medicines. It's only natural to turn to Social Security, which presumes that a person with AIDS is disabled if he or she exhibits certain specific medical conditions.

But if the former employee seeks those benefits, does he or she foreclose the right to challenge AIDS-related employment discrimination? The federal appeals courts are sharply divided over the question.

The 3rd Circuit, based in Philadelphia, takes the strongest view. In a 1996 ruling, it decided that if a person asserts that he is "totally disabled" for purposes of obtaining Social Security benefits, that statement "judicially estops" — automatically bars — him from pursuing an ADA claim.

"The fact that the choice between obtaining federal or state disability benefits and suing under the ADA is difficult does not entitle one to make false representations with impunity," **Judge Ruggero J. Aldisert** said for a three-judge panel in *McNemar v. The Disney Stores Inc. (see AIDS Policy & Law, Aug. 23, 1996, page 1).*

The *McNemar* court held that because the plaintiff told the **Social Security Administration** that he was "totally and permanently disabled," he no longer is a "qualified individual with a disability" who can receive protection under the ADA.

The District of Columbia Circuit rejected that rationale entirely. In *Swanks v. Washington Metropolitan Area Transit Authority* in 1997, a worker with spina bifida was allowed to proceed with his ADA complaint even though he accepted Social Security benefits.

The ADA and the Social Security Act differ in their definition of "disability." They also differ in their statutory intent and their legal standards. As a result, a statement made in the context of a disability application does not preclude a claim brought by the worker for illegal discrimination. The claimant's statement in support of disability benefits is relevant evidence for the trial, but is not dispositive in a summary judgment motion.

Writing for the *Swanks* court, **Judge David S. Tatel** said workers shouldn't be forced into a "Catch 22" situation.

"Claimants choosing benefits would sacrifice an opportunity for reinstatment while simultaneously shielding their employers from liability for allegedly unlawful acts," Tatel said *(see AIDS Policy & Law, July 25, 1997, page 1).*

Several other circuits fall in between those polar positions.

The 1st, ruling in *D'Aprile v. Fleet Services Corp.*, found that the timing of the disability application was crucial. Here, the plaintiff never claimed to be disabled during the time she asked her employer for a job accommodation due to multiple sclerosis. The court said she could proceed with her lawsuit.

The 5th, 8th and 9th circuits used factual evidence, rather than judicial estoppel, to reject ADA lawsuits, but the effect was the same: The worker lost.

In *Cleveland v. Policy Management Systems Corp.*, the 5th Circuit in August 1997 concluded that a plaintiff who represented in a Social Security disability application that she was "totally disabled" was unable to show that she was a "qualified individual with a disability" under the ADA. The worker was recovering from a stroke that temporarily affected her concentration, memory, reading and speaking.

The 8th Circuit in *Dush v. Appelton Electric Co.* found it "unnecessary" to invoke judicial estoppel in a case involving an employee who said she was "temporarily and totally disabled" in order to receive worker's compensation benefits for a ruptured disc. In its ruling in August 1997, the court said the plaintiff failed to present evidence showing that she was able to perform the essential functions of the job.

In *Kennedy v. Applause Inc.* in February 1997, the 9th Circuit rejected the ADA claim of an employee who applied for Social Security disability benefits after she was fired for tak-

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Based in New York
Connecticut
New York
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Delaware
New Jersey
Pennsylvania
Virgin Islands

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Mississippi
Texas

6th Circuit
Based in Cincinnati
Kentucky
Ohio
Michigan
Tennessee

7th Circuit
Based in Chicago
Illinois
Indiana
Wisconsin

8th Circuit
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Arkansas
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ing several leaves due to chronic fatigue syndrome. The Social Security Administration rejected her application, deciding she was able to return to work. The 9th Circuit said the denial of benefits didn't matter — the fact that she had stated in the application that she was "completely disabled for all work-related purposes" left her unable to assert that she was a "qualified individual with a disability."

On the other hand, the 6th Circuit in *Blanton v. Inco Alloys International Inc.* decided that a janitor who received disability benefits following a back injury could proceed with his lawsuit. The Cincinatti-based court said a factual dispute existed as to whether the employer met its duty to reasonably accommodate the worker, who sought to return to work in a light-duty position. The opinion, handed down in March 1997, was amended in August 1997 to deny the use of judicial estoppel.

Is Insurance Covered by the ADA?

The circuits also differ on whether insurance products, including those provided through employee benefit programs, are covered under the ADA.

The 1st Circuit was the first to take up the issue. The case, decided in 1994, involved an employer-provided health-care benefit plan that capped lifetime AIDS-related medical care at $25,000 while imposing a $1 million limit on other illnesses. The court, in *Carparts Distribution Center Inc. v. Automotive Wholesaler's Association of New England Inc.*, rejected the insurer's argument that the ADA applied only to the physical premises of insurance offices, and thus the cap could not be illegal *(see AIDS Policy & Law, Nov. 4, 1994, page 7)*.

The *Carparts* court held that "it would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or mail are not. Congress could not have intended such an absurd result."

On the other hand, in a recent 8-5 decision, the 6th Circuit rejected the idea that insurance products are covered under the ADA. The court said the ADA imposes requirements on the premises of the insurance company, not the products the insurer offers *(see AIDS Policy & Law, Aug. 22, 1997, page 1)*.

The case, *Parker v. Metropolitan Life Insurance Co.*, was brought by a worker who lost her job after her disability benefits for mental illness expired after two years. Her employer's insurance plan placed no such limitation on disabilities arising from physical conditions.

The court reasoned that the employee could not obtain the benefit package from anyone but her employer, and thus the insurance product did not represent a service offered by a public accommodation. Writing for the majority, **Judge Cornelia G. Kennedy** accused the *Carparts* court of "giving unintended breadth" to the ADA.

In dissent, **Judge Gilbert S. Merritt** said the court was able to reach its conclusion only by ignoring other portions of the law, as well as the legislative history of the ADA. He pointed out that the ADA contains a "safe harbor" provision that allows insurers to underwrite, classify or administer risks, as long as they comply with state law. The majority's interpretation renders that provision superfluous, something Congress could not have intended when it wrote the law, Merritt said.

At the district court level, opinion is divided.

In three separate rulings in the 4th Circuit, district courts have held that insurance companies that provide group health insurance through an employer are not covered under the ADA. The cases, decided in late 1996 and early 1997, all involved plaintiffs with HIV who sought coverage for hyperbaric oxygen treatments. They are: *Good v. Blue Cross and Blue Shield of Maryland*, *Nearhood v. Freestate Health Plan Inc.* and *Campbell v. Blue Cross and Blue Shield of Maryland*.

In the 9th Circuit, district judges in *Doe v. Chubb Sovereign Life Insurance Co.* and *Cloutier v. Prudential Insurance Co.* found that insurance products were covered. A judge in the 11th Circuit reached the same conclusion in *World Insurance Co. v. Branch (see AIDS Policy & Law, Dec. 27, 1996, page 2; May 16, 1997, page 4, and June 27, 1997, page 1, respectively)*.

Can the Differences Be Resolved?

The U.S. Supreme Court is the final arbiter of disputes between the federal circuit courts of appeal. Thus far, the high court has shown no eagerness to reconcile the differences of opinion arising from HIV cases.

Even though HIV is perhaps the most litigated disease in the country, the Supreme Court has never ruled on a discrimination case involving HIV or AIDS, although it has had opportunities to do so.

For example, in the last term, it chose not to take up the *McNemar* case from the 3rd Circuit, the one which barred a plaintiff from proceeding with an ADA claim because he had obtained Social Security benefits after his firing.

Other cases never reach the high court. The losing plaintiffs in *Krauel* and *Zatarain*, for instance, chose not to appeal the circuit court decisions. Those rulings stand as binding law within the circuit.

One case that could make it to the Supreme Court soon is *Abbott v. Bragdon*, in which the 1st Circuit held that a plaintiff could make a case of discrimination even though her HIV infection was asymptomatic. The defendant in *Abbott* filed an appeal on July 28.

A second closely watched ruling, the 4th Circuit's decision in *Runnebaum*, is less certain. As of Sept. 8, the losing side had yet to decide whether to appeal.

Some commentators say the *Abbott* and *Runnebaum* cases are ripe for Supreme Court review, but others say it will take more than that one dispute of law to entice the high court to act.

One factor weighing against an appeal is chief justice's stated intention to reduce the number of cases the court reviews each term.

The court's next term starts Oct. 6. ❑

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U.S. Equal Employment Opportunity Commission

U.S. Department of Justice
Civil Rights Division

The Americans with Disabilities Act

Questions and Answers

Barriers to employment, transportation, public accommodations, public services, and telecommunications have imposed staggering economic and social costs on American society and have undermined our well-intentioned efforts to educate, rehabilitate, and employ individuals with disabilities. By breaking down these barriers, the Americans with Disabilities Act will enable society to benefit from the skills and talents of individuals with disabilities, will allow us all to gain from their increased purchasing power and ability to use it, and will lead to fuller, more productive lives for all Americans.

The Americans with Disabilities Act gives civil rights protections to individuals with disabilities similar to those provided to individuals on the basis of race, color, sex, national origin, age, and religion. It guarantees equal opportunity for individuals with disabilities in public accommodations, employment, transportation, State and local government services, and telecommunications.

Fair, swift, and effective enforcement of this landmark civil rights legislation is a high priority of the Federal Government. This booklet is designed to provide answers to some of the most often asked questions about the new law.

This publication was printed with the generous support of the National Institute on Disability and Rehabilitation Research

EEOC-BK-15 Rev: September, 1992

Contents

Employment

Q. What employers are covered by title I of the ADA, and when is the coverage effective?

A. The title I employment provisions apply to private employers, State and local governments, employment agencies, and labor unions. Employers with 25 or more employees are covered as of July 26, 1992. Employers with 15 or more employees will be covered two years later, beginning July 26, 1994.

Q. What practices and activities are covered by the employment nondiscrimination requirements?

A. The ADA prohibits discrimination in all employment practices, including job application procedures, hiring, firing, advancement, compensation, training, and other terms, conditions, and privileges of employment. It applies to recruitment, advertising, tenure, layoff, leave, fringe benefits, and all other employment-related activities.

Q. Who is protected from employment discrimination?

A. Employment discrimination is prohibited against "qualified individuals with disabilities." This includes applicants for employment and employees. An individual is considered to have a "disability" if s/he has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. Persons discriminated against because they have a known association or relationship with an individual with a disability also are protected.

The first part of the definition makes clear that the ADA applies to persons who have impairments and that these must substantially limit major life activities such as seeing, hearing, speaking, walking, breathing, performing manual tasks, learning, caring for oneself, and working. An individual with epilepsy, paralysis, HIV infection, AIDS, a substantial hearing or visual impairment, mental retardation, or a specific learning disability is covered, but an individual with a minor, nonchronic condition of short duration, such as a sprain, broken limb, or the flu, generally would not be covered.

The second part of the definition protecting individuals with a record of a disability would cover, for example, a person who has recovered from cancer or mental illness.

The third part of the definition protects individuals who are regarded as having a substantially limiting impairment, even though they may not have such an impairment. For example, this provision would protect a qualified individual with a severe facial disfigurement from being denied employment because an employer feared the "negative reactions" of customers or co-workers.

Q. Who is a "qualified individual with a disability"?

A. A qualified individual with a disability is a person who meets legitimate skill, experience, education, or other requirements of an employment position that s/he holds or seeks, and who can perform the "essential functions" of the position with or without reasonable accommodation. Requiring the ability to perform "essential" functions assures that an individual with a disability will not be considered unqualified simply because of inability to perform marginal or incidental job functions. If the individual is qualified to perform essential job functions except for limitations caused by a disability, the employer must consider whether the individual could perform these functions with a reasonable accommodation. If a written job description has been prepared in advance of advertising or interviewing applicants for a job, this will be considered as evidence, although not conclusive evidence, of the essential functions of the job.

Q. Does an employer have to give preference to a qualified applicant with a disability over other applicants?

A. No. An employer is free to select the most qualified applicant available and to make decisions based on reasons unrelated to a disability.

For example, suppose two persons apply for a job as a typist and an essential function of the job is to type 75 words per minute accurately. One applicant, an individual with a disability, who is provided with a reasonable accommodation for a typing test, types 50 words per minute; the other applicant who has no disability accurately types 75 words per minute. The employer can hire the applicant with the higher typing speed, if typing speed is needed for successful performance of the job.

Q. What limitations does the ADA impose on medical examinations and inquiries about disability?

A. An employer may not ask or require a job applicant to take a medical examination before making a job offer. It cannot make any pre-employment inquiry about a disability or the nature or severity of a disability. An employer may, however, ask questions about the ability to perform specific job functions and may, with certain limitations, ask an individual with a disability to describe or demonstrate how s/he would perform these functions.

An employer may condition a job offer on the satisfactory result of a post-offer medical examination or medical inquiry if this is required of all entering employees in the same job category. A post-offer examination or inquiry does not have to be job-related and consistent with business necessity.

However, if an individual is not hired because a post-offer medical examination or inquiry reveals a disability, the reason(s) for not hiring must be job-related and consistent with business necessity. The employer also must show that no reasonable accommodation was available that would enable the individual to perform the essential job functions, or that accommodation would impose an undue hardship. A post-offer medical examination may disqualify an individual if the employer can demonstrate that the individual would pose a "direct threat" in the workplace (i.e., a significant risk of substantial harm to the health or safety of the individual or others) that cannot be eliminated or reduced below the "direct threat" level through reasonable accommodation. Such a disqualification is job-related and consistent with business necessity. A post-offer medical examination may not disqualify an individual with a disability who is currently able to perform essential job functions because of speculation that the disability may cause a risk of future injury.

After a person starts work, a medical examination or inquiry of an employee must be job-related and consistent with business necessity. Employers may conduct employee medical examinations where there is evidence of a job performance or safety problem, examinations required by other Federal laws, examinations to determine current "fitness" to perform a particular job, and voluntary examinations that are part of employee health programs.

Information from all medical examinations and inquiries must be kept apart from general personnel files as a separate, confidential medical record, available only under limited conditions.

Tests for illegal use of drugs are not medical examinations under the ADA and are not subject to the restrictions of such examinations.

Q. When can an employer ask an applicant to "self-identify" as having a disability?

A. Federal contractors and subcontractors who are covered by the affirmative action requirements of section 503 of the Rehabilitation Act of 1973 may invite individuals with disabilities to identify themselves on a job application form or by other pre-employment inquiry, to satisfy the section 503 affirmative action requirements. Employers who request such information must observe section 503 requirements regarding the manner in which such information is requested and used, and the procedures for maintaining such information as a separate, confidential record, apart from regular personnel records.

A pre-employment inquiry about a disability is allowed if required by another Federal law or regulation such as those applicable to disabled veterans and veterans of the Vietnam era. Pre-employment inquiries about disabilities may be necessary under such laws to identify applicants or clients with disabilities in order to provide them with required special services.

Q. Does the ADA require employers to develop written job descriptions?

A. No. The ADA does not require employers to develop or maintain job descriptions. However, a written job description that is prepared before advertising or interviewing applicants for a job will be considered as evidence along with other relevant factors. If an employer uses job descriptions, they should be reviewed to make sure they accurately reflect the actual functions of a job. A job description will be most helpful if it focuses on the results or outcome of a job function, not solely on the way it customarily is performed. A reasonable accommodation may enable a person with a disability to accomplish a job function in a manner that is different from the way an employee who is not disabled may accomplish the same function.

Q. What is "reasonable accommodation"?

A. Reasonable accommodation is any modification or adjustment to a job or the work environment that will enable a qualified applicant or employee with a disability to participate in the application process or to perform essential job functions. Reasonable accommodation also includes adjustments to assure that a qualified individual with a disability has rights and privileges in employment equal to those of employees without disabilities.

Q. What are some of the accommodations applicants and employees may need?

A. Examples of reasonable accommodation include making existing facilities used by employees readily accessible to and usable by an individual with a disability; restructuring a job; modifying work schedules; acquiring or modifying equipment; providing qualified readers or interpreters; or appropriately modifying examinations, training, or other programs. Reasonable accommodation also may include reassigning a current employee to a vacant position for which the individual is qualified, if the person is unable to do the original job because of a disability even with an accommodation. However, there is no obligation to find a position for an applicant who is not qualified for the position sought. Employers are not required to lower quality or quantity standards as an accommodation; nor are they obligated to provide personal use items such as glasses or hearing aids.

The decision as to the appropriate accommodation must be based on the particular facts of each case. In selecting the particular type of reasonable accommodation to provide, the principal test is that of effectiveness, i.e., whether the accommodation will provide an opportunity for a person with a disability to achieve the same level of performance and to enjoy benefits equal to those of an average, similarly situated person without a disability. However, the accommodation does not have to ensure equal results or provide exactly the same benefits.

Q. When is an employer required to make a reasonable accommodation?

A. An employer is only required to accommodate a "known" disability of a qualified applicant or employee. The requirement generally will be triggered by a request from an individual with a disability, who frequently will be able to suggest an appropriate accommodation. Accommodations must be made on an individual basis, because the nature and extent of a disabling condition and the requirements of a job will vary in each case. If the individual does not request an accommodation, the employer is not obligated to provide one except where an individual's known disability impairs his/her ability to know of, or effectively communicate a need for, an accommodation that is obvious to the employer. If a person with a disability requests, but cannot suggest, an appropriate accommodation, the employer and the individual should work together to identify one. There are also many public and private resources that can provide assistance without cost.

Q. What are the limitations on the obligation to make a reasonable accommodation?

A. The individual with a disability requiring the accommodation must be otherwise qualified, and the disability must be known to the employer. In addition, an employer is not required to make an accommodation if it would impose an "undue hardship" on the operation of the employer's business. "Undue hardship" is defined as an "action requiring significant difficulty or expense" when considered in light of a number of factors. These factors include the nature and cost of the accommodation in relation to the size, resources, nature, and structure of the employer's operation. Undue hardship is determined on a case-by-case basis. Where the facility making the accommodation is part of a larger entity, the structure and overall resources of the larger organization would be considered, as well as the financial and administrative relationship of the facility to the larger organization. In general, a larger employer with greater resources would be expected to make accommodations requiring greater effort or expense than would be required of a smaller employer with fewer resources.

If a particular accommodation would be an undue hardship, the employer must try to identify another accommodation that will not pose such a hardship. Also, if the cost of an accommodation would impose an undue hardship on the employer, the individual with a disability should be given the option of paying that portion of the cost which would constitute an undue hardship or providing the accommodation.

Q. Must an employer modify existing facilities to make them accessible?

A. The employer's obligation under title I is to provide access for an *individual* applicant to participate in the job application process, and for an *individual* employee with a disability to perform the essential functions of his/her job, including access to a building, to the work site, to needed equipment, and to all facilities used by employees. For example, if an employee lounge is located in a place inaccessible to an employee using a wheelchair, the lounge might be modified or relocated, or comparable facilities might be provided in a location that would enable the individual to take a break with co-workers. The employer must provide such access unless it would cause an undue hardship.

Under title I, an employer is not required to make its existing facilities accessible until a particular applicant or employee with a particular disability needs an accommodation, and then the modifications should meet that individual's work needs. However, employers should consider initiating changes that will provide general accessibility, particularly for job applicants, since it is likely that people with disabilities will be applying for jobs. The employer does not have to make changes to provide access in places or facilities that will not be used by that individual for employment-related activities or benefits.

Q. Can an employer be required to reallocate an essential function of a job to another employee as a reasonable accommodation?

A. No. An employer is not required to reallocate essential functions of a job as a reasonable accommodation.

Q. Can an employer be required to modify, adjust, or make other reasonable accommodations in the way a test is given to a qualified applicant or employee with a disability?

A. Yes. Accommodations may be needed to assure that tests or examinations measure the actual ability of an individual to perform job functions rather than reflect limitations caused by the disability. Tests should be given to people who have sensory, speaking, or manual impairments in a format that does not require the use of the impaired skill, unless it is a job-related skill that the test is designed to measure.

Q. Can an employer maintain existing production/performance standards for an employee with a disability?

A. An employer can hold employees with disabilities to the same standards of production/performance as other similarly situated employees without disabilities for performing essential job functions, with or without reasonable accommodation. An employer also can hold employees with disabilities to the same standards of production/performance as other employees regarding marginal functions unless the disability affects the person's ability to perform those marginal functions. If the ability to perform marginal functions is affected by the disability, the employer must provide some type of reasonable accommodation such as job restructuring but may not exclude an individual with a disability who is satisfactorily performing a job's essential functions.

Q. Can an employer establish specific attendance and leave policies?

A. An employer can establish attendance and leave policies that are uniformly applied to all employees, regardless of disability, but may not refuse leave needed by an employee with a disability if other employees get such leave. An employer also may be required to make adjustments in leave policy as a reasonable accommodation. The employer is not obligated to provide additional paid leave, but accommodations may include leave flexibility and unpaid leave.

A uniformly applied leave policy does not violate the ADA because it has a more severe effect on an individual because of his/her disability. However, if an individual with a disability requests a modification of such a policy as a reasonable accommodation, an employer may be required to provide it, unless it would impose an undue hardship.

Q. Can an employer consider health and safety when deciding whether to hire an applicant or retain an employee with a disability?

A. Yes. The ADA permits employers to establish qualification standards that will exclude individuals who pose a direct threat -- i.e., a significant risk of substantial harm -- to the health or safety of the individual or of others, if that risk cannot be eliminated or reduced below the level of a "direct threat" by reasonable accommodation. However, an employer may not simply assume that a threat exists; the employer must establish through objective, medically supportable methods that there is significant risk that substantial harm could occur in the workplace. By requiring employers to make individualized judgments based on reliable medical or other objective evidence rather than on generalizations, ignorance, fear, patronizing attitudes, or stereotypes, the ADA recognizes the need to balance the interests of people with disabilities against the legitimate interests of employers in maintaining a safe workplace.

Q. Are applicants or employees who are currently illegally using drugs covered by the ADA?

A. No. Individuals who currently engage in the illegal use of drugs are specifically excluded from the definition of a "qualified individual with a disability" protected by the ADA when the employer takes action on the basis of their drug use.

Q. Is testing for the illegal use of drugs permissible under the ADA?

A. Yes. A test for the illegal use of drugs is not considered a medical examination under the ADA; therefore, employers may conduct such testing of applicants or employees and make employment decisions based on the results. The ADA does not encourage, prohibit, or authorize drug tests.

If the results of a drug test reveal the presence of a lawfully prescribed drug or other medical information, such information must be treated as a confidential medical record.

Q. Are alcoholics covered by the ADA?

A. Yes. While a current illegal user of drugs is not protected by the ADA if an employer acts on the basis of such use, a person who currently uses alcohol is not automatically denied protection. An alcoholic is a person with a disability and is protected by the ADA if s/he is qualified to perform the essential functions of the job. An employer may be required to provide an accommodation to an alcoholic. However, an employer can discipline, discharge or deny employment to an alcoholic whose use of alcohol adversely affects job performance or conduct. An employer also may prohibit the use of alcohol in the workplace and can require that employees not be under the influence of alcohol.

Q. Does the ADA override Federal and State health and safety laws?

A. The ADA does not override health and safety requirements established under other Federal laws even if a standard adversely affects the employment of an individual with a disability. If a standard is required by another Federal law, an employer must comply with it and does not have to show that the standard is job related and consistent with business necessity. For example, employers must conform to health and safety requirements of the U.S. Occupational Safety and Health Administration. However, an employer still has the obligation under the ADA to consider whether there is a reasonable accommodation, consistent with the standards of other Federal laws, that will prevent exclusion of qualified individuals with disabilities who can perform jobs without violating the standards of those laws. If an employer can comply with both the ADA and another Federal law, then the employer must do so.

The ADA does not override State or local laws designed to protect public health and safety, except where such laws conflict with the ADA requirements. If there is a State or local law that would exclude an individual with a disability from a particular job or profession because of a health or safety risk, the employer still must assess whether a particular individual would pose a "direct threat" to health or safety under the ADA standard. If such a "direct threat" exists, the employer must consider whether it could be eliminated or reduced below the level of a "direct threat" by reasonable accommodation. An employer cannot rely on a State or local law that conflicts with ADA requirements as a defense to a charge of discrimination.

Q. How does the ADA affect workers' compensation programs?

A. Only injured workers who meet the ADA's definition of an "individual with a disability" will be considered disabled under the ADA, regardless of whether they satisfy criteria for receiving benefits under workers' compensation or other disability laws. A worker also must be "qualified" (with or without reasonable accommodation) to be protected by the ADA. Work-related injuries do not always cause physical or mental impairments severe enough to "substantially limit" a major life activity. Also, many on-the-job injuries cause temporary impairments which heal within a short period of time with little or no long-term or permanent impact. Therefore, many injured workers who qualify for benefits under workers' compensation or other disability benefits laws may not be protected by the ADA. An employer must consider work-related injuries on a case-by-case basis to know if a worker is protected by the ADA.

An employer may not inquire into an applicant's workers' compensation history before making a conditional offer of employment. After making a conditional job offer, an employer may inquire about a person's workers' compensation history in a medical inquiry or examination that is required of all applicants in the same job category. However, even after a conditional offer has been made, an employer cannot require a potential employee to have a medical examination because a response to a medical inquiry (as opposed to results from a medical examination) shows a previous on-the-job injury unless all applicants in the same job category are required to have an examination. Also, an employer may not base an employment decision on the speculation that an applicant may cause increased workers' compensation costs in the future. However, an employer may refuse to hire, or may discharge an individual who is not currently able to perform a job without posing a significant risk of substantial harm to the health or safety of the individual or others, if the risk cannot be eliminated or reduced by reasonable accommodation.

An employer may refuse to hire or may fire a person who knowingly provides a false answer to a lawful post-offer inquiry about his/her condition or worker's compensation history.

An employer also may submit medical information and records concerning employees and applicants (obtained after a conditional job offer) to state workers' compensation offices and "second injury" funds without violating ADA confidentiality requirements.

Q. What is discrimination based on "relationship or association" under the ADA?

A. The ADA prohibits discrimination based on relationship or association in order to protect individuals from actions based on unfounded assumptions that their relationship to a person with a disability would affect their job performance, and from actions caused by bias or misinformation concerning certain disabilities. For example, this provision would protect a person whose spouse has a disability from being denied employment because of an employer's unfounded assumption that the applicant would use excessive leave to care for the spouse. It also would protect an individual who does volunteer work for people with AIDS from a discriminatory employment action motivated by that relationship or association.

Q. How are the employment provisions enforced?

A. The employment provisions of the ADA are enforced under the same procedures now applicable to race, color, sex, national origin, and religious discrimination under title VII of the Civil Rights Act of 1964, as amended, and the Civil Rights Act of 1991. Complaints regarding actions that occurred on or after July 26, 1992, may be filed with the Equal Employment Opportunity Commission or designated State human rights agencies. Available remedies will include hiring, reinstatement, promotion, back pay, front pay, restored benefits, reasonable accommodation, attorneys' fees, expert witness fees, and court costs. Compensatory and punitive damages also may be available in cases of intentional discrimination or where an employer fails to make a good faith effort to provide a reasonable accommodation.

Q. What financial assistance is available to employers to help them make reasonable accommodations and comply with the ADA?

A. A special tax credit is available to help smaller employers make accommodations required by the ADA. An eligible small business may take a tax credit of up to $5,000 per year for accommodations made to comply with the ADA. The credit is available for one-half the cost of "eligible access expenditures" that are more than $250 but less than $10,250.

A full tax deduction, up to $15,000 per year, also is available to any business for expenses of removing qualified architectural or transportation barriers. Expenses covered include costs of removing barriers created by steps, narrow doors, inaccessible parking spaces, restroom facilities, and transportation vehicles. Information about the tax credit and the tax deduction can be obtained from a local IRS office, or by contacting the Office of Chief Counsel, Internal Revenue Service.

Tax credits are available under the Targeted Jobs Tax Credit Program (TJTCP) for employers who hire individuals with disabilities referred by State or local vocational rehabilitation agencies, State Commissions on the Blind, or the U.S. Department of Veterans Affairs, and certified by a State Employment Service. Under the TJTCP, a tax credit may be taken for up to 40 percent of the first $6,000 of first-year wages of a new employee with a disability. This program must be reauthorized each year by Congress, and currently is extended through June 30, 1993. Further information about the TJTCP can be obtained from the State Employment Services or from State Governors' Committees on the Employment of People with Disabilities.

Q. What are an employer's recordkeeping requirements under the employment provisions of the ADA?

A. An employer must maintain records such as application forms submitted by applicants and other records related to hiring, requests for reasonable accommodation, promotion, demotion, transfer, lay-off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship for one year after making the record or taking the action described (whichever occurs later). If a charge of discrimination is filed or an action is brought by EEOC, an employer must save all personnel records related to the charge until final disposition of the charge.

Q. Does the ADA require that an employer post a notice explaining its requirements?

A. The ADA requires that employers post a notice describing the provisions of the ADA. It must be made accessible, as needed, to individuals with disabilities. A poster is available from EEOC summarizing the requirements of the ADA and other Federal legal requirements for nondiscrimination for which EEOC has enforcement responsibility. EEOC also provides guidance on making this information available in accessible formats for people with disabilities.

Q. What resources does the Equal Employment Opportunity Commission have available to help employers and people with disabilities understand and comply with the employment requirements of the ADA?

A. The Equal Employment Opportunity Commission has developed several resources to help employers and people with disabilities understand and comply with the employment provisions of the ADA.

Resources include:

- A Technical Assistance Manual that provides "how-to" guidance on the employment provisions of the ADA as well as a resource directory to help individuals find specific information.
- A variety of brochures, booklets, and fact sheets.

For information on how to contact the Equal Employment Opportunity Commission, see page 29.

State and Local Governments

Q. Does the ADA apply to State and local governments?

A. Title II of the ADA prohibits discrimination against qualified individuals with disabilities in all programs, activities, and services of public entities. It applies to all State and local governments, their departments and agencies, and any other instrumentalities or special purpose districts of State or local governments. It clarifies the requirements of section 504 of the Rehabilitation Act of 1973 for public transportation systems that receive Federal financial assistance, and extends coverage to all public entities that provide public transportation, whether or not they receive Federal financial assistance. It establishes detailed standards for the operation of public transit systems, including commuter and intercity rail (AMTRAK).

Q. When do the requirements for State and local governments become effective?

A. In general, they became effective on January 26, 1992.

Q. How does title II affect participation in a State or local government's programs, activities, and services?

A. A state or local government must eliminate any eligibility criteria for participation in programs, activities, and services that screen out or tend to screen out persons with disabilities, unless it can establish that the requirements are necessary for the provision of the service, program, or activity. The State or local government may, however, adopt legitimate safety requirements necessary for safe operation if they are based on real risks, not on stereotypes or generalizations about individuals with disabilities. Finally, a public entity must reasonably modify its policies, practices, or procedures to avoid discrimination. If the public entity can demonstrate that a particular modification would fundamentally alter the nature of its service, program, or activity, it is not required to make that modification.

Q. Does title II cover a public entity's employment policies and practices?

A. Yes. Title II prohibits all public entities, regardless of the size of their work force, from discriminating in employment against qualified individuals with disabilities. In addition to title II's employment coverage, title I of the ADA and section 504 of the Rehabilitation Act of 1973 prohibit employment discrimination against qualified individuals with disabilities by certain public entities.

Q. What changes must a public entity make to its existing facilities to make them accessible?

A. A public entity must ensure that individuals with disabilities are not excluded from services, programs, and activities because existing buildings are inaccessible. A State or local government's programs, when viewed in their entirety, must be readily accessible to and usable by individuals with disabilities. This standard, known as "program accessibility," applies to facilities of a public entity that existed on January 26, 1992. Public entities do not necessarily have to make each of their existing facilities accessible. They may provide program accessibility by a number of methods including alteration of existing facilities, acquisition or construction of additional facilities, relocation of a service or program to an accessible facility, or provision of services at alternate accessible sites.

Q. When must structural changes be made to attain program accessibility?

A. Structural changes needed for program accessibility must be made as expeditiously as possible, but no later than January 26, 1995. This three-year time period is not a grace period; all alterations must be accomplished as expeditiously as possible. A public entity that employs 50 or more persons must have developed a transition plan by July 26, 1992, setting forth the steps necessary to complete such changes.

Q. What is a self-evaluation?

A. A self-evaluation is a public entity's assessment of its current policies and practices. The self-evaluation identifies and corrects those policies and practices that are inconsistent with title II's requirements. All public entities must complete a self-evaluation by January 26, 1993. A public entity that employs 50 or more employees must retain its self-evaluation for three years. Other public entities are not required to retain their self-evaluations, but are encouraged to do so because these documents evidence a public entity's good faith efforts to comply with title II's requirements.

Q. What does title II require for new construction and alterations?

A. The ADA requires that all new buildings constructed by a State or local government be accessible. In addition, when a State or local government undertakes alterations to a building, it must make the altered portions accessible.

Q. How will a State or local government know that a new building is accessible?

A. A State or local government will be in compliance with the ADA for new construction and alterations if it follows either of two accessibility standards. It can choose either the Uniform Federal Accessibility Standards or the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities, which is the standard that must be used for public accommodations and commercial facilities under title III of the ADA. If the State or local government chooses the ADA Accessibility Guidelines, it is not entitled to the elevator exemption (which permits certain private buildings under three stories or under 3,000 square feet per floor to be constructed without an elevator).

Q What requirements apply to a public entity's emergency telephone services, such as 911?

A. State and local agencies that provide emergency telephone services must provide "direct access" to individuals who rely on a TDD or computer modem for telephone communication. Telephone access through a third party or through a relay service does not satisfy the requirement for direct access. Where a public entity provides 911 telephone service, it may not substitute a separate seven-digit telephone line as the sole means for access to 911 services by nonvoice users. A public entity may, however, provide a separate seven-digit line for the exclusive use of nonvoice callers in addition to providing direct access for such calls to its 911 line.

Q. Does title II require that telephone emergency service systems be compatible with all formats used for nonvoice communications?

A. No. At present, telephone emergency services must only be compatible with the Baudot format. Until it can be technically proven that communications in another format can operate in a reliable and compatible manner in a given telephone emergency environment, a public entity would not be required to provide direct access to computer modems using formats other than Baudot.

Q. How will the ADA's requirements for State and local governments be enforced?

A. Private individuals may bring lawsuits to enforce their rights under title II and may receive the same remedies as those provided under section 504 of the Rehabilitation Act of 1973, including reasonable attorney's fees. Individuals may also file complaints with eight designated Federal agencies, including the Department of Justice and the Department of Transportation.

Public Accommodations

Q. What are public accommodations?

A. A public accommodation is a private entity that owns, operates, leases, or leases to, a place of public accommodation. Places of public accommodation include a wide range of entities, such as restaurants, hotels, theaters, doctors' offices, pharmacies, retail stores, museums, libraries, parks, private schools, and day care centers. Private clubs and religious organizations are exempt from the ADA's title III requirements for public accommodations.

Q. Will the ADA have any effect on the eligibility criteria used by public accommodations to determine who may receive services?

A. Yes. If a criterion screens out or tends to screen out individuals with disabilities, it may only be used if necessary for the provision of the services. For instance, it would be a violation for a retail store to have a rule excluding all deaf persons from entering the premises, or for a movie theater to exclude all individuals with cerebral palsy. More subtle forms of discrimination are also prohibited. For example, requiring presentation of a driver's license as the sole acceptable means of identification for purposes of paying by check could constitute discrimination against individuals with vision impairments. This would be true if such individuals are ineligible to receive licenses and the use of an alternative means of identification is feasible.

Q. Does the ADA allow public accommodations to take safety factors into consideration in providing services to individuals with disabilities?

A. The ADA expressly provides that a public accommodation may exclude an individual, if that individual poses a direct threat to the health or safety of others that cannot be mitigated by appropriate modifications in the public accommodation's policies or procedures, or by the provision of auxiliary aids. A public accommodation will be permitted to establish objective safety criteria for the operation of its business; however, any safety standard must be based on objective requirements rather than stereotypes or generalizations about the ability of persons with disabilities to participate in an activity.

Q. Are there any limits on the kinds of modifications in policies, practices, and procedures required by the ADA?

A. Yes. The ADA does not require modifications that would fundamentally alter the nature of the services provided by the public accommodation. For example, it would not be discriminatory for a physician specialist who treats only burn patients to refer a deaf individual to another physician for treatment of a broken limb or respiratory ailment. To require a physician to accept patients outside of his or her specialty would fundamentally alter the nature of the medical practice.

Q. What kinds of auxiliary aids and services are required by the ADA to ensure effective communication with individuals with hearing or vision impairments?

A. Appropriate auxiliary aids and services may include services and devices such as qualified interpreters, assistive listening devices, notetakers, and written materials for individuals with hearing impairments; and qualified readers, taped texts, and brailled or large print materials for individuals with vision impairments.

Q. Are there any limitations on the ADA's auxiliary aids requirements?

A. Yes. The ADA does not require the provision of any auxiliary aid that would result in an undue burden or in a fundamental alteration in the nature of the goods or services provided by a public accommodation. However, the public accommodation is not relieved from the duty to furnish an alternative auxiliary aid, if available, that would not result in a fundamental alteration or undue burden. Both of these limitations are derived from existing regulations and caselaw under section 504 of the Rehabilitation Act and are to be determined on a case-by-case basis.

Q. Will restaurants be required to have brailled menus?

A. No, not if waiters or other employees are made available to read the menu to a blind customer.

Q. Will a clothing store be required to have brailled price tags?

A. No, not if sales personnel could provide price information orally upon request.

Q. Will a bookstore be required to maintain a sign language interpreter on its staff in order to communicate with deaf customers?

A. No, not if employees communicate by pen and notepad when necessary.

Q. Are there any limitations on the ADA's barrier removal requirements for existing facilities?

A. Yes. Barrier removal need be accomplished only when it is "readily achievable" to do so.

Q. What does the term "readily achievable" mean?

A. It means "easily accomplishable and able to be carried out without much difficulty or expense."

Q. What are examples of the types of modifications that would be readily achievable in most cases?

A. Examples include the simple ramping of a few steps, the installation of grab bars where only routine reinforcement of the wall is required, the lowering of telephones, and similar modest adjustments.

Q. Will businesses need to rearrange furniture and display racks?

A. Possibly. For example, restaurants may need to rearrange tables and department stores may need to adjust their layout of racks and shelves in order to permit access to wheelchair users.

Q. Will businesses need to install elevators?

A. Businesses are not required to retrofit their facilities to install elevators unless such installation is readily achievable, which is unlikely in most cases.

Q. When barrier removal is not readily achievable, what kinds of alternative steps are required by the ADA?

A. Alternatives may include such measures as in-store assistance for removing articles from inaccessible shelves, home delivery of groceries, or coming to the door to receive or return dry cleaning.

Q. Must alternative steps be taken without regard to cost?

A. No, only readily achievable alternative steps must be undertaken.

Q. How is "readily achievable" determined in a multisite business?

A. In determining whether an action to make a public accommodation accessible would be "readily achievable," the overall size of the parent corporation or entity is only one factor to be considered. The ADA also permits consideration of the financial resources of the particular facility or facilities involved and the administrative or fiscal relationship of the facility or facilities to the parent entity.

Q. Who has responsibility for ADA compliance in leased places of public accommodation, the landlord or the tenant?

A. The ADA places the legal obligation to remove barriers or provide auxiliary aids and services on both the landlord and the tenant. The landlord and the tenant may decide by lease who will actually make the changes and provide the aids and services, but both remain legally responsible.

Q. What does the ADA require in new construction?

A. The ADA requires that all new construction of places of public accommodation, as well as of "commercial facilities" such as office buildings, be accessible. Elevators are generally not required in facilities under three stories or with fewer than 3,000 square feet per floor, unless the building is a shopping center or mall; the professional office of a health care provider; a terminal, depot, or other public transit station; or an airport passenger terminal.

Q. Is it expensive to make all newly constructed places of public accommodation and commercial facilities accessible?

A. The cost of incorporating accessibility features in new construction is less than one percent of construction costs. This is a small price in relation to the economic benefits to be derived from full accessibility in the future, such as increased employment and consumer spending and decreased welfare dependency.

Q. Must every feature of a new facility be accessible?

A. No, only a specified number of elements such as parking spaces and drinking fountains must be made accessible in order for a facility to be "readily accessible." Certain nonoccupiable spaces such as elevator pits, elevator penthouses, and piping or equipment catwalks need not be accessible.

Q. What are the ADA requirements for altering facilities?

A. All alterations that could affect the usability of a facility must be made in an accessible manner to the maximum extent feasible. For example, if during renovations a doorway is being relocated, the new doorway must be wide enough to meet the new construction standard for accessibility. When alterations are made to a primary function area, such as the lobby of a bank or the dining area of a cafeteria, an accessible path of travel to the altered area must also be provided.

The bathrooms, telephones, and drinking fountains serving that area must also be made accessible. These additional accessibility alterations are only required to the extent that the added accessibility costs do not exceed 20% of the cost of the original alteration. Elevators are generally not required in facilities under three stories or with fewer than 3,000 square feet per floor, unless the building is a shopping center or mall; the professional office of a health care provider; a terminal, depot, or other public transit station; or an airport passenger terminal.

Q. Does the ADA permit an individual with a disability to sue a business when that individual believes that discrimination is about to occur, or must the individual wait for the discrimination to occur?

A. The ADA public accommodations provisions permit an individual to allege discrimination based on a reasonable belief that discrimination is about to occur. This provision, for example, allows a person who uses a wheelchair to challenge the planned construction of a new place of public accommodation, such as a shopping mall, that would not be accessible to individuals who use wheelchairs. The resolution of such challenges prior to the construction of an inaccessible facility would enable any necessary remedial measures to be incorporated in the building at the planning stage, when such changes would be relatively inexpensive.

Q. How does the ADA affect existing State and local building codes?

A. Existing codes remain in effect. The ADA allows the Attorney General to certify that a State law, local building code, or similar ordinance that establishes accessibility requirements meets or exceeds the minimum accessibility requirements for public accommodations and commercial facilities. Any State or local government may apply for certification of its code or ordinance. The Attorney General can certify a code or ordinance only after prior notice and a public hearing at which interested people, including individuals with disabilities, are provided an opportunity to testify against the certification.

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Q. What is the effect of certification of a State or local code or ordinance?

A. Certification can be advantageous if an entity has constructed or altered a facility according to a certified code or ordinance. If someone later brings an enforcement proceeding against the entity, the certification is considered "rebuttable evidence" that the State law or local ordinance meets or exceeds the minimum requirements of the ADA. In other words, the entity can argue that the construction or alteration met the requirements of the ADA because it was done in compliance with the State or local code that had been certified.

Q. When are the public accommodations provisions effective?

A. In general, they became effective on January 26, 1992.

Q. How will the public accommodations provisions be enforced?

A. Private individuals may bring lawsuits in which they can obtain court orders to stop discrimination. Individuals may also file complaints with the Attorney General, who is authorized to bring lawsuits in cases of general public importance or where a "pattern or practice" of discrimination is alleged. In these cases, the Attorney General may seek monetary damages and civil penalties. Civil penalties may not exceed $50,000 for a first violation or $100,000 for any subsequent violation.

Miscellaneous

Q. Is the Federal government covered by the ADA?

A. The ADA does not cover the executive branch of the Federal government. The executive branch continues to be covered by title V of the Rehabilitation Act of 1973, which prohibits discrimination in services and employment on the basis of handicap and which is a model for the requirements of the ADA. The ADA, however, does cover Congress and other entities in the legislative branch of the Federal government.

Q. Does the ADA cover private apartments and private homes?

A. The ADA does not cover strictly residential private apartments and homes. If, however, a place of public accommodation, such as a doctor's office or day care center, is located in a private residence, those portions of the residence used for that purpose are subject to the ADA's requirements.

Q. Does the ADA cover air transportation?

A. Discrimination by air carriers in areas other than employment is not covered by the ADA but rather by the Air Carrier Access Act (49 U.S.C. 1374 (c)).

Q. What are the ADA's requirements for public transit buses?

A. The Department of Transportation has issued regulations mandating accessible public transit vehicles and facilities. The regulations include requirements that all new fixed-route, public transit buses be accessible and that supplementary paratransit services be provided for those individuals with disabilities who cannot use fixed-route bus service. For information on how to contact the Department of Transportation, see page 30.

Q. How will the ADA make telecommunications accessible?

A. The ADA requires the establishment of telephone relay services for individuals who use telecommunications devices for deaf persons (TDD's) or similar devices. The Federal Communications Commission has issued regulations specifying standards for the operation of these services.

Q. Are businesses entitled to any tax benefit to help pay for the cost of compliance?

A. As amended in 1990, the Internal Revenue Code allows a deduction of up to $15,000 per year for expenses associated with the removal of qualified architectural and transportation barriers.

The 1990 amendment also permits eligible small businesses to receive a tax credit for certain costs of compliance with the ADA. An eligible small business is one whose gross receipts do not exceed $1,000,000 or whose workforce does not consist of more than 30 full-time workers. Qualifying businesses may claim a credit of up to 50 percent of eligible access expenditures that exceed $250 but do not exceed $10,250. Examples of eligible access expenditures include the necessary and reasonable costs of removing architectural, physical, communications, and transportation barriers; providing readers, interpreters, and other auxiliary aids; and acquiring or modifying equipment or devices.

Telephone Numbers for ADA Information

This list contains the telephone numbers of Federal agencies that are responsible for providing information to the public about the Americans with Disabilities Act and organizations that have been funded by the Federal government to provide information through staffed information centers.

The agencies and organizations listed are sources for obtaining information about the law's requirements and informal guidance in understanding and complying with the ADA. They are not, and should not be viewed as, sources for obtaining legal advice or legal opinions about your rights or responsibilities under the ADA.

Architectural and Transportation Barriers Compliance Board	1-800-872-2253 (voice & TDD)
Equal Employment Opportunity Commission	
For questions and documents	1-800-669-3362 (voice) 1-800-800-3302 (TDD)
Alternate number for ordering documents (print and other formats)	202/663-4264 (voice) 202/663-7110 (TDD)
Federal Communications Commission	
For ADA documents and general information	202/632-7260 (voice) 202/632-6999 (TDD)
Job Accommodation Network	1-800-526-7234 (voice) 1-800-526-7234 (TDD)
Within West Virginia	1-800-526-4698 (voice & TDD)

President's Committee on Employment of People with Disabilities Information Line: ADA Work	1-800-232-9675 (voice & TDD)
U.S. Department of Justice	202/514-0301 (voice) 202/514-0383 (TDD)
U.S. Department of Transportation	
Federal Transit Administration (for ADA documents and information)	202/366-1656 (voice) 202/366-2979 (TDD)
Office of the General Counsel (for legal questions)	202/366-9306 (voice) 202/755-7687 (TDD)
Federal Aviation Administration	202/376-6406 (voice)
Rural Transit Assistance Program (for information and assistance on public transportation issues)	1-800-527-8279 (voice & TDD)

Regional Disability and Business Technical Assistance Centers

ADA information, assistance, and copies of ADA documents supplied by the Equal Employment Opportunity Commission and the Department of Justice, which are available in standard print, large print, audio cassette, braille, and computer disk, may be obtained from any of the ten Regional Disability and Business Technical Assistance Centers.

Toll-free number for reaching any of the following Centers	1-800-949-4232 (voice & TDD)
Region I (Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut)	207/874-6535 (voice & TDD)

Addresses for ADA Information

U.S. Equal Employment Opportunity Commission
1801 L Street NW
Washington, DC 20507

U.S. Department of Justice
Civil Rights Division
Public Access Section
P.O. Box 66738
Washington, DC 20035-6738

U.S. Department of Transportation
400 Seventh Street SW
Washington, DC 20590

Architectural and Transportation Barriers
Compliance Board
1331 F Street NW
Suite 1000
Washington, DC 20004-1111

Federal Communications Commission
1919 M Street NW
Washington, DC 20554

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