

3-15-1991

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Recommended Citation

Robert B. Fitzpatrick, *Americans with Disabilities Act of 1990*, 11 J. Nat'l Ass'n Admin. L. Judges. (1991)
available at <https://digitalcommons.pepperdine.edu/naalj/vol11/iss1/2>

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Americans With Disabilities Act of 1990¹

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I. Introduction

On July 26, 1990, President George Bush signed the Americans With Disabilities Act (ADA) (Pub. L. 101-336) into law. The ADA is a comprehensive anti-discrimination statute that prohibits discrimination against disabled individuals in private and state and local government employment, public accommodations, public transportation, state and local government services, and telecommunications. The purposes of the ADA are to provide a clear national mandate to end discrimination against individuals with disabilities and to provide strong, consistent, enforceable standards prohibiting discrimination against individuals with disabilities.

The ADA consists of five Titles. Title I of the Act, which is enforced by EEOC, prohibits employment discrimination against qualified disabled individuals. The underlying theory of discrimination in Title I is essentially that developed under the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*, and in particular in regulations implementing § 504 of that Act. Title I joins this theory of discrimination with the enforcement provisions of Title VII. It provides that the “powers, remedies, and procedures set forth in §§ 705, 706, 707, 709, and 710 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5, 2000e-6, 2000e-8, and 2000e-9) shall be the powers, remedies, and procedures this title provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability . . .” (§ 107(a)). Title 1 becomes effective on July 26, 1992. For the first two years after the effective date, employers with 25 or more employees are covered. Employers with 15 or more employees are covered as of July 26, 1994.

Title II applies to public services provided by state and local governments, and in particular to transit provided by public agencies; Title III applies to public accommodations, defined broadly to include most private establishments providing service to the public, with a separate section on public transportation provided by private entities; Title IV requires telephone companies to provide relay services that will enable persons with hearing impairments to communicate freely. Title V contains miscellaneous provisions, including requirements for technical assistance, that apply to the other titles, and makes certain changes in the Rehabilitation Act.

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The ADA prohibits discrimination in the workplace and elsewhere on the basis of an individual's physical or mental disability. This is a significant expansion of the protection afforded to the disabled under prior civil rights legislation. Employers, accordingly, must become familiar with the ADA as failure to comply with its strictures can result in legal sanctions.

II. History of Federal Disability Law

Prior to 1973 the recourse available to a disabled person who had been the victim of discrimination was virtually nonexistent. With the passage of the Federal Rehabilitation Act, 29 U.S.C. § 701 *et seq.*, however, a small percentage of disabled individuals were afforded protection from discrimination. This protection arose out of §§ 503 and 504 of the Federal Rehabilitation Act. Section 503 requires federal contractors, with contracts of at least \$2,500, to incorporate affirmative action plan and nondiscrimination clauses into their contracts, while § 504 prohibits discrimination against disabled individuals by employers receiving federal assistance. Although the Federal Rehabilitation Act protects some disabled individuals from discrimination, the majority of disabled individuals remain unprotected. It is for precisely this reason that the ADA was drafted and passed.

III. The ADA

The ADA is a comprehensive anti-discrimination law which seeks to protect qualified individuals with disabilities. The different titles of the Act set out the law as it pertains to the areas of federal and private employment, transportation, public accommodations, and telecommunications services. The following discussion focuses primarily on the employment and public accommodation titles of the ADA.

IV. Title I—Employment

A. Overview

Under Title I, covered employers are prohibited from discrimination against "qualified individuals with a disability." This prohibition against discrimination extends to every aspect of the employment process; from reviewing job applications to terminating employment. This being the case, it is important to understand which employers this title covers and which employees it protects.

1. **Covered Employers**—Employers in "industries affecting commerce" that have 25 or more employees for each working day, in each of 20 or more calendar

weeks, in the current or preceding calendar year will be covered by the ADA starting July 26, 1992. The Act's coverage will be expanded to include employers with 15 or more employees starting July 26, 1994. Employers with fewer than 15 employees are exempt from the ADA. The ADA excludes from coverage the federal government, government owned corporations, Indian tribes, and bona fide private membership clubs.

2. **Protected Employees**—The ADA protects any employee or prospective employee who: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such impairment; or (3) is regarded as having such an impairment. "Major life activities" include functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and, importantly, working.
 - a. An "impairment" under the ADA includes: physiological disorders; body disfigurements; mental illness; retardation; and learning disabilities. Acquired Immunodeficiency Syndrome (AIDS) is also included.
 - b. An "impairment" does not include: homosexuality; bisexuality; transvestism; transsexualism; pedophilia; exhibitionism; voyeurism; gender-identity disorders not resulting from physical impairments; compulsive gambling; kleptomania; pyromania; or psychoactive substance-use disorders resulting from current illegal drug use.

Since the ADA only applies to "qualified individuals with a disability," once an individual is found to be disabled, a further determination as to whether the individual is "qualified" must be made. Under the ADA, an individual with a disability is qualified for a job if, with or without reasonable accommodation, the individual can perform the essential functions of that job.

- a. The requirement of "reasonable accommodation" means that an employer must, where possible, remove the impediments that a disability

poses to employment. Examples of such accommodations are as follows:

- 1) making the work area physically accessible to disabled employees by installing equipment such as ramps and lifts;
 - 2) changing work schedules or hours;
 - 3) providing readers and interpreters; and,
 - 4) modifying training material and examinations. Furthermore, any business which is renovating its premises must give disabled individuals access to rest rooms, telephones, water fountains, and the like. If a new job site is under construction, it must be made handicap accessible, and all new and renovated buildings that have three or more stories must have elevators.
- b. Such accommodations, however, do not have to be made in those cases where they would constitute an "undue hardship" on the employer. The term "undue hardship" is synonymous with difficulty or expense. The following factors are considered in determining the existence of undue hardship:
- 1) the type and cost of the accommodation to be made;
 - 2) the size and financial resources of the business doing the accommodating;
 - 3) the type of business doing the accommodating; and,
 - 4) whether the cost of the accommodation can be offset by grants from a state rehabilitation agency.
- c. Since accommodations only have to be made with respect to "essential functions of the job," it is important to understand what this phrase means. The ADA does not define this phrase. The Senate Labor Committee Report states that "consideration should be given to the employer's judgment what functions are essential as a matter of business necessity." The problem, however, is

that it is unclear just how far such deference extends. Accordingly, employers should protect themselves by formulating written job descriptions which distinguish between essential and nonessential job functions. The Equal Employment Advisory Council, an organization representing employers, has urged EEOC to provide guidance to help employers distinguish between “essential” and marginal job functions and has urged EEOC to place on the claimant the burden of proving that the employer made an error regarding “essential” job functions.

B. Specific Provisions Concerning Drugs and Alcohol

The ADA has explicit provisions that address alcohol and drug abuse or addiction. An individual who is currently engaging in the illegal use of drugs is not protected by the ADA when the employer acts on the basis of the illegal drug use.

Under the ADA, “drugs” means controlled substances proscribed under the Controlled Substances Act and illegal drug use includes possession or distribution. It does not include the use of drugs taken under supervision by a licensed health-care professional, or other uses authorized by federal law.

An employer cannot discriminate against an individual who has successfully completed or is participating in a supervised drug rehabilitation program and is no longer using illegal drugs, or has otherwise been rehabilitated successfully. It is not a violation for an employer to adopt or administer reasonable policies or procedures, including drug testing, designed to ensure that an individual who has or is undergoing rehabilitation is no longer using the illegal drugs. Drug testing is not considered a “medical examination” under the ADA. Accordingly, an employer may:

1. prohibit the use of alcohol or illegal drugs at the workplace by all employees;
2. require that employees not be under the influence of illegal drugs or alcohol at the workplace;
3. require that employees conform their behavior to the requirements of the Drug Free Workplace Act, 41 U.S.C. 701 et seq.;
4. hold a drug user or alcoholic to the same qualification standards for employment, job performance and behavior to which it holds other individuals, even if such

individual's unsatisfactory job performance is related to his or her drug use or alcohol abuse;

5. refuse to hire, or fire, an employee who "is a current user of illegal drugs"; and
6. test employees for drug use.

C. Physical Examination Restrictions

The ADA is the first law to place restrictions on the employer's right to require that employees or job applicants submit to a physical examination. These restrictions are set out below.

1. Pre-employment Physicals

Pre-employment (i.e., pre-hiring) physicals are prohibited. A medical examination can only be required after a job offer is made and only if the physical is being given to all entering employees.

- a. The examination must be job related and not merely a pretext for discriminating against an otherwise qualified individual with a disability.
- b. The results of such examinations must be maintained in a confidential manner; being revealed on a need-to-know basis only.

2. Employment Physicals

When it appears that an employee is having trouble performing his or her essential job functions, an employer may require that the employee submit to a physical examination.

- a. The examination must be job related and consistent with business necessity.
- b. The results of the examination must be maintained in a confidential manner.

3. Drug Testing

The ADA does not place drug testing in the same category as physical examinations. Therefore, it is not prohibited under the Act. Employers, however, are still required to comply with all state and federal laws governing this area. On the other hand, tests for alcohol use do fall within the prohibition.

D. Protection Afforded to Individuals with AIDS

The ADA protects individuals infected with AIDS as well as individuals infected with other contagious diseases or infections. The Act, however, allows an employer to exclude or deny a job or benefit to a person with a contagious disease or infection if the employer can demonstrate both of the following:

1. that the infected individual poses a significant risk of transmitting the infection to others by virtue of receiving the position or benefit; and
2. that no reasonable accommodation on the part of the employer can eliminate such a risk.

The ADA requires the U.S. Department of Health and Human Services to study all communicable diseases and how they are transmitted, and to develop and publish within six months a list of any infections and communicable diseases transmitted through handling food. Employers in the food services industry will be able to reassign workers whose diseases may be spread to customers through contact with food.

E. Health Insurance Coverage

The ADA prohibits employers from denying health insurance coverage to disabled employees. While this prohibition may appear unduly burdensome and costly, the Act provides some protection for employers. An employer may limit the coverage of the insurance policy so long as the policy applies equally to all employees; regardless of disability. An employer may also place pre-existing condition exclusions in the policy, but the use of such exclusions will be prohibited where they are merely an attempt to defeat the purposes of the ADA. Finally, an employer may charge a disabled employee for the increased cost of health insurance for that employee but only to the extent that the increase is actuarially related to the cost of treating or insuring that condition; and if those rates are consistent with state law and if not prohibited by state law from doing so.

F. Enforcement of Title I

The enforcement provisions of Title VII of the Civil Rights Act of 1964 have been incorporated into the ADA. These provisions authorize any or all of the following types of relief in response to a violation of this title:

- a. injunctive relief;
- b. reinstatement;
- c. back pay; and

d. attorney's fees.

These provisions do not allow for the recovery of compensatory or punitive damages. If Congress passes the Civil Rights Act of 1990, which provides for compensatory and punitive damages and the right to jury trials, these new remedies also will be available under the ADA in cases of intentional discrimination. The Equal Employment Opportunity Commission ("EEOC") is responsible for enforcement under this title. EEOC is required to issue substantive regulations by July 26, 1991, and such rule making will be governed by the Administrative Procedure Act, 5 U.S.C. § 553 et seq. EEOC also must develop a manual to aid employers in complying with the ADA within six months of publication of the final regulations.

V. Title III—Public Accommodations and Services Operated by Private Entities

Title III of the ADA provides that no covered entity shall discriminate against an individual on the basis of a disability in the full and equal enjoyment of goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation. Public accommodations include privately owned establishments such as: restaurants, hotels, doctors' offices, pharmacists, grocery stores, museums, and homeless shelters. This title does not cover religious institutions or entities under their control.

A. Discriminatory Acts

Discrimination under this title occurs when:

1. a disabled individual or group of individuals has *not* been provided an opportunity or benefit afforded others;
2. a disabled individual or group of individuals is provided an opportunity that is *not equal* to that afforded others;
3. a disabled individual or group of individuals is provided an opportunity that is *less effective* than that afforded others; or
4. a disabled individual or group of individuals is provided an opportunity that is *separate or different* than that afforded others, unless such action is necessary to provide the individual or group of individuals with an opportunity that is as effective as that provided to others.

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This title also outlines specific measures to be taken in preventing the above-mentioned types of discrimination. These measures are set out below.

1. Public establishments must make reasonable modifications to policies and procedures to ensure that the disabled are not denied services or segregated.

This includes providing auxiliary aids to disabled individuals so that they can use and have access to the goods and services provided, so long as doing so does not cause undue hardship to the business. Thus, hotels or restaurants that do not permit animals on the premises would be required to make an exception for a blind patron's seeing eye dog.

2. Public establishments must make structural changes to their facilities in compliance with this title's physical accessibility requirements. The type of physical alterations required depends on whether the facility already exists, is being remodeled, or is under construction.

- a. **Existing Facilities**—Architectural and communication barriers must be removed if so doing is "readily achievable." The "readily achievable" standard in this title appears to be less stringent than the "undue burden" standard in Title I. Therefore, only those physical alterations which are easily accomplishable and able to be completed without much difficulty or expense will be required.
- b. **Facilities Being Remodeled**—If major structural changes are being made, a facility will be required to make additional changes which will provide disabled individuals with access to the facility. This includes the construction of ramps and elevators for wheelchairs, placement of handicap bars in bathrooms, and placement of water fountains and telephones so as to make them accessible to wheelchair-bound individuals.

- c. **Facilities Under Construction—**
Facilities that will be ready for occupancy after January 26, 1992, must be “readily accessible or usable” by the disabled. While the phrase “readily accessible or usable” is not defined, it is apparent that this title requires that the highest degree of convenience be afforded to disabled individuals.

B. Enforcement

Any disabled individual who believes that he has been or is about to be discriminated against under this title may bring suit in federal court. The court has the power to award equitable remedies including injunctions and orders to modify the facility. Additionally, the U.S. Attorney General may investigate and bring suit for violations of this title and may seek civil penalties of up to \$50,000 for the first violation and \$100,000 for all subsequent violations.

VI. Public Transportation

In addition to the employment and public accommodations titles, Title II of the ADA specifically addresses prohibited discrimination in public transportation (other than air travel) provided by private entities. This title provides that a privately operated entity that is primarily engaged in the business of transporting people (except those entities who are in the principal business of providing air transportation) and whose operations affect commerce shall not discriminate against an individual on the basis of a disability in the full and equal enjoyment of public transportation services. Examples of requirements of this title include:

- A. Private entities purchasing new trains after February 26, 1992, must ensure that they are accessible for use by all individuals, including those in wheelchairs;
- B. Private entities purchasing new buses six years after the ADA's enactment for large entities and seven years after enactment for small entities must ensure that they are accessible to all disabled individuals.

This title also provides that public entities purchasing or leasing new buses, rail, or other vehicles must make sure that those vehicles are accessible to disabled individuals. Requirements for public entities include:

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- A. New vehicles bought by the public transit authorities must be accessible to disabled individuals;
- B. If a vehicle is remanufactured so as to extend its life for five years or greater, it must be made accessible to disabled individuals to the extent possible.
- C. Good faith efforts must be made to comply with the purposes of the ADA when purchasing used vehicles;
- D. Para-transit service must be provided to those individuals with disabilities who cannot use the mainline system unless providing such service would be too financially burdensome.

VII. Conclusion

The ADA extends civil rights protection for disabled individuals to employment in the private sector, public accommodations, services provided by state and local governments, transportation, and telecommunication relay services. The purpose of the Act is to provide clear, forceful, consistent and enforceable standards addressing all forms of discrimination against individuals on the basis of a disability. Because the ADA is often unclear with respect to its meaning and scope, it will likely produce a substantial amount of litigation. Employers, accordingly, should take the following measures to help insulate themselves from suit.

- A. Employers should treat all disabilities as if they are covered under the ADA. This means that an employer should not use the existence of a disability in any employment decision unless the disability, where reasonably accommodated, clearly prevents an employee from performing an essential function of the job.
- B. Employers should draft clear and concise job descriptions which distinguish, where possible, between essential and nonessential job functions.
- C. Employers should only conduct pre-employment physicals after a job offer is made and only if physicals are being given to all entering employees. The examination should be job related and the results should be maintained in a confidential manner.
- D. Employers should only require employment physicals when it appears that an employee is having trouble performing his or her essential job functions. The results of this physical, like the results of the pre-

employment physical, should be maintained in a confidential manner.

- E. Employers should not base employment decisions on the fact that an individual has AIDS or any other contagious disease or infection, unless they can show that no reasonable accommodation will enable the infected individual to perform the essential functions of his or her job or prevent the risk of transmission.
- F. Employers should review their health insurance policies to make sure that disabled employees are receiving the same coverage as all other employees.
- G. Employers should make existing workplaces more accessible to disabled employees by removing architectural and communication barriers where so doing is readily achievable.
- H. Employers who are constructing new facilities or remodeling existing facilities should make the facilities readily accessible to disabled individuals.

Keep in mind that the ADA does not require an employer to pick a disabled individual over a non-disabled individual. Rather, it requires that an employer refrain from basing employment decisions on the existence of a disability.