An Employer's Guide to the Americans With Disabilities Act

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Enacted on July 27, 1990, the Americans With Disabilities Act (ADA) [1] is a wide-ranging law that creates new rights and extends existing rights for an estimated 43 million Americans who have a disability. The ADA prohibits discrimination against persons with disabilities in employment (Title I); governmental programs and services (Title II); public accommodations and services, including hotels, restaurants, retail stores, service establishments, and other public facilities (Title III); and telecommunications (Title IV).

The ADA charges the Equal Employment Opportunity Commission (EEOC) with issuing final regulations to carry out Title I by July 26, 1991. On February 28, 1991, the EEOC issued the proposed regulations and an Interpretive Guidance Appendix to the regulations, which set forth the EEOC's view on issues arising under the ADA.[2]

For employers, the heart of the ADA is its requirement that the employer make *reasonable accommodations*, which are not an *undue hardship*, so that any *qualified individual with a disability* can perform the *essential functions* of a job. While these terms may seem simple, the reasonable accommodation requirement can impose a tremendous financial burden on a business and employers will often not know what is "enough." In addition, the ADA restricts the use of pre-employment medical questionnaires and examinations, and requires justification for employment tests, standards, and criteria that tend to screen out disabled persons. Many employers will have to revise their hiring procedures and work assignment practices in order to comply with the ADA, or face an onslaught of litigation for back pay, reinstatement, attorney fees, and possibly compensatory and punitive damages to be determined by a jury. The burdens imposed by the ADA can potentially range from the expense of hiring a reader for a blind typist to restructuring job assignments so that a disabled employee can perform a tailor-made job.

Coverage

After a two-year waiting period, as of July 26, 1992, the ADA will cover all employers who employ 25 or more

[1] 42 U.S.C. §§ 12101-12213. The bulk of the legislative history of the ADA appears in several congressional reports. The House Labor Committee Report, H.R. Rep. No. 101-485 (part 2), hereinafter referred to as the "House Labor Report"; the House Judiciary Committee Report, H.R. Rep. No. 101-485 (part 3), hereinafter referred to as the "House Judiciary Report"; the Senate Report, S. Rep. No. 101-116, hereinafter referred to as the "Senate Report"; and the Conference Report, H.R. Rep. No. 101-596, hereinafter referred to as the "Conference Report."

[2] 29 CFR § 1630.1-.16.56 Fed. Reg. 8577 (Feb. 28, 1991), hereinafter referred to as the "regulations." The proposed regulations have attached to them an Interpretive Guidance Appendix, hereinafter referred to as "Interpretive Appendix.". The references to the regulations and Interpretive Appendix cited herein should be compared to the final regulations when they are issued in July 1991. Recordkeeping requirement regulations have also been proposed. 56 Fed. Reg. 9185 (March 5, 1991).

employees. After two additional years, as of July 26, 1994, the coverage will expand to all employers who employ 15 or more persons.

Some employers are, of course, already covered by state and local handicap discrimination laws. Federal contractors, recipients of federal funds, and federal agencies, are presently regulated by the federal Rehabilitation Act of 1973. The ADA, however, goes much further than these statutes in its requirements and its remedies. Thus, compliance under the present laws does not assure compliance with the ADA.

The ADA forbids employment "discrimination" against any "qualified individual with a disability." The coverage of the ADA is keyed to the definition of "disability" in section 3(2). A disability is defined as (1) any physical or mental impairment that substantially limits a major life activity (e.g., communications, ambulation, and working), (2) having a record of such an impairment, or (3) being regarded by others as having such an impairment.

The legislative history indicates that courts interpreting the ADA should generally follow the regulations and precedent under the Rehabilitation Act of 1973. The regulations in section 1630.1(c) state that unless otherwise provided, the ADA does not apply a lesser standard than the Rehabilitation Act of 1973. Under the Rehabilitation Act, and similarly worded state handicap discrimination statutes, courts have broadly defined the concept of "disability" to include epilepsy, cardiovascular disease, former drug use, psychiatric problems, legal blindness, manic depressive syndrome, ankylosing spondylitis (causes stiffening of the joints), nervous and heart conditions, multiple sclerosis, blindness in one eye, a heart condition, osteoarthritis of the knee joints, cerebral palsy and dyslexia, right leg amputation, and unusual sensitivity to tobacco smoke.[3]

The legislative history of the ADA in the House Labor Report at 51 makes clear that Congress also meant "disability" to include such additional conditions as muscular dystrophy, infection with the AIDS virus (HIV), mental retardation, alcoholism, and emotional illness. Indeed, the concept of a disability is so broad that Congress took pains to ensure that certain controversial conditions, which arguably could qualify as disabilities, are *not* intended to be protected. Thus, the ADA, in section 511, expressly provides that the concept of "disability" excludes homosexuality, bisexuality, transvestism, transsexualism, pedophelia, exhibitionism, voyeurism, sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and "psychiatric substance use disorders resulting from current illegal use of drugs."

The Act is particularly clear about the use of illegal drugs. Section 105(d) provides that nothing in the ADA is meant to "encourage, prohibit, or authorize" the use of drug tests for the "illegal use of drugs by job applicants or employees, or making employment decisions based on such test results." Section 510 states that a person who currently uses illegal drugs is not considered an individual with a disability. The regulations in section 1630.3(b) provide that a *former* illegal drug user does not lose the protection of the ADA if he is completing or has com-

[3] *Fitzgerald v. Green Valley Area Educ. Agency*, 589 F Supp 1130 (DC Iowa 1984), 36 EPD ¶ 35,180; *Bey v. Bolger*, 540 F Supp 910 (ED Pa. 1982), 33 EPD ¶ 33,967; *Davis v. Bucher*, 451 F Supp 791 (ED Pa. 1978), 17 EPD ¶ 8437; *Doe v. New York Univ.*, 666 F2d 761 (CA-2 1981); *Norcross v. Sneed*, 755 F2d 113 (CA-9 1985), 36 EPD ¶ 35,006; *Gardner v. Morris*, 752 F2d 1271 (CA-8 1985), 35 EPD ¶ 34,906; *Sisson v. Helms*, 751 F2d 991 (CA-9 1985), 35 EPD ¶ 34,918, cert. denied, 106 US SCt 137 (1985), 38 EPD ¶ 35,535; *Treadwell v. Alexander*, 707 F2d 473 (CA-11 1983), 32 EPD ¶ 33,690; *Pushkin v. Regents of the Univ. of Colorado*, 658 F2d 1372 (CA-10 1981), 26 EPD ¶ 32,096; *Holly v. City of Naperville*, 603 FSupp 220 (ND Ill. 1985); *Bento v. I.T.O. Corp.*, 599 FSupp 731 (D.R.I. 1984); *Guinn v. Bolger*, 598 FSupp 196 (DC D of C 1984), 38 EPD ¶ 35,556; *Fitzgerald v. Green Area Ed. Agency*, 589 FSupp 1130 (SD Iowa 1984), 36 EPD ¶ 35,180; *Longoria v. Harris*, 554 FSupp 102 (SD Tex. 1982); and *Vickers v. Veterans Admin.*, 549 FSupp 85 (DC D of C 1982), 30 EPD ¶ 33,099.

pleted a supervised drug rehabilitation program, *and* he is not currently using illegal drugs. The term "currently" means more than just the day in question and includes "recently."

The regulations in section 1630.2(j) make it clear that when determining whether a condition affects a major life activity, and hence is considered a disability, the effect of the condition on the worker is compared to the activities that an "average person in the general population" can engage in without the condition. The Interpretive Appendix in section 1630.2(h) states that a condition is to be considered "without regard to mitigating measures such as medicine or prosthetic devices." The regulations in section 1630.2(j)(2)(ii) indicate that even a temporary condition, if severe enough, can qualify as a disability. The Interpretive Appendix in section 1630.2(h) clarifies that "physical characteristics, such as eye color, hair color, left-handedness, or height, weight, or muscle tone, which are within a *normal* range and are not the result of a physiological disorder," are not disabilities. In addition, "personality traits such as poor judgment or a quick temper, where these are not symptoms of a mental or psychological disorder," cannot qualify as a disability. Obesity will normally not be considered to be a disability, as noted in the Interpretive Appendix in section 1630.2(l).

Of particular significance are the regulations in section 1630.1(j)(3)(i), which dispel the fear that the definition of a disability is self-defining. There was some concern that if an employer rejects an applicant due to a condition, then the condition limits the ability of the person to work and thus, by definition, is a disability. The regulations and Interpretive Appendix make clear that rejection for a single job does not equate with substantially limiting the ability to work. Rather, to be a disability with respect to the limiting work test, the condition must restrict the applicant from "either a class of jobs or a broad range of jobs in various classes." As an example, the Interpretive Appendix in section 1630.2(j) notes that shaky hands in a surgeon is not a disability because the surgeon can still advise on the need for surgery or teach. Conversely, a laborer with a bad back that prevents him from performing heavy labor jobs would be considered as a person with a disability.

In determining whether a person is precluded from a class of jobs, the Interpretive Appendix in section 1630.2(l) notes that it will be assumed that "all similar employers would apply the same exclusionary qualification standard that the employer charged with discrimination used." Thus, an employer cannot argue that while it rejected a worker with a condition for a job, other employers in the same business might hire the worker. In addition, the Interpretive Appendix concludes in section 1630.2(l) that just because an employer's judgment is wrong or mistaken does not save the employer. Thus, even though a person with high blood pressure can perform strenuous labor, if the employer acts on the mistaken assumption such a worker cannot perform such work, then the worker will be considered disabled. The same is true if the employer mistakenly believes a person has AIDS.

Medical Examinations and Inquiries

The ADA starts at the first hurdle that most disabled job applicants face in the employment process: the medical examination and inquiry. Many employers use pre-employment screening and medical examinations that have the effect of rejecting disabled applicants, often without an applicant knowing the basis for the rejection. The ADA in section 102(c)(2)(A) reforms these practices by forbidding an employer, before making a job offer, from "conduct[ing] a medical examination or mak[ing] 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." The legislative history in the House Judiciary Report at 46 states that the medical examination prohibition includes psychological testing.

On the other hand, to ensure that employers may continue to rely on certain pre-employment drug screens, the ADA, in section 104(d), provides that "a test to determine the illegal use of drugs shall not be considered a medical examination." Section 1630.16(b) of the regulations makes it clear that an employer does not violate the ADA by complying with the Drug-Free Workplace Act. The regulations also provide in section 1630.3(b)(3) that if the employer misreads a drug test as being positive, the employer will be held liable for the discrimination. There is no good-faith defense.

Similarly, many job applications routinely ask if applicants have any physical handicap that may prevent them from performing their job. The ADA will also change this practice. The Interpretive Appendix in section 1630.13(a) states that employers may inquire as to an applicant's ability to perform "job-related functions," but the question cannot be phrased in terms of a medical condition or a disability. "Employers may ask questions which relate to the ability to perform job-related functions, but may not ask questions in terms of disability." The Interpretive Appendix in section 1630.13(a) and the legislative history in the Senate Report at 39 use the example of a truck driver. The employer may ask whether the driver has a driver's license, but the employer may not inquire as to his visual ability.

Thus, the ADA in section 102(c) prohibits "medical examinations and inquiries" prior to the making of a tentative job offer, although it permits an "employment entrance examination," on which the offer of employment may be conditioned. Section 102(c) of the Act, and the legislative history in the Senate Report at 39, provide that any such post-tentative job offer medical examination must meet certain requirements. (1) It must apply to all applicants for a particular class of jobs. (2) The results must be kept confidential, including being kept in a separate file. (3) All parts of the examination that exclude a worker, i.e., all "exclusionary criteria," must be "job-related and consistent with business necessity."

The regulations in section 1630.16(b)(5)(6) state that an employer may include in its medical criteria, any requirement imposed by federal, state, or local law and may conduct any examinations required by law. This includes Department of Transportation requirements for truck drivers, as well as examinations required by the Occupational Safety and Health Administration (OSHA). However, the regulations in section 1630.1(a) and the legislative history in the House Labor Report at 74 make clear that any state law, which is inconsistent with the purpose of the ADA (i.e., the examination or criteria is not job-related and of business necessity), may be preempted by the ADA. Finally, the legislative history in the House Labor Report at 74 provides that an employment entrance examination may be used to obtain "baseline data to assist the employer in measuring physical changes attributable to on-the-job exposures."

The ADA thus allows limited inquiry into a worker's medical condition, once a tentative job offer is made. However, if an applicant is rejected because of a medical examination, the individual will be aware of that fact and will be able to challenge the determination. Employers will thus have to tailor their medical examination criteria to the physical requirements and functions of the job in question. If the applicant is rejected because of a condition that would not prevent him from performing the essential functions of the job with reasonable accommodations, the employer will be held liable for a violation of the ADA.

For current employees, section 102(c)(4)(A) of the ADA provides that a mandatory medical examination is permitted only if it can be shown to be "job-related and consistent with business necessity." For example, the Interpretive Appendix in section 1630.13(a) states that a "fit to return to duty examination" after an injury or illness could be proper. In addition, section 102(c)(4)(B) of the Act provides that within certain limits, voluntary medical examinations are allowed without such a showing.

Employment and Safety Standards

The ADA is primarily directed at employment standards, e.g., job requirements that unnecessarily exclude a disabled person from a job. In evaluating such standards, the employer must first identify the essential functions of the job. The employer then must ensure that any employment standard that might exclude a disabled person is "job related and of business necessity" with respect to the essential functions of the job. Finally, the employer must determine if a reasonable accommodation would permit the disabled person to meet the employment standards and thus perform the essential functions of the job. Each of the three mandates has a number of potential pitfalls for employers who must carefully examine and meet each requirement for each disabled person.

Section 101(8) of the Act defines a qualified individual with a disability as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." The ADA itself does not define "essential functions." The legislative history is not very helpful. For example, the Senate Report at 37 defines "essential" as duties that are "fundamental and not marginal."

The ADA in section 101(8) states that "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 [job] description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job." While any previously created written job descriptions will be considered evidence of the essential functions of a job, the legislative history in the House Judiciary Report at 33-34 makes clear that the worker will be free to challenge the accuracy of the descriptions. Thus, employers will want to have written job descriptions of the physical requirements for a position in place, before any claim is filed. Moreover, employers must recognize the need for industrial engineering support for such descriptions, since the job descriptions will be open to challenge.

The *essential* functions of the job are not all the job duties for a position. Thus, for example, one court held that 88% of a welder's assignments constituted the essential functions of the job and that the welder's inability to perform the remaining 12% of the job tasks was no defense to a discrimination claim.[4]

Moreover, as reflected by the legislative history in the House Judiciary Report at 33, if only *some* employees in a work group need an ability (e.g., to drive a car in an emergency), then that function may not be essential. Furthermore, in evaluating an individual's capabilities, the employer should only consider current conditions. The Interpretive Appendix in section 1630.14(b) observes that the "mere possibility that the employee of applicant will become incapacitated and unqualified in the future" cannot by itself be considered as rendering the person disqualified. On the other hand, if it is known (as opposed to a mere possibility) that the applicant will have to miss work

[4] *Ackerman v. Western Elec. Co.*, 643 FSupp 836 (ND Calif. 1986).

in the next three months due to his condition, and even with reasonable accommodations the worker's job requires that he be at work every day for the next three months, then he need not be hired.

The regulations provide some guidance in applying the definition of "essential functions" to the practicalities of the real world. The regulations in section 1630.2(n)(2) offer the following three reasons why a job function may be considered essential: (1) the position exists to perform that function, (2) "the limited number" of employees available to perform the function, and (3) the function is so "highly specialized" that the incumbent in the position is hired to perform it. The regulations in section 1630.2(n)(3) identify six of the evidence categories that may help determine whether a particular function is essential: (1) the employer's judgment, (2) written job descriptions prepared before job advertising or interviews, (3) the amount of time spent on the job performing the function, (4) the consequences of not requiring the incumbent to perform the function, (5) the work experience of past incumbents in the job, and (6) the current work experience of incumbents in "similar jobs."

The Interpretive Appendix in section 1630.2(n) notes that these examples and categories of evidence, while not exhaustive, will be given greater weight than evidence that is not on these lists. The Interpretive Appendix also notes that the small size of a work force and a "cycle of heavy demand for labor intensive work" will be considered. The Interpretive Appendix in section 1630.2(n) also observes that the employer's reasoned judgment will not be questioned and nitpicked, provided the production standard is not a subterfuge for intentional discrimination. "It is important to note that the inquiry into essential functions is *not intended to second guess an employer's business judgment with regard to production standards*, whether qualitative or quantitative, nor to require employers to lower such standards. . . .If an employer requires its typists to be able to type 75 words-per-minute, it will not be called upon to explain why a typing speed of 65 words-per-minute would not be adequate. Similarly, if a hotel requires its service workers to clean 16 rooms a day, it will not have to explain why it chose a 16-room requirement rather than a 10-room requirement."

Conversely, however, the Interpretive Appendix goes on to note that the employer will "have to show that it actually imposes such requirements on its employees in fact, and not simply on paper." The Interpretive Appendix also notes that "if it is alleged that the employer intentionally selected the particular level of production to exclude individuals with disabilities, the employer may have to offer a legitimate nondiscriminatory reason for its selection."

Because courts will look closely at what really are the essential functions of a job, employers will need good industrial engineering backup to justify most job duty requirements. The applicant's current abilities, with reasonable accommodations, will then be measured in terms of the job's essential functions.

Proving Job-Related Requirements

If an employer's job qualification requirements tend to screen out disabled persons, then the ADA in section 102(b)(6) requires the employer to prove the requirement is "job related for the position in question and is consistent with business necessity." Under established employment discrimination law, the job-related and business necessity standard is one of the more difficult requirements to meet.

Similarly, the ADA in section 102(b)(7) forbids tests that do not accurately reflect the disabled individual's skill, aptitude, or other factors the tests purport to measure. Authority under the Rehabilitation Act similarly prohibits employers from utilizing discriminatory testing procedures. In

one case, it was held to be unlawful for an employer to deny an equipment operator job to a dyslexic applicant simply because he could not pass a written test to enter the training program for the job. Since the dyslexia would not interfere with the operation of the equipment itself, i.e., the job duties, it was an inappropriate screening criterion.[5]

The regulations and Interpretative Appendix appear to recognize some exceptions to this requirement. For instance, the regulations in section 1630.16(d) provide that a smoke-free workplace is explicitly permitted. The Interpretive Appendix in section 1630.15(b)(c) notes that leave policies generally need not be justified.

The lesson for employers is clear. If a standard, criterion or test excludes a disabled person from a job, then the employer will have to justify the need for the test and demonstrate that it excludes only those persons who cannot perform the essential functions of the job, even with reasonable accommodations.

Employers have an obvious interest in insisting that a worker be able to safely perform his job. The regulations provide, in section 1630.2(r), that a safety risk can be considered only if there is "a significant risk of substantial harm . . . based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence."

The ADA in sections 101(3) and 103(b) explicitly states that an employer may defend against a charge of disability discrimination on the basis that an individual's disability poses a "significant risk to the health and safety of others." However, as the Supreme Court made clear in *School Board of Nassau County v. Arline*,[6] safety and health risks will not be judged based on unfounded fears, or even the views of an individual physician. Rather, courts will look to the opinions of public health officials.

In *Arline*, the Supreme Court interpreted the Rehabilitation Act in its consideration of the health and safety risk from tuberculosis. The Court indicated that it would follow the approach urged by the American Medical Association in its amicus brief, weighing the risk and dangers from the disease, as well as the probability of transmission. The Court made a statement supportive of this approach when it stated that "[Findings of] facts, based on reasonable medical judgments given the state of medical knowledge about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties), and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm."

The *Arline* Court also stated that judges should "defer to the judgments of public health officials in determining whether an individual is otherwise qualified unless those judgments are medically unsupportable." The Court was unsure whether courts could also credit "the reasonable medical judgments of private physicians on which an employer has relied."

The legislative history of the ADA outlined in the Senate Report at *27* and the Conference Report at 60, explicitly accepts the *Arline* precedent: "The employer must identify the specific risk that the individual with a disability would pose. The standard to be used in determining whether there is a direct threat is whether the person poses a *significant risk to the safety of others or to property*, not a speculative or remote risk, and that no reasonable accommodation is available that can remove the risk . . . For

[5] *Stutts v. Freeman*, 694 F2d 666, 669 (CA-11 1983), 30 EPD ¶ 33,261; Appendix § 1630.11, 56 Fed. Reg. 8600 (Feb. 28, 1991).

[6] 480 US 273, 107 US SCt (1987), 42 EPD ¶ 35,791.

people with mental disabilities, the employer must identify the specific behavior on the part of the individual that would pose the anticipated direct threat. Making such a determination requires a fact-specific individualized inquiry resulting in a well-informed judgment grounded in a careful and open-minded weighing of the risks and alternatives . . . Consistent with this explanation, in determining what constitutes a significant risk, the conferees intend that the employer may take into consideration such factors as the magnitude, severity, or likelihood of risk to other individuals in the workplace and that the burden would be on the employer to show the relevance of such factors in relying on the qualification standard."

Thus, in evaluating a health or safety risk to others, employers should be prepared to demonstrate, via opinions of public health officials from the Surgeon General's office or the Centers for Disease Control, that a worker represents a significant risk to the health or safety of others. At a minimum, the regulations in section 1630.2(r) requires the employer to produce evidence of the "current medical knowledge and/or the best available objective evidence" to substantiate the significant risk.

The Effect of Paternalism on Employing the Disabled

A question raised by the language of the ADA is the extent to which employers can deny employment opportunities on the basis of fears about the disabled individual's own safety. While the ADA expressly permits consideration of a direct threat "to the health or safety of others," any reference to a worker's own safety is conspicuously absent.

The legislative history in the Senate Report at 38 suggests some apprehension related to an employer's "paternalistic concerns for the disabled person's own safety." The House Labor Report at 73-74 addresses in some detail the limits on an employer's ability to exclude a disabled individual on the basis of danger to himself, suggesting that exclusion may be appropriate only where the disability poses a "high probability of substantial harm" or an "imminent substantial threat of harm."

The House Labor Report goes on to note that "employment decisions must not be based on paternalistic views about what is best for a person with a disability. Paternalism is perhaps the most pervasive form of discrimination for people with disabilities and has been a major barrier to such individuals. A physical or mental employment criterion can be used to disqualify a person with a disability only if it has a direct impact on the ability of the person to do their actual job duties *without imminent, substantial threat of harm.* Generalized fear about risks from the employment environment, such as exacerbation of the disability caused by stress, cannot be used by an employer to disqualify a person with a disability."

Remarks on the House and Senate floors further emphasized that in any case where a company considers the individual's own health or safety, the individual should be consulted.[7] Given the legislative history, as well as the requirement of the Occupational Safety and Health Act,[8] which states that an employer must provide a safe workplace, it seems clear that an employer may consider the worker's own safety. Indeed, the proposed regulations adopt this viewpoint and allow an employer to consider an individual worker's safety in the same manner the employer considers the safety of others. Thus, the regulations in sections 1630.2(r) and 1630.10(b) provide that, if current medical knowledge and the best available

[7] Congressional Record at H. 4626 (July 12, 1990), remarks of Representative Waxman; Congressional Record at S. 9697 (July 13, 1990), remarks of Senator Kennedy.

[8] 29 U.S.C. § 651 et seq.

objective evidence demonstrates a significant risk of substantial harm to the worker himself, the worker need not be hired, unless the risk can be eliminated by reasonable accommodations.

Employers prefer to develop employment criteria and procedures that can be applied in a uniform manner. The legislative history to the ADA found in the Senate Report at 28 makes clear that each qualified individual with a disability must be treated with an *individualized approach* that does not result in segregation of the disabled and is free of stereotyping and generalizations. The language from the report states: "For example, it would be a violation of this legislation if an employer were to limit the duties of an individual with a disability based on a presumption of what was best for such individual or based on a presumption about the ability of that individual to perform certain tasks. Similarly, it would be a violation for an employer to adopt separate lines of progression for employees with disabilities based on a presumption that no individual with a disability would be interested in moving into a particular job. It would also be a violation to deny employment to an applicant based on generalized fears about the safety of the applicant or higher rates of absenteeism. By definition, such fears are based on averages and group-based predictions. This legislation requires *individualized assessments* which are incompatible with such an approach. Moreover, even group-based fears may be erroneous."

For large employers who hire in significant numbers, this approach will be difficult to implement. One possibility is to have an ADA review officer, much like the medical review officer who plays an important role in drug testing procedures. Applicants can go through a standardized process, but before an applicant is rejected due to a disability, the ADA review officer can review the applicant's individual case. Such an approach gives the efficiency of a standardized system with the flexibility that the ADA requires.

Discrimination on the Basis of Association

While the main thrust of the ADA is to eliminate unintentional and unnecessary barriers to the employment of qualified individuals with disabilities, it also resembles traditional employment discrimination laws, by forbidding intentional discrimination based on prejudice. Employers covered by the ADA will be absolutely forbidden to reject a disabled applicant based on prejudice against disabled persons, just as they are forbidden to rely upon the individual's race, sex, national origin, or religion in denying employment.

The ADA goes one step further than traditional employment law in this respect, by expressly forbidding discrimination on the basis of an individual's association. The ADA in section 102(b)(4) forbids an employer from relying on a person's "relationship or association with a disabled individual." The historical origin of this provision, as reflected in the House Judiciary Report at 39, was a concern that employers might discriminate against persons who, while not themselves being disabled, care for or live with individuals who are disabled, particularly persons with AIDS. This provision applies to many situations, such as an employee who has a child with Down's Syndrome. Indeed, the House Labor Report at 61-62 notes that the association need not be with a family member.

In these cases, it is forbidden for an employer to discriminate against an employee or applicant on the basis of that individual's relationship with a person who has a disability. For purposes of this provision, it is irrelevant whether the disabled individual is qualified for any particular job. By the same token, the legislative history in the Senate Report at 30 and the regulations in section 1630.8 make it clear that the employer has no

duty to provide any reasonable accommodation to non-disabled persons simply because they are associated with a person who is disabled.

The Duty to Provide Reasonable Accommodation

The ADA uses the concept of employment discrimination in such a way as to impose affirmative obligations on employers. Thus, an employer is liable for discrimination, not only if it acts on the basis of a prejudice against individuals with disabilities, but also if the employer fails to make reasonable accommodations. The ADA in section 102(b)(5) defines discrimination to include: "(A) 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."

In an effort to clarify this requirement, the ADA in section 101(9) spells out several examples of possible reasonable accommodations. These examples highlight different aspects of "reasonable accommodations" and include: making existing facilities accessible and usable; the acquisition or modification of equipment or devices; the provision of qualified readers or interpreters; the appropriate adjustment or modification of examination, training materials, or policies; part-time or modified work schedules; job restructuring; reassignment to a vacant position; and other similar accommodations for individuals with disabilities.

This statutory list of possible reasonable accommodations is merely a guide, not an exhaustive list. The legislative history in the Senate Report at 32 mandates that employers utilize a "fact-specific, case-by-case approach." The flexibility required by this approach means that the employer may sometimes not know "what is enough," even when the accommodations are very expensive (e.g., providing a reader), or require totally revising the approach to the work itself (e.g., job restructuring). The individual accommodations are discussed below.

1. Making Facilities Accessible

One of the standard means of accommodating the disabled is to make a facility physically accessible to the worker with a disability. Often a worker can perform the duties of a job, but he can not get to the work location. Whether the need is for a wheelchair ramp, a specially equipped bathroom, a closer parking spot, or possibly even the installation of an elevator, an employer must install such facilities if they are reasonable and not an undue hardship. The Interpretative Appendix at section 1630.9 states that this "duty includes not only the employee's work station, but also other work locations such as a company cafeteria or employee lounge." Moreover, the undue hardship standard under Title I of the ADA is more difficult for an employer to meet than the "not-readily-achievable" test imposed on public facilities under Title III of the ADA. Thus, a facility modification that is not required to accommodate the public under Title III might, nonetheless, be required under title I to accommodate a disabled worker.

2. Adaptive Hardware

For many employees, reasonable accommodation can be achieved with little cost in the form of adaptive hardware. Indeed, such an accommodation is a natural corollary to making facilities physically accessible. Examples cited in the Senate Report at 10, include the follow-

ing: (1) a $49.95 telephone headset, so that an insurance salesperson with cerebral palsy could write while talking; (2) a $26.95 timer with an indicator light, so that a deaf medical technician could perform the laboratory tests required for her job; and (3) a $45.00 lighting system, so that a visually impaired receptionist could see which telephone lines were ringing, on hold, or in use.

Other examples of simple and inexpensive devices noted in the Senate Report at 10 include special computer systems, electronic visual aids, talking calculators, magnifiers, audio recordings, brailled materials, telephone handset amplifiers, telephones compatible with hearing aids, and special telecommunication devices, gooseneck telephone headsets, mechanical page turners, and raised or lowered furniture for individuals with limited physical dexterity.

The legislative history in the Senate Report at 33 and the Interpretive Appendix at section 1630.9 note that the reasonable accommodation requirement does not include "personal use items such as hearing aids and eyeglasses." Rather, a reasonable accommodation is thus an adjustment or modification that "specifically assists the individual in performing the duties of a particular job," as opposed to an adjustment or modification that "assists the individual throughout his or her daily activities, on and off the job."

3. Qualified Readers or Interpreters

While providing physical facility modifications and adaptive equipment have been traditional accommodations, often of a low-cost nature, the idea of hiring a reader or interpreter is a relatively new concept near the cutting edge of the accommodation requirement. Readers and interpreters can be expensive, and may effectively require hiring two persons to perform one job. Yet, under the ADA, reasonable accommodations may include qualified readers, interpreters, and as noted in the Senate Report at 33, even the provision of an attendant during the workday or for travel.

The provision of readers and interpreters shows how far the reasonable accommodation requirement can go. In a case decided under the Rehabilitation Act, an employer was required to hire half-time readers for a blind maintenance worker because the actual cost of the accommodation to the employer was *only* a small percentage of the employer's entire *budget*.[9] When one looks at an accommodation for one employee in terms of an employer's entire budget, almost all accommodation requirements are "reasonable" and not an "undue hardship."

There are limits, of course, as to what an employer can be required to do in the name of a reasonable accommodation. In one case, a police department declined to assign a "back-up" employee for a hearing-impaired individual who wanted assistance in performing the job of police dispatcher. The hearing handicap would have caused the individual to miss 40 percent of the communications because of the high frequencies involved. Although a "back-up" employee could have listened and repeated every communication to ensure that nothing was missed, this was held not to be a reasonable accommodation because it would have supplanted the need for the individual with a disability, rather than enabling the individual to perform the essential job function in question.[10]

While the provision of readers and interpreters occurs infrequently, the employer who must pick up the tab has a significant expense. Moreover, as an illustration, this accommodation demonstrates how far the ADA requires the employer to go.

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[9] *Nelson v. Thornburg*, 567 FSupp 369 (ED Pa. 1983), 32 EPD ¶ 33,857; aff'd, 732 F2d 146 (CA-3 1984), 34 EPD ¶ 34,521.

[10] *DFEH v. City of Anaheim Police Dept.*, California FEHC Decision No. 82-08 (1982).

4. Modification of Examinations, Training Materials, or Policies

As noted above, any employment examination, job criterion, training materials, or policy that excludes persons with disabilities must be job-related and a business necessity. Moreover, even if the examinations, criteria, standards, and policies are so justified, the employer must attempt, as a reasonable accommodation, to revise them so that they do not exclude persons with disabilities. That is, there is a duty to attempt to eliminate exclusionary examinations, training materials, and policies as a reasonable accommodation.

5. Part-Time or Modified Work Schedules

What many employers will find most troubling is the way the ADA can affect how the employer actually performs its work. It is one thing to require an employer to remove unnecessary barriers to the employment of persons with disabilities. It is another matter to tell employers how they must operate their business. For many employers, particularly in manufacturing industries, it will be difficult for them to understand that the ADA can actually require them to revise their manufacturing process or method of operation as an accommodation. One example is the requirement that employers provide part-time or modified work schedules as a reasonable accommodation. Thus, if a worker because of a disability cannot accept the stress of a full-time job, or must leave work early to catch a special-equipped bus, a part-time or a modified work schedule may be required as a reasonable accommodation. As invasive as such a requirement may be, even more significant is the problem presented by the logical next step of job restructuring.

6. Job Restructuring

For employers who engage in manufacturing or construction, the most difficult reasonable accommodation to understand and implement is job restructuring. The Senate Reports at 32 and the House Labor Report at 62 define job restructuring in an identical manner: "Job restructuring means modifying a job so that a person with a disability can perform the essential functions of the position. Barriers to performance may be eliminated by eliminating nonessential elements; *redelegating assignments; exchanging assignments with another employee; and redesigning procedures for task accomplishment.*"

For many employers, how they do their work is viewed as their own business. The government may tell us who we must hire to build a widget, but we decide how to build it. The ADA changes this. Now, as a reasonable accommodation, an employer must consider redelegating assignments and redesigning work procedures so that a person with a disability can perform the essential functions of a job.

Of particular concern is the requirement of "exchanging assignments with another employee," which arguably mandates job swapping. Thus, an employer may be required to develop a system of reassigning work so that disabled persons can be assigned to light-duty jobs, even if this means trading jobs with a non-disabled person. While the exact reach of this requirement is unclear, the legislative history in the Senate Report at 32 makes clear that it does not require job "bumping," i.e., placing another employee out of work.

For many plant managers, the concept of job restructuring is foreign. Employers naturally prefer able-bodied workers who can move from assignment to assignment. Job restructuring undermines this flexibility, and instead, requires employers to tailor a job to the worker.

The Interpretive Appendix in section 1630.2(o) does indicate an important limit on job restructuring. While the employer can be required to reallocate marginal and peripheral job duties, "[a]n employer or other covered entity is not required to reallocate essential functions.

The essential functions are by definition those that the individual who holds the job would have to perform, with or without reasonable accommodation, in order to be considered qualified for the position. For example, suppose a security guard position requires the individual who holds the job to inspect identification cards. An employer would not have to provide an individual who is legally blind with an assistant to look at the identification cards for the legally blind employee. In this situation, the assistant would be performing the job for the individual with a disability rather than assisting the individual to perform the job."

A fitting end note to job restructuring and work reassignments is the fact that the Interpretive Appendix in section 1630.2(o) mandates that unpaid leave is also considered a possible reasonable accommodation, although paid leave is excluded as such. Thus, a reasonable accommodation without undue hardship may include a duty to cover for an ill employee when the inconvenience of doing so is no greater than that of covering the absences of other employees.[11]

7. Reassignment to a Vacant Position

Sometimes an incumbent employee, because of disability, can no longer perform the essential functions of a job, even with reasonable accommodations. In that case, the ADA would permit an employer to remove the employee from the job, but would require the employer to transfer the employee to any vacant job for which the employee is qualified. The legislative history in the Senate Report at 32 requires that an employer must first try to accommodate a worker in his current job, before transferring him to a vacant position.

As previously noted, the employer need not displace any other worker to accommodate the disabled employee; the reassignment need only be to a vacant position. The ADA does not create "bumping" rights. The ADA does, however, require giving the current disabled employee the first crack at a job opening if no reasonable accommodation would permit the employee to perform his current job. The Interpretive Appendix in section 1630.2(o) also clarifies that the ADA does not require that an individual be promoted to fill a vacant position.

The Interpretive Appendix provides in section 1630.2(o) that reassignment is *not* a reasonable accommodation required for *applicants*, as opposed to current employees. Of course, as a practical matter, this merely puts the burden on the applicant to find appropriate job vacancies. If he applies for the vacancy, the ADA requirements apply to his application.

8. Other Accommodations

The list of reasonable accommodations in the ADA is expressly non-exhaustive. Anything that provides assistance for a disabled worker to be able to perform the essential functions of a job must be considered. For example, courts have held that other possible accommodations include seating rearrangements.[12] The Interpretive Appendix in section 1630.2(o) states that employer-provided transportation may also be a reasonable accommodation. The only limitation is the imagination of the disabled person and his attorney.

In addition to the aforementioned accommodations, the reasonable accommodation requirement can impose a significant burden on employers and the legislative history makes clear that an employer's adherence to the ADA and the implementations of appropriate procedural safeguards will be closely monitored.

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[11] *DFEH v. Kingburg Cotton Oil Co.*, California FEHC Decision No. 84-30 (1984).

[12] *DFEH v. Fresno County*, California FEHC Decision (1984). Employer required to permit non-smokers that are sensitive to smoke to sit apart from smokers in office. *Arneson v. Heckler*, 879 F2d 393 (CA-8th 1989), 50 EPD ¶ 39,138; on rem'd (DC Mo 1990), 54 EPD ¶ 40,301. An easily distracted employee could have been reasonably accommodated by transferring him to job that separated him from co-workers.

The legislative history recommends that employers follow a step-by-step approach towards meeting the reasonable accommodation requirement. The ADA, in section 104, requires that the employer first must notify the applicant or worker that the employer has a duty to provide reasonable accommodations. The employer then should await a request for an accommodation. Following these steps, the employer then needs to accommodate a disability only to the extent that the employer is aware of the disability. Moreover, even if so aware, the employer should normally not offer an accommodation, but rather should wait until the disabled individual requests one. The legislative history, in the Senate Report at 34, observes that "the duty to accommodate is generally triggered by a request from an employee or applicant for employment ... In the absence of a request, it would be inappropriate to provide an accommodation, especially where it could impact adversely on the individual. For example, it would be unlawful to transfer unilaterally a person with HIV infection from a job as a teacher to a job where such person has no contact with people." Of course, if a person with a disability is having problems performing his job, the Interpretive Appendix in section 1630.9 provides that the employer "may inquire whether the employee is in need of a reasonable accommodation."

The legislative history in the Senate Report at 34 indicates that when considering possible accommodations, it is very important that the employer obtain the thoughts of the individual involved. The Report states that "[t]he Committee suggests that, after a request for an accommodation has been made, employers first will consult with and involve the individual with a disability in deciding on the appropriate accommodation. The Committee recognizes that people with disabilities may have a lifetime of experience identifying ways to accomplish tasks differently in many different circumstances. Frequently, therefore, the person with a disability will know exactly what accommodation he or she will need to perform successfully in a particular job. And, just as frequently, the employee or applicant's suggested accommodation is simpler and less expensive than the accommodation the employer might have devised, resulting in the employer and the employee mutually benefiting from the consultation."

The Interpretive Appendix in section 1630.9 suggests a four-step "problem-solving approach": (1) analyze the particular job involved and determine its purpose and essential functions; (2) consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation; (3) in consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and (4) consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer. The regulations in section 1630.2(o)(3) refer to an "informal, interactive process with the qualified individual with a disability."

The employer ultimately must decide whether a possible accommodation is reasonable. In addition to the ADA statutory examples, cases decided under the Rehabilitation Act will indicate what accommodations are considered reasonable. For instance, one employer had to accommodate an epileptic nursing assistant with seizure disorders by either providing additional supervision and giving blood tests to ensure that he remained under proper

medication or by placing him in a clerical position.[13]

There are, however, limits to the accommodation that an employer must provide. One court rejected the demand of a mail-sorting machine operator with strabismus (cross-eyes) that his employer eliminate an essential function of his job by attempting an impractical modification of machinery.[14] Nor was an employer forced to create a new position or designate other workers to perform a disabled individual's essential duties in order to accommodate an employee who had a heart and nervous condition.[15]

If an employer can identify more than one effective accommodation, the legislative history in the Senate Report at 35 and the Interpretive Appendix in section 1630.9 gives mixed signals as to how a choice is to be made. On the one hand, "the employer may choose the accommodation that is less expensive or easier." On the other hand, the employee's choice is to be given "primary consideration."

In this respect, Title VII law on religious accommodation may well be persuasive under the ADA. In one case,[16] the court rejected a flight attendant's claim that the employer's flexible scheduling system was not a reasonable accommodation to her religious need to observe Saturday as the Sabbath. The court held that *any* reasonable accommodation is enough.[17] The employer was not required to accept the employee's proposed alternative scheduling plans or to prove that each of the employee's proposed alternatives would have imposed an undue hardship.

The legislative history in the House Labor Report at 62 and 66-67, and the Senate Report at 31 and 35, arguably is compatible with this Title VII concept that any reasonable accommodation will suffice. First, the list of activities in the definition of "reasonable accommodation" in Section 101(8) is "not meant to suggest that employers must follow all of the actions listed in each particular case." Second, "where there are two effective accommodations, the employer may choose the accommodation that is less expensive or easier for the employer to implement, so long as the selected accommodation provides meaningful equal employment opportunity." Third, while generally the "expressed choice of the applicant or employee shall be given primary consideration," it appears that such primary consideration is *not* determinative if "another effective accommodation exists that would provide a meaningful equal employment opportunity."

The Role of Collective Bargaining Agreements

The legislative history in the Senate Report at 32 and the House Labor Report at 63 indicates that the ADA permits some consideration of collective bargaining agreements when determining what is a reasonable accommodation. Provisions of a collective bargaining agreement cannot, however, justify an employer doing what the ADA forbids. "The collective bargaining agreement could be relevant . . . in determining whether a given accommodation is reasonable. For example, if a collective bargaining agreement reserves certain jobs for employees with a given amount of seniority, it may be considered as a factor in determining whether it is a reasonable accommodation to assign an employee with a disability without seniority to that job. In other situations, the relevant question would be whether the collective bargaining agreement articulates legitimate business crite-

[13] *Smith v. Administrator of Veterans' Affairs*, (DC Cal. 1983), 33 EPD ¶ 34,259.

[14] *Jasany v. US Postal Service*, 755 F2d 1244 (CA-6 1985), 36 EPD ¶ 35,070.

[15] *Treadwell v. Alexander*, 707 F2d 473 (CA-11 1983), 32 EPD ¶ 33,690.

[16] *Hudson v. Western Airlines. Inc.*, 851 F2d 261 (CA-9 1988), 47 EPD ¶ 38,117.

[17] *Id.*, at 266. Citing *Ansonia Bd. of Education v. Philbrook*, 479 US 40 (1986), 41 EPD ¶ 36,565.

ria. For example, if the collective bargaining agreement includes job duties, it may be taken into account as a factor in determining whether a given task is an essential function of the job."

The exact role of a collective bargaining agreement is unclear. It is disturbing that the regulations and the Interpretive Appendix provide no stated role for such agreements, except to state that no contractual arrangement can be used to violate the ADA. The Interpretive Appendix in section 1630.6 provides that no contract (e.g., for service of equipment) can protect the employer from its ADA obligations.

For any agreement negotiated after the ADA's effective date of July 26, 1992, the legislative history in the Senate Report at 32 indicates that it expects that the agreement will explicitly authorize the employer to take any necessary action to comply with the ADA. "Conflicts between provisions of a collective bargaining agreement and an employer's duty to provide reasonable accommodations may be avoided by ensuring that agreements negotiated after the effective date of this title contain a provision permitting the employer to take all actions necessary to comply with this legislation."

Undue Hardship

A reasonable accommodation is not required if it would impose an "undue hardship" on the employer. Read superficially, this language might allay concerns about the reasonable accommodation requirement. In practice, however, the undue hardship defense is one most employers in most circumstances will not be able to meet. Moreover, an employer will never know that it qualifies for the defense until the court rules, for there is no "safe harbor." [18] As such, this defense may be of limited value.

The ADA in section 101(10) provides that an undue hardship "means an action requiring significant difficulty or expense, when considered in light of the [following] factors: (i) the nature and cost of the accommodation needed under this Act; (ii) 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 upon the operation of the facility; (iii) the overall financial resources of the covered entity [including,] 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 (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the work force of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity."

The regulations in section 1630.2(p)(2)(v) add a fifth factor to be considered—the disruption to the other workers and the production process: "The impact of the accommodation upon the operation of the site, including the impact on the ability of other employees to perform their duties and the impact on the site's ability to conduct business." This is an important addition since it recognizes the practical realities of the work force and the importance of avoiding disruptive forces. The Interpretive Appendix in sections 1630.2(p) and 1630.15(d) gives examples of a waiter in a nightclub with such bad eyesight that he cannot see in dim light, or an employee who must deal with the public, which requires a hot indoor temperature.

Under the foregoing standards, it will be difficult for any large employer to show that any one accommodation truly

[18] Proposed amendments to the ADA would have provided that costs in excess of 10 percent of an individual's salary would constitute an undue hardship as a matter of law. These amendments were defeated. H.R. Rep. No. 101-485 (part 3) at 41.

imposes an "undue hardship," unless the accommodation is extreme. It is clear, moreover, that substantial cost alone will not necessarily constitute undue hardship. The legislative history in the Senate Report at 36 explicitly denies any precedential value to the holding in *TWA v. Hardison*,[19] which was rendered in the context of religious accommodation under Title VII and states that anything more than a de minimis cost is an undue hardship.

The legislative history in the House Judiciary Report at 40 observed that the undue hardship defense is also much harder for an employer to meet than the defense under Title III and that a physical modification in public accommodation is not "readily achievable." The legislative history in the House Judiciary Report at 81 goes on to emphasize the difficulty of showing undue hardship by favorably citing a court decision that rejected "an undue hardship" defense based on the fact that the large sums of money involved were only a "small fraction of the [entity's] budget." Creating still further difficulties for an employer who would seek to show that an accommodation creates an undue hardship is the legislative history in the House Labor Report at 69, in regards to whether a reasonable accommodation would potentially benefit more than one disabled person. (E.g., a wheelchair ramp, then that fact reduces the impact of the employer's undue hardship argument.)

And if all this were not enough, wherever an employer can prove an undue hardship, the legislative history in the Senate Report at 35-36 indicates that the individual with a disability must be permitted to supply or pay for the accommodation to the extent that the undue hardship can then be eliminated. Thus, an employer will be hard pressed to know where to draw the line and how to approach the disabled person concerning his option to contribute. Congress has declined to provide any safe harbor in this area, other than to acknowledge in the legislative history in the House Judiciary Report at 40-41 that the ADA does not require accommodations that would cause closure of a plant or bankruptcy.

Health Benefits

The ADA covers discrimination with regard to "terms, conditions, and privileges of employment," including health benefits. However, the ADA also has a "safe harbor" provision, which states that Title I shall not be construed to restrict normal insurance law as to underwriting risks. Thus, the ADA in section 501(c) does not prohibit or restrict "(1) an insurer, hospital or medical service company, health maintenance organization, or any agent or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with state law; or (2) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with state law; or (3) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to state laws that regulate insurance."

The legislative history in the Senate Report at 29 cites examples of health insurance practices that are forbidden and permissible under the ADA. First, it would be unlawful to deny insurance coverage to an employee on account of disability, but an employer may limit coverage for certain procedures or treatments, even though that would affect disabled persons more than non-disabled persons. Second, employers may continue to use insurance policy clauses that

[19] 432 US SCt 63 (1977), 14 EPD ¶ 7620.

exclude pre-existing conditions, so long as these clauses are not used as a subterfuge to evade the purposes of the ADA.

Because the ADA will require employers to hire persons with pre-existing conditions, who previously might not have been hired, employers should consider expanding their pre-existing exclusion provision in their health, life, and disability insurance plans. Of course, if the exclusions go too far, they may be considered to be a subterfuge. Thus, a reasoned, balanced provision should be adopted. One possibility is an 18-month exclusion that would be co-extensive with the applicant's right under COBRA to continue his health insurance from his prior employer.[20]

Comparison With Current Law

Many employers believe that the ADA will not change how they do business because they already are subject to the Rehabilitation Act or a similar state handicap discrimination law. The Act prohibits handicap discrimination by federal contractors and grantees, as well as federal agencies. It is true that most of the concepts behind the ADA are borrowed from the Rehabilitation Act and its regulations. Additionally, the ADA in section 501(b) leaves all state handicap discrimination laws in place. It does not supersede any law that provides "greater or equal protection for the rights of individuals with disabilities than are afforded by this Act."

There are, however, two critical differences that will make the ADA as different from the current law as night is from day. First, the ADA explicitly spells out certain examples of reasonable accommodations that the vast majority of employers do not currently utilize. Many managers would laugh at the suggestion that they must provide readers, interpreters, part-time work, and modified work schedules. With respect to job restructuring, most managers do not even know what the concept is, let alone understand its full ramifications. All of these accommodations cost money and reduce efficiency. As such, many businesses will have a hard time emotionally, as well as economically, accepting them. To date, for most corporations, compliance with equal opportunity laws has been rather simple. Many companies take the position of what "does it matter if the employee is white, black, or green; male, female, or in between; if the employee can get the job done, equal opportunity hiring costs the company nothing." The ADA is different. In contrast to traditional discrimination laws, it can impose substantial costs on employers.

The second difference is one of enforcement. It is one thing to have the federal government enforce handicap discrimination laws against government contractors. It is another matter to have enforcement initiated by private attorneys who attempt to obtain compensation for their clients, and a fee for themselves, against all employers with 15 or more employees.

Moreover, because the ADA incorporates the remedies of Title VII of the Civil Rights Act, any future amendments to Title VII that provide for jury trials, compensatory damages for pain and suffering, and punitive damages, will vastly broaden the scope of remedies available under the ADA. While President Bush successfully vetoed the proposed Civil Rights Act of 1990, he did not object to the provisions for jury trials and compensatory damages, and he only mildly objected to punitive damages. Thus, it is likely that Title VII remedies will be expanded before the effective date of the ADA (July 26, 1992). Employers covered by the ADA could then face the potential of being sued by disabled individuals before sympathetic jurors, who are free to award virtually any level of damages.

[20] 29 U.S.C. § 1162(2)(A).

Conclusion

Employers must begin now to revise their thought processes in filling jobs. It is no longer enough to ask whether the company hires all qualified applicants regardless of race, creed, color, religion, or sex. Rather, employers will have to ensure that they have an affirmative program for implementing reasonable accommodations that will allow disabled employees the ability to perform the essential functions of a job. This may mean reserving light duty work for disabled persons, allowing part-time work and modified work schedules, as well as providing special equipment, readers, and interpreters. An ADA review officer may well be a useful means of providing the case-by-case approach the ADA requires.

Smart employers will plan ahead and develop programs that minimize the implementation costs and assure compliance. Hiring disabled workers may cost more, but that is what the law requires. The following actions should be part of any compliance program:

1. Once the ADA becomes law, notify employees and applicants of the employer's duties under the Act, including the duty to provide reasonable accommodations upon requests. Employers should post notice of the duties, in the same manner as they presently post notice of their responsibilities under various other employment statutes. Such postings will prevent potential plaintiffs from arguing that the statute of limitations on filing an action under the ADA has been tolled.

2. Eliminate all pre-offer medical examinations, except any screening for the use of illegal drugs. Even in the case of drug-screening tests, the employer should provide assurances that the only information reported is the use of illegal drugs. Otherwise, the employer may receive information about legal drug usage that indicates such protected disabilities as epilepsy or HIV disease.

3. Ensure that the list of forbidden pre-employment inquiries includes any questions about disabilities, diseases, prescription drugs, and workers' compensation claims.

4. Prepare job descriptions prior to the effective date of the ADA that list the physical requirements for each job. In doing so, ensure that each physical requirement directly relates to essential job functions, with industrial engineering backup documentation.

5. Confine all pre-employment inquiries concerning vocational abilities, to questions about the individual's abilities to perform the essential functions of the job in question.

6. Do not reject an applicant or dismiss a current employee because of an individual's disability, unless the disability prevents the individual from performing the essential functions of the job; or the disability means that the individual cannot perform the job without imminent and substantial risk or injury to the individual or others.

7. Even then, do not reject the applicant or dismiss the current employee, unless it is *also* true that no reasonable accommodation will enable the individual to perform the job safely.

8. Base each employment decision, to the extent possible, on factors *other than* the individual's disability.

9. When considering possible reasonable accommodations, make a written record of all of the individual's suggestions as to what accommodations would address the disability in question; the costs imposed by the accommodations considered both in terms of immediate outlay and job efficiency; the sources the employer consulted, such as other employers in the industry and disability advisory groups; and the options the employer considered.

10. Avoid casting any employment decision involving an individual with a disability in terms of the individual's own good or protection. The ADA takes a very

dim view of paternalism. Any rationale stated in terms of the individual's own good must rest on very strong evidence that the individual's employment would create an imminent and substantial risk to the individual's safety, based on the established views of public health officials.

11. Along these same lines, never make any adverse decision concerning an individual with a disability, without thoroughly consulting and documenting the individual's own thoughts concerning the various options open to the employer.

12. Appoint an ADA review officer to ensure that the employer has an experienced and individualized approach to compliance with the ADA for *each* worker.

13. To minimize the insurance costs that will accompany a policy of hiring employees without consideration of disability, consider expanding the pre-existing exclusion in company insurance plans.

[The End]

Age Bias Suit Was Filed Within Time Limits

A federal employee could file an age bias claim in federal court six months after a notice of intent to do so was delivered to the EEOC and a year after the challenged adverse employment action was taken, the Supreme Court ruled (*Stevens v. Department of Treasury*, 56 EPD ¶ 40,679). The employee had 180 days under the Age Discrimination in Employment Act in which to notify the EEOC of his intent to file a civil suit in federal court. A federal trial judge had erroneously ruled that the suit itself must be filed within 180 days of the alleged discriminatory action. A federal appeals court overruled that decision but mistakenly held that the court suit must be filed within 30 days of the expiration of the 180-day period for notifying the EEOC. The law states that the suit cannot be filed within less than 30 days after notice to the EEOC. Since the ADEA does not state how long a complainant has after the 30-day period to file a case in court, it must be assumed that Congress intended to borrow an appropriate time period from an analogous state or federal statute. It was not necessary here to decide which statute was intended because the one year and six days that had passed since the alleged discriminatory action was well within the statute of limitations of any law that might apply, the Court said. Because the government conceded that there was no exhaustion requirement, the Supreme Court did not address the question of whether the employee was required to exhaust his administrative remedies after he had filed an administrative complaint with the EEOC before filing suit in federal court.