

## **AMERICANS WITH DISABILITIES ACT: EMPLOYER OBLIGATIONS\***

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### **ABSTRACT**

This article describes coverage, employer definition, impairment and job functions. It also explains how firms may avoid discrimination and provide reasonable accommodations to employees who have disabilities.

The Americans With Disabilities Act of 1990 (ADA or act) provides comprehensive civil rights protections to individuals with various disabilities in the areas of employment, public accommodations, state and local government services, and telecommunications. In passing the act, Congress noted that some 43,000,000 Americans (1 in every 7) have one or more physical or mental disabilities, and that as the population grows older, this figure will increase. Recognizing that "individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness . . .," Congress adopted the ADA [1].

The act was adopted to address what Congress perceived to be pervasive discrimination in areas of employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and public services. To eliminate discrimination resulting from prejudice against disabled individuals and to avoid the additional discriminatory effects of architectural, transportation, and communication barriers, Congress

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adopted the most comprehensive antidiscrimination legislation ever to affect the rights of the disabled.

The act is intended to provide a clear legislative mandate promoting the elimination of discrimination against individuals with disabilities, integrating disabled individuals into society and the work force, and shifting the costs of supporting individuals with disabilities from the public to the private sector. To that end, the ADA establishes enforceable standards for redress and ensures federal government action to enforce such standards.

Title I of the act, which is the focus of this article, deals with employment discrimination. Title I provides that no employer or other entity governed by the act may discriminate against a qualified individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the job. The ADA prohibits discrimination in all aspects of the employment process from application to discharge, including hiring, advancement, compensation, training, and all other terms, conditions and privileges of employment.

## **COVERAGE UNDER THE ADA**

### **Effective Dates**

Although enacted July 26, 1990, the employment provisions of the ADA are being phased in as follows: For employers of more than twenty-five employees, the act became effective on July 26, 1992. For employers of fifteen to twenty-four employees, the act has no effect until July 26, 1994. This phase-in period was intended to allow the Equal Employment Opportunity Commission (EEOC) and the U.S. Department of Justice time to adopt regulations for implementation and to allow employers time to comply with such regulations.

### **Who Is An Employer Under the Act?**

For purposes of the act employers include those individuals engaged in an industry affecting commerce and their agents, as well as employment agencies, labor unions, and labor-management committees [2]. The requirement that the employer's business affect commerce is open to broad interpretation, and is generally considered to include those employers covered by Title VII [3], including any governmental industry, business, or activity [4] and governments, governmental activities, and political subdivisions [5].

"Employers" exclude the United States, corporations wholly owned by the government of the United States, Indian tribes, and bona fide private membership clubs [6].

## Who is Protected Under the Act?

The ADA prohibits discrimination against all “qualified individuals with disabilities” [7]. To facilitate an understanding of ADA coverage, it is first necessary to understand the ADA’s definition of an “individual with a disability,” and then determine whether the individual meets the act’s definition of a “qualified individual with a disability.”

### *Individual with a Disability*

The ADA adopts a three-pronged definition of the term “disability.” Under the ADA, an individual is “disabled” if such individual:

- has a physical or mental impairment that substantially limits a major life activity;
- has a record of such impairment; or
- is perceived as having such impairment [8].

*What Constitutes an Impairment?* — To obtain a clearer understanding of the term “disability,” it is necessary to analyze the phrase, “physical or mental impairment.” An “impairment,” as defined by the EEOC’s regulations, is any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculo-skeletal; sensory; respiratory (including speech); cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; or endocrine. Moreover, the term “impairment” encompasses many mental and psychological disorders [9]. Such disorders include: mental retardation; organic brain syndromes; emotional or mental illness; and specific learning disabilities [10].

In addition, the Department of Justice Regulations enumerate several specific impairments that generally lead to ADA protection. These include: cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, and diabetes. However, the definition of whether an individual is disabled “is not necessarily based on the name or diagnosis of the [individual’s] impairment . . .” [11]. Rather, the determination of whether an individual has a disability is premised on “the effect of the impairment on the life of the individual” [11].

Thus, an impairment that constitutes a disability for one individual may not be a disability for another. That determination depends on “the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling, or any number of other factors” [11]. For example, a person diagnosed with heart disease may be able to perform his/her job and not be limited in any major life activities. Accordingly, under the first prong of the ADA definition of “disability,” such an individual would not be considered disabled.

*Impairments and Characteristics that Do Not Constitute Disabilities* — The term “disability” is not all-encompassing. The ADA provides that the following

sexual behavior disorders are excluded from the protections of the act: transvestitism [12], transsexualism, pedophilia, exhibitionism, voyeurism, and gender identity disorders that are not the result of physical impairments. In addition, the following psychological disorders are not considered disabilities: kleptomania, pyromania, and compulsive gambling [13].

Physiological conditions that are not the result of a disorder and simple physical characteristics do not fall within the ADA's definition of "disability." Accordingly, persons who are pregnant, left-handed, or who have weight problems are not accorded the protections of the act [14]. Nor does the definition cover environmental, cultural, or economic disadvantages such as having a prison record or being indigent [14].

### *Specific Cases*

**Drug Addiction.** Despite its arguably voluntary nature, drug addiction is protected under the ADA if the individual meets certain criteria.

An individual is accorded ADA protections if such individual:

- has been rehabilitated;
- is participating in a supervised rehabilitation program *and* is not currently using drugs; or
- is erroneously regarded as an illegal drug user [15].

Individuals *currently* engaging in the illegal use of drugs are specifically exempted from protection under the ADA [16]. Thus, where an employer determines that a job applicant or employee currently engages in illegal drug use, the employer may refuse to hire the applicant or take action against the employee based on this determination, regardless of the individual's job qualifications and without regard to the ADA.

While the ADA does not specify what constitutes "current" illegal use of drugs, the EEOC's regulations suggest that the definition should apply "to the illegal use of drugs that has occurred recently enough to indicate that the individual is actively engaged in such conduct" [17]. An individual is *not* protected by the ADA merely by participating in a drug rehabilitation program. Such an individual must not be currently using drugs.

**Alcoholism.** While alcoholics are considered "individuals with disabilities" under the ADA [18], the act provides only limited protection from discrimination for such individuals. An employer may discipline, discharge or refuse to hire an alcoholic where such individual's alcohol use impairs job performance to the extent that such individual is not qualified to perform the essential functions of the job. Moreover, employers may require that employees who use alcohol must meet the same standards of performance and conduct as are required of all other employees.

**Employer Protections.** The ADA affords employers certain protections with regard to drug addicted and alcoholic employees: 1) Employers may hold reformed drug addicts and alcoholics to the same work performance standards as other employees, “even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee” [19]. 2) Employers may prohibit use of drugs or alcohol in the workplace or during work hours [20]. 3) Any employee who violates this rule may be subject to discipline or termination. 4) Employers may require employees to abide by the requirements established under the Drug Free Workplace Act of 1988 [21] and may test potential job applicants and employees for drug use [22]. 5) An employer is always free to seek reasonable assurances from employees that they are not illegally using drugs or drinking during work hours.

**AIDS.** Both the ADA and the EEOC’s regulations provide that an individual with HIV infection or AIDS is considered disabled under the ADA. The Justice Department maintains that AIDS and HIV-infected individuals are covered under the first prong of the disability test as having a physical impairment that substantially limits a major life activity. Although an infected individual may not exhibit physical impairment, at a minimum, such individual is substantially limited in the major life activities of procreation and intimate sexual relations. Moreover, an HIV-infected individual may also be covered under the third prong of the disability test. That is, if the individual is regarded as disabled due to HIV or AIDS, he/she will be protected against discrimination under the ADA. Finally, an individual believed to have AIDS by virtue of his association with AIDS inflicted individuals may also be protected by the act.

**Major Life Activities** — To require ADA protection under the first prong of the disability test, impairment must *substantially limit one or more major life activities*. Such activities are those the average person can perform with little or no difficulty. Examples of major life activities include: walking, breathing, speaking, seeing, hearing, working, learning, performing manual tasks, sitting, standing, lifting, reading, and caring for oneself.

**Substantial Limitation** — To elicit ADA protection, an impairment must *substantially limit one or more major life activities*. A major life activity is substantially limited where an individual is unable to perform or is significantly limited in performing an activity. The EEOC’s regulations enumerate three considerations in determining whether an individual’s impairment substantially limits a major life activity:

- its nature and severity;
- how long is its anticipated duration; and
- its anticipated impact.

It is necessary to consider these factors since it is the *effect* of an impairment rather than the *name* of an impairment that determines whether an individual is protected under the ADA.

For example, although multiple sclerosis often significantly limits major life activities such as walking and performing menial tasks, an individual who has only a mild case of multiple sclerosis, which only slightly affects major life activities, may not be an individual with a disability under the first prong of the test.

**Temporary Impairment.** Duration alone, does not determine whether an individual is disabled under the ADA. The fundamental inquiry is whether an impairment substantially limits one or more major life activities. Accordingly, one must analyze the nature, impact, and duration of the impairment. Generally, temporary, nonchronic impairments are not considered disabilities under the ADA.

For example, broken bones, appendicitis, and influenza are generally not considered disabilities. However, if a broken arm healed improperly and resulted in a permanent impairment or disfigurement, which significantly impaired manual activity or other major life activities, the individual would be considered to have a disability.

### *Qualified Individuals*

Qualified individuals are those who, with or without reasonable accommodation, can perform the *essential* functions of the employment position that the individual holds or seeks. The EEOC's ADA regulations define a qualified individual with a disability as one "who satisfies the requisite skill, experience and education and other job-related requirements of the employment position such individual holds or desires . . ." [23].

**"Essential" Job Functions** — The essential job function requirement was adopted by the ADA to permit employers to require that every employee be qualified to perform the job, while simultaneously ensuring that disabled individuals are not denied employment merely because they cannot perform peripheral functions of the position [24].

An employer charged with discriminatorily denying a disabled individual employment may defeat such claim by demonstrating that the disabled individual was unable to perform the "essential" functions of the employment. Essential functions are those "intrinsic" to the position rather than "marginal or peripheral" [25].

To determine whether a job duty constitutes an essential function, it is first necessary to consider whether employees in the position are actually required to perform the function [23]. If it is determined that the position does in fact require the function to be performed, the next consideration in determining essentiality is "whether removing the function would fundamentally alter the position" [25]. For instance, a job description for a secretary may state that dictation is a function of

the employment. However, if the employer never or seldom requires secretaries to take dictation, dictation is not an essential job function.

The EEOC's regulations specify three reasons why a function could be considered essential:

- The position was created to perform the particular function;
- There are a limited number of employees to whom the job function can be distributed; and
- The function is highly specialized and the position's incumbent was hired specifically to perform the function [25].

The EEOC's regulations further provide that, to determine whether a particular function is essential, the following evidence may be considered:

- The amount of time the employee would spend performing the particular job function;
- The consequences of not having the employee perform the job function;
- The work experience of past incumbents in the job;
- The current work experience of those holding similar jobs; and
- The terms of a collective bargaining agreement [25].

In addition, the employer's interpretation of the essential functions of a particular job will be considered in determining its actual essential functions. Moreover, if such job functions are part of a written description prepared before the position is advertised, the description shall be considered evidence of the essential job functions [25, 26].

*Job Descriptions* — Since the EEOC will consider an employer's written description of a job prepared before the position was advertised, it is suggested that written descriptions be developed for each job. The essential functions must clearly be defined and justifiable. Employers should estimate the amount of time to be devoted to particular functions and the degree of expertise required.

## **AVOIDING DISCRIMINATION**

The ADA is designed to ensure that "persons with disabilities [are] not [ ] excluded from job opportunities unless they are actually unable to do the job" [27]. To that end, the act prohibits discrimination against qualified individuals with disabilities because of their disabilities, with regard to job application procedures, hiring, advancement or discharge of employees, employee compensation, job training and other terms, conditions, and privileges of employment [28]. The act further provides a list of employer actions that are impermissible as discriminatory, including:

- Limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of his/her disability . . .
- Participating in a contractual or other arrangement or relationship that has the effect of subjecting . . . an applicant or employee with a disability to discrimination . . .
- Utilizing standards, criteria, or methods of administration:
  - that have the effect of discrimination on the basis of disability; or
  - that perpetuate the discrimination of others who are subject to common administrative control;
- 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;
- 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
- 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;
- 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 unless the standard, test or other selection criteria is shown to be job-related . . . and is consistent with business necessity; and
- 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, . . . such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the [disability] . . . [29].

## **The Job Application Process**

### *Qualification Standards*

The ADA does not preclude an employer from establishing job-related qualification standards. Such standards may require that applicants for a particular job have minimum education skills and work experience, as well as physical and mental qualifications necessary for job performance and which ensure that the health and safety of the applicant and other employees will not be jeopardized.

The ADA prohibits employers from using job qualification standards that tend to screen out individuals on the basis of disability, unless the standards are job-related and consistent with business necessity [30]. Moreover, the employer may administer only employment tests that accurately reflect the prospective employee's job skills or aptitude, rather than reflect the individual's disability [31]. The employer must also consider whether the applicant could meet qualification standards if the employer provided reasonable accommodation.

*Direct Threat Standard* — Employers may require that job applicants not pose a “direct threat” to the health or safety of individuals in the workplace [32]. Such a standard must be applied equally to all job applicants. Moreover, where an employer fails to hire an individual with a disability based on a belief that the applicant poses a direct threat, the employer must identify the specific risk involved, and further demonstrate that: 1) the risk of substantial harm is *significant*; 2) the risk is actual and *current*, not merely speculative; 3) the assessment of risk was based on *objective evidence* regarding the applicant; and 4) the risk *cannot* be eliminated or reduced below the level of “direct threat” by reasonable accommodation.

#### *Preemployment Medical Inquiries and Examinations*

To protect disabled individuals against discrimination in hiring, the ADA prohibits most preemployment medical examinations and inquiries that identify a prospective employee's disabilities [33]. The act provides:

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 [33, 34].

This prohibition applies even where the applicant voluntarily informs the employer of a disability or where such individual is obviously disabled.

*Permissible Inquiries* — Despite the prohibition against certain preemployment medical inquiries, the ADA expressly permits employers to “make preemployment inquiries into the ability of an applicant to perform job-related functions and/or may ask an applicant to describe or demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions” [35, 36].

The following are examples of permissible employment inquiries.

- “The job requires a 9:00 a.m. to 5:00 p.m. workday. Can you work these hours?”
- Where driving is an essential job function: “Do you have a driver's license?”
- Where the applicant is blind: “How do you input and retrieve computer data?”

- Where the applicant has one leg: “Can you stand for four consecutive hours?”
- “These are the duties of the job. How would you perform them?”
- Where lifting is an essential job function: “Can you lift (*number*) pounds without difficulty?”

In addition, an employer may describe a job function and ask whether the applicant can perform the function with or without accommodation [35].

*Impermissible Inquiries* — The following are examples of inquiries that are impermissible because they focus on the applicant’s disability.

- Where an applicant has only one leg, do not ask “what happened to you?”
- Do not ask an individual with a disability “do you anticipate going to the doctor often?”
- Do not ask “do you have a disability that would prevent you from performing the duties of the job?”
- Do not ask “do you have a bad back that would preclude you from doing heavy lifting?”
- Do not ask an individual in a wheelchair “do you drive a car?” where driving is not an essential job function.

Moreover, where an employer checks the job references of an applicant with a disability, the employer may not make any inquiries that could not be inquired directly of the applicant regarding the applicant’s disabilities.

The following constitute questions a prospective employer may ask an applicant’s previous employer:

- What were the essential functions of the applicant’s job?
- Was the applicant able to successfully perform these functions?
- What accommodations were made to enable the applicant to perform the job?
- Did these accommodations enable the applicant to successfully perform the job?

*Permissible Medical Examinations* — The ADA provides one exception to the prohibition against preemployment medical inquiries. An employer may condition an offer of employment on the results of a medical examination. However, the examination must be administered for all entering employees; the examination results must be kept confidential; and the examination may not be used to discriminate against individuals with disabilities [37].

A conditional-offer medical examination does not have to be job-related or consistent with business necessity [38]. Accordingly, the examination can assess an individual’s general physical or mental health without relating to specific job duties. Under these circumstances, such examinations permit an employer to “discover possible disabilities that do, in fact, limit the person’s ability to do the

job . . . [39]. However, where the medical examination reveals a disability that would not impair the applicant's ability to perform the essential job functions, with or without reasonable accommodation, the employer may not use such information to deny employment.

Where a job applicant who has been given a conditional offer refuses to take a medical examination that satisfies ADA requirements, presumably an employer has sufficient grounds to deny employment.

*Other Examinations* — The ADA provides that, where appropriate, an employer may administer a physical agility test to ascertain whether job applicants have the physical qualifications necessary for certain jobs. The EEOC has held that “physical agility tests are not medical examinations and so may be given at any point in the application or employment process” [31]. Such examinations are permissible only if given to all similarly situated applicants or employees, regardless of disability.

The ADA provides that tests for illegal use of drugs do not constitute medical examinations. Accordingly, such tests are not subject to the ADA medical examination restrictions [40].

#### *Medical Inquiries and Examinations During Employment*

ADA protections regarding medical inquiries and examinations continue to apply after an employee is hired. The ADA prohibits employers from requiring an employee to take a medical examination, inquiring about an employee's disabilities, or inquiring about the nature of an employee's disability, unless the inquiry or examination is “job-related and consistent with business necessity” [41].

Accordingly, where an employer needs to ascertain whether an employee can still execute the essential functions of the job, the employer may make medical inquiries and administer fitness-for-duty examinations [42]. Moreover, an employer may conduct voluntary medical examinations that are part of an employee wellness or voluntary health program [43]. However, results of such testing should remain confidential [44].

### **Job Benefits and Privileges**

#### *Job Benefit Plans*

The ADA mandates that employers provide disabled employees with equal access to the same health, life, and disability insurance coverage and other benefits that are provided to nondisabled employees. However, employers are permitted to provide benefit plans that limit reimbursements for specified medical procedures or medications. For example, a plan may completely deny coverage for experimental medications, so long as this limitation applies equally to *all* employees.

There is one exception, however, to the requirement that employers provide equal coverage to all employees. Where a group of disabled individuals is recognized as presenting an increased risk of illness or death, an employer may: 1) refuse to insure such individuals; 2) limit the amount or type of coverage available; or 3) charge a different rate for identical coverage. Such differentiation, however, must be “based on sound actuarial principles” or be “related to actual or reasonably anticipated experience” [39, p. 137].

The following is a checklist provided to assist employers in avoiding discrimination with regard to employee benefit plans.

- Review each employee benefit plan for restrictions that could affect participants differently based upon medical conditions.
- Where a plan or policy provision adversely affects individuals with disabilities, consider whether it applies equally to all employees and may be justified as a uniform limitation.
- If the limitation or exclusion does not apply to all employees equally, ascertain whether the limitation or exclusion is actuarially justified.
- When soliciting bids for new group insurance, be careful when disclosing medical information regarding plan participants. Disclosing medical information during the bid solicitation process may create problems under the ADA.
- Before adopting insurance plans based on financial implications, consider ADA requirements. The act may require actuarial justification for use of special classifications of employees for premium contributions, deductible limits, copayments or noncovered matters.
- Insurance companies may administer group health plans in a discriminatory fashion. An employer, however, is liable for ADA violations by virtue of its contractual arrangements. Thus, review the contractual arrangements and administrative practices for ADA implications.

#### *Other Job Benefits*

Nondiscrimination requirements apply to all social and recreational activities sponsored by an employer, as well as all other benefits and privileges of employment. Accordingly, disabled employees must have an opportunity to participate in any employer-sponsored social functions, including parties, picnics, shows, and award ceremonies. Such events must be held in accessible locations and interpreters and other accommodations should be provided where necessary.

In addition, disabled employees must have access to lounges, cafeterias, and all other nonwork facilities provided by the employer. Similarly, disabled employees must have equal access to gymnasiums or health clubs provided for employee use. Finally, disabled employees must be afforded equal opportunity to participate in sports teams, leagues or other recreational activities sponsored by the employer.

The act requires employers to extend all benefits to their disabled employees. Thus, where in-service training is provided off the employer's premises, the employer must assure that such locations are accessible to disabled employees.

## REASONABLE ACCOMMODATION

To comply with the ADA, employers must do more than merely avoid discrimination of individuals with disabilities. To avoid liability, an employer is required to make "reasonable accommodation" to all qualified individuals with disabilities. This obligation extends to all employment-related decisions from job application to discharge. Moreover, the reasonable accommodation requirement is not restricted to work facilities or activities. Rather, the duty applies to *all* facilities or programs provided by an employer [45].

While the act does not expressly define "reasonable accommodation," the EEOC's regulations suggest that it consists of any change in the work environment or job requirement which "enables an individual with a disability to enjoy equal employment opportunities" [46]. The regulations further provide that reasonable accommodation is any modification that gives the disabled individual opportunities equal to those of nondisabled individuals [46].

Once an employer is requested to provide reasonable accommodation to a qualified individual with a disability, the employer is obligated to make a reasonable effort to ascertain an appropriate accommodation [47]. The employer should discuss potential reasonable accommodations with the employee to facilitate a more accurate assessment of what accommodations are needed [48]. The discussion should identify the precise limitations resulting from the disability, as well as potential reasonable accommodations to overcome the limitations [48].

The act and the EEOC regulations enumerate various types of accommodations an employer may be required to provide. These include: making work facilities accessible; restructuring jobs; modifying work schedules; reassigning disabled individuals to vacant positions [49]; acquiring or modifying equipment; modifying examinations, training materials, or policies; providing readers or interpreters; and altering existing facilities [50]. The appropriate reasonable accommodation "is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability" [47].

EEOC regulations provide that the employer should use the following approach in determining the scope of reasonable accommodations to be provided:

1. Analyze the particular job involved and determine its purpose and essential functions;
2. Consult with the individual with a disability to ascertain job-related limitations imposed by the disability and how they may be overcome by reasonable accommodation;

3. In consultation with the individual with a disability, determine potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the job; and
4. Consider the preference of the individual with a disability, evaluate the cost or hardship to the employer, and select and implement the accommodation most appropriate for employer and employee [43].

### **Make Facilities Accessible**

Title III of the ADA requires that any alterations to or new construction of places of public accommodation made after January 26, 1992, must conform to ADA Accessibility Guidelines. Places of public accommodations are private businesses that serve the public, and include all “nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education” [51].

### **Restructure Jobs**

An employer may be required to modify a particular job to enable a disabled employee to perform the essential functions of the employment. Job restructuring may entail re delegating job assignments, exchanging assignments with another employee, redesigning procedures for accomplishing job duties, or eliminating nonessential elements of employment [35, p. 62].

### **Provide Part-Time or Modified Work Schedules**

Disabled individuals are sometimes unable to work during regular work hours. Under such circumstances, an employer may be required to assign part-time or modified work schedules to enable disabled employees to perform their jobs. For example, disabled individuals who depend on public transportation may require flexible work schedules to mitigate commutation problems. Similarly, disabled individuals who have poor night vision may be accommodated by permitting a work schedule that begins and ends during daylight hours. In addition, disabled persons who require medical treatment during the week may also be reasonably accommodated by modified work schedules.

### **Institute Flexible Leave Policies**

Insofar as individuals with disabilities may require time off from work due to their disabilities, employers should consider flexible leave policies as a reasonable accommodation. Such accommodations may include allowing accrued leave, advanced leave, or leave without pay, so long as such leaves do not cause undue hardship. The ADA does *not*, however, require employers to provide additional paid leave as an accommodation.

## **Reassign Disabled Employees to Vacant Positions**

Under the ADA, an employer may be required to reassign a disabled employee who can no longer perform the job's essential functions. Reassignment may not, however, be used to discriminate against a disabled employee. Where feasible, the disabled employee should be assigned to a vacant position equivalent to the current job in terms of pay and status. Only where no such positions exist may an employer reassign the employee to a lower-grade and lower-paying position. The employer is not required to promote the disabled employee to effectuate reassignment. Nor is an employer required to create a new position or "bump" another employee from a position to provide reassignment for the disabled employee.

## **Purchase or Modify Equipment and Devices**

Employers may be required to purchase or modify equipment to accommodate disabled employees. The following are examples of equipment and devices that may constitute reasonable accommodations:

- Telecommunication devices for deaf employees (TDDs) that enable individuals with hearing or speech impairments to communicate via telephone;
- Telephone amplifiers for hearing-impaired employees;
- Tactile markings on equipment for the visually-impaired;
- Talking calculators for employees with visual or reading impairments; and
- Speaker phones for employees with mobility disabilities

For additional information regarding such equipment for disabled employees, contact the Job Accommodation Network, P.O. Box 6123, 809 Allen Hall, Morgantown, West Virginia 26506-6123. For information via telephone, call: 1-800-526-7234.

## **Other Accommodations**

Various other accommodations may assist disabled employees, including:

- Modifying examinations to reflect the actual ability of the employee to perform job functions, rather than the limitations caused by the impairment;
- Modifying training programs to accommodate disabled individuals (*i.e.*, providing programs at accessible locations and during hours accessible to disabled employees, providing training materials in braille for visually-impaired employees);
- Providing a reader for a visually impaired employee;
- Providing a sign language interpreter for a deaf employee;

- Providing a personal assistant for certain job-related functions, such as a page-turner for a paralyzed person or a travel attendant to assist a blind employee on business trips.

## **When an Employer May Avoid Making Accommodations**

### *The Employer Must Be Aware of the Disability*

The ADA mandates that an employer make reasonable accommodation to the “known” physical or mental limitations of an otherwise qualified individual [52]. However, an employer is not required to accommodate disabilities of which it is unaware [47]. Accordingly, the disabled individual is generally responsible for notifying the employer of the necessity for an accommodation [53]. Obvious disabilities need not be called to the employer’s attention to entitle the disabled employee to reasonable accommodation.

### *Undue Hardship*

An employer is not required to make a reasonable accommodation to an otherwise qualified individual with a disability, where the accommodation would impose an “undue hardship” on the employer’s business [54]. Under such circumstances, the employer must determine whether there are alternative accommodations that would not impose such hardship.

An accommodation causes undue hardship where it requires significant difficulty or expense in relation to the size of the employer, the resources available, and the nature of the operation. To ascertain whether an accommodation would impose undue hardship, the employer may consider:

1. the nature and cost of the accommodation needed under this chapter;
2. the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation on the operation of the facility;
3. the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
4. the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity [55]. Other factors to be considered are whether there are independent sources to fund the accommodation, or whether tax credits or business deductions attach to the accommodation.

In addition, “undue hardship” refers to any noncost accommodation that would be substantial or disruptive or that would fundamentally alter the nature or operation of the employer’s business [35, p. 67; 56]. Where an employer determines that the cost of an accommodation would impose an undue hardship and no funding is available from another source, the disabled individual should be offered the option of paying for that portion of the cost which constitutes an undue hardship.

## **REMEDIES**

An individual who believes s/he has been discriminated against in employment must first file a charge with the EEOC or (in New York) the New York State Division of Human Rights, which have a work-sharing agreement such that filing with one will result in notice to the other. If a reasonable cause finding of discrimination is made and conciliation efforts fail, the EEOC may bring a federal action or it may issue a right-to-sue letter to the complainant. An individual who receives a “right-to-sue” letter may then bring an action in federal district court. An ADA plaintiff has the same remedies available as those provided by §504 of the Rehabilitation Act. A prevailing plaintiff may recover back pay, front pay, injunctive relief, hiring, reinstatement, promotion, and attorney’s fees [57]. Moreover, the 1991 amendments to the Civil Rights Act of 1964 allow a plaintiff to recover compensatory damages for pain and suffering, mental anguish, and other nonpecuniary losses. Punitive damages, which are available against an employer engaged in discriminatory practices with malice or reckless indifference to one’s rights under the ADA, are capped from \$50,000 for the employer with 15-100 employees, to \$300,000 for the employer with 500 or more employees. The Civil Rights Act amendments also allow recovery for expert witness fees and provide for jury trials when compensatory or punitive damages are sought.

## **CONCLUSION**

The Americans with Disabilities Act is the most far-reaching antidiscrimination measure signed into law in recent history. The act is likely to have a revolutionary impact on the manner in which disabled individuals are treated in society. Accordingly, it is incumbent upon employers and places of public accommodations to understand the requirement of the ADA and examine current and future practices to ensure compliance.

## **APPENDIX A**

### **ADA: Practice Points**

1. The ADA is an antidiscrimination statute, not an affirmative action statute.

2. Review all employment application forms and revise to exclude questions seeking information of medical history, or the existence or severity of physical or mental disabilities.

3. Review all existing job descriptions to determine whether they reflect essential job functions as the jobs are currently constituted. If a job description does not contain essential functions, it should be revised. If no job description exists, consider creating one.

4. Audit all leave, promotion, training, transfer and other personnel policies and practices, to assure that they reflect employer's needs and do not discriminate against individuals with disabilities.

5. If job descriptions include both essential and nonessential duties, they may enable the employer to analyze whether a particular individual is qualified or how nonessential functions may be shifted to accommodate an individual with a disability.

6. Create job descriptions even if jobs have already been advertised or posted. Although the ADA requires that an employer's preadvertising and pre-hiring job descriptions be given consideration by the EEOC in determining the essential functions of a job, after-the-fact job descriptions may still be viewed by the reviewing entity to determine the employer's judgment as to the essential functions, and should accurately reflect the actual requirements and duties of the job.

7. If the individual with a disability is not otherwise qualified for the position in question, i.e., he or she lacks the education or experience required, he or she is not a "qualified individual" under the ADA, and therefore, is not entitled to accommodation.

8. Educate job interviewers about the mandate of the ADA, the employer's policies against discrimination of individuals with disabilities and how to conduct interviews that determine whether an employee can perform the essential functions of the job, rather than whether an applicant has a disability, the nature of the disability or its severity.

9. Avoid making hiring decisions based on stereotypes or fear. Where an employer's decision is based on a stereotype or the fear of a disability, the affected employee will be protected from discrimination as one regarded as having a disability.

10. Remember, an undue hardship is one that poses a significant difficulty or expense for an employer, and will be determined on a case-by-case basis.

11. To determine whether and which reasonable accommodation should be provided, an employer should:

- a. discuss with the individual with a disability the barriers that exist, including abilities and limitations of the individual;
- b. identify possible accommodations;
- c. assess the effectiveness of each accommodation, to determine which will achieve the goal of giving the employee the maximum opportunity of performing the essential functions of the job;

d. evaluate the cost or hardship to the employer in providing the accommodations; and,

e. implement the accommodation that is effective and does not pose an undue hardship for the employer.

12. Pursuant to the ADA, a “qualified individual with a disability” is one who is able to perform the essential functions of the job with or without a reasonable accommodation. Thus, in analyzing whether an applicant or employee is a qualified individual with a disability, the employer must select criteria which are essential to the performance of the job and which are not designed to discriminate against an individual with a disability.

13. An employer may refuse to hire an individual with a disability who poses a “direct threat,” meaning a significant risk or high probability of substantial harm to the health or safety of the individual or others, based upon objective, factual evidence, not subjective perceptions, irrational fears, patronizing attitudes or stereotypes, where the direct threat *cannot be eliminated or reduced* through reasonable accommodation.

14. The “direct threat” notion is generally thought to apply to individuals with highly contagious diseases; however it may also include individuals with illnesses that prevent them from being able to perform the essential functions of the job.

15. When reviewing a “direct threat” concern, the determination of the company physician may be challenged by the employee’s physician on the theory that the individual’s physician knows the employee and his condition better than a company doctor. Accordingly, the company doctor should consult with the employee’s treating doctor before concluding that a direct threat exists.

16. A request for an accommodation comes from the individual with a disability; however, under the ADA an employer has an obligation to put its staff on notice that it will provide reasonable accommodations where appropriate.

17. In announcing preemployment testing, the employer may wish to provide notice that individuals who will require accommodations, such as readers or untimed testing, give reasonable advance notice to the employer.

18. Audit all conditional offer medical examination procedures, including medical history forms used by company doctors, to be sure they are job-related and have an adequate business necessity justification.

19. Conditional offer medical examination results must remain confidential, must be retained in a separate file and the information obtained should be used only to revoke an offer where the results reveal a medical condition that would prevent the person from performing the essential functions with or without reasonable accommodation.

20. The obligation to provide a reasonable accommodation does not require promotions, creations of vacancies or termination of other employees; however, under certain circumstances it may require an employer to offer a vacancy where available.

21. Review contractual relationships, including those with employment agencies, labor unions, employee benefit providers or training entities, to determine whether they are consistent with the ADA.

22. Review social and recreational activities to ensure that they are accessible to all employees.

## **APPENDIX B Directory**

The following is a directory of federal and New York State agencies providing information and assistance to employers relating to ADA compliance.

### **U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

1801 L. St., N.W.

Washington, D.C. 20507

(Title I)

ADA Helpline:

(800) 669-EEOC (Voice)

(800) 800-3302 (TTD)

### **U.S. DEPARTMENT OF JUSTICE**

Civil Rights Division

Office on the Americans with Disabilities Act

P.O. Box 66118

Washington, D.C. 20035-6118

(Title III)

(202) 514-0301 (Voice)

(202) 514-0381 (TDD)

(202) 514-6193 (Electronic Bulletin Board)

### **NORTHEAST DISABILITY AND BUSINESS TECHNICAL ASSISTANCE CENTER**

354 South Broad Street

Trenton, N.J. 08608

(609) 392-4004 (Voice)

(609) 392-7044 (TDD)

### **JOB ACCOMMODATION NETWORK**

P.O. Box 6123

809 Allen Hall

Morgantown, W.V. 26506-6123

(800) 526-7234 (Accommodation Information) (Voice/TDD)

(800) ADA-WORK (ADA Information) (Voice/TDD)

(800) 342-5526 (ADA Information) (Computer Modem)

**ARCHITECTURAL AND TRANSPORTATION BARRIERS  
COMPLIANCE BOARD**

1111 18th St., N.W.  
Suite 501  
Washington, D.C. 20036-3894  
(800) USA-ABLE (Voice/TDD)

**ASSOCIATION ON HANDICAPPED STUDENT SERVICE  
PROGRAMS IN POSTSECONDARY EDUCATION**

P.O. Box 21192  
Columbus, Ohio 43221-0192  
(614) 488-4972 (Voice/TDD)  
(614) 488-1174 (Fax)

(Provides information on readers, interpreters, personal assistants, and assistive devices for people with disabilities, and information on job analysis, job modification, and restructuring. Provides information on overcoming architectural, communications, transportation, and attitudinal barriers.)

**WORLD INSTITUTE ON DISABILITY**

510 16th Street  
Oakland, CA 94612  
(415) 736-4100

(Identifies solutions to problems faced by disabled individuals, focusing on such areas as public education.)

**EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

90 Church Street, Room 1501  
New York, New York 10007  
(212) 264-7161 (Voice)  
(212) 264-7697 (TDD)

**NEW YORK STATE DEPARTMENT OF LABOR**

State Office Building  
Campus Building 12  
Albany, New York 12240  
(518) 457-2741

**NEW YORK STATE OFFICE OF ADVOCATE FOR THE DISABLED**

7RAID Project  
One Empire State Plaza  
10th Floor  
Albany, New York 12223-0001  
(518) 474-2825 (Voice)  
(518) 473-4231 (TDD)

(Provides technology-related assistance.)

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Jacob S. Feldman is a partner in the firm of Ehrlich, Frazer & Feldman. The firm specializes in representation of public school districts and public and private sector clients in employment and labor relations matters. He is admitted to practice law in the State Courts of New York, the Southern and Eastern District Courts of New York, the Second Circuit Court of Appeals, and the United States Supreme Court. Mr. Feldman is a frequent speaker and participant in programs conducted by Cornell University Industrial and Labor Relations, the Nassau County Bar Association, the New York State Association of School Personnel Administrators and the Long Island Association of School Personnel Administrators regarding labor education law and employment law topics.

### ENDNOTES

1. 42 U.S.C. §12,101 et seq.
2. 42 U.S.C. §12111 (2),(5)(A)(1991).
3. 42 U.S.C. §2000e(b)(1992).
4. 42 U.S.C. §2000e(h)(1992).
5. 42 U.S.C. §2000e(2)(1992).
6. 42 U.S.C. §12111(5)(B)(1992).
7. 42 U.S.C. §12111(8)(1992).
8. 42 U.S.C. §12102(2)(1992). Moreover, the ADA prohibits discrimination against an individual namely because such individual is associated or has a relationship with a disabled individual. *See*, 42 U.S.C. §12112(b)(4)(1992).
9. 29 C.F.R. §1630.3(h)(1991).
10. *See*, H.R. Rep. No. 485, Part 2, 101st Cong., 2d Sess. at 51 (1990); H.R. Rep. No. 485, Part 3, 101st Cong., 2d Sess. at 28 (1990); S. Rep. No. 116, 101st Cong. 1st Sess. at 22 (1989).
11. 29 C.F.R. Appendix to Part 1630 "Interpretative Guidance on Title I of the Americans with Disability Act," hereafter, 29 C.F.R. App. § \_\_\_\_").
12. 42 U.S.C. §12208(1992).
13. 42 U.S.C. §12211(1992); *see also*, 29 C.F.R. §1630.3(d)-(e)(1991).
14. *See*, 29 C.F.R. App. §1630.2(h)(1992).
15. 42 U.S.C. §§12210(b) and 12114(b)(1992).
16. 42 U.S.C. §12210(a)(1992); *see also*, 29 C.F.R. §1630.3(a)(2)(1991).
17. 29 C.F.R. App. §1630.3(1991).
18. 29 C.F.R. App §1630.2(o)(1991).
19. 42 U.S.C. §12114(c)(4)(1992); *see also*, 29 C.F.R. §1630.16(b)(1991).
20. 42 U.S.C. §12114(c)(1)-(2)(1992); *see also*, 29 C.F.R. §1630.16(b)(1991).
21. 42 U.S.C. §12114(c)(3)(1992).
22. 42 U.S.C. §12210(b)(1992).
23. 29 C.F.R. §1613.702(f)(1991).
24. 29 C.F.R. App. §1630.2(1991).
25. 29 C.F.R. App. §1630.2(n)(1991).
26. *See also*, 42 U.S.C. §12111(8)(1992).
27. H.R. Rep. No. 485, Part 3, 101st Cong., 2d Sess. at 31 (1990).

28. 42 U.S.C. §12112(a)(1992).
29. 42 U.S.C. §12112(b)(1992).
30. 42 U.S.C. §12112(b)(6)(1992).
31. 42 U.S.C. §12112(b)(7)(1992).
32. 42 U.S.C. §12113(b)(1992).
33. 42 U.S.C. §12112(d)(1992).
34. *See*, 29 C.F.R. §1630.13(a)(1991).
35. 29 C.F.R. §1630.14(a)(1991).
36. 42 U.S.C. §12112(d)(2)(B)(1992).
37. 42 U.S.C. §12112(d)(3)(1992).
38. 29 C.F.R. §1630.14(b)(3)(1991).
39. H.R. Rep. No. 485, Part 2, 101st Cong., 2d Sess. at 73 (1990).
40. 42 U.S.C. §12114(d)(1)(1992).
41. 42 U.S.C. §12112(d)(4)(A)(1992).
42. 42 U.S.C. §12112(d)(4)(B)(1992); 29 C.F.R. App. §1630.13(b)(1991).
43. 42 U.S.C. §12112(d)(4)(B)(1992).
44. 29 C.F.R. §1630.14(d)(1992).
45. For example, an employer is obligated to provide disabled individuals with equal access to cafeterias, lounges, and auditoriums.
46. 29 C.F.R. App. §1630.2(o)(1991).
47. 29 C.F.R. App. §1630.9 (1991).
48. *See*, 29 C.F.R. §1630.2(o)(3)(1991).
49. The employer is not obligated to accommodate an employee by promoting the individual to a vacant position. S. Rep. No. 11b, 101st Cong., 1st Sess. at 31-32 (1989); H.R. Rep. No. 485, part 2, 101st Cong., 2d Sess. at 63 (1990). Moreover, the employer is not obligated to bump another employee from its position to accommodate the disabled individual. *See*, C.F.R. App. §1630.2(o)(1991).
50. 29 C.F.R. §1630(o)(2)(1991).
51. 42 U.S.C. §12181(7)(J)(1992).
52. 42 U.S.C. §12112(b)(5)(A)(1992).
53. Although job applicants or employees are responsible for informing their employers of a need for reasonable accommodation, employers are obligated to inform job applicants and employees of their duty to make reasonable accommodation. Under the Act, employers must post notices to applicants and employees describing ADA requirements. *See*, 42 U.S.C. §12115 (1992).
54. 42 U.S.C. §12112(b)(5)(A)(1992).
55. 42 U.S.C. §12111(10)(B)(1992).
56. *See*, S. Rep. No. 116, 101st Cong., 1st Sess. at 35 (1989).
57. 28 C.F.R. §36.504(c)(1992).

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