University of Dayton Law Review

Volume 18 | Number 3 Article 9

3-1-1993

The Americans with Disabilities Act Title I: Equal Employment Rights for Disabled Americans

Tracy L. Hart
University of Dayton

LEGISLATIVE NOTE

THE AMERICANS WITH DISABILITIES ACT[1] TITLE I: EQUAL EMPLOYMENT RIGHTS FOR DISABLED AMERICANS

I. INTRODUCTION

There are over forty-three million Americans who are afflicted with mental or physical disabilities.[2] On July 26, 1992, a new federal anti-discrimination statute—the Americans with Disabilities Act[3] (ADA)—took effect. The ADA removes long-existing barriers which have prevented disabled Americans from securing employment.[4] Title I of the ADA prohibits discrimination against a qualified disabled individual based on the individual's disability, with regard to: (1) job application procedures; (2) hiring; (3) promotions; (4) discharge; (5) compensation; (6) job training; and (7) other terms, conditions, or privileges of employment.[5] "No longer will an employer be able to say 'I don't want you here because you have a wheelchair,' or 'because you have a tick that makes [me] uncomfortable.' "[6]

The ADA was enacted partially for financial reasons, including the estimated $100 billion wasted on federal programs which subsidize the millions of Americans with disabilities who are employable and eager to work.[7] The ADA was also enacted because of the high cost of workers' compensation premiums, the low cost of most accommoda-

---

1. 42 U.S.C. § 12101 (Supp. II 1990).
2. *Id.* § 12101(a)(1).
3. *Id.* § 12101.
4. Brooks S. Thayer, *ADA Compels Employers To Make Changes*, MASS. LAWYERS WEEKLY, March 23, 1992, at 39.
5. 42 U.S.C. § 12112.
6. Susan Harrigan, *Welcome to Work; It's Now Illegal for Most Businesses to Discriminate Against the Disabled, but Some Employers' Attitudes May Prove Harder to Change than the Law*, NEWSDAY, July 26, 1992, at 68 (statement of Chai Feldblum, a professor of disabilities law at Georgetown University).
7. Brian T. McMahon & John G. Carlson, *Disabilities Act: What Employers Need to Know*, PROPERTY & CASUALTY/RISK & BENEFITS MANAGEMENT EDITION, March 30, 1992, at 10.

tions, and the benefit reaped from accommodating individuals when necessary.[8] Congress' stated purpose for enacting the ADA is to provide a "clear and comprehensive mandate for the elimination of discrimination against individuals with disabilities."[9] While the ADA is a step toward achievement of this goal, the ADA is afflicted with problems which must be corrected before this country will achieve the complete elimination of discrimination toward disabled individuals.

This Note first discusses the background of the Americans with Disabilities Act.[10] Second, this Note explains the provisions of Title I of the ADA concerning employment of disabled Americans, including definitions of key terms of Title I.[11] Finally, this Note discusses the potential shortcomings of Title I of the ADA.[12]

The two major problems of the ADA are its perceived cost, as seen through the eyes of employers, and the anticipated increases in litigation due to unclear and expansive definitions of key terms.[13] For most employers, the perceived high cost of implementing the ADA is just that—a perception. The cost of implementing Title I of the ADA will be minor for most employers.[14] Although ADA litigation will increase initially, it should not be a major long-term problem.[15] The ideal of nondiscrimination against disabled individuals is certainly desirable. Concern exists, however, that the ADA will have to be revisited on a yearly basis to address the problems already apparent in the Act.[16]

---

8. *Id.* Community Hospital of Central California developed a program in which accommodations similar to those required under ADA Title I were provided to lighten the workload of injured employees. Andrea Maier, *Enabling Disabled: A Civil Rights Act for Fourteen Million Workers*, L.A. TIMES, July 24, 1992, at D1. Because these injured employees did not go on long-term disability, the hospital experienced a savings of $900,000 in workers' compensation and a fifty percent decrease in lost-time claims. *Id.* Also, Title I of the ADA expands the pool of skilled persons from which employers may hire at a time when skilled workers are not abundant. Peter T. Kilborn, *Major Shift Likely as Law Bans Bias Toward Disabled*, N.Y. TIMES, July 19, 1992, at 1-1.

9. 42 U.S.C. § 12101(b)(1) (Supp. II 1990).

10. *See infra* notes 17-37 and accompanying text.

11. *See infra* notes 38-137 and accompanying text.

12. *See infra* notes 138-66 and accompanying text.

13. See *infra* notes 79-137 and accompanying text for definitions of key terms, such as "qualified individual with a disability," "reasonable accommodation," and "undue hardship."

14. *See infra* notes 139-49 and accompanying text.

15. *See infra* notes 156-66 and accompanying text.

16. 136 CONG. REC. S59695 (daily ed. July 13, 1990). For example, Senator Dole stated:

> I think [the ADA] will bring quality to the lives of millions of Americans who have not had quality in the past. Perhaps this bill may not be perfect, and we may be back revisiting it again in a year or two, making changes for the better, I hope. But it is important legislation.

Id.

II. History of Legislation for Disabled Individuals

Historically, the relationship between disabled individuals and employers was governed by a variety of state and federal statutes.[17] Title I of the ADA establishes a national prohibition against employment practices which discriminate against an individual based on a disability.[18] The National Council on Disabilities released a report in 1988 which called for equitable civil rights for disabled individuals.[19] Shortly thereafter, Senators Harkin, Weicker, and Kennedy introduced the Americans with Disabilities Act.[20] The ADA received bipartisan support and was passed by an overwhelming majority.[21] "The ADA incorporates many of the standards of discrimination set out in regulations implementing section 504 of the Rehabilitation Act of 1973 . . . ."[22] The ADA also "incorporates by reference the enforcement provisions under Title VII of the Civil Rights Act of 1964."[23] Therefore, the remainder of this section focuses on the appropriate provisions of the Rehabilitation Act and the Civil Rights Act (CRA).

A. ADA Draws From the Rehabilitation Act of 1973

The employment protections of the ADA are similar to the protections that exist under section 504 of the Rehabilitation Act of 1973.[24]

---

17. Thayer, *supra* note 4, at 39.

18. Thayer, *supra* note 4, at 39.

19. 136 Cong. Rec. S9680 (daily ed. July 13, 1990).

20. *Id.*

21. *Id.* The Act passed the Senate by a vote of 76 to 8, and it passed the House by a vote of 403 to 20. *Id.*

22. 136 Cong. Rec. E1839 (daily ed. June 7, 1990) (statement of Hon. Steny H. Hoyer of Maryland).

23. *Id.* at E1840.

> The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 [sections 705, 706, 707, 709,and 710 of the Civil Rights Act of 1964] shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12166 of this title [section 106 of the Civil Rights Act of 1964], concerning employment.

42 U.S.C. § 12117(a) (Supp. II 1990).

24. The Rehabilitation Act of 1973 states that "[n]o otherwise qualified individual with handicaps in the United States . . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." 29 U.S.C. § 794(a) (1988) [§ 504 of the Rehabilitation Act of 1973 refers to § 504 of Public Law 93-112, which is codified at 29 U.S.C. § 794]. "Subject to discrimination" as applied includes the following: (1) recruitment; (2) advertising; (3) application; (4) hiring; (5) promoting; (6) tenure; (7) demotion: (8) transfer; (9) layoff; (10) termination; (11) rate of compensation; (12) leave of absence; etc. 45 C.F.R. § 84.11 (1992). These are the same activities which are prohibited under the Americans with Disabilities Act. 42 U.S.C. § 12112 (Supp. II 1990); 29 C.F.R. § 1630.4 (1992). These are also employment activities which are prohibited in Title VII of the CRA. 42 U.S.C. § 2000e-2 (1988).

The ADA, however, extends coverage to more individuals.[25] Section 504 of the Rehabilitation Act of 1973 prohibits discrimination against an otherwise qualified handicapped individual on the basis of his handicap by any program or activity receiving federal financial assistance.[26] The Rehabilitation Act of 1973, therefore, applies only to employers who receive federal financial assistance. The ADA, however, takes the Rehabilitation Act of 1973 a step further by extending coverage to many employers who do not receive federal financial assistance.[27]

The Rehabilitation Act of 1973 stipulates that an entity need not provide disabled individuals with a method of achieving identical opportunities and results as those provided to nondisabled individuals.[28] Rather, disabled individuals must be afforded equal opportunities to achieve similar results, benefits, or levels of accomplishment.[29] In addition, entities which provide separate programs or activities for disabled individuals may not prohibit a qualified disabled person from participating in programs or activities that are not separate or different.[30] These provisions of the Rehabilitation Act of 1973 served as a model for provisions incorporated into the Americans with Disabilities Act of 1990.

B. ADA Remedies are Identical to Civil Rights Act Remedies

The Civil Rights Act of 1964 and its progeny also influenced the development of the ADA. The CRA prohibits employment discrimination based on race, color, religion, sex, or national origin.[31] There is no mention of handicapped or disabled individuals in Title VII of the CRA.[32]

---

25. 136 CONG. REC. E1913 (daily ed. June 13, 1990) (statement of Hon. Steny H. Hoyer of Maryland).

26. 29 U.S.C. § 794.

27. 42 U.S.C § 12111 (Supp. II 1990). The definition of "covered entity" in the ADA is "employer, employment agency, labor organization, or joint labor-management committee." 42 U.S.C. § 12111(2).

28. 29 U.S.C. § 794 (1988).

29. *Id.*

30. *Id.*

31. 42 U.S.C. § 2000e-2.

> It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id.

32. *Id.*

The CRA influenced many of the provisions of the ADA. The CRA was especially influential in the area of remedies. The ADA specifically incorporates the remedies available under the CRA; thus, the remedies available under the ADA are the same as those provided in Title VII of the CRA.[33] Originally, these enforcement provisions provided for equitable relief only.[34] The CRA of 1991, however, expanded the type of relief recoverable for violations of Title VII, and thus expanded the relief recoverable under the ADA.[35] The CRA of 1991 specifically provides for the recovery of compensatory damages in a Title VII action against a business which has engaged in unlawful intentional discrimination.[36] The CRA of 1991 also provides for the recovery of punitive damages when the employee/applicant has demonstrated that an employer has engaged in a discriminatory practice with malice or reckless indifference to the employee/applicant's federally protected rights.[37]

---

33. 42 U.S.C. § 12117 (Supp. II 1990).

34. 42 U.S.C. § 2000e-5(g) (1988).

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.

Id.

This means that the court could: (1) issue an injunction prohibiting the unlawful employment practice; (2) order any appropriate affirmative action, including reinstatement or hiring of employees, with or without back pay; or (3) order any other equitable relief thought appropriate in the circumstances. *Id.*

35. 42 U.S.C. § 1981a (Supp. 1992).

> In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 . . . (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of Title 29, respectively) [section 505(a)(1) of the Rehabilitation Act of 1973] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of Title 29 [section 501 of the Rehabilitation Act of 1973] and the regulations implementing section 791 of Title 29 concerning the provision of a reasonable accommodation or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 U.S.C.A. §2000e-5(g)], from the respondent.

Id.

36. *Id.* See *infra* note 155 and accompanying text for discussion of recoverable compensatory damages.

37. 42 U.S.C. § 1981a(b)(1).

> A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discrimina-

It was against this background that Congress enacted the Americans with Disabilities Act of 1990. Congress intended the ADA to remove the barriers disabled Americans encounter in the employment arena. While this goal should be achieved eventually, the ADA is not a panacea.

III. EXPLANATION OF ADA TITLE I

In order to fully comprehend Title I of the ADA, an employer or employee/applicant must be familiar with the reach of the ADA. An employer or employee/applicant must also understand the definitions of key terms as used in the Act. This section sets forth these criteria and explains each in detail.

A. The Scope of Title I of the ADA

Title I of the ADA creates, for the first time, "a definitive civil rights act for [fourteen] million potential workers."[38] Title I of the ADA prohibits employment discrimination against qualified disabled individuals.[39] The ADA, however, goes beyond this general prohibition.[40] It directs employers to make reasonable accommodations to allow qualified disabled individuals to perform the job.[41] Employers must

---

tory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

Id.

See *infra* note 155 and accompanying text for amount recoverable.

38. Maier, *supra* note 8, at D1. According to Mitchell LaPlante, director of the Disability Statistics Program at the University of California, while there are 14.2 million disabled individuals between the ages of sixteen and sixty-four, only thirty percent worked in 1989 (most of these were part-time or irregular positions). Kilborn, *supra* note 8, at 1-1. This is in comparison to the non-disabled community in which seventy-six percent of the individuals were employed, and most of these in full-time positions. *Id.*

39. 42 U.S.C. § 12112(a) (Supp. II 1990).

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

Id.

A 1986 poll found that one out of every four disabled individuals had experienced employment discrimination because of their disability. Harrigan, *supra* note 6, at 68.

40. Julia Lawlor, *Disabilities No Longer a Job Barrier*, USA TODAY, July 22, 1992, at 1A.

41. 42 U.S.C. § 12112.

[T]he term "discriminate" includes . . . 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: or (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant . . . .

focus on an individual's ability to perform the job rather than that person's disability.[42] Title I also requires that all personnel decisions be made without reference to an individual's disability.[43] The ADA's standards for treatment of disabled individuals are not lower than similar standards found in the Rehabilitation Act of 1973.[44] Nor does the ADA preempt any federal, state, or local law which provides greater or equal protection for the rights of disabled individuals.[45] The ADA thus requires "equal treatment, not special treatment."[46]

1. Who Must Comply and What is Prohibited?

The ADA specifies that "[n]o 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, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[47] Title I of the ADA defines a "covered entity" as "an employer, employment agency, labor organization, or joint labor-management committee."[48] Under the ADA, "employer" means a person with fifteen or more employees each working day for twenty or more calendar weeks in the current or preceding calendar year.[49]

Employers are prohibited from discriminating against an individual based on the individual's disability.[50] "Essentially, if a disabled per-

---

42 U.S.C. § 12112(5)(A) & (B); *see also* Lawlor, *supra* note 40, at 1A.

42. Lawlor, *supra* note 40, at 1A.

43. McMahon & Carlson, *supra* note 7, at 10.

44. 42 U.S.C. § 12201(a). "Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title." *Id.*

45. 42 U.S.C. 12201(b). This section of the ADA provides:

> Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any federal law or law of any state or political subdivision of any state or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this [act].

Id.

"Section 501(b) [of ADA Title I] makes clear that Congress did not intend the Americans with Disabilities Act to effect a change in the breadth of enforcement under the Rehabilitation Act or any other federal, state, or local law protecting the rights of handicapped individuals." Moore v. Sun Bank of N. Fla., 923 F.2d 1423, 1424 n.2 (11th Cir. 1991).

46. Michelle Laque Johnson, *What's 'Reasonable Accommodation' for Disabled?*, INVESTOR'S DAILY, October 11, 1990, at 8 (statement of Barbara Judy, executive director of Job Accommodation Network (JAN), a free service for employers that offers information on workplace accommodations for the disabled).

47. 42 U.S.C. § 12112.

48. 42 U.S.C. § 12111.

49. *Id.* § 12111(5)(A). For the first two years after the effective date of ADA Title I (July 26, 1992), a covered employer is one who has twenty-five or more employees. *Id.*

50. *Id.* § 12112(a). As defined in the ADA, "discriminate" means:

son applies for a job and would be the best candidate, the employer must make a 'reasonable accommodation' to help that person fill the position."[51] The ADA does not require an employer to hire someone who "lacks vital faculties for a particular job."[52] An individual's disability by itself, however, cannot be the basis for rejecting that individual.[53] Since employers are not required to seek out disabled individuals, the ADA is not affirmative action legislation.[54] Rather, employers cannot "allow myths and fears and stereotypes to affect their employment decisions."[55] Notwithstanding the fact that employers do not have an affirmative duty to seek out disabled individuals for employment, it is

---

(1) limiting, segregating or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such [individual] because of the disability of such [individual];

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter . . . ;

(3) utilizing standards, criteria, or methods of administration -

(A) that have the effect of discrimination on the basis of disability, or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual . . . unless . . . the accommodation would impose an undue hardship on the operation of the business of such covered entity, or

(B) denying employment opportunities . . . based on the need . . . to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities [(disparate impact)] unless . . . shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing 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 that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such [individual] that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such [individual] (except where such skills are the factors that the test purports to measure).

Id. § 12112(b).

51. Caty Von Housen, *Employers Grapple With ADA Policies,* SAN DIEGO BUS. J., July 20, 1992, vol. 13, no. 28, at 1-1.

52. Kilbourn, *supra* note 8, at 1-1 (statement of Christopher Bell, a senior lawyer for the Equal Employment Opportunity Commission (EEOC)).

53. *Id. See* 42 U.S.C. § 12112 (Supp. II 1990). This ADA section states that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to . . . hiring . . . ." *Id.*

54. Von Housen, *supra* note 51, at 1-1.

55. Von Housen, *supra* note 51, at 1-1. "The ADA prohibits discrimination on the basis of disability; it does not guaranty equal results, establish quotas or require preferences favoring individuals with disabilities over those without disabilities." Thayer, *supra* note 4, at 39.

insufficient for an employer to simply avoid intentional discrimination.[56] The ADA instead mandates that employers have an affirmative duty to provide reasonable accommodations to disabled applicants and employees.[57]

2. Medical Examinations

Title I of the ADA also addresses the issue of administering medical examinations to employees and prospective employees. A covered entity is not permitted to conduct a medical exam or other inquiry in order to determine either the existence of a disability or the nature or severity of a disability.[58] After a job applicant is offered an employment position, but before he begins working, the employer may require a medical examination and condition the employment offer on the results of that examination.[59] This examination is permissible only if all entering employees are required to submit to the examination.[60] "[Exam] results may be used to withdraw offers only from individuals who are found not to be qualified for the job based on the test results."[61]

---

56. See *supra* note 41 concerning employer's duty to provide reasonable accommodation; *see also* Ted Johnson, *Q & A: Bruce May, Attorney, Stradling, Yocca, Carlson & Rauth*, L.A. TIMES, July 27, 1992, at D-4.

57. 42 U.S.C. § 12112. *See supra* note 41; *see also* Johnson, *supra* note 56, at D-4. An employer cannot compare applicants until first assuming that he will provide any reasonable accommodation needed by the disabled applicant. *Id.*

58. 42 U.S.C. § 12112(c)(2)(A). "Except as provided in paragraph (3), 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." *Id.* Paragraph three states that:

> A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if —
>
> (A) all entering employees are subjected to such an examination regardless of disability;
>
> (B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that —
>
> (i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;
>
> (ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and
>
> (iii) government officials investigating compliance with this Act shall be provided relevant information on request; and
>
> (C) the results of such examination are used only in accordance with this [title].

Id. § 12112(c)(3).

59. *Id.* See *supra* note 58 for statutory language.

60. *Id.* § 12112(c)(3)(A). See *supra* note 58 for statutory language.

61. 136 CONG. REC. H4624 (daily ed. July 12, 1990) (statement of Rep. Edwards).

An employer must keep all information obtained from such an exam in a separate and confidential file.[62] The information in this file may only be released in three circumstances: (1) to inform supervisors and managers about any necessary restrictions on the work or duties of the employee, or any necessary accommodations; (2) to inform first aid and safety personnel if the disability might require emergency treatment; and (3) to provide relevant information to government officials who are investigating compliance with ADA Title I.[63] Finally, the results of such an exam must be used in a manner that is consistent with the purpose of Title I of the ADA.[64] Thus, the results of the exam may not be used to discriminate on the basis of a disability.[65]

The ADA also restricts medical examinations of current employees.[66] Medical exams designed to discover a disability or inquire about the nature or severity of a disability of a current employee are prohibited by the ADA, unless the exam is shown to be job related and consistent with a business necessity.[67] Voluntary medical examinations are permitted if the exams are connected with an employee health program.[68] Drug testing is also permitted under the ADA.[69]

3. The Foodhandling Provision

The most hotly debated topic covered by the ADA is what is referred to as the "foodhandling" provision.[70] This provision provides that a covered entity may refuse to allow an individual who has an infec-

---

62. 42 U.S.C. § 12112(c)(3)(B). See *supra* note 58 for statutory language.

63. 42 U.S.C. § 12112(c)(3)(B)(i)-(iii). See *supra* note 58 for statutory language.

64. 42 U.S.C. § 12112. See *supra* note 58 for statutory language.

65. 42 U.S.C. § 12112. See *supra* note 58 for statutory language.

66. 42 U.S.C. § 12112.

> A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity. . . . A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at the work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

Id.

67. *Id.* See *supra* note 66 for statutory language.

68. 42 U.S.C. § 12112. See *supra* note 66 for statutory language.

69. 42 U.S.C. § 12114. "For purposes of this title, a test to determine the illegal use of drugs shall not be considered a medical examination." *Id.*

70. 42 U.S.C § 12113(d)(2).

> In any case in which an individual has an infectious or communicable disease that is transmitted to others through the handling of food, that is included on the list developed by the Secretary of Health and Human Services under paragraph (1), and which cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling.

Id. See infra notes 150-54 and accompanying text.

tious or communicable disease to perform a job which involves the handling of food.[71] The foodhandling provision, however, only applies if the individual's disease is one which has been found by the Secretary of Health and Human Services to be transmittable through foodhandling.[72] As stated by Senator Kennedy:

> The original [foodhandling] amendment responded to public fear and misperception regarding people with HIV disease by legitimizing those fears and by allowing those fears to govern who could serve in certain jobs. By contrast, . . . the approach ultimately accepted by [Congress], responds to that fear by focusing on educating the American public with valid, scientific information.[73]

Despite Congress' attempt to educate the public with scientific information, this provision remains very controversial because of the AIDS issue.[74] Senator Kennedy further explained that:

> [The foodhandling provision] appropriately reinforces the original approach of the ADA. Under section 103 of the Act, "an individual who poses a significant risk to the health or safety of others in a particular job, which risk cannot be eliminated by reasonable accommodation, is not considered a qualified individual with a disability for purposes of that particular job."[75]

---

71. 42 U.S.C. § 12113. *See supra* note 70.

72. 42 U.S.C. § 12113. The Secretary of Health and Human Services is required to do the following: review all infectious and communicable diseases which may be transmitted through the handling of food; publish a list of such diseases and the means by which they are transmitted; widely disseminate this information; and update the list annually. *Id.*

73. *See* 136 CONG. REC. S9696 (daily ed. July 13, 1990) (statement of Sen. Kennedy). The original amendment was called the Chapman amendment. "The Chapman amendment said that someone who has—an employer who has a cook in the kitchen who has AIDS could transfer that cook out of the kitchen . . . . [The adopted amendment] says that you cannot transfer the person out of the kitchen, because AIDS cannot be contracted by food handling." 136 CONG. REC. H4616 (daily ed. July 12, 1990) (statement of Rep. Bartlett).

74. Acquired Immune Deficiency Syndrome (AIDS) is a virus that devastates the body's normal defenses against disease. The virus weakens the body's disease fighting immune system, therefore making its victim vulnerable to infections. LILLIAN S. BRUNNER & DORIS S. SUDDORTH, TEXTBOOK OF MEDICAL SURGICAL NURSING 1500 (5TH ED. 1984). The public is very concerned with this issue because of lack of complete information on the ways in which AIDS can be contracted. Many people fear that scientists cannot be sure whether AIDS can be contracted through foodhandling, and these people are unwilling to take the risk.

75. 136 CONG. REC. S9696 (daily ed. July 13, 1990) (statement of Sen. Kennedy). The ADA states that:

> 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 tend to 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 accomplished by reasonable accommodation, as required under this title. . . . The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

42 U.S.C. § 12113(a)(b).

The foodhandling provision, however, prescribes specific procedures for dealing with the foodhandling industry to allay any possible concerns on the part of the general public.[76]

4. Publication of the ADA

Employers are required to post notices describing the applicable provisions of Title I of ADA in places which are accessible to both applicants and employees.[77] The powers, remedies, and procedures, which Title I of the ADA provides to the Equal Employment Opportunity Commission, to the Attorney General, or to any person alleging discrimination under the Act, are the same powers, remedies, and procedures found in Title VII of the Civil Rights Act of 1964.[78]

B. Definitions of Key Terms in Title I of the ADA

There are many key terms used in Title I of the ADA. Each has a specific meaning that must be understood in order to determine the applicability of the ADA to specific factual circumstances.

1. What is Considered a "Disability"?

The definition of "disability" adopted by the ADA is the same three-prong definition used in sections 503 and 504 of the Rehabilitation Act of 1973.[79] A person is considered disabled under the ADA if: (1) he has a physical or mental impairment that substantially limits one or more major life activities; (2) he has a record of such an impairment; or (3) he is regarded as having such an impairment.[80] An Equal Employment Opportunity Commission (EEOC) regulation concerning the ADA defines a physical or mental impairment as "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproduction, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine."[81] The EEOC regulation's definition of dis-

---

76. 136 Cong. Rec. S9684 (daily ed. July 13, 1990) (statement of Sen. Kennedy).

77. 42 U.S.C. § 12115.

78. 42 U.S.C. § 12117(a). The remedies from Title VII were previously only equitable, but since the passage of the CRA of 1991, both compensatory and punitive damages are permitted in many cases. *See supra* notes 33-37 and accompanying text.

79. 42 U.S.C. § 12102; *see also* 29 U.S.C § 791 (1988); Human Resource Advisors, Americans With Disabilities Act: An Employer's Guide to Compliance, I-16 (1992) [hereinafter Human Resource Advisors].

80. 42 U.S.C. § 12102.

81. 29 C.F.R. § 1630.2(h)(1) (1992). "Examples of applicants who would not be considered disabled under the ADA would be an obese person or a pilot with imperfect vision who can still legally fly cargo planes but not passenger planes." Meg Fletcher, *Employers Face Legal Issues*, Business Insurance, May 4, 1992, at 18. Impairment within the meaning of the ADA does not

ability also includes mental and psychological disorders, including mental retardation, organic brain syndromes, emotional or mental illness, and specific learning disabilities.[82]

There are some conditions which are specifically excluded from the definition of disability under the ADA. The ADA specifically excludes the following: (1) transvestites;[83] (2) persons currently engaged in the use of illegal drugs;[84] (3) homosexuality and bisexuality;[85] (4) pedophilia; (5) exhibitionism; (6) voyeurism; (7) gender identity disorders not resulting from physical impairments; (8) other sexual behavior disorders; (9) compulsive gambling; (10) kleptomania; (11) pyromania; and (12) psychoactive substance use disorders resulting from current illegal use of drugs.[86]

Under the first prong of the definition of "disability," an individual must have a physical or mental impairment that substantially limits one or more major life activities in order to qualify as "disabled."[87] There is no definition of "substantially limit" in the ADA.[88] An EEOC

---

include slight or short-term impairments, i.e., a broken arm. McMahon & Carlson, *supra* note 7, at 10.

> A person who has a broken leg is not 'substantially limited' but has what is normally a temporary condition; if the leg heals improperly, it may become a disability if it substantially limits the person's ability to walk. Old age is not a physical or mental condition; individuals who are elderly may have underlying physical or mental conditions which are disabilities.

Thayer, *supra* note 4, at 39.

82. 29 C.F.R. § 1630.2(h) (1992). "A person who has difficulty reading due to a visual impairment or dyslexia may have a disability; an individual who never learned to read does not have a physical or mental impairment." Thayer, *supra* note 4, at 39.

83. 42 U.S.C. § 12208. "For purposes of this Act, the term 'disabled' or 'disability' shall not apply to an individual solely because that individual is a transvestite." *Id.*

84. 42 U.S.C. § 12210. "For purposes of this Act, the term 'individual with a disability' does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use." *Id.* The question arises, however, concerning what the term "currently" means in this section of the ADA. According to the Congressional Record:

> [t]he provisions excluding an individual who engages in the illegal use of drugs from protection is intended to insure that employers may discharge or deny employment to persons who illegally use drugs on that basis without fear of being held for discrimination. The provision is not intended to be limited to persons who use drugs on the day of, or within a matter of days or weeks before, the employment action in question. Rather, the provision is intended to apply to a person whose illegal use of drugs occurred recently enough to justify a reasonable belief that a person's drug use is current.

136 CONG. REC. H4614 (daily ed. July 12, 1990) (statement of Rep. Bartlett).

85. 42 U.S.C. § 12211. "For purposes of the definition of 'disability' in section 3(2) . . . homosexuality and bisexuality are not impairments and as such are not disabilities under this Act." *Id.*

86. *Id.*

87. 42 U.S.C. § 12102. Major life activities include functions such as: walking, seeing, hearing, speaking, breathing, learning, working, sitting, standing, and caring for oneself. 29 C.F.R. § 1630.3(i) (1992).

88. *See* 42 U.S.C. § 12102.

regulation, however, defines the term as an inability to adequately perform a major life activity in comparison to the general population.[89] This definition involves the comparison of the individual's abilities to the abilities of an average person in the population, taking into account both the severity and the duration of the individual's condition.[90]

An individual does not have to be impaired, however, at the time the discriminatory practice occurs to be "disabled" under the ADA.[91] Under the second prong of the definition of "disability" adopted by the ADA, a person is considered an individual with a disability if he has a "record" of a qualifying impairment.[92] Within the meaning of the ADA, a person has a "record" of an impairment if: (1) he had a physical or mental impairment which substantially limited him in a major life activity, but no longer has that impairment; or (2) he was mistakenly classified as having such an impairment.[93]

The third prong of the definition of disability under the ADA allows a person who is regarded as having a substantially limiting impairment to qualify as disabled under Title I.[94] According to an EEOC Title I regulation,[95] a person satisfies this definition of "disability" in one of the following situations: (1) the individual has a physical or mental disorder that is not substantially limiting, but is treated by a covered entity as one that substantially limits the individual in some major life activity;[96] (2) the individual has a physical or mental disorder that is substantially limiting to major life activities due to the attitudes of others;[97] or (3) the individual has no disorder at all, but is

---

89. 29 C.F.R. § 1630.2(j)(i)-(ii) (1992). Substantially limits means, "unable to perform a major life activity that the average person in the general population can perform; or . . . [s]ignificantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to . . . the average person in the general population . . . ." *Id.*

90. Thayer, *supra* note 4, at 39. This definition comes from interpretation of ADA language and the EEOC regulation quoted *supra* note 89.

91. HUMAN RESOURCE ADVISORS, *supra* note 79, at II-4.

92. 42 U.S.C. § 12102(2)(B).

93. 29 C.F.R. § 1630.2(k) (1992). "*Has a record of such impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities." *Id*; *see also* HUMAN RESOURCE ADVISORS, *supra* note 79, at II-4.

94. 42 U.S.C § 12102(2)(A).

95. 29 C.F.R. § 1630.2(l) (1992).

96. *Id.* The appendix to § 1630 provides the following example:

> [S]uppose an employee has controlled high blood pressure that is not substantially limiting. If an employer reassigns the individual to less strenuous work because of unsubstantiated fears that the individual will suffer a heart attack if he or she continues to perform strenuous work, the employer would be regarding the individual as disabled.

Id. § 1630.2(l) app.

97. *Id.* § 1630.2(l)(2). The appendix to § 1630 provides the following example:

treated by the covered entity as having a physical or mental disorder that substantially limits a major life activity.[98]

2. What Makes a Person a "Qualified Individual With a Disability"?

A person is not automatically protected under the ADA because he is disabled. Rather, the individual must be a "qualified individual with a disability" to fall within the protection of the ADA.[99] In order to satisfy this requirement, the disabled individual must qualify for the position sought and otherwise meet the basic prerequisites for the position.[100] These prerequisites include factors such as education, work experience, skills, licenses, and certificates.[101] "The term 'qualified individual with a disability' means 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."[102] In order to understand the meaning of the term "qualified

---

[A]n individual may have a prominent facial scar or disfigurement, or may have a condition that periodically causes an involuntary jerk of the head but does not limit the individual's major life activities. If an employer discriminates against such an individual because of the negative reactions of customers, the employer would be regarding the individual as disabled and acting on the basis of that perceived disability.

Id. § 1630.2(l) app.

98. *Id.* § 1630.2(l). The appendix to § 1630 provides the following example:

[I]f an employer discharged an employee in response to a rumor that the employee is infected with Human Immunodeficiency Virus (HIV). Even though the rumor is totally unfounded and the individual has no impairment at all, the individual is considered an individual with a disability because the employer perceived of this individual as being disabled.

Id. § 1630.2(l) app.

99. 42 U.S.C. § 12112(a) (Supp. II 1990). Section 12112 states: "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, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." *Id.* (emphasis added). Courts have interpreted this term under the Rehabilitation Act of 1973. *See* Gilbert v. Frank, 949 F.2d 637, 642-44 (2d Cir. 1991) (due to a kidney disfunction, an applicant was unable to perform many of the functions of a postal job and therefore did not qualify as a "qualified individual with a disability"); Taylor v. United States Postal Serv., 946 F.2d 1214, 1216-18 (6th Cir. 1991) (due to a back condition the applicant was unable to perform heavy lifting and prolonged walking and standing, which were essential functions of the job and he was therefore not a "qualified individual with a disability" within the meaning of the act); Jasany v. United States Postal Serv., 755 F.2d 1244, 1248-52 (6th Cir. 1985) (due to an eye disease, an employee was no longer able to operate the machine he had been primarily hired to work on, therefore he was not a "qualified individual with a disability").

100. HUMAN RESOURCE ADVISORS, *supra* note 79, at III-1.

101. HUMAN RESOURCE ADVISORS, *supra* note 79, at III-1.

102. 42 U.S.C. § 12111(8). Section 12111 states:

"For purposes of this subchapter, consideration 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 applicants for the job, this description shall be considered evidence of the essential functions of the job."

individual with a disability," working definitions of "essential job function" and "reasonable accommodation" are necessary.

"A qualified individual with a disability is only protected if he can perform the essential functions of the job."[103] The term "essential job function" includes only fundamental job duties and excludes marginal responsibilities of the job.[104] The ADA has set forth the following standards for determining whether a job duty constitutes an "essential job function." The function is considered "essential" if: (1) the reason the job exists is to perform the function; (2) the number of employees able and available to perform the function is limited; or (3) the function is highly specialized.[105] "In identifying an essential function, an employer should focus on the purpose of the function and the result to be accomplished, rather than the manner in which the function is currently being performed."[106] If an essential job function contains physical restrictions, the employer must determine if there are reasonable alternative methods available to perform that job function.[107] As long as an employer's standards are used and applied consistently to all applicants and employees, the ADA does not second-guess an employer's established performance standards or require an employer to lower these standards.[108]

According to Senator Harkin, however, "[a] job description that is not tailored to the actual functions of the job . . . will ultimately have little weight." 136 CONG. REC. S9684 (daily ed. July 13, 1990). Also, a person is not unqualified simply because he cannot perform marginal job functions. Thayer, *supra* note 4, at 39. The following provides an example of impermissible discrimination based on a disabled individuals inability to perform a marginal job function:

> [An] employer . . . interviews two candidates for a job, one of whom is blind. Both are equally qualified. The employer decides that, while it is not essential to the job, it would be convenient to have an employee who has a driver's license to run occasional errands by car and hires the sighted individual with a driver's license.

Robert F. Mace & Rex L. Sessions, *Employment Impact of ADA and EEOC Regulations*, N.Y. L.J., November 13, 1991, at 1, 5.

103. 136 CONG. REC. H4617 (daily ed. July 12, 1990) (statement of Rep. Bartlett).

104. HUMAN RESOURCE ADVISORS, *supra* note 79, at III-1.

105. 29 C.F.R. § 1630.2(n) (1992).

106. HUMAN RESOURCE ADVISORS, *supra* note 79, at V-2.

107. Susan M. Werner, *Ask a Risk Manager: Positive Thinking and the New Disabilities Law*, BUS. INS., April 13, 1992, at 46. For example:

> [a]n employee is required to routinely lift 50 pounds as part of a basic element of a job. This weight restriction may be too stringent for someone with back problems or other physical limitations. Because most individuals could safely handle up to 25 pounds, a "reasonable accommodation" would be to purchase items in 25-pound increments instead of 50-pound loads.

Id.

108. Thayer, *supra* note 4, at 39.

3. What Constitutes a "Reasonable Accommodation"?

"In general, an accommodation is 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 opportunities."[109] A "reasonable accommodation" may include one of the following actions: making physical changes in the workplace, such as removing curbs for wheelchair access or lowering tables; restructuring jobs by removing or transferring some duties; or transforming a position into a part-time job or otherwise modifying work hours.[110] The examples listed in the ADA itself were included to clarify the types of accommodations which are considered reasonable and, therefore, should be used as guidelines for employers when assessing needed accommodations.[111] "This listing is not intended to be exhaustive of accommodation possibilities."[112]

An EEOC Title I regulation provides a three-part explanation of reasonable accommodation.[113] First, a "reasonable accommodation" is any adjustment to the job application process that would allow a qualified disabled individual to be considered for the job.[114] Second, a "reasonable accommodation" is any adjustment to the work environment or method of job performance that would enable a qualified disabled individual to perform the essential job functions.[115] Finally, a "reasonable accommodation" includes any adjustment to the work situation that would provide a disabled employee with equal benefits and privileges of employment when compared to benefits and privileges enjoyed by similarly situated employees without disabilities.[116]

The ADA merely requires employers to make a reasonable accommodation for the known disability of an employee.[117] "Generally, it is

---

109. Thayer, *supra* note 4, at 39.

110. 42 U.S.C. § 12111 (Supp. II 1990).

The term "reasonable accommodation" may include —

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

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

Id.; *see also* Johnson, *supra* note 56, at D4.

111. 29 C.F.R. § 1630.2(o) app. (1992). The accommodations listed in Title I of the ADA are common types of accommodations which employers may have to provide. *Id.*

112. *Id.*

113. 29 C.F.R. § 1630.2(o) (1992).

114. *Id.*

115. *Id.*

116. *Id.*

117. 42 U.S.C. § 12112 (Supp. II 1990); For relevant text of this section, see *supra* note 41.

the responsibility of the applicant or employee with the disability to inform the employer of the need for an accommodation."[118] Thus, an employer has no duty to investigate whether an employee, or prospective employee, requires an accommodation to perform his job.[119]

Once an employee informs his employer that an accommodation is necessary, the employer must decide what specific accommodation he will provide. Consultation between the employer and the disabled individual should result in an accurate assessment of what accommodation is necessary.[120] In cases where the appropriate accommodation is not obvious, the EEOC has set forth guidelines for deciding on an appropriate accommodation.[121] The EEOC regulation states that an employer should first perform a job analysis to determine the purpose and essential functions of the job.[122] Second, the employer must identify which job tasks or other aspects of the work environment will limit the disabled individual's effectiveness regarding his job performance, as well as how these limitations can be overcome.[123] Third, the employer must identify possible effective accommodations.[124] Finally, the employer must choose and implement the most appropriate accommodation considering both the employee's and employer's needs.[125] In deter-

---

118. HUMAN RESOURCE ADVISORS, *supra* note 79, at IV-2.

119. 29 C.F.R. § 1630.9 app. (1992). "[A]n employer would not be expected to accommodate disabilities of which it is unaware." *Id.*

120. HUMAN RESOURCE ADVISORS, *supra* note 79, at IV-3.

121. 29 C.F.R. § 1630.9 app. (1992).

> Once a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability.

Id.

122. *Id.*

> This process requires the individual assessment of both the particular job at issue, and the specific physical or mental limitations of the particular individual in need of reasonable accommodation. With regard to assessment of the job, 'individual assessment' means analyzing the actual job duties and determining the true purpose or object of the job. Such an assessment is necessary to ascertain which job functions are the essential functions that an accommodation must enable an individual with a disability to perform.

Id. See *supra* notes 102-08 and accompanying text for explanation of "essential job functions."

123. 29 C.F.R. § 1630.9 app. (1992). "This assessment will make it possible to ascertain the precise barrier to the employment opportunity which, in turn, will make it possible to determine the accommodation(s) that could alleviate or remove the barrier." *Id.*

124. *Id.* "[T]he employer should assess the effectiveness of each potential accommodation in assisting the individual in need of the accommodation in the performance of the essential functions of the position." *Id.*

125. *Id.* "[T]he preference of the individual with a disability should be given primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation, or the accommodation that is easier for it to provide." *Id.*

mining the effectiveness of each accommodation, the employer should consider that "[t]he accommodation must provide an opportunity for a person with a disability to achieve the same level of performance or to enjoy benefits or privileges equal to those of an average similarly-situated nondisabled person."[126]

4. What Happens if Providing Accommodation Causes "Undue Hardship"?

An employer is not required to provide an employee/applicant with whatever accommodation the employee/applicant desires. Rather, the employer may select any accommodation that is appropriate from a cost and convenience perspective, provided that the accommodation chosen effectively eliminates the barrier for the disabled individual.[127] Under the ADA, an employer is not required to provide an accommodation if providing the accommodation would cause the business to suffer an undue hardship.[128] According to the ADA, the term "undue hardship" means an action requiring significant difficulty or expense.[129] This difficulty or expense is determined by examining the following factors: (1) the nature and cost of the accommodation; (2) the overall financial resources of the facility; (3) the number of persons employed at the facility; (4) the effect of the accommodation on expenses and resources; (5) other impacts of the accommodation on the operation of the facility; (6) the overall financial resources and size of the covered entity; (7) the number, type and location of the employer's facilities; (8) the composition, structure, and functions of the workforce of the entity; and (9) the geographic, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.[130] "By including the 'site-specific' factors in the determination of undue hardship, it is assured that the situation at the local facility will be considered when

126. HUMAN RESOURCE ADVISORS, *supra* note 79, at IV-4. "[T]he accommodation does not have to ensure equal results or provide exactly the same benefits or privileges." *Id.*

127. *Id.*

128. 42 U.S.C. § 12112(b)(5)(A) (Supp. II 1990). A covered entity must provide a reasonable accommodation to an applicant/employee's known disability, "unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity . . . ." *Id*; *see also* 136 CONG. REC. E1913 (daily ed. June 13, 1990) (statement of Hon. Steny H. Hoyer of Maryland).

> Under the ADA, as under section 504, an accommodation need not be provided if it would impose an "undue hardship" on the employer. There is no hard and fast rule about what is or is not an "undue hardship." To the contrary, the strength of section 504, and the strength of the ADA, is that "undue hardship" is a flexible standard, which is designed to take into account a range of different factors.

Id. at E1915.

129. 42 U.S.C. § 12111(10)(A).

130. *Id.* § 12111(10)(B).

determining what is an undue hardship to the covered entity."[131] The financial aspect of "undue hardship" must be based on net cost to the employer.[132] The net cost is calculated after taking into account the applicable tax provisions, employee contributions, and contributions from all other sources.[133] Since this cost will often net to a very low figure, possibly even zero,[134] it will be difficult for an employer to justify refusing to make a reasonable accommodation based on "undue hardship."[135]

Federal courts have interpreted the meanings of "reasonable accommodation" and "undue hardship" under the Rehabilitation Act of 1973.[136] These decisions provide guidance to employers and courts when deciding potential ADA violations.[137]

IV. ANALYSIS

The ADA has been called "the greatest expansion of civil rights protection since the 1964 Civil Rights Act."[138] Although the ADA ex-

---

131. 136 CONG. REC. E1915 (daily ed. June 13, 1990) (statement of Hon. Steny H. Hoyer of Maryland). These site-specific factors will allow for a different result at a "mom and pop" grocery versus a fortune five-hundred company. Johnson, *supra* note 56, at D4. The large company will be expected to make more significant and costly accommodations than the small company. *Id.*

132. McMahon & Carlson, *supra* note 7, at 10.

133. McMahon & Carlson, *supra* note 7, at 10.

134. *See infra* note 141.

135. McMahon & Carlson, *supra* note 7, at 10. For a complete discussion of the costs associated with implementing and complying with the ADA, see *infra* text accompanying notes 139-49.

136. *See* Southeastern Community College v. Davis, 442 U.S. 397 (1979) (request for school to change curriculum for hearing impaired student found to be an unreasonable accommodation); *see also* Guice-Mills v. Derwinski, 967 F.2d 794 (2d Cir. 1992) (head nurse assigned to position as staff nurse at no decrease in pay, grade, or benefits deemed a reasonable accommodation); Severino v. North Fort Meyers Fire Control Dist., 935 F.2d 1179 (11th Cir. 1991) (reassignment of fireman with AIDS to light duty to reduce risk to his and others' safety considered a reasonable accommodation).

In *Davis*, the Supreme Court decided that the accommodations that Davis wanted the school to make were not reasonable. 442 U.S. at 414. Davis was a hearing impaired student who wanted to attend Southeastern's nursing program. *Id.* at 400. The North Carolina Board of Nursing found that it would be unsafe for Davis to practice nursing, due to her hearing impairment. *Id.* at 401. Thus, the school rejected her application for the nursing program. *See id.* at 402. Davis asked that the school provide her with individual supervision by a faculty member anytime that she was required to attend patients, and that she not be required to take certain courses in the nursing program. *Id.* at 407. The Court found that Davis "could not participate in Southeastern's nursing program unless the [school's] standards were substantially lowered," and that the Act did not require the school "to lower or to effect substantial modifications of standards to accommodate a [disabled] person." *Id.* at 413. Obviously, the Court felt that Davis' proposed accommodations would create an "undue hardship" for the school, by lowering its standards and thus its reputation.

137. HUMAN RESOURCE ADVISORS, *supra* note 79, at I-15.

138. 136 CONG. REC. S9688 (daily ed. July 13, 1990) (statement of Sen. Durenberger).

pands the civil rights of disabled individuals, it creates two potential problems. First, employers are concerned about the cost of implementing and complying with the requirements of the ADA. Parallel to the general employer fear of cost implementation, the foodhandling industry fears overwhelming costs in their industry due to the "foodhandling" provision of Title I of the ADA. Second, there is concern that the ADA will cause an influx of disability discrimination cases into the court system.

A. Employers' Cost of Compliance With Title I of the ADA

Employers fear that supplying reasonable accommodations for disabled individuals under the ADA will result in excessive costs. This concern, however, is unfounded for most employers.[139] According to the Job Accommodations Network (JAN), a service of the President's Committee on Employment of People with Disabilities, thirty-one percent of accommodations reported to JAN cost nothing, nineteen percent cost between $0.00 and $50.00, nineteen percent cost between $50.00 and $500.00, and nineteen percent cost between $500.00 and $1,000.00.[140] Thus, eighty-eight percent of all necessary accommodations cost less than $1,000.00.[141] While the cost of complying with the ADA depends on the circumstances of the employer, based on experience under similar state laws, "the costs of complying will be manageable."[142]

It will cost employers approximately $16 million per year to make the necessary "reasonable accommodations."[143] It is also estimated that it will cost the EEOC $25 million to enforce the ADA.[144] These accommodations and enforcement procedures, however, will allow for the recognition of "productivity gains of more than $164 million and reduced

---

139. *See* HUMAN RESOURCE ADVISORS, *supra* note 79, at VIII; see also *infra* notes 140-41 and accompanying text for breakdown on the cost of providing accommodations.

140. Johnson, *supra* note 46, at 8.

141. Johnson, *supra* note 46, at 8. The ten year average cost to federal contractors for making a necessary accommodation was $261. *Accommodating Disabled Workers*, N.Y. TIMES, Nov. 17, 1991, at 12CN6. With the availability of federal tax credits, the final cost to an employer may be close to zero. *Id.*

142. Johnson, *supra* note 56, at D4 (statement of Bruce May, a Newport Beach, California lawyer who represents employers). Because of differing circumstances, "you might end up with a very different obligation if you are talking about a mom-and-pop grocery store versus a Fortune 500 computer maker." *Id.* "The latter might find that it has a much more significant or much more costly obligation when it comes to reasonable accommodation . . . ." *Id.*; see also *supra* notes 140-41 and accompanying text for overall EEOC cost estimates, based on prior experience under state law and the Rehabilitation Act of 1973.

143. Evelyn Gilbert, *Clarity Seen Needed in Disability Act*, NATIONAL UNDERWRITER, PROPERTY & CASUALTY/RISK & BENEFIT MANAGEMENT EDITION, April 15, 1991, at 41. This gross figure is estimated by the EEOC. *Id.*

144. Maier, *supra* note 8, at D1. This estimate was made by the EEOC. *Id.*

government support payments and higher tax revenue of $222 million a year . . . ."[145]

Employers are concerned that the ADA will increase not only visible costs due to supplying accommodations, but also hidden costs such as litigation expenses[146] and rates for workers' compensation insurance.[147] Past experiences of businesses who already employ disabled individuals show, however, the opposite result.[148] Companies have experienced savings in workers' compensation, decreases in lost-time claims, and increases in productivity, morale, and net income.[149]

The ADA provision which possesses the greatest potential for creating problems for employers is the "foodhandling" provision.[150] This provision has great potential for causing economic problems for employers in the food business. As stated in a letter from the National Restaurant Association:

> [The provision] does absolutely nothing to protect a restaurateur who is faced with the tragic circumstance of a chef, waiter or other foodhandler

---

145. Gilbert, *supra* note 143, at 41. These figures were determined by the EEOC. *Id.* Two out of every three disabled individuals are not working, and two out of every three who are not working would like to work, but cannot find a job. Lawlor, *supra* note 40, at 1A. Six out of every ten disabled individuals who do not work receive government benefits or insurance payments. Harrigan, *supra* note 6, at 68.

The state of New York recently conducted a study which found that, if the ADA allowed 25,000 of its disabled residents to secure employment, the state would save $100 million due to foregone Social Security payments and foregone Medicaid payments. If additional income taxes paid by the newly employed individuals are taken into consideration, the savings are even greater. *Id.*

Concluding from the above data, implementation of ADA Title I will result in a net financial benefit to society in general. Specifically, implementation of ADA Title I will provide a net financial benefit to the government in the form of increased revenues from income taxes and decreased expenditures for Social Security and Medicaid.

146. Some employers fear that every disabled individual who applies for a position and is not hired will bring a lawsuit against the employer. Maier, *supra* note 8, at D1. This "cost" fear corresponds with the fear of increased litigation due to implementation of ADA Title I which is discussed *infra* notes 156-66 and accompanying text.

147. Maier, *supra* note 8, at D1 (employer concern expressed by labor law attorney Paul W. Crane, Jr.) (sources used for Maier article were ADA; EEOC; Mitchell LaPlante, Disability Statistics Program, University of California, San Francisco; Paul W. Crane, Jr., labor law expert, interview; and Richard Lord, hospital benefits manager, interview).

> Richard Lord, benefits manager of Community Hospital of Central California, said his experience has led him to the opposite conclusions. Two years ago, Lord said his company adopted an innovative program in an attempt to stem workers compensation costs by lightening injured employees' work loads instead of placing them on long-term disability. . . . The result of the program, Lord said, has been a $900,000 savings in workers compensation and a 50% decrease in lost-time claims. [Lord said], It has been good for us in terms of productivity, morale and the bottom line.

Id.

148. Maier, *supra* note 8, at D1; *see also supra* note 147.

149. Maier, *supra* note 8, at D1; *see also supra* note 147.

150. 42 U.S.C.A. § 12113(d) (Supp. 1990). *See supra* note 70.

> who has a serious infection or communicable disease such as AIDS. The . . . language will not permit the employer to transfer the employee to a non-foodhandling position without exposing him to civil rights litigation. It will ultimately result in business failures and loss of jobs because restaurant employers' hands will be tied in their ability to deal reasonably with workers afflicted with certain communicable diseases.[151]

"No restaurant [will] stay in business for very long if the public ha[s] reason to believe that the food it serve[s] [is] being handled by someone with . . . a [communicable or infectious] disease."[152] The ADA places restaurateurs in a perplexing position. If a foodhandling employee has an infectious or communicable disease that is not specifically named on the Human Services list,[153] the employer may not remove such employee from his foodhandling position.[154] If the employer does not remove the infected employee from foodhandling, however, he is likely to experience a decline in business when word of the situation reaches the public.

While it appears that the cost of complying with the ADA is not high for most employers, the cost of not complying may be overwhelm-

---

151. 136 CONG. REC. S9536 (daily ed. July 11, 1990).

152. 136 CONG. REC. S9544 (daily ed. July 11, 1990) (statement of Senator Coats). For example:

> The Wreck Room, a popular Milwaukee homosexual bar, nearly failed after a manager and another employee died of AIDS. The owner reported, "[w]e went from being one of the most popular bars in Milwaukee to close to zero. There were times when I wasn't sure we were going to make it."

136 CONG. REC. S9543 (daily ed. July 11, 1990) (statement of Senator Helms).

> A Hardee's unit outside Montgomery was forced to close after a rumor that its manager had AIDS. The rumor was started by a disgruntled employee who was let go. Within 2 months, sales dropped 60 percent. The Hardee's unit, which formerly had been a very popular restaurant, was closed down only six months after the rumor was started.

Id. "A popular Chili's restaurant in Amarillo terminated all its employees and closed for 2 months after the public became aware that a foodhandling employee had AIDS. Two years later that restaurant is still not performing as well as before the incident." *Id.* "Sales dropped twenty-five percent at a unit of a national fast food franchise when it became known in a small community that the manager had tested positive for HIV. Sales recovered 4 months later after the manager voluntarily quit her job." *Id.* at S9543-44.

> As a result of false AIDS rumors, sales at a prominent restaurant in a small Kentucky county dropped 45 percent from the prior year. It was 9 months before customer sales returned to normal levels, and this only occurred after local health officials made public statements that there were no cases of AIDS in the county.

Id. at S9544. As shown by these examples, it appears that most people do not want a person who is HIV positive handling or preparing their food. Given the public's lack of knowledge with respect to the transmission of HIV, there is a great deal of fear and concern in this situation.

153. 42 U.S.C. § 12113. This list of infectious and communicable diseases that can be transmitted through the handling of food is published annually by the Secretary of Health and Human Services. *Id.* § 12113(d).

154. *Id.* § 12113(b). This is true, unless the employee "pose[s] a direct threat to the health or safety of other individuals in the workplace." *Id.*

ing. The remedies provided in the Civil Rights Act of 1991, which is incorporated into the ADA enforcement and remedies section, allows for compensatory and punitive damages in an amount as high as $300,000 for a disability discrimination action.[155]

B. Potential Increase of Discrimination Litigation Under Title I of the ADA

Employers fear that the Americans with Disabilities Act will cause excessive litigation due to "the bill's vague and elastic definition of disability" and other terms.[156] Employers who are concerned with the broad nature of the definitions of terms in the ADA must understand that the vagueness is intentional.[157] "The ADA intends that personnel actions involving individuals with disabilities be managed on a fact-spe-

---

155. McMahon & Carlson, *supra* note 7, at 10.

> The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party (A) in the case of a respondent who has more than fourteen and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000; (B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding year, $100,000; (C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding year, $200,000; and (D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

42 U.S.C § 1981a.

Thus, the larger the employer involved in the Title I suit, the larger the award of damages if the trier of fact determines that the employer engaged in an illegal discriminatory practice.

156. 136 CONG. REC. S9694 (daily ed. July 13, 1990) (statement of Sen. Armstrong). For example:

> The bill says that people who have abused drugs are protected by the act, but that people who currently abuse drugs are not. That is quite a subtle distinction, and one that is difficult to make in the real world. It is troubling that neither the bill itself nor the conference report does very much to resolve this ambiguity. The conference report simply states that the phrase, "currently engaging in the illegal use of drugs" is not "intended to be limited to persons who use drugs on the day of, or within a matter of days or weeks before, the employment action in question. Rather, the provision is intended to apply to a person whose illegal use of drugs occurred recently enough to justify a reasonable belief that a person's drug use is current."

Id.

157. McMahon & Carlson, *supra* note 7, at 10. Congress intentionally left certain terms vague in the ADA. Some lawsuits are therefore inevitable. Kilborn, *supra* note 8, at 1-1. *But see infra* notes 159-62 and accompanying text.

This vagueness was designed to give employers leeway in making their employment decisions. Maier, *supra* note 8, at D1. Employers are going to have to exercise judgment; at times this will be in consultation with their lawyers. *Id.*

The terms are defined vaguely in the statute, though there are many cases on record which have previously clarified these terms. *See infra* note 162.

cific, case-by-case, individual basis in relation to the specific employment requirements in question."[158]

While discrimination litigation will necessarily increase with the implementation of the ADA, it is doubtful that litigation will present any long-term problems. As stated by Representative Bartlett, "[l]itigation will not be a problem with this legislation. . . . [The "vague" terms] are defined, and the definitions in every single case are the same way they have been defined since 1973 [in the Rehabilitation Act], . . . with the only exception of ways in which we define the terms even more closely."[159] In fact, "the Rehabilitation Act of 1973 was utilized in large part in the drafting of the ADA. The numerous court decisions interpreting the Rehabilitation Act were also utilized to shape the requirements of the ADA."[160] The ADA uses the same definition for the term "disability," as well as most other terms, that are used by the Rehabilitation Act of 1973.[161] Therefore, the court decisions interpreting definitions in the Rehabilitation Act of 1973 will act as persuasive authority in ADA Title I cases calling for a decision based on the meaning of these terms.[162] Accordingly, federal courts have already clarified the "vague" terms in question, such as "disability," "qualified individual with a disability," "reasonable accommodation," and others, in cases interpreting the Rehabilitation Act of 1973.

During the first year of enforcement of the ADA, the EEOC expects an additional twelve to fifteen thousand discrimination charges to be filed.[163] The EEOC expects, however, that many of these cases will be rejected because the plaintiff/employee will be categorized as a non-

158. McMahon & Carlson, *supra* note 7, at 10.

159. 136 CONG. REC. H4617 (daily ed. July 12, 1990) (statement of Rep. Bartlett).

160. HUMAN RESOURCE ADVISORS, *supra* note 79, at I-15.

161. HUMAN RESOURCE ADVISORS, *supra* note 79, at I-16.

162. *See* Southeastern Community College v. Davis, 442 U.S. 397 (1979) (Court's interpretation of "qualified individual with a handicap/disability," "reasonable accommodation," and "undue hardship"); *see also* Guice-Mills v. Derwinski, 967 F.2d 794 (2d Cir. 1992) (court's interpretation of "handicapped/disabled," "qualified individual with a handicap/disability," and "reasonable accommodation"); Gilbert v. Frank, 949 F.2d 637, (2d Cir. 1991) (court's interpretation of "handicap/disability," "qualified individual with a handicap/disability," "reasonable accommodation," and "essential job function"); Taylor v. United States Postal Serv., 946 F.2d 1214 (6th Cir. 1991) (court's interpretation of "handicap/disability"); Pandazides v. Virginia Bd. of Educ., 946 F.2d 345 (4th Cir. 1991) (court's interpretation of "handicapped/disabled" and "qualified individual with a handicap/disability"); Jasany v. United States Postal Serv., 755 F.2d 1244 (6th Cir. 1985) (court's interpretation of "handicapped/disabled," "major life activity," and "substantially limiting"); Barth v. Gelb, 761 F. Supp. 830 (D.D.C. 1991) (court's interpretation of "qualified individual with a handicap/disability," "reasonable accommodation" and "undue burden/hardship"); E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088 (D. Haw. 1980) (court's interpretation of "handicapped/disabled"), *vacated*, 26 Fair Empl. Prac. Cas. (BNA) 1183 (D. Haw. 1981).

163. Lawlor, *supra* note 40, at 1A.

qualified disabled individual.[164] The EEOC also believes that many of the cases will be settled through negotiation and/or arbitration.[165] Thus, while discrimination litigation will increase initially, it is unlikely that this increase will be significant over time.[166]

V. CONCLUSION

The Americans with Disabilities Act is breakthrough legislation for the millions of Americans who are disabled. The ADA legally places these individuals on an equal footing with nondisabled individuals. Nowhere will the impact of the ADA be felt stronger than in the area of employment. Title I of the ADA opens many doors for the disabled in their search for employment, and their ultimate goal of self-sufficiency.

Title I of the ADA prohibits discrimination in employment practices based on an individual's disability. Beyond this prohibition, the ADA requires that employers provide "reasonable accommodations" to an individual's disability, if these accommodations will enable the disabled individual to perform the job. These provisions provide disabled individuals with access to numerous career opportunities which have in the past been reserved only for non-disabled individuals.

The overall cost to employers of complying with the ADA will be insignificant in comparison to the benefits they will receive from employing qualified disabled individuals. Discrimination litigation will initially increase, while people test various provisions of the ADA. Over time, however, passage of the ADA will not significantly increase discrimination litigation. The benefits that will flow from the ADA will greatly outweigh any costs of compliance or litigation annoyances that the ADA may trigger.

Tracy L. Hart

---

164. Kilborn, *supra* note 8, at 1-1. Non-qualified disabled individual means that, although the individual may be disabled, he does not possess the needed skills for the position in question. See *supra* notes 99-108 and accompanying text for definition of "qualified individual with a disability."

165. Kilborn, *supra* note 8, at 1-1.

166. *See* 136 CONG. REC. H4617 (daily ed. July 12, 1990) (statement of Rep. Bartlett) ("[l]itigation will not be a problem with this legislation").