

The Americans with Disabilities Act of 1990: Overview and Analysis

BRENT EDWARD KIDWELL*

INTRODUCTION

The Americans with Disabilities Act of 1990 (ADA) was enacted to provide equality of opportunity to individuals with disabilities.¹ To accomplish this, the ADA prohibits discrimination against individuals with disabilities, creates a mechanism to enforce this prohibition, and grants extensive authority to the federal government to ensure ADA goals are accomplished.

The ADA is divided into five sections, which prohibit discrimination against individuals with disabilities in employment, public services and transportation, public accommodations, and telecommunications. Because of this breadth, most businesses and public agencies will feel the effects of the ADA.

This Article provides only a general overview of the ADA.² General explanations of the law are offered together with relevant provisions of regulations implementing the Act. This Article also provides citations to the Act, regulations, court decisions, and other secondary materials in an attempt to compile the vast resources available to the practitioner as a basis for ADA interpretation and implementation.

Organizationally, this Article tracks the ADA. Section I concerns "who" is protected by the ADA. Section II analyzes the employment provisions of the ADA, and section III concerns those provisions applicable to public or governmental entities. Next, ADA rules concerning accessibility to facilities and public accommodations are explained in Section IV. Finally, Section V discusses methods of enforcement and remedies for violations.

I. WHO IS PROTECTED BY THE ADA

The threshold issue under the ADA is to determine "who" is protected.³ This is answered by a somewhat unhelpful phrase: Only "qualified

* Law clerk to the Hon. John Tinder, Judge, United States District Court for the Southern District of Indiana; B.A., 1990, Indiana University; J.D., 1993, Indiana University School of Law, Indianapolis.

1. 42 U.S.C. § 12101 (Supp. 1991).

2. For a comprehensive symposium on issues arising under the ADA, see Dick Thornburgh, *The Americans with Disabilities Act: What it Means to All Americans*, 64 *TEMPLE L. REV.* 375 (1991) and related articles in the same issue.

3. Under the ADA, this determination is complex and difficult. Indeed, errors

individuals with disabilities” are protected by the ADA.⁴ This phrase creates a two-pronged test: (1) Does the individual has a disability and, if so, (2) is that individual with the disability “qualified?”

A. *Individual with a Disability*

A person is an individual with a disability if one of three tests are satisfied.⁵ First, a person is disabled if he or she has a “physical or mental impairment that substantially limits one or more of their major life activities.”⁶ Impairments satisfying this definition include:⁷

- Orthopedic, visual, speech, and hearing impairments
- Epilepsy
- Multiple sclerosis
- Heart disease
- Mental retardation
- Specific learning disabilities
- Tuberculosis
- Alcoholism
- Cerebral palsy
- Muscular dystrophy
- Cancer
- Diabetes
- Emotional illness
- HIV disease⁸
- Drug addiction⁹

Conversely, certain conditions are not considered sufficient impairments to merit ADA protection:¹⁰

- Pregnancy
- Homosexuality or bisexuality
- Kleptomania
- Compulsive gambling
- Young or old age
- Transvestitism
- Exhibitionism or voyeurism
- Pedophilia
- Pyromania
- Gender identity disorders

in this determination and the resulting failures to afford ADA protections could expose an employer or other entity to liability. The following discussion provides general guidelines to determine who is an individual with a disability protected by ADA. However, a covered entity should ensure its programs, policies, and facilities comply with the ADA because a general policy of nondiscrimination promises the greatest protection under the ADA.

4. 42 U.S.C. § 12112(a) (Supp. 1991).

5. *Id.* § 12102(2). The ADA avoids the term “disabled individual,” instead opting for the more appropriate phrase “individual with a disability.” This is intended to convey the message that people are not disabled, but are merely encumbered with disabilities.

6. *Id.* § 12102(2)(A).

7. See 28 C.F.R. § 35.104 (1992). Although this regulation discusses “disability” in relation to public entities, the examples are relevant generally to determining disabilities under all portions of the ADA.

8. The protections afforded by the ADA for persons diagnosed with AIDS is currently of great interest to AIDS groups. See generally 9 Ben. Today (BNA) 348 (Oct. 30, 1992).

9. The Institute for a Drug-Free Workplace has published a guidebook which specifically addresses ADA compliances when alcoholics and drug addicts are present in the workplace. The book is available from the Institute by calling (202) 842-7400.

10. See 28 C.F.R. § 35.104 (1992).

Likewise, trivial impairments, impairments short in duration, or physical characteristics are not considered disabilities. Thus, an individual with an eye infection or who is left handed is not an individual with a disability.

Second, a person is an individual with a disability if they have a record of such an impairment.¹¹ Under this definition, a person with a history of mental or emotional illness, heart disease, or cancer is protected as if the person is currently disabled by the condition.¹² By defining disability in this manner, a covered entity cannot discriminate based on a prior history of a disability when the individual is not currently suffering from the impairment.

Lastly, a person is an individual with a disability if they are *regarded* as having a physical or mental impairment that is considered a disability.¹³ This protects a person with a physical or mental impairment which does not limit a major life activity, but who is *treated* as having such a limitation.¹⁴ Further, a person with an impairment that limits a major life activity only as a result of the *attitude* of others toward the impairment is also protected. In addition, a person without an impairment but who is regarded as having an impairment is protected by the ADA.¹⁵

Common to each of these tests is a finding that a disability substantially limits a major life activity. A major life activity is one that an average person can perform with little or no difficulty,¹⁶ including walking, speaking, breathing, and standing.¹⁷ If any of these activities are substantially limited by a disability, the individual is a person with a disability under the ADA. Determining if a limitation is substantial requires an analysis of the effect of the limitation on the person.¹⁸

11. 42 U.S.C. § 12102(2)(B) (Supp. 1991).

12. S. REP. NO. 116, 101st Cong., 1st Sess. 22 (1989).

13. 42 U.S.C. § 12102(2)(C) (Supp. 1991).

14. S. REP. NO. 116, 101st Cong., 1st Sess. 24 (1989).

15. Example: A severe burn victim or obese person who is not substantially limited in a major life activity and who is discriminated against because an employer believes the person is unable to work is protected by the ADA. Such person is considered an individual with a disability. (This and other examples in this Article are liberally adapted from examples found in various federal regulations and other cited works. See e.g. 56 Fed. Reg. 35544, 35550 (July 26, 1991). However, no further citations will be given for the examples that follow.)

16. 29 C.F.R. § 1630.2(i) (1992). See also U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT II-3 to 4 (1992) [hereinafter MANUAL].

17. 29 C.F.R. § 1630.2(i) (1992). See also MANUAL, *supra* note 16, at II-3 to 4.

18. 29 C.F.R. § 1630.2(j) (1992). The regulations set forth three factors to consider in determining if a major life activity is substantially limited: (1) The nature and severity of the impairment, (2) the duration or expected duration of the impairment, and (3) the actual or expected permanent or long-term impact of the disability. *Id.* § 1630.2(j)(2)(i)-(iii).

Temporary impairments with little or no long-term impact do not substantially limit a major life activity, and thereby prevent a disability finding.¹⁹

B. "Qualified" Individual with a Disability

Even if a person has a disability, and this disability substantially limits a major life activity, the protections of the ADA are not necessarily implicated. The person with a disability must be "qualified." The specific test applied depends upon which provisions of the ADA are being invoked. Because of the interrelated nature of the test and the antidiscrimination provisions particular to each Title of the ADA, a discussion of "qualified" individual is reserved for the pertinent Article sections below.²⁰

II. EMPLOYMENT PRACTICES

The first major area of regulation under the ADA relates to the private employment relationship. The nondiscrimination provisions of the employment section of the ADA apply to all "covered entities,"²¹ defined as an "employer."²² An employer is an organization engaged in commerce which employs a certain minimum number of employees.²³ Until July 25, 1994, the ADA applies only to employers with twenty-five or more employees. Thereafter, the ADA will be extended to employers who maintain fifteen or more employees.²⁴ These effective dates and employee thresholds apply only to private employers, with the employment provisions of the ADA immediately applying to government and public entities regardless of the number of employees.²⁵

A. Discrimination Prohibited

The general nondiscrimination rule of the ADA provides:

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement,

19. MANUAL, *supra* note 16, at II-5.

20. For a discussion of "qualified" individual in the employment context, see *infra* note 27 and accompanying text; for the similar discussion regarding public and governmental entities, see *infra* note 106 and accompanying text.

21. 42 U.S.C. § 12112(a) (Supp. 1991).

22. *Id.* § 12111(2).

23. *Id.* § 12111(5)(A).

24. *Id.*

25. 28 C.F.R. § 35.140, app. A (1992). See *infra* note 103 and accompanying text.

or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.²⁶

Under this broad rule, the key issues are who is a “covered entity,” who is a “qualified individual with a disability,” and what is “discrimination.” Distinguishing which employers are subject to the ADA, that is, are denominated “covered entities,” is explained immediately above. The latter two issues, however, deserve careful analysis.

B. “Qualified Individual with a Disability”

The antidiscrimination rule protects only “qualified individuals with a disability” (QID).²⁷ A QID is: “[A]n individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”²⁸ By this definition, an employer is not required to hire or retain an individual with a disability who is unable to perform the “essential functions” of the position.

1. *Essential Functions.*—The ADA requires that consideration be given to the employer’s judgment as to which job functions are essential, acknowledging the business necessity of having an employee capable of performing required job tasks.²⁹ An essential function is a job task which is fundamental, as opposed to a task which is only marginally related to the position.³⁰ Whether a function is essential does not necessarily depend upon the specific duty in isolation, but rather the duty in the context of the total work environment.³¹ The essential function analysis focuses on the desired results of the job, not the means of attaining those results.³²

An employer’s written description of a job is considered evidence of the essential functions of the position, provided the employer prepares

26. 42 U.S.C. § 12112(a) (Supp. 1991).

27. *Id.*

28. *Id.* § 12111(8).

29. *Id.*

30. 29 C.F.R. § 1630.2(n), app. A (1992).

31. *Id.* Example: A person with epilepsy applies for a position as counselor at juvenile hall. After receiving a job offer, the offer is withdrawn because the person does not have a driver’s license. Driving is required in emergencies, such as taking a child to the hospital. However, it is only necessary that some of the counselors are able to drive, and it is not essential that all counselors be able to drive. On a given shift, another counselor who is able to drive could be assigned. Thus, having a driver’s license is not an essential function.

32. *Id.* Example: The postal service required postal clerks to be able to perform the job of mail distribution with both arms. The essential function of the job was found to be the ability to lift and carry mail. Thus, an employee with limited mobility in one arm who could lift and carry mail could perform the “essential function” of the position.

the description before advertising or interviewing for the job.³³ This description should be written in terms of the results required of a person performing the job, not in language indicating the manner of performance.³⁴ Although an employer's description is not conclusive as to the essential functions of a position, the employer's judgment would be considered evidence in a subsequent charge of discrimination.

The ADA does not prevent an employer from hiring or promoting the most qualified individual for a position.³⁵ To this end, the ADA does not impose quotas or other hiring goals on private employers.³⁶ Although the employer may require every employee to be qualified to perform the essential functions of a job, the ADA prevents an employer from not hiring or not promoting an individual because a disability prevents the person from performing a nonessential function. Further, an employer cannot make an adverse employment decision because an individual with a disability requires a reasonable accommodation to perform an essential job function.³⁷ If an individual with a disability is qualified to perform the essential functions of a job, with or without a reasonable accommodation, the employer may not premise any employment decision on an employee's disability.

Other specific evidence indicating that a particular aspect of the job is an essential function include: that the position exists to perform the

33. *Id.* § 1630.2(n)(3)(ii). A commercial computer software package is available to assist in creating, compiling, and storing job descriptions for ADA compliance. The package is available from Human Resources Management Services, Inc. by calling (317) 571-4230. *See* 58 Daily Lab. Rep. (BNA) A-21 (Mar. 25, 1992).

34. In preparing a job description, employers should avoid vague and undefined tasks and duties. For example, the phrase "other duties as assigned" should not be included in the description of the essential functions of the position. Other authorities suggest a job description should be divided into specific areas:

- (1) Physical and mental requirements,
- (2) Equipment needed,
- (3) Working conditions,
- (4) Supervisory control, and

(5) Output required. Equal Employment Opportunity Commission (EEOC) officials to warn against placing anything in a description that is not related to the job. *See* 107 Daily Lab. Rep. (BNA) A-1 (June 3, 1992) (providing this and other related information).

35. *See* H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 56 (1990).

36. Example: If an employer seeking a typist has two applicants, one with a disability who can type 50 words per minute and one without a disability who can type 75 words per minute, the employer may hire the faster typist.

37. The definition of "reasonable accommodation" will be discussed further *infra* at note 59 and accompanying text. Example: If two applicants for a typing position are both capable of typing 75 words per minute, but one is hearing-impaired and requires the use of an amplified handset in order to use the telephone, the employer may not hire the non-disabled applicant merely because hiring the hearing-impaired applicant would mean incurring the additional expense of purchasing the amplified handset.

function, there are a limited number of other employees to perform the function, or the function is highly specialized and the person is hired for special expertise or ability to perform it.³⁸ In a charge of discrimination, the regulations provide that all of the above items are evidence of the essential functions of a position.

2. *Pre-Employment Tests*.—An employer may require certain tests of a potential employee provided those tests are “job-related” and “consistent with business necessity.”³⁹ This enables an employer to determine if an applicant can perform the essential functions of the position and is therefore a QID.⁴⁰ Requiring an employee to demonstrate the ability to lift a certain weight, run a certain distance, or climb a pole is permitted, provided that the job in question requires those skills. However, tests or selection criteria related to an essential function of a position may not disqualify an individual with a disability if that person could satisfy the criteria if provided with a reasonable accommodation.⁴¹

In addition to governing what may be tested, the ADA regulates how one may be tested. Under the ADA, discrimination includes:

[F]ailing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability . . . such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the [impairment] of such employee or applicant (except where such skills are the factors that the test purports to measure).⁴²

Thus, testing procedures must accurately isolate and measure the specific skill relative to the essential job function. A test that excludes individuals with disabilities from a position because of a disability not connected to the essential skill in question is discriminatory.⁴³ Individuals with disabilities may not be excluded from positions they can actually perform simply because their disability prevents them from taking a test or causes

38. 29 C.F.R. § 1630.2(n)(2) (1992). See also MANUAL, *supra* note 16, at II-13 to II-18. Also included as evidence are the consequences of not requiring the person in the position to perform the function, the terms of a collective bargaining agreement, the work experience of both those who currently perform the job and those who have performed the job in the past, and the nature of the work operation and the employer's structure.

39. 29 C.F.R. § 1630.10 (1992).

40. *Id.* § 1630.10, app. A.

41. *Id.*

42. 42 U.S.C. § 12112(b)(7) (Supp. 1991).

43. 29 C.F.R. § 1630.10, app. A (1992).

negative results on a test that is a prerequisite to a job.⁴⁴ A facially neutral test or qualification criteria with a discriminatory impact on the disabled is discrimination under the ADA unless the employer can show a relationship between the test and the essential functions of the job.⁴⁵

3. *Medical Exams and Inquiries.*—The ADA prohibits an employer from making a pre-offer medical inquiry or requiring a medical exam to determine if the applicant has a disability or to determine the nature and severity of a disability.⁴⁶ The employer may, however, inquire of the applicant's ability to perform job-related functions.⁴⁷ The prohibition against medical inquiries includes both oral inquiries and written inquiries on application forms, as well as questions about an applicant's worker's compensation history.⁴⁸ Accordingly, questions on application forms that ask about physical or mental disabilities, unless those disabilities are related to performing an essential job function, may violate the ADA. Essentially, the ADA only allows the employer to ask an applicant if he has a physical or mental impairment which would interfere with his ability to perform a position.⁴⁹ This ensures that an employer does not screen out applicants from jobs based solely on a disability, and forces the employer to focus on job qualifications.

An employer may require a medical exam of the applicant after the applicant is offered a position.⁵⁰ Further, the employer may condition the offer of employment on the results of the exam.⁵¹ However, the ADA prevents an employer from discriminating against the applicant

44. *Id.* Example: A person with dyslexia is denied a job as a heavy equipment operator because the applicant could not pass a written test used by the employer for entry into the job training program. Assuming the applicant is able to perform the essential functions of a heavy equipment operator, the testing process may be discriminatory.

45. See H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 3, at 42 (1990).

46. 42 U.S.C. § 12112(d)(2)(A) (Supp. 1991). See generally Chai R. Feldblum, *Medical Examinations and Inquiries Under the Americans with Disabilities Act: A View from the Inside*, 64 TEMPLE L. REV. 521 (1991). This applies to psychological as well as physiological evaluations. Report from the Committee on the Judiciary, Report 101-485, Part 3, May 15, 1990, pp. 45-46.

47. 42 U.S.C. § 12112(d)(2)(B) (Supp. 1991). Example: If driving is an essential function of a position, the employer may ask if the applicant has a driver's license, but may not ask if the applicant has a visual impairment.

48. 29 C.F.R. § 1630.13(a), app. A (1992).

49. Although an employer may question an applicant regarding the ability to perform both marginal and essential functions of a position, the employer may not refuse to hire an individual who is unable to perform the marginal functions of a position due to a disability. *Id.* § 1630.13(a), app. A (1992). Example: An employer could explain that a job requires the assembly of small parts and ask the individual if he is able to perform that function, with or without reasonable accommodation. The employer may not, however, inquire as to the nature or severity of the disability.

50. 42 U.S.C. § 12112(d)(3) (Supp. 1991).

51. *Id.* See also 29 C.F.R. § 1630.14(b), app. A (1992).

based upon the results of the exam if the applicant is capable of performing the essential functions of the job.⁵² The ADA allows post-offer medical examinations on two conditions. First, the employer may require an examination of an applicant only if all entering employees in the same job category are required to have the same examination.⁵³ Second, the employer must maintain the results of any medical exam in separate medical record files and treat the information as confidential.⁵⁴

Once an individual becomes an employee, the employer may not require medical exams except when an exam is required to determine if the employee is still able to perform the essential job functions.⁵⁵ This permits routine and regular physical examinations to determine fitness for job performance.⁵⁶ Similarly, the employer may not make inquiries of the employee regarding any disability except for inquiries into the ability of an employee to perform job-related functions.⁵⁷

4. *Reasonable Accommodation.*—Once the essential functions of a job are determined, the employer's next task is to measure the applicant against those standards to determine if the applicant can satisfy legitimate job expectations. Even if the employer determines that a person with a disability is unable to perform the essential functions, the employer is not automatically justified in denying the applicant the position. Under the ADA, a "qualified individual with a disability" is: "[A]n individual with a disability who, *with or without reasonable accommodation*, can perform the essential functions of the employment position that such individual holds or desires."⁵⁸ A person is a QID if he can perform the essential functions of a job with the assistance of a reasonable accommodation. Thus, an employer has a duty to provide assistance to an employee with a disability to help the individual perform the job. However, the employer is not obligated to lower standards or modify programs to hire an employee with a disability if no accommodation would allow the person to meet the legitimate job standards or if the only sufficient accommodation imposes an undue hardship on the employer.

52. An important point to note is that the ADA does not override any requirement under local, state, or federal law regarding medical qualifications for employment or regular medical exams.

53. 42 U.S.C. § 12112(d)(3)(A) (Supp. 1991).

54. *Id.* § 12112(d)(3)(B). An employer may divulge medical information in three situations: (1) To inform supervisors and managers of necessary restrictions on the work or duties of the employee and necessary accommodations; (2) To inform first aid and safety personnel, when appropriate, if the disability might require emergency treatment; and (3) To provide relevant information at the request of government officials investigating ADA compliance. *Id.* § 12112(d)(3)(B)(i) - (iii).

55. *Id.* § 12112(d)(4)(A).

56. 29 C.F.R. § 1630.14(c), app. A (1992).

57. 42 U.S.C. § 12112(d)(4)(B) (Supp. 1991).

58. *Id.* § 12111(8).

The ADA does not offer a complete definition of "reasonable accommodation," but suggests that the term includes:⁵⁹

- Making existing facilities used by employees readily accessible to and usable by individuals with disabilities;⁶⁰
- Job restructuring;
- Part-time or modified work schedules;
- Reassignment to a vacant position;⁶¹
- Acquisition or modification of equipment or devices;
- Appropriate adjustment or modifications of examinations, training materials, or policies;⁶²
- The provision of qualified readers or interpreters;
- Other similar accommodations for individuals with disabilities;
- Permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment;
- Making employer-provided transportation accessible;
- Providing reserved parking spaces; and
- Permitting the use of a guide dog at work for a blind individual.

This list is not exhaustive, but illustrative of the steps employers are required to take to allow a individual with a disability to perform the functions of a position.⁶³

The employer is only required to provide a "reasonable" accommodation. An employer's obligation depends upon the needs of the specific individual and the job in question.⁶⁴ If two accommodations exist to remedy a particular situation, the employer may choose the less

59. *Id.* § 12111(9). See also MANUAL, *supra* note 16, at III-16 to III-34.

60. The public accommodation requirements of Title III of the ADA may also apply to the employer, requiring alterations to ensure accessibility to services. See *infra* note 215 and accompanying text.

61. This would be reasonable accommodation only if no reasonable accommodation to the employee's current position allows him to perform the essential functions of the job. See MANUAL, *supra* note 16, at III-25.

62. A lawsuit has been filed in the Western District of Wisconsin alleging that the State of Wisconsin violated the ADA when it failed to properly assist a dyslexic electrician take a written exam to become a master electrician. *Welbes v. Wisconsin Dept. of Indus., Labor, and Human Relations*, No. 92C566C (W.D. Wis. filed July 7, 1992). State examiners refused the plaintiff's request to bring more illustrations into the exam room, but provided him with more time for the exam and a person to read the questions.

63. 29 C.F.R. § 1630.2(o), app. A (1992).

64. Additionally, an employer is only required to provide a reasonable accommodation for a *known* disability. Disabled individuals have the burden to inform the employer of their need of an accommodation to perform the essential functions of the job. Additionally, the employer has an obligation to inform employee's of its duty to provide accommodations. MANUAL, *supra* note 16, at III-7.

expensive one. Further, an accommodation is reasonable only if the adjustment or modification is job-related and specifically assists the individual in performing the duties of a particular job.⁶⁵

Although job restructuring is an example of a reasonable accommodation, an employer is not required to alter the job description of a position to eliminate an essential function the disabled person is unable to perform.⁶⁶ Further, an accommodation is unreasonable, and not required, if it assists the individual throughout his or her daily activities, on and off the job, and is actually a personal item.⁶⁷ The duty to provide reasonable accommodations also applies to all services and programs provided in connection with employment, including non-work facilities provided for employees.⁶⁸ Thus, it may be reasonable to provide an accommodation that allows an employee with a disability to use cafeterias, lounges, gymnasiums, auditoriums, and employer-provided transportation.⁶⁹

Under the ADA, discrimination includes:

[N]ot making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.⁷⁰

The “undue hardship” standard limits the employer’s duty to provide a reasonable accommodation, and serves as a defense to a charge of discrimination for failure to make the accommodation.⁷¹ An undue hardship is an action requiring “significant difficulty or expense,” and includes any action which is unduly costly, extensive, substantial, or disruptive.⁷² Several factors are considered to determine if an otherwise reasonable accommodation creates an undue hardship:⁷³

65. 29 C.F.R. § 1630.9, app. A (1992).

66. *Id.* § 1630.2(o), app. A.

67. *Id.*

68. *Id.*

69. *Id.*

70. 42 U.S.C. § 12112(b)(5)(A) (Supp. 1991).

71. *Id.* See generally Margaret E. Stine, *Reasonable Accommodation and Undue Hardship Under the American with Disabilities Act of 1990*, 37 S.D. L. REV. 97 (1991); E. Anne Benaroya, *Reasonable Accommodation and Undue Hardship under the ADA: Selected Issues*, C669 ALI-ABA 389 (1991).

72. 42 U.S.C. § 12111(10)(A) (Supp. 1991).

73. *Id.* § 12111(10)(B).

- The nature and *net* cost of the accommodation needed;⁷⁴
- The overall financial resources of the facility involved in the provision of the reasonable accommodation;
- The number of persons employed at the facility;
- The effect on expenses and resources or the impact otherwise of such accommodation upon the operation of the facility;⁷⁵
- The overall financial resources of the covered entity;
- The overall size of the business of a covered entity with respect to the number of employees;
- The number, type, and location of facilities of the covered entity;
- The type of operation of the covered entity, including the composition, structure, and functions of the workforce of such entity; and
- The geographic separateness, and administrative or fiscal relationship of the facility or facilities in question to the covered entity.

In multilevel organizations or related entities, the entity whose financial resources are available to provide the accommodation is the proper focus.⁷⁶ Thus, whether a particular accommodation is an undue burden must always be determined on a case-by-case basis.⁷⁷

C. *Defining "Discrimination" in Employment Practices Under the ADA*

Several specific prohibitions flow from the ADA's general statement of nondiscrimination. These prohibitions extend into every facet of the employment relationship, including:⁷⁸

74. The term "net cost" is used to indicate that the actual cost of the accommodation to the employer is the relevant consideration. Net cost of the accommodation is derived after tax credits, and other government subsidies are subtracted from the total cost of the accommodation. *MANUAL*, *supra* note 16, at III-12 to III-13.

75. This includes a showing that the accommodation would be unduly disruptive to other employees or to the employer's ability to conduct its business. *MANUAL*, *supra* note 16, at III-14.

76. 29 C.F.R. § 1630.2(p), app. A (1992). Example: A fast food franchise receives no money from the franchisor and refuses to hire an individual with a hearing impairment because provision of an interpreter would be an undue hardship. Because the financial relationship between the franchisor and the franchisee is limited, only the financial resources of the franchise would be considered in determining whether the accommodation would be an undue hardship.

77. See *MANUAL*, *supra* note 16, at III-12.

78. 42 U.S.C. § 12112. See *also* *MANUAL*, *supra* note 16, at I-4 to I-5.

- Limiting, segregating, or classifying an applicant or employee which adversely affects employment opportunities because of the disability;
- Participating in a contract relationship with another entity that subjects, person with disability to discrimination;
- Denying employment opportunities to a person because of association with a person with a disability;
- Refusing to make reasonable accommodation;
- Using qualification standards, employment tests, or other selection criteria that screen out individuals with a disability unless job-related and necessary for business;
- Failing to use employment tests in the most effective manner to measure actual abilities; and
- Discriminating against an individual because of their opposition to an employment practice of the employer or filing a complaint, testifying, assisting, or participating in an investigation or hearing.

While general in application, the specific application of these prohibitions will await lawsuits under the ADA.⁷⁹

Another possible area for discriminatory conduct is employer provided healthcare.⁸⁰ Under the ADA, employers must provide equal access to any benefits offered. Although employers can treat employees differently for insurance purposes based upon risk, such treatment must be justified under the ADA's provisions. While the ADA does not specifically address the issue, the EEOC is developing interpretive regulations to deal with discrimination in this area.⁸¹

D. Defenses to a Discrimination Charge

An employer charged with discrimination may raise several "defenses." Although not affirmative defenses in the judicial sense, these arguments negate the employer's liability if proven. Generally, the burden is on the employer to prove these defenses in the discrimination action.

79. For instance, in *Realbuto v. Howe*, No. 92-CV-1003 (N.D.N.Y. Aug. 3, 1992), an employee has alleged that a New York state program violates the ADA because it denies equal tenure rights and job security to persons with disabilities. Employees hired under the program perform the same tasks but do not receive the same seniority as other employees.

80. The effect of the ADA on health-insurance costs is a major concern of American businesses. See 19 *Pens. Rep.* (BNA) 1363 (July 27, 1992).

81. See 9 *Ben. Today* (BNA) 324 (Oct. 16, 1992). Additionally, the EEOC is developing comprehensive guidelines concerning the ADA's impact on the whole range of employee benefit plans. 235 *Daily Lab. Rep.* (BNA) A-9 (Dec. 7, 1992).

1. *Business Necessity*.—First, no liability accrues if the discriminatory action is job related and consistent with business necessity.⁸² To establish this defense, the employer must prove that the use of qualification standards, tests, or selection criteria having a disparate impact on a person with a disability are: (1) Job-related, (2) consistent with business necessity, and (3) cannot be cured by a reasonable accommodation.⁸³ In other words, if the challenged action is justified by a legitimate, nondiscriminatory reason, the employer may not be liable under the ADA.⁸⁴

To establish that a qualification is “job-related,” it must be a legitimate measure or qualification for the specific job at issue.⁸⁵ Even marginal functions of a job, as compared with the essential functions, can be considered job-related. However, if a person’s disability prevents them from performing the marginal functions of a job, the employer cannot premise an employment decision on this fact.⁸⁶

The second requirement, that the criteria or qualification be consistent with business necessity, is inextricably tied to the job-related standard. Under the ADA, if the standard excludes an individual with a disability because of the disability, and does not relate to the essential functions of a job, it is not consistent with business necessity.⁸⁷ Thus, a standard may be job-related, but not consistent with business necessity if it does not relate to an essential function of the job.⁸⁸

Even if the standard is job-related and consistent with business necessity, the employer must show that the individual with the disability could not satisfy the standards, tests, or criteria even if that person was provided a reasonable accommodation.⁸⁹

2. *Undue Hardship*.—The fact that an undue hardship would result is a defense to a charge of discrimination based on an employer’s failure to provide a reasonable accommodation.⁹⁰ As discussed above, an em-

82. 42 U.S.C. § 12113(a) (Supp. 1991).

83. *Id.*

84. 29 C.F.R. § 1630.15(a) (1992). This defense is similar to the disparate treatment defense under Title VII, expressed in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

85. *MANUAL*, *supra* note 16, at IV-2.

86. *Id.* at IV-2 to IV-3.

87. *Id.* at IV-3.

88. *Id.* at IV-4.

89. 42 U.S.C. § 12113(a) (Supp. 1991). Example: An employer requires an interview which is job-related and consistent with business necessity before hiring an applicant. The employer may not refuse to hire a hearing-impaired applicant because he cannot be interviewed. In this instance, an interpreter could be provided as a reasonable accommodation that would allow the individual to be interviewed and satisfy the selection criteria. Thus, this defense is only applicable if all three criteria are satisfied.

90. 29 C.F.R. 1630.15(d) (1992).

ployer is not required to provide a reasonable accommodation to an individual with a disability if doing so results in an undue hardship.⁹¹

3. *Direct Threat*.—An employer may require that an individual not pose a direct threat to the health or safety of other individuals in the workplace or to himself.⁹² If this requirement is job-related, consistent with business necessity, and cannot be cured by a reasonable accommodation, the employer has a defense against a charge of discrimination.⁹³ This requirement must be applied to each employee in the job category and not just to individuals with a disability.⁹⁴ An employee is a direct threat if he poses a significant risk to the health or safety of others that cannot be eliminated with a reasonable accommodation.⁹⁵ Thus, if an applicant is otherwise qualified for a job, he cannot be disqualified because of a physical or mental disability unless the employer shows that the disability presents a direct threat to the safety of others in the workplace. Adverse employment decisions based upon stereotypes or fear are prohibited.⁹⁶ Instead, any belief that the employee is a direct threat must be based on articulated facts derived from the individual employee's condition.⁹⁷

The employer may consider the duration of the risk and the magnitude, severity, or likelihood of the potential harm to other individuals in the workplace to determine if the individual poses a direct threat.⁹⁸ However, this must be based on the current condition of the applicant or employee, not past problems.⁹⁹ In addition, the risk must be significant before it may disqualify an individual with a disability.¹⁰⁰ The risk must pose a high probability of substantial harm. A speculative or remote risk is insufficient.¹⁰¹ If, after consideration of these factors, the employer concludes an applicant or employee poses a direct threat to other employees, the employer may make an adverse employment decision on that basis without fear of liability for discrimination.¹⁰²

91. See *supra* note 73 and accompanying text.

92. 42 U.S.C. § 12113(b) (Supp. 1991).

93. *Id.* § 12113(a).

94. 29 C.F.R. § 1630.2(r), app. A (1992).

95. 42 U.S.C. § 12111(3) (Supp. 1991).

96. *Id.*; 29 C.F.R. § 1630.2(r), app. A (1992).

97. Example: An employer may not assume that a person with a mental illness poses a direct threat to other employees. Instead, there must be objective evidence from the person's behavior that the person has a recent history of committing overt acts or making threats which caused harm or directly threatened harm.

98. 29 C.F.R. § 1630.2(r)(1) to (3) (1992).

99. *Id.* § 1630.2(r), app. A.

100. *Id.*

101. *Id.*

102. An additional defense involves federal laws and regulations that impose certain

III. PUBLIC/GOVERNMENT ENTITIES

The ADA specifically addresses the duties of public and governmental entities regarding persons with disabilities. The ADA prohibits all public entities, regardless of their size, from discriminating against individuals with disabilities.¹⁰³ A public entity is defined as: (1) Any State or local government; or (2) any department, agency, special purpose district, or other instrumentality of a State or States or local government.¹⁰⁴ Specifically, the antidiscrimination provision applicable to public entities states: “[N]o qualified individual with a disability shall, by reason of such disability be excluded from participating in or be denied the benefits of the services, programs, or activities of a public entity”¹⁰⁵

Title II of the ADA protects only “qualified individuals with disabilities” (QID), defined as:

[A]n individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.¹⁰⁶

The “essential eligibility requirements” vary depending on the service or program in question.¹⁰⁷ If an individual with a disability satisfies these eligibility requirements, the person is a QID and is protected by the antidiscrimination rules.

A. Specific Prohibitions

1. *Provision of Services.*—A public entity may not, in providing an aid, benefit, or service with respect to a QID:¹⁰⁸

medical standards and safety requirements on various occupations. An employer may defend a charge of discrimination on the basis that the challenged act is required or necessitated under another federal law.

103. 42 U.S.C. § 12132 (Supp. 1991); 28 C.F.R. § 35.140, app. A (1992).

104. 42 U.S.C. § 12131(1) (Supp. 1991).

105. *Id.* § 12132. The term “qualified individual with a disability” qualifies who is covered by this section of the ADA. *See Id.* § 12131(2).

106. 28 C.F.R. § 35.104 (1992). The term “qualified individual with a disability” may have different definitions depending on the particular non-discrimination provision at issue. *See, e.g., infra* note 28 and accompanying text.

107. *See* official comment to 28 C.F.R. § 35.104 (1992). An example is provided by the comment of the ability of a person to receive information about a public entity’s operations. The comment characterizes the essential eligibility requirements for receipt of such information as simply the request for the information. *Id.*

108. *Id.* § 35.130(b)(1) (1992). These prohibitions are based on the regulations implementing § 504 of the Rehabilitation Act of 1974 and are already applicable to some state and local entities.

- Deny the QID the opportunity to participate in or benefit from the aid, benefit, or service;¹⁰⁹
- Afford a QID an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;
- Provide a QID an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;
- Provide different or separate aids, benefits, or services to individuals with disabilities than is provided to others unless such action is necessary to provide a QID with aids, benefits, or services as effective as those provided to others;
- Aid or perpetuate discrimination against a QID by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability;
- Deny a QID the opportunity to participate as a member of planning or advisory boards; or
- Otherwise limit a QID in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.¹¹⁰

Although special programs for individuals with disabilities may be offered, a QID always has the right to participate in the program not designed to accommodate persons with disabilities.¹¹¹ This is true even if the non-accommodated program is less effective.¹¹² The ADA's goal is to prevent exclusion and segregation of disabled individuals based upon disabilities, ensuring integration of persons and opportunities.¹¹³

109. As an example of the ADA's application to government entities, see Jeanne Dooley & Erica Wood, *Opening the Courthouse Door: The Americans with Disabilities Act's Impact on the Courts*, 76 JUDICATURE 39 (June/July 1992).

110. In *Kent v. Director, Mo. Dep't. of Elementary & Secondary Educ. and Div. of Vocational Rehabilitation*, 792 F. Supp. 59, 61 (E.D. Mo. 1992), the court held as nonfrivolous the plaintiff's allegation that the state discriminated against him when it failed to provide an alternative to the required psychological evaluation for a job rehabilitation program. Because of his religion, the plaintiff would not submit to the psychological evaluation. Although the court held a possible ADA claim was stated, it is difficult to understand how religious beliefs constitute a "disability" under the ADA.

111. 28 C.F.R. § 35.130(b)(2) (1992). Example: There is no violation by offering special recreation programs for the disabled; however, the ADA is violated if children with disabilities are required to participate in these special programs instead of the standard programs.

112. *See Id.* § 35.130(a).

113. *Id.* § 35.130, app. A.

Even if an alternative accommodated program is offered by a public entity, the entity retains a duty to ensure the regular program is accessible to the individual with a disability. The public entity may be required to modify the standard program or provide auxiliary aids or services which allow a QID to participate in that program.¹¹⁴

All activities of a public entity are covered by the ADA, even if performed by an outside contractor.¹¹⁵ A public entity may not discriminate against an individual with disabilities through contractual or licensing arrangements.¹¹⁶ Accordingly, the ADA makes a public entity liable for the acts of any contractor or licensee.

2. *Administration.*—The nondiscrimination rules extend beyond the provision of aids, benefits, and services to encompass the actual administrative practices of a public entity. An entity may not use criteria or methods of administration that:

- Have the effect of subjecting a QID to discrimination on the basis of disability,
- Have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's programs with respect to individuals with disabilities, or
- Perpetuate the discrimination of another public entity if both public entities are subject to common administrative control or are agencies of the same State.¹¹⁷

These rules govern both the official written policies of the entity as well as its actual practices.¹¹⁸ Thus, a public entity may not promulgate or apply blatantly exclusionary policies nor policies which are neutral on their face, but have the effect of denying individuals with disabilities the opportunity to participate in programs.¹¹⁹

3. *Facility Location.*—A public entity, in selecting the site or location of a facility, may not make selections that:¹²⁰

- Have the effect of excluding individuals with disabilities from, denying them the benefits of, or otherwise subjecting them to discrimination; or

114. This obligation may be mitigated by the defenses available under these rules. For example, if an entity provides an alternative program which includes an interpreter for the hearing impaired, an undue burden may result if the entity is required to provide an interpreter at the standard program also. See 28 C.F.R. § 35.130, app. A (1992).

115. 28 C.F.R. § 35.102, app. A (1992).

116. *Id.* § 35.130(b).

117. *Id.* § 35.130(b)(3).

118. *Id.* § 35.130, app. A.

119. *Id.*

120. *Id.* § 35.130(b)(4).

- Have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the service, program, or activity with respect to individuals with disabilities.

These rules do not apply to the construction of additional buildings at an existing site, but only to new facility locations.¹²¹

4. *Licensing/Certification Programs.*—A public entity is also prohibited from administering licensing or certification programs in a manner that subjects a QID to discrimination.¹²² Before an individual is considered a QID for these purposes, the person must satisfy the essential eligibility requirements for receiving the license or certificate.¹²³ However, the provision does not require to lowering or substantially modifying licensing requirements to accommodate a person with a disability.¹²⁴

5. *Screening Criteria.*—A public entity may not impose eligibility criteria that screen out or tend to screen out individuals with disabilities from full and equal enjoyment of any service, program, or activity.¹²⁵ Thus, a public entity may not:

- Establish exclusive or segregative criteria that bar or tend to screen individuals with disabilities from participation in services, benefits, or activities; or
- Impose requirements or burdens on disabled individuals that are not placed on others.

Such criteria may be applied, however, if necessary to the provision of the service, program, or activity being offered.¹²⁶ Accordingly, neutral requirements to ensure the safety of participants in a program are allowed if based on actual risks.¹²⁷

121. *Id.* § 35.130, app. A. However, the public entity is required to provide access to programs and services, which sometimes requires a public entity to physically modify its facility. In *Kroll v. St. Charles County, Mo.*, 766 F. Supp. 744, 753 (E.D. Mo. 1991), the district court found the county courthouse and government buildings did not comply with Title II of the ADA because they were physically inaccessible to handicapped persons. As a result, the court ordered an increase in county property taxes to facilitate renovations.

122. 28 C.F.R. § 35.130(b)(6) (1992).

123. *Id.* § 35.104.

124. *Id.* § 35.130, app. A.

125. *Id.* § 35.130(b)(8). Examples: A public entity may not require a QID to be accompanied by an attendant. A public entity may not require presentation of a drivers license as the sole means of identification for purposes of paying by check when an individual with a vision disability is ineligible for such a license and alternative means of I.D. are feasible.

126. *Id.*

127. *Id.* § 35.130, app. A. Example: All participants in a whitewater rafting program can be required to satisfy a certain swimming proficiency to participate.

6. *Limits on Liability.*—The ADA limits the duties imposed on a public entity to comply with the nondiscrimination provisions. These limits are crucial to an understanding of the remedial acts required by the ADA.

First, the ADA requires a public entity to make all reasonable modifications in policies, practices, or procedures to avoid discrimination on the basis of disability.¹²⁸ However, no modification is required if the public entity can demonstrate that making the modification would fundamentally alter the nature of the service, program, or activity.¹²⁹

Second, a public entity may not place a surcharge on particular individuals with disabilities or groups of individuals with disabilities to cover the costs of actions required by the ADA.¹³⁰ This prevents a transfer of compliance costs to those who may benefit from the services.

Third, as indicated throughout the ADA, a person may be discriminated against based on his current illegal use of drugs.¹³¹ A drug addict, as distinguished from an illegal user of drugs, is a person with a disability and protected under the ADA.¹³² Accordingly, a public entity can discriminate against someone because that person engages in the illegal use of drugs, but not because the person is a drug addict.¹³³ This provision does not apply to alcohol or the use of alcohol, and alcoholics are protected individuals under the ADA.¹³⁴

Fourth, a public entity is not required to provide personal devices or services to an individual with a disability.¹³⁵ This limitation applies to all modifications or alterations required by the ADA and limits all regulations which affect public entities.¹³⁶ This means, for example, that a public entity is not required to provide an individual wheelchair to accommodate a disabled individual in a program.

B. *Employment Practices*

A public entity is subject to the same rules, regulations, and antidiscrimination provisions as a private employer under the ADA.¹³⁷

128. *Id.* § 35.130(b)(7).

129. *Id.* Note, however, that no limitation exists merely because the modification results in undue financial or administrative burdens. Such a limit does exist when considering modifications to achieve program accessibility. *See infra* note 215 and accompanying text.

130. 28 C.F.R. § 35.130(f) (1992).

131. *Id.* § 35.131(a).

132. *Id.* § 35.131, app. A.

133. *Id.*

134. *Id.* § 35.131, app. A. *See generally* Wendy K. Voss, *Employing the Alcoholic Under the Americans with Disabilities Act of 1990*, 33 WM. & MARY L. REV. 895 (1992).

135. 28 C.F.R. § 35.135 (1992).

136. *Id.* § 35.135, app. A.

137. *Id.* § 35.140(b).

Accordingly, a public entity should comply with the specific guidelines regarding those requirements.¹³⁸

C. *Access to Facilities, Programs, and Services*

A public entity must operate each service, program, or activity so that, when viewed in as a whole, each is readily accessible to and usable by individuals with disabilities.¹³⁹ This does not necessarily require a public entity to:¹⁴⁰

- Make each existing facility accessible to and usable by individuals with disabilities;
- Take any action that would threaten or destroy the historic significance of property; or
- Take any action it can demonstrate would result in a *fundamental alteration* in the nature of the service, program, or activity or in undue financial or administrative burdens.

These limits ensure that the programs of the public entity are accessible, but do not require each facility to be accessible.¹⁴¹ If program accessibility requires structural changes to comply with the ADA, these changes must be completed by January 26, 1995.¹⁴²

1. *Limitations.*—Two provisions limit the duty of a public entity to make alterations to ensure access to programs. First and most importantly, a public entity is not required to take any action that would result in a fundamental alteration of the nature of the service, program, or activity or in undue financial or administrative burdens.¹⁴³ However, the public entity must take all other steps necessary to ensure that individuals with disabilities receive the benefits or services provided by the public entity.¹⁴⁴ Because the “undue burden” standard applies to program accessibility rather than facility accessibility, it will be a rare situation if a public entity is not required to ensure individuals with

138. Actually, the Title I provisions of the ADA only apply to those public employers who satisfy the requirements of Title I. *Id.* § 35.140(b)(1). All others must satisfy the requirements of the Rehabilitation Act of 1973. *Id.* § 35.140(b)(2). However, the Title I provisions were derived from the Rehabilitation Act, thus imposing essentially the same requirements on all public employers. For an analysis of Title I's impact on state and local government, see Jean F. Galanos & Stephen H. Price, *Title I of the Americans with Disabilities Act of 1990: Concepts & Considerations for State & Local Government Employers*, 21 STETSON L. REV. 931 (1992).

139. 28 C.F.R. § 35.150(a) (1992).

140. *Id.*

141. *Id.* § 35.150, app. A.

142. *Id.* § 35.150(c).

143. 28 C.F.R. § 35.150(a)(3) (1992).

144. *Id.* § 35.150, app. A.

disabilities are able to participate in and benefit from the services, programs, or activities of the entity.¹⁴⁵

2. *Methods of Compliance with Accessibility Requirements.*—ADA regulations provide several examples of methods of complying with a public entity's program accessibility requirements.¹⁴⁶ To determine the most appropriate method of compliance, the public entity should consider the ADA's overall goal to provide services and programs in the most integrated setting possible. As a result, structural changes to facilities are not required if other methods result in program accessibility or otherwise result in compliance with the ADA.¹⁴⁷ Structural changes are required only if no other method makes the public entity's program accessible.¹⁴⁸

3. *New Construction and Alterations.*—Any facility or new part of a facility, if construction was commenced on or after January 26, 1992, must be designed and constructed to be readily accessible and usable by individuals with disabilities.¹⁴⁹ Further, any alterations made to a facility after January 26, 1992 must, to the maximum extent feasible, be accessible and usable by persons with disabilities.¹⁵⁰ To comply with this requirement, the facility should satisfy either the Uniform Federal Accessibility Standards or the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG).¹⁵¹

These structural requirements do not apply to existing buildings leased by a public entity.¹⁵² However, a public entity that leases a building

145. *Id.* To determine the burden of a particular action, all available financial resources of the public entity to fund the change should be considered. The decision that a particular action will result in a fundamental alteration or in an undue burden must be made by the head of the public entity or his designee. *Id.* § 35.150(a)(3). The official making the decision must be at least a department head with budgetary authority and responsibility for spending decisions. *Id.* § 35.150, app. A. This decision must be in writing and state the reasons for the conclusion. *Id.* § 35.150(c)(3).

146. These examples include: (1) redesign of equipment, (2) reassignment of services to accessible buildings, (3) assignments of aides to beneficiaries, (4) home visits, (5) delivery of services at alternative accessible sites, (6) alteration of existing facilities, and (7) building new facilities. *Id.* § 5.150(b)(1).

147. *Id.*

148. *Id.* 35.150, app. A.

149. *Id.* § 35.151(a). A facility under design on this date is governed by these provisions if the date that bids were invited falls after January 26, 1992. *Id.* § 35.151, app. A.

150. *Id.* § 35.151(b).

151. 28 C.F.R. § 35.151(c) (1992). The ADAAG is found at *id.* § 36, app. A (1992). A public entity choosing to comply with ADAAG is not entitled to the elevator exemption. This exemption allows a facility with less than three stories or 3000 square feet in area to not have an elevator when such would facilitate accessibility. Thus, a two-story courthouse must have an elevator, whereas a two-story private office building need not. *Id.* § 35.151, app. A.

152. *Id.* § 35.151, app. A.

must still satisfy the program accessibility requirements of the ADA.¹⁵³ In addition, if these buildings would be altered or newly constructed, the alterations or new construction must satisfy the architectural design and accessibility provisions.¹⁵⁴

D. Communications

The ADA imposes several requirements to ensure individuals with disabilities have full and effective communications with both government entities and private concerns.

1. *General Requirements.*—A public entity must ensure communication with members of the public with disabilities is as effective as communications with others.¹⁵⁵ To accomplish this, a public entity is required to provide auxiliary aids and services to a person with a disability that allow the disabled person to fully and equally participate in the program and benefit from its services.¹⁵⁶ The type of auxiliary aid required will depend, in large part, on the requests of the individual with the disability.¹⁵⁷ This request must be honored by the public entity unless some limitation previously discussed allows the public entity to choose an alternative.¹⁵⁸

Different situations require different forms of aid. For example, if the communication is simple and short in duration, written materials or a notepad may be sufficient. However, some circumstances may require the public entity to provide a qualified interpreter to aid in the communication. To determine if an interpreter is required, consider (1) the context in which the communication is taking place, (2) the number of people involved, (3) the importance of the communication, (4) the complexity of the communication, and (5) the duration of the communication.¹⁵⁹ Other aids or services possibly required include readers, reading devices, and close captioned television programs.¹⁶⁰

2. *Communication with the Deaf.*—If a public entity communicates by telephone with applicants and beneficiaries of the entity's programs, telecommunication devices for the deaf (TDDs) or equally effective tele-

153. *Id.*

154. *Id.*

155. *Id.* § 35.160(a).

156. *Id.* § 35.160(b)(1).

157. *Id.* § 35.160(b)(2).

158. For instance, the existence of other effective means of communication may be a valid reason for denial of the request. Additionally, if providing the requested aid results in a fundamental alteration of the service or an undue financial or administrative burden, the request may be denied.

159. 28 C.F.R. § 35.160, app. A (1992).

160. *Id.*

communication systems must be used to communicate to individuals with impaired hearing or speech.¹⁶¹ The ADA requires telecommunication companies to provide relay stations that allow a TDD user to communicate to a TDD operator who conveys the disabled person's communication to a standard telephone user.¹⁶² If a relay service is available, a public entity may use this service to satisfy the TDD requirements.¹⁶³ However, if relay services are unavailable, the public entity may be required to provide TDD communication services.

3. *Telephone Emergency Services.*—Telephone emergency services, including 911 services, must provide direct access to individuals who use TDD's and computer modems.¹⁶⁴ Unlike the TDD provision above, use of relay services will not provide "direct access" and does not satisfy this requirement.¹⁶⁵ Further, a public entity may not establish a separate or different emergency number for use by disabled individuals.¹⁶⁶

4. *Information and Signage.*—A public entity must guarantee all interested persons can obtain information as to the existence and location of accessible services, activities, and facilities.¹⁶⁷ This requirement applies to any person with a vision or hearing impairment.¹⁶⁸ Signage is required at each inaccessible entrance to a facility directing users to an accessible entrance or a location where they can obtain information about accessible facilities.¹⁶⁹ The international symbol of accessibility should be used at each accessible entrance to a facility.¹⁷⁰

5: *Limitations.*—As in other ADA provisions, a public entity need not take any action that fundamentally alters the nature of the service, benefit, or program, or which imposes an undue financial or administrative burden.¹⁷¹

161. *Id.* § 35.161.

162. 47 U.S.C. § 225 (1990) (Supp. 1991).

163. 28 C.F.R. § 35.161, app. A (1992).

164. *Id.* § 35.162. Relying on this regulation and the ADA, a New York district court issued a preliminary injunction ordering the City of New York to "acquire all equipment and contract for all services necessary to adapt its existing emergency 911 system such that they are directly and equally accessible" to deaf individuals using TDDs. *Chatoff v. City of New York*, No. 92 Civ. 0604 (RWS), 1992 WL 202441, at *3 (S.D.N.Y. June 30, 1992).

165. 28 C.F.R. § 35.162, app. A (1992).

166. *Id.*

167. *Id.* § 35.163(a).

168. *Id.* Example: If a building houses TDD compatible telephones or portable TDD equipment, signage must indicate the availability and location of the equipment.

169. 28 C.F.R. § 35.163(b) (1992).

170. *Id.*

171. For the particular implications of this limit, see *id.* § 35.164.

E. Special Requirements for Public Entities

First, all public entities were required to complete a self-evaluation of current services, policies, practices, and the effects thereof no later than January 26, 1993.¹⁷² Public entities employing fifty or more persons must maintain the evaluation on file and make it available for public inspection for three years.¹⁷³ This evaluation is limited to those services, policies, and practices that may not or do not meet ADA requirements.¹⁷⁴ The evaluation should be completed in writing and include a description of areas examined and any problems identified, a description of any modifications made, and a list of the interested persons consulted or invited to participate in the self-evaluation. In completing this evaluation, the public entity must provide interested persons an opportunity to participate in the self-evaluation by submitting comments.¹⁷⁵ Interested persons include individuals with disabilities or organizations representing disabled individuals.¹⁷⁶

Second, a public entity is required to provide notice to applicants, participants, beneficiaries, and other interested persons of the rights and protections provided by the ADA.¹⁷⁷ Methods of accomplishing this notice include:

- Publication of information in handbooks, manuals, and pamphlets that are distributed to the public;
- Display of informative posters in service centers and other public places; and
- Broadcast of information by television or radio.¹⁷⁸

In providing information, the public entity must satisfy the ADA's requirements regarding effective communication with disabled persons.¹⁷⁹

Third, a public entity with fifty or more employees must designate at least one employee to coordinate its efforts to comply with, and carry out, the duties imposed by the ADA.¹⁸⁰ The duties of this employee include (1) coordinating investigations of any complaint alleging non-compliance with the ADA; and (2) coordinating compliance efforts,

172. *Id.* § 35.105(a).

173. *Id.* § 35.105(c).

174. Some entities may have completed evaluations under § 504 of the Rehabilitation Act of 1973. If so, the evaluation required by the ADA is limited to those policies and practices not evaluated under the prior law. *Id.* § 35.105(d).

175. *Id.* § 35.105(b).

176. *Id.*

177. *Id.* § 35.106.

178. 28 C.F.R. § 35.106, app. A (1992).

179. *Id.* Regarding this requirement, see *infra* note 181 and accompanying text.

180. *Id.* § 35.107(a).

including self-evaluations. The name, address, and telephone number of the designated employee must be made available to all interested persons.¹⁸¹

Last, a public entity employing fifty or more employees must also adopt and publish grievance procedures which provide for prompt and equitable resolution of complaints alleging violations of the ADA.¹⁸² The purpose of this requirement is to resolve as many complaints as possible at the local level, avoiding the need to use federal complaint procedures.¹⁸³

IV. ACCESS TO FACILITIES

The ADA affects businesses and other nonpublic entities in two ways. First, as discussed above, certain restrictions are imposed on employers and their employment practices. The second area of impact is the lease, ownership, or operation of facilities which are open to the public. Only "public accommodations," (PAC) as defined by the ADA, need be concerned with these antidiscrimination provisions. However, even if an entity is not a PAC, it may qualify as a commercial facility and be subject to restrictions regarding new construction or alteration of existing facilities.

Although a facility may be required to make structural adjustments in order to comply with the ADA, the ADA is not a building code. The ADA is a civil rights law enforced through charges of discrimination brought by the government or private individuals. Building inspectors will not evaluate facilities to determine if the premises comply with the ADA unless the state or locality adopts the provisions of the ADA.¹⁸⁴ These ADA provisions limit liability for violations to the PAC, by protecting individuals from personal liability for violations.¹⁸⁵ An individual is liable, however, for retaliation or coercion in response to an individual's efforts to exercise rights under the ADA.¹⁸⁶ Thus, officers of a PAC need not be concerned about personal liability for violations of the ADA unless the retaliation or coercion prohibitions are implicated.

181. *Id.*

182. *Id.* § 35.107(b).

183. *Id.* § 35.107, app. A.

184. Under the ADA, a state or municipality may request the Justice Department to certify that its laws or building code meet or exceed the requirements of the ADA. If an action is brought against an entity for discrimination in public accommodation, compliance with a certified code is rebuttable evidence of compliance with the public accommodations provisions of the ADA. *Id.* § 36.602.

185. 28 C.F.R. § 36.102, app. B (1992).

186. *Id.* § 36.206. Example: A restaurant customer who intimidates or harasses a disabled person attempting to patronize the restaurant violates the retaliation and coercion provisions of the ADA and may be subject to personal liability under the ADA.

A. Public Accommodation

The public accommodation, not the *place* of the public accommodation, is subject to the nondiscrimination requirements.¹⁸⁷ A PAC is a private entity that owns, operates, or leases a place of public accommodation.¹⁸⁸ Because the ADA prohibits discrimination by any person who owns, leases (or leases to), or operates a place of PAC, the initial question is to determine what is a PAC. A three-step analysis is performed to determine if an entity is a "PAC" under the ADA.

First, to be a place of public accommodation, a facility must be operated by a private entity.¹⁸⁹ A private entity is any entity other than a public entity.¹⁹⁰ As discussed above, a public entity is any state or local government, or any department or agency thereof.¹⁹¹ Accordingly, any private business, operation, or entity that is not affiliated with, or operated by, a government will satisfy the first prong of the PAC test under the ADA. A corollary of this definition is that facilities operated by government agencies or other public entities are not PACs under the ADA.¹⁹²

Second, the operations of the entity must affect commerce.¹⁹³ Congress intended the ADA to reach all activities that affect commerce.¹⁹⁴ Accordingly, even a very local business or entity will satisfy the second prong of the PAC definition.¹⁹⁵

The third prong of the test involves the categorization of business operations. Under the ADA, a private entity is a PAC if their operations fall within one of twelve broad categories:¹⁹⁶

- Place of lodging (e.g., inn, hotel or motel);
- Establishments serving food or drink (e.g., restaurant or bar);
- Places of exhibition or entertainment (e.g., movie theater, concert hall, or stadium);
- Places of public gathering (e.g., auditorium, convention center, or lecture hall);
- Sales or rental establishments (e.g., bakery, grocery store, clothing store, hardware store, or shopping center);

187. *Id.* § 36.104, app. B.

188. *Id.*

189. 42 U.S.C. § 12181(7) (Supp. 1991).

190. *Id.* § 12181(6).

191. *Id.* § 12131(1).

192. 28 C.F.R. § 36.104, app. B (1992).

193. 42 U.S.C. § 12181(7) (Supp. 1991).

194. 28 C.F.R. § 36.104, app. B (1992).

195. This provision should be read to reach all activities which Congress, pursuant to the Commerce Clause of the Constitution, can affect.

196. 42 U.S.C. § 12181(7) (Supp. 1991).

- Service establishments (e.g., laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or attorney, pharmacy, insurance office, health care provider's office, or hospital);
- Stations used for specified public transportation;
- Places of public display or collection (e.g., museum, library, or gallery);
- Places of recreation (e.g., zoo, park, or amusement park);¹⁹⁷
- Places of education (e.g., nursery, primary, secondary, undergraduate, or graduate private school);
- Social service center or establishment (e.g., day-care center, senior citizen center, homeless shelter, food bank, or adoption agency); or
- Places of exercise or recreation (e.g., gymnasium, health spa, bowling alley, or golf course).

This list of categories is exhaustive and an entity not falling within a category is not a PAC. However, the examples within each category are not exhaustive but only illustrative of the types of covered operations. Thus, a videotape rental store is a rental establishment, and a PAC, even though not specifically listed by the Act.

B. Landlord-Tenant Relationship

The ADA imposes responsibility for compliance with the PAC's provisions on both the landlord who owns a facility housing a PAC and the tenant who owns or operates the PAC.¹⁹⁸ However, a landlord and tenant may allocate compliance responsibility between themselves by the terms of lease or other contract.¹⁹⁹ Both parties remain liable for any discrimination award under the ADA, but an agreement for indemnification or contribution rights may protect the parties should penalties or damages be assessed.

A nonpublic accommodation becomes a PAC, and susceptible to the requirements of the ADA, if it leases a facility from a PAC.²⁰⁰ Under the ADA, a "lease" only exists if an exchange of consideration

197. In *Anderson v. Little League Baseball, Inc.*, 794 F. Supp. 342, 344 (D. Ariz. 1992), the court implicitly held that the defendant Little League Baseball and its games were "public accommodations" under this provision.

198. 28 C.F.R. § 36.201(b) (1992).

199. *Id.* See Brian N. Poll & John A. Gose, *The Americans with Disabilities Act of 1990: Impacts on Tenants, Landlords, and Lenders*, C736 A.L.I.-A.B.A. 179 (1992).

200. 28 C.F.R. § 36.104 (1992).

in some form occurs for the use of the space.²⁰¹ Accordingly, an entity does not become a PAC if it accepts donated space rather than leases space. However, if a "lease" results, the otherwise nonpublic accommodation entity is subject to the ADA.

1. *Requirements.*—The general ADA provision of nondiscrimination regarding public accommodations provides:

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.²⁰²

From this statement flows a series of general and specific antidiscrimination guidelines. Specifically, the ADA requires existing PACs to remove architectural and communication barriers to the disabled. Further, the ADA requires subsequent alterations or new construction to conform to certain technical guidelines.

a. *Contractual relationships.*—First, the ADA certainly prohibits a PAC from directly engaging in activities or providing facilities that are discriminatory. In addition, the ADA prohibits a PAC from indirectly discriminating against an individual with a disability. A PAC is liable for discrimination occurring to its customers or clients because of a contractual, licensing, or other arrangement with another entity.²⁰³ A PAC is liable even if the entity with which it contracts is not covered by the ADA, but engages in discriminatory conduct. This extended liability prevents a PAC from doing indirectly, through a contract or otherwise, what it is prohibited from doing directly.²⁰⁴

b. *Policy modification.*—Second, in addition to physical alterations, the ADA requires a PAC to make reasonable modifications in policies, practices, or procedures necessary to ensure access to goods, services, or facilities by individuals with disabilities.²⁰⁵ This requirement is similar to the reasonable accommodations requirement of the employment provisions of the ADA.²⁰⁶ However, a PAC need not make modifications

201. *Id.* § 36.201, app. B.

202. 42 U.S.C. § 12182(a) (Supp. 1991).

203. *Id.* § 12182(b)(1)(A)(i)-(iv).

204. 28 C.F.R. § 36.202, app. B (1992).

205. 42 U.S.C. § 12182(b)(2)(A)(ii) (Supp. 1991); 28 C.F.R. § 36.302(a) (1992).

Example: A parking facility must alter a policy prohibiting all vans or all vans with raised roofs from parking if an individual wishing to use a wheelchair accessible van wants to park in the facility, provided the height of the facility would accommodate the van.

206. *See supra* text accompanying note 58.

that would fundamentally alter the nature of the goods, services, facilities, privileges, or accommodations of the entity.²⁰⁷

c. Insurance.—A public accommodation may not refuse to serve an individual with a disability because its insurance company conditions its rates on the absence of individuals with disabilities.²⁰⁸ Beyond this, the ADA does not place any restrictions on the terms, conditions, and offering of insurance policies by PACs.²⁰⁹ The ADA only prevents differential treatment of individuals with disabilities in insurance offered by PACs that are based upon disability rather than sound actuarial data and established risk practices.²¹⁰ Thus, if differential treatment of individuals with disabilities is justified by sound insurance practices, a PAC may continue a standard insurance program.

d. Eligibility criteria.—A public accommodation may not impose or apply eligibility criteria that screen out, or tend to screen out, an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, and accommodations, unless such criteria are necessary.²¹¹ This rule prohibits:²¹²

- Attempts to unnecessarily identify the existence of a disability,
- Imposing requirements or burdens on individuals with disabilities that are not placed on other individuals,
- Placing a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the cost of measures required under the ADA, and
- Establishing segregative eligibility criteria that bar or limit a class of individuals with disabilities from full enjoyment of the public accommodation.

However, a PAC may apply neutral rules that screen out individuals with disabilities if those rules are necessary for the safe operation of

207. 42 U.S.C. § 12182(b)(2)(A)(ii) (Supp. 1991). Example: A museum would not be required to modify a rule prohibiting the touching of art to enhance the participation of a blind individual if the touching threatened the integrity of the art. One specific provision of the regulations requires a PAC to permit the use of a guidedog or other service animal to assist a disabled individual. This is intended to be applied broadly and applies to restaurants, hotels, retail stores, and the myriad of other PACs.

208. 28 C.F.R. § 36.212(c) (1992).

209. *Id.* § 36.212(a).

210. *Id.* § 36.212, app. B. Example: The person who is blind may not be denied coverage based on blindness independent of actuarial risk classification. A public accommodation may offer insurance policies that limit coverage for certain procedures or treatments, but may not entirely deny coverage to a person with a disability.

211. 42 U.S.C. § 12182(b)(2)(A)(i) (Supp. 1991).

212. 28 C.F.R. § 36.301, app. B (1992).

the PAC.²¹³ If used, these safety requirements must be based on actual risk, not mere speculation, stereotypes, or generalizations about individuals with disabilities.²¹⁴

C. Access to Public Accommodations

The obligations imposed by the ADA to ensure access to PACs depend upon whether the accommodation is in an existing facility or is in a newly constructed or altered facility. Because the retrofitting of existing facilities imposes substantial costs on a business or accommodation, the duty to modify a facility is less rigorous than the duty imposed at the design phase.²¹⁵

1. *Existing Public Accommodation.*—A public accommodation must remove architectural barriers and communication barriers in existing facilities that are structural in nature if removal is “readily achievable.”²¹⁶ Physical objects that impede access to, or use of, a facility by an individual with a disability must be removed,²¹⁷ including those barriers to communications that are an integral part of the physical structure.²¹⁸

Removal of architectural barriers is only required if “readily achievable.” This is defined as easily accomplishable and able to be carried out without much difficulty or expense.²¹⁹ To determine whether removal is readily achievable, a PAC should consider the following:²²⁰

- The nature and cost of the action needed;
- The overall financial resources of the site or sites involved, the number of persons employed at the site, the effect on expenses and resources, or the impact upon the operation of the site;
- The geographic separateness and administrative or fiscal relationship of the site or sites to any parent corporation or entity;

213. *Id.* § 36.301(b).

214. *Id.* In *Anderson v. Little League Baseball, Inc.*, 794 F. Supp. 342 (D. Ariz. 1992), the court granted a temporary restraining order preventing the defendant from enforcing a general rule prohibiting persons in wheelchairs from serving as on-field coaches during baseball games. Relying on 28 C.F.R. § 36.208(c), the court held that the ADA requires an individualized and specific determination that the particular person poses a direct threat before segregative policies may be applied. *Anderson*, 794 F. Supp. at 345.

215. 28 C.F.R. § 36.304, app. B (1992). When accessibility can be more conveniently and economically incorporated in the initial stages of design, the obligations imposed by the ADA are more stringent.

216. *Id.* § 36.304(a).

217. *Id.* § 36.304, app. B.

218. *Id.*

219. *Id.* § 36.304(a).

220. *Id.* § 36.104.

- If applicable, the overall financial resources and size of any parent corporation or entity; and
- If applicable, the type of operation of any parent corporation or entity.

Many situations require the PAC to evaluate the resources of a parent company or organization to determine if an action is readily achievable.²²¹ The resources of the parent company are only relevant to the degree the financial resources of the parent are available to the subsidiary.²²²

The "readily achievable" standard limits a PAC's duty to remove barriers.²²³ Essentially, the ADA requires the burden of barrier removal to be balanced with the duty to ensure access to PACs. Examples of barrier removal that may be considered readily achievable include the following:²²⁴

- Installing ramps;
- Making curb cuts in sidewalks and entrances;
- Repositioning shelves;
- Adding raised markings on elevator control buttons;
- Installing flashing alarm lights;
- Widening doors;
- Installing offset hinges to widen doorways;
- Eliminating a turnstile or providing an alternative accessible path;
- Installing accessible door hardware;
- Installing grab bars in toilet stalls;
- Rearranging toilet partitions to increase maneuvering space;
- Insulating lavatory pipes under sinks to prevent burns;
- Installing a raised toilet seat;
- Installing a full-length bathroom mirror;
- Repositioning the paper towel dispenser in a bathroom;
- Creating designated accessible parking spaces;
- Installing an accessible paper cup dispenser at an existing inaccessible water fountain;
- Removing high-pile, low-density carpeting; and
- Installing vehicle hand controls.

This list is illustrative and not exhaustive of the barrier removals that may be readily achievable. Actual determination of whether removal is readily achievable depends upon the specific facts and circumstances

221. 28 C.F.R. § 36.104, app. B (1992).

222. *Id.*

223. *Id.* § 36.104, app. B.

224. *Id.* § 36.304(b).

confronting the entity. Further, the PAC has a continuing obligation to remove barriers, i.e., removal that is not currently readily achievable may become so in the future.

The obligations to remove barriers does not extend to areas of a facility used exclusively as employee work areas.²²⁵ This result is dictated by the purpose of the ADA, which is to ensure that PACs are accessible to their customers, clients, or patrons, as opposed to the employees.

a. Recommended priorities and planning document.—Regulations offer a recommended order in which barriers should be removed.²²⁶ Adherence to the priority list discussed below is evidence of the covered entity's "good faith effort" in complying with the ADA, and must be considered by courts when assessing penalties for ADA violations.²²⁷

First, access to the PAC from public sidewalks, parking, or public transportation should be provided.²²⁸ This includes installing entrance ramps, widening entrances, and providing accessible parking spaces. Overall, the highest priority is ensuring that an individual with a disability has physical access to a public accommodation.²²⁹

Second, a PAC should ensure access to areas where goods and services are made available to the public.²³⁰ Among the measures available are adjusting the layout of display racks, rearranging tables, providing Braille and raised character signage, widening doors, providing visual alarms, and installing ramps.²³¹

Third, a PAC should provide access to public restrooms, which may require widening of toilet stalls, installation of grab bars and removal of obstructing furniture.²³² Finally, a PAC should take any other measures required to ensure access to its operations, goods, or services.²³³

In addition to these priorities, the Department of Justice recommends that every PAC adopt an ADA compliance plan.²³⁴ The adoption of a plan is also evidence of a good faith effort to comply with the ADA and may mitigate penalties for violations. In adopting a plan, a PAC should evaluate its facilities to determine the alterations required to comply with the ADA. To facilitate this evaluation, PACs should consult with local community disability groups regarding barrier removal and

225. 28 C.F.R. § 36.304, app. B (1992).

226. *Id.* § 36.304(c) (1992).

227. *See* 42 U.S.C. § 12188(b)(5) (Supp. 1991).

228. 28 C.F.R. § 36.304(c)(1) (1992).

229. *Id.*

230. *Id.* § 36.304(c)(2).

231. *Id.*

232. *Id.* § 36.304(c)(3).

233. *Id.* § 36.304(c)(4).

234. *See* 28 C.F.R. § 36.304, app. B (1992).

appropriate remedial measures.²³⁵ A written plan of compliance, including identified barriers, measures to remove the barriers, and costs associated with removal, should be maintained by the PAC.

b. Miscellaneous provisions.—First, if removal of a barrier is not readily achievable, a PAC must take all available alternative measures which are readily achievable to ensure access to its facilities, goods, and services.²³⁶ Examples of alternatives include providing curb service or home delivery, retrieving merchandise from inaccessible shelves or racks, and relocating activities to accessible locations.²³⁷

Second, the ADA does not require PACs to allow smokers to smoke in the accommodation.²³⁸ Thus, the ADA does not prevent a PAC from prohibiting or restricting smoking.²³⁹

Third, a PAC must ensure that features and facilities required by the ADA are maintained in operable condition.²⁴⁰ Temporary obstructions or isolated incidents of non-operation of a facility are allowed, especially if the failure is due to maintenance or repair.²⁴¹ Thus, reasonable interruptions in access are allowed, but inaccessibility for an unreasonable amount of time or repeated failures may violate the ADA.²⁴²

Lastly, a PAC is not required to provide customers, clients, or participants with personal devices or services to ensure access to the accommodation's facilities.²⁴³ Devices such as wheelchairs, eye glasses, and hearing aids, or services of a personal nature, including assistance in eating, toileting, or dressing are not required.²⁴⁴ This rule serves as a limit for every requirement of the ADA regarding PACs.²⁴⁵

2. Alterations/New Construction.—

a. Alterations to existing facilities.—As previously indicated, a PAC may be required to remove barriers to access if removal is readily achievable. Any alteration beginning after January 26, 1992, must ensure that, to the maximum extent feasible, the altered portions of the facility are readily accessible to, and usable by, individuals with disabilities.²⁴⁶ An alteration is any change to a place of PAC that affects, or could

235. *Id.*

236. *Id.* § 36.305(a). For definition of readily achievable, *see supra* note 219 and accompanying text.

237. 28 C.F.R. § 36.305(b) (1992).

238. *Id.* § 36.210, app. B.

239. 42 U.S.C. § 12201(b) (Supp. 1991).

240. 28 C.F.R. § 36.211(a) (1992).

241. *Id.* § 36.211(b).

242. *Id.* § 36.211, app. B.

243. *Id.* § 36.306.

244. *Id.*

245. *Id.* § 36.306, app. B.

246. 28 C.F.R. § 36.402(a)(1) (1992).

affect, the usability of the building or facility.²⁴⁷ This includes remodeling, renovation, reconstruction, or changes in structural parts of a facility.²⁴⁸ Compliance with this rule is accomplished if the altered structure or element complies with the ADAAG.²⁴⁹ However, a PAC may deviate from the ADAAG requirements if compliance is not readily achievable at the time of the barrier removal.²⁵⁰ In these situations, the accommodation is required to undertake the alteration or removal that is readily achievable even if not within strict compliance with the ADAAG.²⁵¹

An alteration that affects, or could affect, the usability or accessibility of an area of a facility containing a primary function must be made to ensure that, to the maximum extent feasible, the path of travel to the altered area, and the rest rooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities.²⁵² This "path of travel" requirement does not apply if the cost and scope of the alteration is disproportionate to the cost of the overall alteration.²⁵³

Thus, this rule requires that a continuous, unobstructed way of pedestrian passage that connects the altered area with an exterior approach, such as an entrance to the facility, must be made readily accessible and usable by individuals with disabilities.²⁵⁴ Under the ADA, a primary function is a major activity for which the facility is intended.²⁵⁵ Examples of areas that contain primary functions include a customer service area of a bank, the dining room of a cafeteria, and the meeting room of a conference center. Mechanical rooms, boiler rooms, supply storage rooms, employee lounges, and rest rooms are not areas containing primary functions.²⁵⁶

As noted above, an accessible path of travel need not be provided if the cost of the alteration to provide the path is disproportionate to the overall cost of the alteration to the primary area. An alteration is disproportionate if the cost exceeds 20% of the cost of the alteration to the primary function area.²⁵⁷ In determining the cost of the provision of an accessible path, the accommodation can consider expenses relating

247. *Id.* § 36.402(b).

248. Normal maintenance, reroofing, painting, wallpapering, or changes to mechanical or electrical systems are not generally considered alterations. *Id.* § 36.402(b)(1).

249. *Id.* § 36.402(b)(2). These guidelines are found at *id.* § 36, app. A (1992).

250. *Id.* § 36.304(d)(2).

251. *Id.* § 36.304, app. B.

252. *Id.* § 36.403(a).

253. *Id.*

254. *See id.* § 36.403(e)(1).

255. *Id.* § 36.403(b).

256. *Id.*

257. 28 C.F.R. § 36.403(f)(1) (1992).

to widening doorways, installing ramps, making rest rooms accessible, and other costs associated with providing an accessible entrance and route to the altered area.²⁵⁸ If the PAC determines that the cost of providing an accessible path of travel is disproportionate to the alteration to the primary area, alterations must be made up to the point that disproportionate costs are incurred.²⁵⁹ If determined that full accessibility is unfeasible, the accommodation's priorities are first to provide an accessible entrance to the altered primary area, then an accessible route to the altered area, and then an accessible route to ancillary facilities such as restrooms and telephones.²⁶⁰

A major source of concern, especially for owners of older buildings, is the possibility that the ADA will require the installation of elevators to ensure accessibility to a building. However, the ADA does not require the installation of an elevator in an altered facility that is less than three stories or has less than 3,000 square feet per story.²⁶¹ However, any facility that houses a shopping center, a shopping mall, or the professional office of a health care provider does not enjoy this exemption.²⁶² Additionally, even if an altered facility is not eligible for this exemption, the facility is not required to install an elevator if installation would be disproportionate in cost and scope to the cost of the overall alteration.²⁶³

b. New construction.—Effective January 26, 1993, a PAC failing to design and construct facilities for first occupancy not readily accessible to, and usable by, individuals with disabilities violates the ADA.²⁶⁴ To comply with the requirements of this section, a newly-constructed facility should satisfy the ADAAG.²⁶⁵ The compliance requirements for new construction are included in the ADAAG rules which provide more adequate technical assistance.

These new construction rules need not be complied with if the entity can demonstrate it is structurally impracticable to satisfy the require-

258. *Id.* § 36.403(f)(2).

259. *Id.* § 36.403(g).

260. *Id.* § 36.403(g)(2).

261. *Id.* § 36.404(a).

262. *Id.* A shopping center or shopping mall is any building that houses five or more sales or rental establishments.

263. *See id.* § 36.403(f)(1).

264. 42 U.S.C. § 12183(a) (Supp. 1991); 28 C.F.R. § 36.403(f)(1) (1992). Thus, a facility is subject to these rules only if a completed application for a building permit or permit extension was filed after January 26, 1992, and the facility is occupied after January 26, 1993. *Id.* § 36.401, app. B.

265. 28 C.F.R. § 36.401, app. B (1992). These guidelines are contained at 28 C.F.R. § 36, app. A (1992).

ments.²⁶⁶ Even if full compliance is structurally impracticable, the entity must comply with the ADAAG to the extent compliance is not structurally impracticable.²⁶⁷ The regulations allow deviation from accessibility requirements only if unique characteristics of terrain would prevent the incorporation of an accessibility feature.²⁶⁸

As with structural changes, the elevator exemption for new construction does not require the installation of an elevator in a facility less than three stories or with less than 3000 square feet per story, unless the facility houses a shopping center, shopping mall, or the professional office of a healthcare provider.²⁶⁹ This exemption is practically identical to the elevator exemption provided for altered facilities.

D. Commercial Facility

The new construction requirements of the ADA apply not only to PACs, but also to commercial facilities.²⁷⁰ A commercial facility is a facility whose operation affects commerce and is intended for nonresidential use by a private entity.²⁷¹ The term commercial facility is not intended to be defined by a dictionary or common industry definitions and includes factories, warehouses, office buildings, and other buildings in which employment may occur.²⁷² Thus, a facility that does not house a PAC must still satisfy the requirements of the new construction provisions of the ADA. Under this broad definition, most commercial buildings will be required to satisfy the ADAAG or be liable for ADA violations for discriminatory conduct.

E. Tax Deduction and Credits

Certain tax deductions are allowed under the Internal Revenue Code for expenses associated with ADA compliance.²⁷³ Up to \$15,000 per year can be deducted for expenses incurred in removing qualified architectural barriers.²⁷⁴ In addition, eligible small businesses may claim a tax credit of 50% of the costs of complying with the ADA for all costs between \$250 and \$10,250.²⁷⁵ A small business is eligible for this tax credit if

266. 42 U.S.C. § 12183(a)(1) (Supp. 1991).

267. 28 C.F.R. § 36.401(c)(2) (1992).

268. *Id.* § 36.401, app. B.

269. 42 U.S.C. § 12183(b) (Supp. 1991).

270. *Id.* § 12183(a).

271. *Id.* § 12181(2).

272. 28 C.F.R. § 36.104, app. B (1992).

273. See I.R.S. PUBLICATION NO. 907, TAX INFORMATION FOR HANDICAPPED AND DISABLED INDIVIDUALS.

274. 26 U.S.C. § 190 (1990).

275. *Id.* § 44.

the business's gross receipts are less than \$1 million or its workforce is thirty or less full-time employees.²⁷⁶ Some examples of eligible expenses include costs of barrier removal, providing readers and interpreters, and the costs of acquiring or modifying equipment for persons with disabilities.²⁷⁷ Both the deductions and credits must be necessary and reasonable costs and, therefore, "eligible expenditures."²⁷⁸

In addition, an employer is eligible to receive a tax credit up to forty percent of the first \$6,000 of first-year wages of a new employee with a disability. This applies only to an employee referred by state or local vocational rehabilitation agencies, a state commission on the blind, or the U.S. Department of Veterans Affairs, and certified by a state employment service.²⁷⁹ This credit is applicable only for the first year of employment and only once the employee has been employed for at least ninety days or has completed 120 hours of work for the employer.²⁸⁰

V. ENFORCEMENT OF THE ADA AND AVAILABLE REMEDIES

An entity violating the antidiscrimination provisions of the ADA is subject to legal action initiated either by the government or the aggrieved individual. The method for the enforcement of rights guaranteed by the ADA and the remedies available for violations varies somewhat depending on what portions of the ADA have been violated. Both governmental and private organizations are adopting measures to prevent large increases in litigation as a result of the ADA.²⁸¹ Generally, however, the enforcement and remedies for ADA violations are the same as those under Title VII of the Civil Rights Act of 1964.²⁸²

A. *Employment Practices*

Violations of the employment provisions of the ADA expose a violator to the same liability as violations of Title VII of the Civil Rights

276. *Id.* § 44(b).

277. *Id.* § 44(c)(2).

278. *Id.* § 44(c)(3); § 190.

279. *Id.* § 51.

280. *Id.*

281. For example, Illinois has developed a computer information-sharing system to assist businesses in complying with the ADA. The goal of the program, touted as a national model of ADA information systems, is to reduce the number of discrimination suits filed under the ADA. 19 Pens. Rep. (BNA) 296 (Feb. 17, 1992).

282. See 42 U.S.C. §§ 107, 308 (1988). The reason for this similarity is Congress' intent to provide disabled individuals remedies parallel to those available to women or minorities suffering from discrimination. H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 48-49 (1990).

Act of 1964.²⁸³ Thus, under the ADA, the goal of an award of a remedy is to return the aggrieved individual to the same status they would have enjoyed had the discrimination not occurred.

The ADA incorporates the procedures under Title VII redressing employment violations as an enforcement mechanism.²⁸⁴ This allows a private right of action and authorizes government agencies to investigate violations and file suits on behalf of individuals suffering discrimination.²⁸⁵ Before bringing a private lawsuit, an aggrieved individual is required to file a complaint with the EEOC.²⁸⁶

B. Public and Governmental Entities/Services

The remedies and enforcement procedures for violation of the public entity provisions are those provided in the Rehabilitation Act of 1973. Accordingly, an individual suffering discrimination has a private right of action and is not required to exhaust any administrative remedies before bringing suit.²⁸⁷ Additionally, the government, including the Department of Justice, can investigate and prosecute violations of the ADA. The Justice Department has indicated that it will attempt to avoid litigation and instead seek to settle voluntarily any complaints through negotiation.²⁸⁸

283. The ADA incorporates the powers, remedies, and procedures provided for violations of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 12117(a) (Supp. 1991).

284. The broad and complex remedial procedures under Title VII are beyond the scope of this Article. However, many treatises examine Title VII procedures. Between the date the ADA become effective, July 26, 1992, and October 30, 1992, the EEOC received 1,477 charges of discrimination. Over half of these complaints alleged discriminatory discharge. *See* 220 Daily Lab. Rep. A-10 (Nov. 13, 1992). The EEOC estimates there will be over 12,000 charges filed during fiscal year 1993. *See* 19 Pen. Rep. (BNA) 1908 (Oct. 26, 1992). Interestingly, the federal fiscal budget for 1993 contains no new funding for the EEOC, despite its new duties of enforcing the ADA. 232 Daily Lab. Rep. A-7 (Dec. 2, 1992).

285. The EEOC recently filed the first lawsuit alleging a violation of the ADA's employment provisions. This suit, filed on November 6, 1992, seeks an injunction as well as back pay for the employee. *See* Lab. L. Rep. (CCH), Rep. 458 (Nov. 16, 1992).

286. The EEOC will attempt to conciliate a solution to the discrimination or either bring suit on behalf of the victim or issue a "right to sue" letter allowing the victim to bring an individual law suit. This process is applicable to victims of discrimination under the ADA as held in *Kent v. Director, Mo. Dept. of Elementary and Secondary Ed. and Div. of Vocational Rehab.*, 792 F. Supp. 59, 62 (E.D. Mo. 1992).

287. 29 U.S.C. § 794(a) (1988). *See also* SEN. COMM. ON LABOR & HUMAN RESOURCES, REPORT FROM THE COMMITTEE ON LABOR AND HUMAN RESOURCES, No. 101-116, Aug. 30, 1989, p. 57-58.

288. This is the Justice Department's position regarding enforcement obligations under Title II (government entities) and Title III (public accommodations). *See* 155 Daily Lab. Rep. (BNA) A-19 (Aug. 11, 1992).

C. *Public Accommodations*

An individual who suffers discrimination prohibited by the PAC provisions of the ADA is entitled to injunctive relief.²⁸⁹ Once it has been established that an entity covered by the ADA is violating one or more of the Act's provisions, a court may order the entity to:²⁹⁰

- Alter facilities to make such readily accessible to, and usable by, individuals with disabilities to the extent required under the ADA;
- Provide auxiliary aids or services;
- Modify a policy; or
- Provide alternative methods of access.

The ADA authorizes the Department of Justice to investigate and enforce the provisions of the PACs section of the ADA in two situations.²⁹¹ First, the Attorney General may file suit for an ADA violation if there is reason to believe an entity is engaged in "a pattern or practice" of behavior violating the ADA.²⁹² Second, the Attorney General may file suit if anyone is discriminated against in violation of the ADA where the violation raises issues of general public importance.²⁹³ Thus, the ability of the Justice Department to investigate ADA violations is severely circumscribed.

If a violation is found as a result of the Attorney General's lawsuit, the court may order the same injunctive relief available to an individual. In addition, the court is authorized to assess monetary damages to be paid to those persons suffering the discrimination.²⁹⁴ Most importantly, the ADA allows a court to assess a penalty against the violating entity of as much as \$50,000 for the first violation and no more than \$100,000 for any subsequent violation.²⁹⁵ In assessing the penalty, a court must consider any good faith effort of the entity to comply with the ADA, including whether the entity could have anticipated the need to provide an auxiliary aid to assist a disabled person.²⁹⁶

D. *Attorney's Fees Awards*

Under the ADA, a party who brings an action to enforce the ADA and who prevails may recover a reasonable attorney's fee, including litigation expenses and costs.²⁹⁷

289. 42 U.S.C. § 12188(a)(1) (Supp. 1991).

290. *Id.* § 12188(a)(2).

291. *Id.* § 12188(b).

292. *Id.* § 12188(b)(1)(B)(i).

293. *Id.* § 12188(b)(1)(B)(ii).

294. *Id.* § 12188(b)(2)(B). The Act, however, prohibits the assessment of punitive damages against a violating entity. *Id.* § 12188(b)(4).

295. *Id.* § 12188(b)(2)(C).

296. *Id.* § 12188(b)(5).

297. *Id.* § 12205.

VI. CONCLUSION

The ADA is new, complicated, and difficult to interpret and apply. However, it is a revolutionary civil rights statute, protecting to the fullest extent those individuals suffering from disabilities. Undoubtedly, the periphery of the ADA's provisions will become more concrete and delineated as courts struggle to interpret and apply the statute in the future. To a large extent, commentators, including the author of this Article, are merely making well-supported conjecture about what the Act means. Its exact "meaning," if such exists, currently lies only in the recesses of the minds of judges and administrative agencies. The challenge of the attorney is to shape and influence the development of this meaning as it emerges consistent with the intent of Congress and the public good.

