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Herbert E. Gerson

J. Gregory Addison

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HANDICAPPED DISCRIMINATION LAW AND THE AMERICANS WITH DISABILITIES ACT

*Herbert E. Gerson**

*J. Gregory Addison***

TABLE OF CONTENTS

I. INTRODUCTION

On July 26, 1990, President Bush signed into law the Americans with Disabilities Act (hereinafter the "ADA").[1] In what has been hailed as the most sweeping civil rights legislation in over twenty-five years, the ADA prohibits discrimination based on an individual's handicap in all phases of employment and requires reasonable accommodation by employers for such persons.[2] In addition to the changes in employment law, the ADA also prohibits discrimination in public services,[3] public accommodation[4] and telecommunications.[5]

In 1989, the United States Congress found that some forty-three million Americans are either physically or mentally disabled.[6] In addition, Congress' investigations into the plight of the handicapped revealed that disabled Americans rank at

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* Mr. Gerson is a partner with the law firm of McDonnell Boyd in Memphis, Tennessee, and heads the Firm's employment law department.

** Mr. Addison is an associate with McDonnell Boyd and is a member of the Firm's employment law department.

1. Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12101-12213 (1990)) (hereinafter ADA).

2. ADA §§ 101-108 (codified at 42 U.S.C. §§ 12111-12117, 12111 note (1990)).

3. ADA §§ 201-246 (codified at 42 U.S.C. §§ 12131-12165, 12161 note (1990)).

4. ADA §§ 301-310 (codified at 42 U.S.C. §§ 12181-12189, 12181 note (1990)).

5. ADA §§ 401-402 (codified at 47 U.S.C. §§ 152, 221, 225, 611 (1990)).

6. ADA § 2(a)(1) (codified at 42 U.S.C. § 12101(a)(1) (1990)).

or near the top in unemployment and poverty rates.[7] Indeed, statistics presented before Congress show that nearly 65% of the non-institutionalized disabled people between the working ages of sixteen to sixty-five years of age are unemployed.[8]

In the past there has only been limited protection for handicapped individuals with respect to employment discrimination. Federal protection was afforded to employees of the federal government and to employees of government contractors and sub-contractors.[9]

Some states have also passed varying levels of restrictions.[10] However, until the passage of the ADA, there has been no national procedure for protecting all private sector employees from discrimination based upon physical or mental disabilities.

The purpose of this article is to analyze the provisions of the Americans with Disabilities Act which specifically deal with employment law. The analysis will include a review of past federal and state laws covering handicapped discrimination, as well as an explanation of the passage and effect of the Act.

II. History of Handicapped Discrimination Law

A. Federal Law

Although no comprehensive protection for handicapped workers existed until passage of the ADA, Congress made several attempts in the past to provide protection to disabled Americans. For example, during the 1970's, several bills were introduced which attempted to amend the Civil Rights Act of 1964 to include mentally or physically handicapped individuals as a protected group.[11] These attempts to amend the anti-discrimination laws governing private employees were unsuccessful.

On the other hand, not all Congressional attempts to prohibit discrimination of the handicapped were unsuccessful. Beginning in the late 1960's, Congress passed numerous statutes designed to prohibit various types of discrimination such as the removal of architectural barriers in federal buildings;[12] the removal of barriers to handicapped children in the public education system;[13] required access to public

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7. *Kennedy Vows Quick Action on Legislation to Bar Private Discrimination Against Disabled*, 188 Daily Lab. Rep. (BNA) A-8 (Sept. 28, 1988)(discussing the testimony of Sandra Swift Parrine, Chairman of the National Council on the Handicapped) [hereinafter *Quick Action*].

8. *Id.*

9. *See* Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796 (1988).

10. *See State Fair Employment Practice Laws*, Fair Empl. Prac. (BNA) 451:101-206 (Jan. 1989) (contains a listing and synopsis of state laws concerning the regulation of discrimination of the handicapped); *see also infra* notes 47-60 and accompanying text.

11. For example, in 1971, there was an attempt to amend Title VI of the Civil Rights Act of 1964 to prohibit discrimination against those with a "physical or mental handicap." *See* H.R. 12154, 92d Cong., 1st Sess., 117 Cong. Rec. 45945 (1971); S. 3044, 92d Cong., 2d Sess., 118 Cong. Rec. 525 (1972). These attempts failed. In addition, there was also an effort to amend Title VII to prohibit handicap discrimination. *See* H.R. 14033, 92d Cong., 2d Sess., 118 Cong. Rec. 9712 (1972). This attempt also failed.

12. The Architectural Barriers Act of 1968, 42 U.S.C. §§ 4151-4157 (1988).

13. Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1400-1485 (1988).

airlines;[14] and the removal of barriers to voting.[15] However, these legislative initiatives were often limited to federal programs or recipients of federal aid and offered little or no shelter from discrimination in the context of employment.

The federal government made its first major foray into the area of employment discrimination against the handicapped when it enacted the Rehabilitation Act of 1973.[16] This legislation was designed to provide vocational rehabilitation and employment opportunities for the disabled.[17] The Rehabilitation Act went about achieving these goals in several different ways.

First, Section 501[18] attempted to make the federal government a model equal opportunity employer by requiring every federal department and agency to implement an affirmative action plan to hire and promote disabled individuals.[19] Next, Section 503[20] places a similar objective and affirmative action obligation on contractors with contracts of $2,500 or more with the federal government.[21]

Undoubtedly, the federal government's most far reaching impact on employment discrimination in the private sector came from Section 504 of the Rehabilitation Act.[22] Section 504 prohibits all discrimination, including employment, against qualified handicapped individuals in any program or activity receiving financial assistance from the federal government.[23] Although the section reached out beyond employees of the federal government, even these prohibitions are limited to those actually receiving money from the federal government.[24]

Aside from this limited extension of protections, Section 504 is important for another reason as well: it provides a statutory model for the ADA.[25] Therefore, a cursory review of the provisions of Section 504 is warranted.

For purposes of the Rehabilitation Act, a handicapped individual is defined as a person "who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment."[26]

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14. Air Carrier Access Act of 1986, 49 U.S.C. § 1374(c) (1988).

15. Voting Accessibility for the Elderly and Handicapped Act, 42 U.S.C. § 1973ee (1982).

16. Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796 (1982) [hereinafter Rehabilitation Act].

17. 29 U.S.C. § 701 (1988).

18. 29 U.S.C. § 791 (1988).

19. *Id. See also* EEOC Management Directive 711, Nov. 2, 1982.

20. 29 U.S.C. § 793 (1988).

21. *Id.*

22. 29 U.S.C. § 794 (1988).

23. *Id.*

24. *Id. See Handicapped Discrimination,* Fair Empl. Prac. (BNA) 421:651 (Mar. 1984).

25. The drafters and supporters of the ADA have expressed this fact in scores of settings in an attempt to assure critics that the ADA will be implemented with a finite set of case law to aid in construction of the Act. For example, while testifying before a House Judiciary Subcommittee, U.S. Attorney General Richard Thornburgh explained that the existing case law defining the terms and conditions of Section 504 would provide assistance in defining the terms of the ADA. Hearings before the Subcommittee on Civil and Const. Rights of the House Judiciary Committee at 192-232. In addition, comparison of several provisions of the two statutes will reveal the similarities. *Compare* ADA § 3(2) (codified at 42 U.S.C. § 12102(a) (1990)) *with* 29 U.S.C. § 706(8)(B) (1988).

26. 29 U.S.C. § 706(8)(B) (1988).

In recent years, the definition of handicap has gone through some expansion in order to encompass more than disabilities such as blindness or orthopedic impairment. For example, the Rehabilitation Act has recently been expanded to qualify acquired immune deficiency syndrome, or AIDS, as a handicap protected under this Act. In *Chalk v. United States District Court Central District of California,*[27] the U.S. Court of Appeals for the Ninth Circuit found AIDS to be a protected handicap[28] and reinstated a California teacher who tested positive for AIDS.[29] The court ruled that AIDS fit the Act's definition of disability and that because the teacher would still be able to perform his job in spite of the handicap, discrimination based upon AIDS would be prohibited.[30]

In *Thomas v. Atascadero Unified School District,*[31] AIDS was again found to be a qualified handicap under Section 504 of the Rehabilitation Act.[32] In *Thomas,* a federal district court ordered a school district to readmit a child who was discovered to be infected with AIDS.[33] In addition to classifying AIDS as a protected disability, the federal district court removed from the affected individual any burden of showing there was no danger of spreading the virus.[34]

Finally, in a legal opinion dated September 27, 1988, the United States Justice Department stated that Section 504 should be read to include the protection of symptomatic and asymptomatic HIV-infected individuals.[35] The opinion stated that those infected with the HIV virus were protected against "discrimination in any covered program or activity on the basis of any actual, past or perceived effect of HIV infection that substantially limits any major life activity" as long as the infected individual poses no direct threat to the safety of others.[36]

Section 503 of this Act protects only those individuals with qualified disabilities who are employed by federal contractors.[37] Covered employers are obligated to take affirmative action to hire and promote "qualified individuals with handicaps"[38] and to post notices of this obligation in conspicuous places.[39] Contractors with contracts of more than $50,000 are required to prepare a written affirmative action plan delineating plans covering qualified handicapped individuals.[40] This

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27. 840 F.2d 701 (9th Cir. 1988).

28. *Id.* at 708.

29. *Id.*

30. *Id.* at 709. The court also found that the chance of the virus spreading based on normal or "casual" contact caused by the teacher's activities would present "no significant risk to children . . . . " *Id.* at 711.

31. 662 F. Supp. 376 (C.D. Cal. 1987).

32. *Id.* at 383.

33. *Id.* at 382.

34. *See id.* at 381-82.

35. *Justice Department Memorandum on the Application of Section 504 of the 1973 Rehabilitation Act to HIV-infected Individuals,* Fair Empl. Prac. (BNA) 403:2021 (Sept. 27, 1988).

36. *Id.*

37. 29 U.S.C. § 793 (1988).

38. *Id.*

39. *See* 41 C.F.R. § 60-741.6(f) (1989).

40. 41 C.F.R. § 60-741.5 (1989).

plan is to be revised annually[41] and made available for inspection to any employee or job applicant upon request.[42]

In addition, the United States Supreme Court in *Consolidated Rail Corp. v. Darrone*[43] concluded that Section 504 included a private right of action for individual victims of discrimination.[44] The Supreme Court opined that the legislative history showed that Section 504 was never intended to limit private actions against employers.[45] The Court held it would be "anomalous to conclude that the section, 'designed to enhance the ability of handicapped individuals to assure compliance with [§ 504],' . . . silently adopted a drastic limitation on the handicapped individual's right to sue federal grant recipients for employment discrimination."[46]

Therefore, until the passage of the ADA, the only federal protection for disabled Americans who were the victims of employment discrimination because of their disabilities was for those working for federal contractors or in programs which specifically received federal aid.

B. State Law

At present, a majority of states have stepped in to provide some protection for handicapped victims of employment discrimination.[47] For example, the State of Mississippi provides protection for employees of the state or state-funded programs in a manner similar to the Federal Rehabilitation Act.[48] The Mississippi statute expressly proscribes the refusal of employment by any state employer or employer funded in whole or in part by state funds to any person "by reason of his being blind, visually handicapped, deaf, or otherwise physically handicapped, unless such disability shall materially affect the performance of the work required by the job . . . ."[49] Mississippi also passed another statute prohibiting discrimination against any individual "seeking employment in state service" based on "race, color, religion, sex, national origin, age or handicap."[50] These protections are only available for employees of the state government or programs funded by the state government.

Additionally, the Mississippi State Personnel Board promulgated regulations which require each state agency to adopt an affirmative action program to increase the number of minorities, women and handicapped employees.[51] The regulations

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41. *Id.*

42. *Id.*

43. 465 U.S. 624 (1984).

44. *Id.* at 633.

45. *Id.*

46. *Id.* at 635 (citation omitted).

47. *See Key Provisions in State Fair Employment Practice Laws*, Fair Empl. Prac. (BNA) 451:101-206 (Jan. 1989).

48. *Compare* 29 U.S.C. §§ 701-796 (1988) *with* MISS. CODE ANN. § 43-6-15 (1972). For a further explanation of the effects of the Mississippi statute see *infra* notes 49-53 and accompanying text.

49. MISS. CODE ANN. § 43-6-15 (1972).

50. MISS. CODE ANN. § 25-9-149 (Supp. 1990).

51. *See* Miss. State Personnel Board Manual of Policies, Rules, and Regulations, Feb. 1, 1981; *see also* Miss. State Personnel Board Policy Manual, Rule 7.30, July 1, 1989.

are written to "assure non-discrimination personnel administration,"[52] as well as requiring all state agencies to adopt an affirmative action plan which analyzes and increases the numbers of handicapped employees.[53] Again, these regulations protect only state employees.

On the other hand, Tennessee has a much broader handicap discrimination statute. The Tennessee statute prohibits discrimination in the "hiring, firing and other terms and conditions of employment" by the state *or any private employer* "based solely upon any physical, mental or visual handicap of the applicant . . . "[54] Violation of the statute is a misdemeanor.[55]

The Tennessee handicap discrimination law also provides several avenues of enforcement for victims. First, the law applies to all employers in the state, even private employers.[56] In addition, the statute provides for a private right of action by individuals, in addition to the administrative remedies available.[57] Therefore, a statute such as this provides a greater opportunity for redress to a handicapped victim of employment discrimination than prior federal legislation.

A majority of states have written or interpreted their discrimination statutes to include protection of AIDS victims.[58] Some states even have discrimination statutes dealing specifically with AIDS and AIDS testing.[59] Generally, these statutes prohibit employment discrimination based upon test results showing AIDS infection.[60]

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52. *See* Miss. State Personnel Board Manual of Policies, Rules, and Regulations, Feb. 1, 1981, Rule 5.10 and 5.10.1.

53. *See id.* at Rule 5.10.2.

54. TENN. CODE ANN. § 8-50-103(a) (Supp. 1990).

55. *Id.*

56. *Id.*

57. *Id.* at § 8-50-103(b)(1). The statute is permissive in its provision of the administrative remedy. The statute states that any person "aggrieved by a discriminatory practice prohibited by this section *may* file" a complaint with the Tennessee Human Rights Commission (THRC). *Id.* (emphasis added). In addition, the THRC provides a statement which explains to every complainant that they have the right to file an action in the state chancery court, as well as the administrative complaint. TENN. CODE ANN. § 4-21-311 (Supp. 1990).

58. *What Discrimination is Forbidden: AIDS Discrimination*, Fair Empl. Prac. (BNA) No. 625, at 8 (July 1989). For example, the Michigan Civil Rights Commission has promulgated a policy statement which classifies AIDS within the definition of "handicapped" contained in the Michigan Handicappers Civil Rights Act. MICH. COMP. LAWS ANN. §§ 37.1101-.1607 (West 1985). *See Michigan: Commission Policy Statement on AIDS*, Fair Empl. Prac. (BNA) 455:1065 (Oct. 1986). At least thirty-six states have statutes dealing with or construed to cover the issue of employees infected with AIDS.

59. *State Fair Employment Practice Laws*, Fair Empl. Prac. (BNA) 451:1, 5 (Feb. 1991). For example, Massachusetts has a statute which proscribes AIDS testing as a condition of employment, requires an individual's informed consent before any testing occurs and mandates confidentiality for test results. MASS. ANN. LAWS ch. 111, § 70F (Law. Co-op. 1991). California also has several statutory provisions dealing with AIDS testing, confidentiality of test results and employment discrimination. *See* CAL. HEALTH & SAFETY CODE § 199.95 (West 1990) (California Communicable Disease Statute which prevents employer testing unless employer can show test is a bona fide occupational qualification).

60. *See* CAL. HEALTH & SAFETY CODE § 199.95 (West 1990).

III. The Americans with Disabilities Act

A. Introduction

The ADA was designed to provide comprehensive protection for disabled Americans from bias against physical and mental disabilities.[61] In addition to prohibiting all employers from discrimination against employees based upon their disabilities, the ADA also prohibits discrimination in the areas of public services,[62] public accommodations,[63] and telecommunications.[64] The specific focus of this particular analysis of the ADA is a discussion of the sweeping changes created in the area of employment law by Title I of the Act.

B. Covered Individuals

The ADA specifically provides that "[n]o covered entity shall discriminate against a *qualified individual* with a disability because of the disability of such individual . . . "[65] A "qualified individual" is "an 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."[66] Thus, in order to be protected, an individual must be able to fulfill the essential functions of the job, except for the disability.[67]

The definition of "disability" is taken almost verbatim from Section 504 of the Rehabilitation Act.[68] The ADA provides a three-prong definition of disability: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment."[69]

As covered in the first prong, the terms "physical and mental impairments" encompass more than the typical orthopedic or mental afflictions which often come to mind. However, this should not pose a problem for lawyers or employers in their implementation of the employment sections of the ADA. Judicial decisions, as well as regulations promulgated by various government agencies, will provide accessible and persuasive interpretations of diseases and physical and mental condi-

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61. ADA §§ 101-108 (codified at 42 U.S.C. §§ 12111-12117, 12111 note (1990)). In addition, the EEOC, the agency responsible for enforcement of Title I, has issued its final regulations for this title. These can be located at 29 C.F.R. § 1630 (1991).

62. ADA §§ 201-246 (codified at 42 U.S.C. §§ 12131-12165, 12161 note (1990)).

63. ADA §§ 301-310 (codified at 42 U.S.C. §§ 12181-12189, 12181 note (1990)). Even though this portion of the ADA will not be discussed in depth in this article, it is important to note that the Justice Department, the agency responsible for enforcement of Title III of the ADA, promulgated proposed regulations for this Title on February 22, 1991, and can be found at 28 CFR Part 36 (1991).

64. ADA §§ 401-402 (codified at 47 U.S.C. §§ 152, 221, 225, 611 (1990)).

65. ADA § 102(a) (codified at 42 U.S.C. § 12112(a) (1990)) (emphasis added).

66. ADA § 101(8) (codified at 42 U.S.C. § 12111(8) (1990)).

67. *Id.* For a more complete analysis of the "essential functions" requirement, see *infra* notes 174-79 and accompanying text.

68. *Compare* ADA § 3(2) (codified at 42 U.S.C. § 12102(2) (1990)) *with* 29 U.S.C. § 706(8)(B) (1988).

69. ADA § 3(2) (codified at 42 U.S.C. § 12102(2) (1990)).

tions which have been found to be covered under the same definitions used in the ADA.[70] Those lists should be used as a guide in these determinations.

Under this first prong, not only must the individual have an impairment, but the impairment must "substantially limit one or more of the major life activities" of the person.[71] In discussing the term "substantially limit," the EEOC regulations provide several factors for consideration: (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; (3) the long term or permanent impact of the impairment; (4) the geographical limitations placed on the individual; (5) the types or classes of similar jobs in the same geographical area from which the individual is disqualified; and (6) the broad range of jobs not utilizing similar training and skills from which the individual is also disqualified.[72]

"Major life activities" are defined in the EEOC regulations as those basic activities that the average person in the general population can perform with little or no difficulty "and include such activities as caring for oneself, performing manual tasks, walking, sitting, standing, breathing and lifting."[73]

The determination of whether a person is "disabled" is to be undertaken on a case-by-case analysis utilizing the above factors.[74] For example, an individual who walks using artificial legs and an individual who has a severe breathing disorder would both be "disabled" because a major life activity, walking, would be substantially limited due to the severe geographic, speed, agility and capability restrictions placed upon each. This inability will effectively exclude these people from myriads of jobs.

The regulations also include working as a major life activity; however, the regulations also point out that impairment of this activity should only be considered after ascertaining that the individual is not substantially limited in any other activity.[75] For example, if the individual walks using artificial legs, there is no need to consider whether the activity of "working" is impaired. The regulations further point out that an individual is not substantially limited in working simply because she is unable to perform a particular job or one requiring special or extraordinary skills.[76] The regulations provide the illustration of an airline pilot, stating that an individual precluded from being a commercial airline pilot because of a minor vi-

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70. Both the Senate and House Committee reports on the ADA expressly recognize that prior case law, regulations and administration decisions under such laws as Section 504 and the Fair Housing Amendments Act should be applied in defining "disability" under the ADA. S. REP. No. 101-16, 121, 101st Cong., 1st Sess. (1990); H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 50-51 (1990). *See also* H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 3, at 26 (1990).

71. ADA § 3(2)(A) (codified at 42 U.S.C. § 12102(3)(2)(A) (1990)).

72. 29 C.F.R. § 1630.2(j) (1991).

73. *Id.*

74. *Id.* This case-by-case approach has been the subject of criticism since the issuance of the proposed regulations in February, 1991. The main criticism has been the lack of definiteness for businesses in making their decisions. *See More Lawsuits?*, NAT'L L.J. Mar. 25, 1991, at 1, 28. However, the final version of the regulations maintains this case-by-case approach. 29 C.F.R. § 1630.2(j) (1991).

75. 29 C.F.R. § 1630.2(j) (1991).

76. 29 C.F.R. § 1630.2(j)(3) (1991).

sion impairment would not be impaired in working if she would still qualify to fly for a courier service.[77]

The second prong covers individuals with a "record of such an impairment."[78] The Senate and House Judiciary Committee reports clearly reveal the intent of this protection.

> This provision is included in the definition in part to protect individuals who have recovered from a physical or mental impairment which previously limited them in a major life activity. Discrimination on the basis of such a past impairment would be prohibited under this legislation. Frequently occurring examples of the first group (i.e., those who have a history of an impairment) are people with histories of mental or emotional illness, heart disease, or cancer; examples of the second group (i.e., those who have been misclassified as having an impairment) are people who have been misclassified as mentally retarded.[79]

Finally, the third prong is designed to protect those individuals who are discriminated against as though being disabled, regardless of whether they actually are.[80] The ADA utilizes the same test presented in the regulations of Section 504 of the Rehabilitation Act.

> "Is regarded as having an impairment" means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated . . . as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined [in the actual impairment paragraph] but is treated . . . as having such an impairment.[81]

Because the statute was designed to draw on the body of case law construing Section 504,[82] numerous amendments were proffered which sought to overturn or include various judicial interpretations of the term "disability." The most controversial of these amendments were designed to exclude acquired immune deficiency syndrome, or AIDS, from the definition of "disabled." As noted previously, the courts had interpreted Section 504 to include the disease as a disability.[83]

Initially, supporters of this viewpoint attempted to amend the definition to specifically exclude these conditions. For example, while the bill was pending before the House of Representatives' Energy and Commerce Committee, Representative William Dannemeyer (R-Cal.) presented an amendment to specifically exclude from coverage carriers of the HIV virus who were homosexuals or users of illegal

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77. *Id.*

78. ADA § 3(2)(B) (codified at 42 U.S.C. § 12102(3)(2)(B) (1990)).

79. S. REP. No. 116, 101st Cong., 1st Sess. (1990); H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 52-53 (1990).

80. ADA § 3(2)(C) (codified at 42 U.S.C. § 12102(3)(2)(C) (1990)).

81. 45 C.F.R. § 84.3(j)(2)(iv) (1990). *See* H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 3, at 29 (1990); S. REP. No. 116, 101st Cong., 1st Sess., at 123 (1990).

82. *See supra* note 25 and accompanying text.

83. *See supra* notes 27-36 and accompanying text.

drugs – causes most often linked to transmission of the virus.[84] Representative Dannemeyer argued that there is a "fundamental distinction" between homosexual HIV carriers, or carriers infected through the ingestion of illegal substances, and truly disabled individuals because those types of carriers were infected with a disease as a result of "conscious life choices and the behavior they pursue."[85]

However, his bill was defeated due to several factors.[86] Initially, it seems that many are in favor of including AIDS victims within the parameters of the ADA.[87] This is evidenced by the Committee's resounding defeat of the proposed amendment.[88] Finally, as discussed previously, Section 504 of the Rehabilitation Act, the model for the ADA, covers carriers of the AIDS and HIV viruses.[89]

Amendments concerning AIDS appeared again in another form. Representative Jim Chapman (D-Tex.) proposed an amendment allowing restaurant employers to transfer employees infected with the AIDS or HIV virus from food-handling positions, if the transfer resulted in no loss of pay or benefits to the employees.[90] Proponents of the amendment argued that citizens would refuse to patronize any food establishment if it became public knowledge that such an employee carried one of these viruses.[91] Opponents claimed the measure was a legislative panacea for fear and prejudice.[92] The measure was passed by the House of Representatives.[93]

However, the Senate version of the bill had no such provision. During the Conference Committee's attempts to assimilate the House and Senate versions of the ADA, the provision was substantially changed to delete AIDS and HIV carriers from this provision.[94] Thus, employers are allowed to transfer food handlers with communicable diseases, however, AIDS and the HIV virus are not considered communicable diseases under the ADA.[95]

The ADA does specifically state that certain conditions are not covered as "disabilities." Transvestism,[96] homosexuality,[97] and bisexuality[98] are specifically excluded from coverage under the ADA. Users of "illegal drugs" are also excluded.[99] Although case law under Section 504 had required a showing that the drug use af-

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84. *Bush Seeking Modifications in Disability – Rights Bill*, 48 CONG. Q. WEEKLY REP., Mar. 17, 1990, at 837 [hereinafter *Modifications*].

85. *Id.* at 838.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. 136 CONG. REC. 2471-01 (1990) (introduced on the floor of the House on May 17, 1990).

91. *Id.*

92. *Id.*

93. The measure passed by a vote of 199-187.

94. *See* ADA § 103(d) (codified at 42 U.S.C. § 12113(d) (1990)).

95. *Id.*

96. ADA § 511(b)(1) (codified at 42 U.S.C. § 12211(b)(1) (1990)).

97. ADA § 511(a) (codified at 42 U.S.C. § 12211(a) (1990)).

98. *Id.*

99. ADA § 510 (codified at 42 U.S.C. § 12110 (1990)).

fected work performance or safety,[100] the ADA contains no such standard and these individuals will not be protected by the ADA.[101]

However, the ADA's exclusion of drug users is not without limit. The Act states that individuals who meet the following conditions are excluded from the definition of "drug user":

> (1) Anyone who has successfully completed a drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated from such use;
> (2) Anyone who is participating in a supervised rehabilitation program and is no longer engaging in such use; or
> (3) Anyone who is erroneously regarded as engaging in such use, but is not engaging in such use.[102]

Also, the ADA does not prohibit the use of drug tests[103] and they have been expressly excluded from the types of medical tests proscribed by the Act.[104] Another strong measure contained in the law allows employers to hold drug users, as well as alcoholics, to the "same qualification standards for employment or job performance and behavior" as other employees, even if unsatisfactory performance is related to drug or alcohol use.[105] Basically, these sections allow an employer to take action against an employee if the employee is currently using drugs or alcohol, the use of the substance affects predetermined performance or behavior standards, and if the employer is basing the action on the illegal use itself.

C. Prohibited Activities

As noted previously, Section 102(a) states "[n]o covered entity shall discriminate against a qualified individual with a disability . . . ."[106] Section 102(b) defines the types of employer activities which are deemed to be discriminatory actions.[107] This subsection contains several provisions which preclude actions the public would more readily consider "discrimination." For example, Section 102(b)(1) prohibits the use of a disability in "limiting, segregating, or classifying" an individual in a manner that "adversarily affects" that individual's employment opportunities.[108] Section 102(b)(2) proscribes participating in a "contractual or other arrangement or relationship" which would discriminate against covered indi-

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100. 29 U.S.C. § 706(8)(B) (1988). *See also* Heron v. McGuire, 803 F.2d 67, 69 (2d Cir. 1986).
101. ADA § 510 (codified at 42 U.S.C. § 12210 (1990)).
102. ADA § 104(b)(1)-(3) (codified at 42 U.S.C. § 12114(b)(1)-(3) (1990)).
103. ADA § 104(b)-(d) (codified at 42 U.S.C. § 12114(b)-(d) (1990)).
104. ADA § 104(d) (codified at 42 U.S.C. § 12114(d) (1990)).
105. ADA § 104(c)(4) (codified at 42 U.S.C. § 12114(c)(4) (1990)).
106. ADA § 102(a) (codified at 42 U.S.C. § 12112(a) (1990)).
107. ADA § 102(b) (codified at 42 U.S.C. § 12112(b) (1990)).
108. ADA § 102(b)(1) (codified at 42 U.S.C. § 12112(b)(1) (1990)).

viduals.[109] This section is specifically designed to include such employment activities as pension plans, labor unions, training programs, etc.[110]

Section 102(b)(5) presents the most far-reaching of all the provisions. Section 102(b)(5)(a) states that discrimination can be defined as:

> Not 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.[111]

Indeed, this provision constitutes a large portion of the ADA's prohibitions. Instead of liability based on the commission of some act, this provision says it is an act of discrimination for any employer to fail to make efforts ensuring that any and all obstacles have been removed from handicapped job applicants and employees.[112] These efforts are called "reasonable accommodations;" however, the ADA does not specifically define "reasonable accommodations." The ADA's mandate requiring employers to accommodate disabled persons is not without limit. Reasonable accommodation is required "unless [the] covered entity can demonstrate that the accommodation would impose an *undue hardship* on the operation of the business of such covered entity."[113] Like reasonable accommodation, the term "undue hardship" is undefined in the ADA.[114]

As a result of this lack of definition, much of the debate over the ADA surrounded the obligation of employers to reasonably accommodate disabled individuals.[115] Those concerned with the effects of such all encompassing legislation pointed to this type of provision as an abyss over which employers would be forced to traverse without any guidance.

Proponents of the Act attempted to allay these fears by pointing out that most accommodations were actually inexpensive. In September 1989, Evan Kemp, then Equal Employment Opportunity Commissioner and also a handicapped individual, told a group of retailers that most methods of accommodation only required such activities as adjusting an individual's work schedule or raising and lowering the heights of desks.[116] In fact, Kemp claimed that Sears Roebuck & Co.

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109. ADA § 102(b)(2) (codified at 42 U.S.C. § 12112(b)(2) (1990)).

110. *Id.*

111. ADA § 102(b)(5)(A) (codified at 42 U.S.C. § 12112(b)(5)(A) (1990)) (emphasis added).

112. *Id.*

113. *Id.*

114. There is a line of cases which construes "undue hardship" in terms of making reasonable accommodations to avoid claims of religious discrimination. However, the Housing Judiciary Committee report explains that the ADA duty to provide reasonable accommodation was designed to be distinguished from the U.S. Supreme Court's interpretation of Title VII in T.W.A. v. Hardison, 432 U.S. 63 (1977). In that case, the Supreme Court held that accommodations to religious beliefs need not be provided if the cost was more than de minimis to the employer. *Id.* at 68.

115. *See, e.g., Small Business and Local Government Group Question Costs of Federal Bill for Disabled*, 209 Daily Lab. Rep. (BNA) C-1 (Oct. 31, 1989).

116. *EEOC Commissioner Kemp Urges Retailers to View Disabled Workers as New Labor Source*, 178 Lab. Rel. Rep. (BNA) A-11 (Sept. 15, 1989).

had entirely retrofitted its famed Chicago headquarters building to accommodate disabled people for the mere cost of $7,000.[117]

The EEOC regulations describe an accommodation as any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunity.[118] The regulations explain the obligations of reasonable accommodation in this way:

> The reasonable accommodation requirement is best understood as a means by which barriers to the equal employment opportunity of an individual with a disability are removed or alleviated. These barriers may, for example, be physical or structural obstacles that inhibit or prevent the access of an individual with a disability to job sites, facilities or equipment. Or they may be rigid work schedules that permit no flexibility as to when work is performed or when breaks may be taken, or inflexible job procedures that unduly limit the modes of communication that are used on the job, or the way in which particular tasks are accomplished.[119]

In addition to defining reasonable accommodation, the regulations provide numerous examples of how to decide on an accommodation.[120] Another aid for employers in deciding how to accommodate a disabled individual is prior case law interpreting Section 504 of the Rehabilitation Act. Because of the language's connection with Section 504, there is a myriad of case law construing the term "reasonable accommodation" upon which employers can rely for guidance.[121]

As part of its effort to protect those with disabilities, Congress, through Section 102 of the ADA, prohibited certain use of medical examinations.[122] The section states that "a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability."[123] This section does permit pre-employment inquiries into whether an applicant can perform "job-related" functions.[124]

These inquiries are, however, quite limited. For example, the regulations make it clear that there can be no inquiry as to whether an applicant has ever filed a workers' compensation claim.[125] Nor can an employer inquire into an applicant's medical history.[126] Instead, the employer may only ask, in positive terms, whether an applicant can perform the essential functions of the position.[127] If the disabled

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117. *Id.*
118. 29 C.F.R. § 1630.2(0) (1991).
119. 29 C.F.R. § 1630.9 (1991).
120. For specific examples, see 29 C.F.R. § 1630.2(0) (1991) and § 1630.9 (1991).
121. *See supra* note 24 and accompanying text.
122. ADA § 102(c) (codified at 42 U.S.C. § 12112(c) (1990)).
123. ADA § 102(c)(2)(A) (codified at 42 U.S.C. § 12112(c)(2)(A) (1990)).
124. ADA § 102(c)(2)(B) (codified at 42 U.S.C. § 12112(c)(2)(B) (1990)).
125. 29 C.F.R. § 1630.14(a) (1991).
126. *Id.*
127. *Id.*

individual is medically unable to perform the essential job functions, the employer will be allowed to deny employment to the individual.

On the other hand, the ADA does allow for "employment entrance examinations" provided certain conditions are met.[128] According to this provision, an employer can require a pre-employment medical examination *after* an offer of employment to the applicant, but prior to the applicant's start in the position.[129] The employer may also condition the employment on the results of the exam, if (a) "*all* entering employees are subjected to" the exam; (b) the results, including medical history, are collected and maintained in separate, confidential files; and (c) the results are not used to discriminate on the basis of any disability as proscribed in the Act.[130] The regulations state that these types of exams need not be job related; however, if the employer screens out employees based on disabilities, then the employer will have to prove the exclusionary criteria are job-related, consistent with business necessity, and performance of essential job functions require reasonable accomodation.[131] Such a showing will constitute a valid defense.[132]

In addition, the prohibition against medical examinations does not preclude voluntary examinations, including medical history, as part of an employee health program.[133] The regulations further indicate that employers will be permitted to establish, sponsor, observe or administer benefit plans, such as health and life insurance plans.[134] Also, the regulations state a plan will not be found in violation of the ADA if it results in limitations on disabled individuals, as long as the plan is not "used as a subterfuge to evade the purposes of [the] regulations."[135] Even with this caveat, employers should be aware of this issue in the future as it may be an area which is often litigated.

D. Implementation

A large portion of the debate over the ADA concerned its implementation. Again, the concerns of businesses over the costs involved in accommodating handicapped persons was at the crux of the debate. For example, Carolyn Weaver, a resident scholar with a conservative think tank named the American Enterprise Institute, told a group of Republican Representatives that many costs would arise due to the passage of the ADA.[136]

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128. ADA § 102(c)(3) (codified at 42 U.S.C. § 12112(c)(3) (1990)).

129. *Id.*

130. *Id.* The ADA denotes three exceptions to the confidential requirements: (1) supervisors "may be informed regarding necessary restrictions on work duties; (2) first aid and safety personnel may be informed, when appropriate if the disability might require emergency treatment; and (3) government officials investigating compliance with" the provisions of the Act. *Id. See also* 29 C.F.R. § 1630.14 (1991).

131. 29 C.F.R. § 1630.14 (1991).

132. *Id.*

133. ADA § 102(c)(4)(B) (codified at 42 U.S.C. § 12112(c)(4)(B) (1990)).

134. 29 C.F.R. § 1630.16(f) (1991). This exemption is not intended to include liability insurance coverage.

135. *Id.*

136. *House Republican Group Holds Discussion on Effect of ADA on U.S. Competitiveness*, 27 Daily Lab. Rep. (BNA) A-1 (Feb. 8, 1990) [hereinafter *Competitiveness*].

As a result of voluminous testimony like that of Ms. Weaver, a myriad of suggestions were proffered for amending the ADA. Ms. Weaver advocated a tax credit for employers who were forced to expend funds for physical alterations.[137] Ronald Lindsay, a prominent Washington, D.C., lawyer, proposed a statutory ceiling on monetary expenditures to a House Task Force on American Competitiveness.[138] Mr. Lindsay's proposal would place a statutory cap on expenditures which the ADA could force an employer to spend on accommodations.[139] For example, the ADA could place a cap of five percent of the gross salary on the employment position in question.[140]

In an effort to address these cost concerns, several attempts were made to amend the bill. One such amendment was introduced in November, 1989, by Senator Herbert Kohl (D-Wis.) and Representative Jim Moody (D-Wis.).[141] Under this bill, businesses would have received a refundable eighty percent (80%) tax credit for covered expenditures between $250 and $4,000.[142] In addition, eligible businesses would also have been able to carry over to the following year expenditures above this $4,000 ceiling.[143] This bill was defeated.[144]

Another effort was introduced in late September, 1989, by Senator David Pryor (D-Ark.).[145] Pryor's proposal would have replaced the present $35,000 tax deduction allowed under Section 190 of the Internal Revenue Code with a $5,000 refundable tax credit.[146] However, this measure was also defeated.[147]

The compromise which finally passed in the final version of the ADA was to allow smaller businesses a longer period of time before the provisions take effect. By its terms, the employment section of the ADA becomes effective twenty-four months after the date of enactment.[148] This effective date will apply for all employers with twenty-five or more employees for each working day in each of twenty or more weeks.[149] However, employers with between fifteen and twenty-five employees are given an extra two years within which to meet the provisions of the employment title of the ADA.[150] This delay of the effective date for small to me-

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137. *Id.* at A-8.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Senator Kohl, Representative Moody Propose Tax Credit for Firms Making Adjustments for Disabled,* 220 Daily Lab. Rep. (BNA) A-1 (Nov. 16, 1989).

142. *Id.*

143. *Id.*

144. *Id.*

145. *Tax Credit Proposed as Incentive for Small Firms to Comply with Disability Act,* 196 Daily Lab. Rep. (BNA) A-16 (Oct. 12, 1989).

146. *Id.*

147. *Id.*

148. ADA § 108 (codified at 42 U.S.C. § 12111 note (1990)). The effective date of enactment was July 26, 1990.

149. ADA § 101(5)(A) (codified at 42 U.S.C. § 12111(5)(A) (1990)).

150. *Id.*

dium-sized employers will help to lessen the burden in accommodating disabled workers.

Furthermore, as part of the implementation process, the ADA mandates that the Equal Employment Opportunity Commission promulgate regulations within one year of the enactment date.[151]

E. Remedies

When a person feels he or she has been aggrieved under the ADA, they must follow the same procedures utilized under Title VII of the Civil Rights Act of 1964.[152] The ADA specifically incorporates by reference the relevant sections of the Civil Rights Act[153] and states that those sections provide the "powers, remedies, and procedures" for bringing a claim under the ADA.[154]

One main reason for this duplication of remedies and procedures is that the ADA was designed to put disabled individuals on the same level as other groups which are commonly discriminated against.[155] Thus, the ADA specifically provides for the same remedies provided for by the Civil Rights Act of 1964.[156] These include injunctive relief, back pay and attorney's fees.[157]

Following the introduction of a bill entitled the Civil Rights Act of 1990, the ADA remedy provision generated much debate.[158] The main thrust of this bill was to amend the remedies provisions of Title VII to allow compensatory and punitive damages in instances of intentional discrimination. In October, 1989, the Bush administration reached a compromise with the Senate in their version of the ADA.[159] This provision was to limit the remedies available under the ADA to only those available under the 1964 version of the Civil Rights Act.[160]

On the other hand, no such compromise was reached with the House of Representatives.[161] As stated by Representative Steny Hoyer (D-Md.), one of the major proponents of the ADA, "[t]he point of the disability community is that they wanted to be treated the same as other minorities."[162]

With the full support of the White House, Representative F. James Sensenbrenner (R-Wis.) offered an amendment limiting the remedies provision to the reme-

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151. ADA § 106 (codified at 42 U.S.C. § 12116 (1990)). The EEOC issued proposed regulations for comment in February, 1991. As noted *supra*, the final regulations were issued on July 26, 1991.

152. ADA § 107(a) (codified at 42 U.S.C. § 12117(a) (1990)).

153. 42 U.S.C. § 2000(c)(4)-(e)(9) (1988).

154. ADA § 107(a) (codified at 42 U.S.C. § 12117(a) (1990)).

155. *See* Royner, *Disability-Rights Legislation Headed for Conference*, 48 CONG. Q. WEEKLY REP., May 26, 1990, at 1657, 1659 [hereinafter *Headed for Conference*]; *see also* Royner, *Bush Seeking Modifications in Disability-Rights Bill*, 48 CONG. Q. WEEKLY REP., Mar. 17, 1990, at 837, 838.

156. *See supra* notes 136-38 and accompanying text.

157. *See* 42 U.S.C. § 2000(e)(4)-(e)(9) (1988).

158. *Headed for Conference*, *supra* note 155, at 1659. The bill was numbered H.R. 4000 in the House of Representatives and S. 2104 in the Senate. *Id.*

159. *Headed for Conference*, *supra* note 155, at 1659.

160. *Id.*

161. *Id.*

162. Royner, *Bush Seeking Modification In Disability Rights Bill*, *supra* note 155, at 837.

dies available under the 1964 Act.[163] Despite this support, the proposal was defeated.[164]

The ADA eventually passed with no limiting provision.[165] The Civil Rights Act of 1990 was eventually passed, however, Congress was unable to override a presidential veto.[166] This bill has been proposed again as the Civil Rights Act of 1991 and at the time of this writing is under debate.[167] Therefore, if the Civil Rights Act of 1991 is successful in amending the Title VII damages provisions to provide for these additional remedies, these remedies will also be available to aggrieved parties under the ADA.[168]

F. Employer Defenses

There are several important actions and defenses available to employers under the ADA. First, as noted previously,[169] the ADA requires reasonable accommodation for disabled individuals unless such accommodation would constitute "undue hardship."[170] The ADA defines "undue hardship" as "an action requiring significant difficulty or expense, when considered in light of the factors" enumerated in the ADA.[171] These factors include: (1) the cost and nature of the accommodation; (2) financial resources of the facility, number of employees employed there, impact of the accommodation on the facility; (3) overall size and financial resources of the covered entity; and (4) the overall composition and structure of the work force.[172] Thus, if an employer can utilize these factors to show that accommodating an individual would pose an undue hardship on his business, this will present a successful defense on his behalf. For example, an employer faced with adjusting work schedules can claim undue hardship if he can show the cost would be significant compared to his revenues and would adversely affect operations of a plant with a small work force. This is the type of case-by-case analysis which employers will be forced to utilize in evaluating "reasonable accommodations."

However, the EEOC regulations point out that in considering whether an accommodation constitutes an undue hardship, more than just financial considerations should come into play.[173] For example, the regulations present a situation where an individual with a visual handicap applies for a position as a waiter in a night club.[174] The regulations then explain undue hardship in this manner:

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163. *Id.*
164. *Id.*
165. *Id. See* ADA § 107 (codified at 42 U.S.C. § 12117 (1990)).
166. 136 CONG. REC. § 16589 (daily ed. Oct. 24, 1990).
167. The bill was reintroduced in the House of Representatives as H.R. 1.
168. *See* ADA § 107(a) (codified at 42 U.S.C. § 12117(a) (1990)).
169. *See supra* note 113 and accompanying text.
170. ADA § 102(b)(5)(A) (codified at 42 U.S.C. § 12112(b)(5)(A) (1990)).
171. ADA § 101(10)(A) (codified at 42 U.S.C. § 12111(10)(A) (1990)).
172. ADA § 101(10)(B) (codified at 42 U.S.C. § 12111(10)(B) (1990)).
173. 29 C.F.R. § 1630.2(p) (1991).
174. *Id.*

> Although the individual may be able to perform the job in bright lighting, the night club will probably be able to demonstrate that that particular accommodation, though inexpensive, would impose an undue hardship if the bright lighting would destroy the ambiance of the night club and/or make it difficult for the customers to see the stage show.[175]

Thus, it is important for an employer to recognize *all* the factors surrounding his decision over whether an accommodation would constitute an undue hardship. Furthermore, an employer must realize that even though one type of accommodation would be precluded, the obligation for reasonable accommodation is not alleviated.[176] If another alternative exists which is not an undue hardship, the employer must utilize that method.[177]

In addition, if an employer can show under the previously enumerated factors that an accommodation would impose financial hardship, the employer's analysis still may not be finished. If funding is available from another source (*i.e.*, state agencies) and that funding would remove the hardship, then the employer is obligated to pursue the proposed accommodation.[178] For example, if an applicant is bound to a wheelchair and the accommodation sought could be made except for the fact that the necessary renovations are too costly for the employer, the employer may be eligible to receive funds from a state vocational rehabilitation agency or may utilize any applicable tax deductions.[179] If these circumstances alleviate the hardship, then the employer could be required to make this accommodation because it had become a reasonable one.[180] Therefore, employers should make themselves aware of these types of programs which aid employers in accommodating handicapped workers.

Another defense which may be available to an employer is contained in Section 103 of the ADA. That section provides:

> It may be a defense to a charge of discrimination under this Act that an alleged application of qualification standards, tests, or selection criteria that screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accompanied by reasonable accommodating as required under this title.[181]

Under this defense an employer may set performance or behavioral standards to use as selection criteria for a position. These criteria are called "qualification standards" under the ADA.[182] It is still unclear at this time as to the full range of selection criteria available for actual use. Clearly, performance standards are in-

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175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. ADA § 103(a) (codified at 42 U.S.C. § 12113(a) (1990)).
182. *Id.*

cluded in this section.[183] For example, if a potential employee cannot meet a certain piece rate standard, even after reasonable accommodation, then obviously that individual would fail to meet the qualification standards.

Also included as a "qualification standard" is a requirement that the handicapped applicant not pose a "direct threat" to other employees in the workplace.[184] Section 103(b) explicitly states that a qualification standard may mean that "an individual shall not pose a direct threat to the health or safety of other individuals in the workplace."[185] According to the EEOC regulations, if an applicant poses a direct threat because of a disability, the employer should consider whether a reasonable accommodation would remove the threat. If not, the employer may refuse to hire the individual.[186]

In determining whether a threat exists, the employer must first identify the specific risk involved.[187] After the risk is identified, the EEOC regulations suggest the application of the following factors: (1) the duration of the risk; (2) the nature and severity of the harm; and (3) the likelihood that the potential harm will occur.[188] These factors must be evaluated by relying on objective facts and medical data. If indeed, factual and medical data reveal a distinct and significant threat of a specific risk, then the employer may refuse to hire the individual.[189] Employers should be aware that any review of this decision during a subsequent lawsuit will be fact intensive.[190] Given this awareness, employers should take special care to document the facts and data upon which they base such decisions.

Finally, an employer may base employment decisions on pre-determined job descriptions written before the hiring process begins. As noted previously,[191] the ADA protects qualified individuals who can perform the "essential functions" of the job.[192] Although the term "essential functions" is not defined by the ADA, the Act states that:

> [C]onsiderations shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applications for the job, this description shall be considered evidence of the essential functions of the job.[193]

This section will give deference to the employer in defining the essential functions of a position, provided the employer defines the functions beforehand to in-

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183. *Id.*

184. ADA § 103(b) (codified at 42 U.S.C. § 12113(b) (1990)).

185. *Id.*

186. 29 C.F.R. § 1630.2(r) (1991). It is important to note that the risk must be significant. An employer may not refuse to hire an applicant simply based on a slightly increased risk of harm. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id. See, e.g.*, Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985); Strathie v. Department of Transp., 716 F.2d 227 (3d Cir. 1983).

192. *See supra* note 67 and accompanying text.

193. ADA § 101(8) (codified at 42 U.S.C. § 12111(8) (1990)).

sure the description is not simply a tool for discrimination. The EEOC regulations also recognize that job descriptions contained in collective bargaining agreements are evidence of the essential functions of a position.[194] Therefore, this is an important tool which employers should utilize as a part of the hiring process.

The existence of a written job description does not end the analysis, since it will only be a factor considered in whether the individual can perform the essential functions of the job.[195] The EEOC regulations enumerate several additional factors to be considered in determining "essential function":

(1) Whether the reason the position exists is to perform that function;

(2) The number of other employees available to perform that task, or among whom the task can be distributed; and

(3) The degree of expertise or skill required to perform the function.[196]

After enumerating these factors, the regulations point out that the issue of whether a particular function is essential is a factual determination that will be made on a case-by-case basis.[197] In discussing relevant evidence that should be considered, an established job description is an important element. In addition to job descriptions, relevant evidence includes: (1) the employer's judgment as to which functions are essential; (2) the amount of time spent on the job performing the function; (3) the consequences of not requiring the incumbent to perform the function; (4) the work experience of past incumbents in the job; and (5) the current work experience of incumbents in similiar jobs.[198]

Given that the employer is aware of the factors used to determine this issue, he or she will be better able to define the job description to protect their decisions. The EEOC regulations claim that "the inquiry into essential functions is not intended to second guess an employer's business judgment with regard to production standards, whether qualitative or quantitative, nor to require employers to lower such standards."[199] Therefore, as long as the employer has a legitimate business rationale for the description, it should be given deference by the courts. In this way, employers can better protect themselves, as well as hire employees who can perform the tasks they are hired to perform.

IV. CONCLUSION

The ADA ushers in a new era for employers and attorneys. For the first time, any employer may be held liable if it fails to take action to accommodate. The ultimate impact of this new approach to remedying discrimination could be far reaching, particularly in light of the strong desire of Congress to amend current civil rights statutes.

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194. 29 C.F.R. § 1630.15 (1991).
195. 29 C.F.R. § 1630.2(n) (1991).
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*

Although the legislative history and EEOC regulations attempt to give employers some solace as to second guessing employers' ability to describe essential job functions, and offers some defenses to the requirements of reasonable accommodation, an employer faced with defending his decison will need to be armed with financial data as to cost and ability to pay, as well as economic studies as to the design of the workplace. While there is little doubt that the disabled should be protected from discrimination, and thus be afforded the full opportunity to participate in our economic system, the far reaching language of the ADA may lead to delays in meeeting the expectations raised by the Act while the courts become more and more embroiled in analyzing the details of employers' day to day operations.