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ARTICLES

AN EMPLOYER'S GUIDE TO THE AMERICANS WITH DISABILITIES ACT: FROM JOB QUALIFICATIONS TO REASONABLE ACCOMMODATIONS

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I. INTRODUCTION

Enacted on July 26, 1990, the Americans With Disabilities Act ("ADA")[1] is a wide-ranging law that creates new rights, and extends existing rights, for the estimated 43 million Americans who have a "disability."[2] The ADA prohibits discrimination against persons with disabilities in employment (Title I), governmental programs and services (Title II), public accommodations and services (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 regulations to carry out Title I.[3] On July 26, 1991, the EEOC issued regulations, together with an Interpretive Guidance Appendix to the regulations to set forth the EEOC's view on issues arising under the ADA.[4]

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1. 42 U.S.C. §§ 12101-12213 (1990). The bulk of the legislative history of the Americans With Disabilities Act (ADA) appears in several congressional reports: the House Labor Committee Report, H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2 (1990); House Judiciary Committee Report, H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 3 (1990); the Senate Report, S. REP NO. 116, 101st Cong., 2d Sess. (1990); and the Conference Report, H.R. REP NO. 596, 101st Cong., 2d Sess. (1990).

2. The ADA uses the term "disability" instead of the term "handicap," which is the term found in the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796 (1990), and in state handicap discrimination statutes. The legislative history explains that "disability" is the "most current terminology" and "reflects the preference of persons with disabilities." H.R. REP NO. 485, 101st Cong., 2d Sess., pt. 3, at 26-27 (1990); *see also* S. REP NO. 116, 101st Cong., 2d Sess. 21 (1990); H.R. REP NO. 485, 101st Cong., 2d Sess., pt. 2, at 50-51 (1990).

3. The EEOC was given until July 26, 1991 to promulgate its regulations. 42 U.S.C. § 12116 (1990). Proposed regulations were issued February 28, 1991, 56 Fed. Reg. 8577 (proposed Feb. 28, 1991) which were finalized July 26, 1991, 56 Fed. Reg. 35,725 (1991).

4. The regulations will be published as Part 1630 of Volume 29 of the Code of Federal Regulations, 29 C.F.R. § 1630.1-.16. 56 Fed. Reg. 35,725 (1991). The regulations have attached to them an Interpretive Guidance Appendix (hereinafter referred to as "Interpretive Appendix"). Recordkeeping requirement reg-

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." 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 also compensatory damages and punitive damages to be determined by a jury.[5] The burdens imposed by the ADA can potentially range from the expense of hiring a reader for a blind lawyer to restructuring job assignments so that a disabled employee can perform a tailor-made job.

II. COVERAGE

A. *Employers Covered*

After a two year waiting period, as of July 26, 1992, the ADA will cover all employers who employ 25 or more employees. After two additional years, as of July 26, 1994, the coverage will expand to all employers who employ 15 or more persons.[6]

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.

B. *Employees And Applicants Covered*

The ADA forbids employment "discrimination" against any "qualified individual with a disability." The coverage of the ADA is thus keyed to the definition of "disability." A disability is (1) any *physical or mental impairment* that substantially limits a *major life activity* (*e.g.*, communications, ambulation, working), (2) having a *record* of such an impairment, or (3) *being regarded by others as having* such an impairment.[7]

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ulations were also issued, requiring that records be retained for one year. 56 Fed. Reg. 35,753 (1991).

5. *See* Section IX, *infra*.

6. ADA §§ 101(5), 108, 42 U.S.C. §§ 12111(5), 12118 (1990).

7. ADA § 3(2), 42 U.S.C. § 12103(2) (1990). *See* 29 C.F.R. § 1630.2(g) (1991).

The legislative history indicates that courts interpreting the ADA should generally follow the regulations and precedent under the Rehabilitation Act of 1973. The regulations state that unless otherwise provided, the ADA does not apply a lesser standard than the Rehabilitation Act of 1973.[8] Under the Rehabilitation Act, and similarly worded state handicap discrimination statutes, courts have broadly defined the concept of "disability" to include: epilepsy,[9] cardiovascular disease,[10] former drug use,[11] psychiatric problems,[12] legal blindness,[13] manic depressive syndrome,[14] ankylosing spondylitis, which causes stiffening of the joints,[15] nervous and heart conditions,[16] multiple sclerosis,[17] blindness in one eye,[18] a heart condition,[19] osteoarthritis of the knee joints,[20] cerebral palsy and dyslexia,[21] right leg amputation,[22] and unusual sensitivity to tobacco smoke.[23] The legislative history of the ADA 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.[24]

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, Congress expressly provided that the concept of "disability" excludes homosexuality, bisexuality, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and "psychiatric substance use disorders resulting from current illegal use of drugs."[25]

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8. 29 C.F.R. § 1630.1(c) (1991).

9. Fitzgerald v. Green Valley Area Educ. Agency, 589 F Supp. 1130 (D.C. Iowa 1984).

10. Bey v. Bolger, 540 F Supp. 910 (E.D. Pa. 1982).

11. Davis v. Bucher, 451 F Supp. 791 (E.D. Pa. 1978).

12. Doe v. New York Univ., 666 F.2d 761 (2d Cir. 1981).

13. Norcoss v. Sneed, 755 F.2d 113 (9th Cir. 1985).

14. Gardner v. Morris, 752 F.2d 1271 (8th Cir. 1985).

15. Sisson v. Helms, 751 F.2d 991 (9th Cir.), *cert. denied*, 474 U.S. 846 (1985).

16. Treadwell v. Alexander, 707 F.2d 473 (11th Cir. 1983).

17. Pushkin v. Regents of the Univ. of Colorado, 658 F.2d 1372 (10th Cir. 1981).

18. Holly v. City of Naperville, 603 F Supp. 220 (N.D. Ill. 1985).

19. Bento v. I.T.O. Corp., 599 F Supp. 731 (D.R.I. 1984).

20. Gunn v. Bolger, 598 F Supp. 196 (D.D.C. 1984).

21. Fitzgerald v. Green Area Ed. Agency, 589 F Supp. 1130 (S.D. Iowa 1984).

22. Longoria v. Harris, 554 F Supp. 102 (S.D. Tex. 1982).

23. Vickers v. Veterans Admin., 549 F Supp. 85 (D.D.C. 1982).

24. H.R. REP NO. 485, 101st Cong., 2d Sess., pt. 2, at 51 (1990).

25. ADA § 511, 42 U.S.C. § 12211 (1990). *See* 29 C.F.R. § 1630.3 (1991).

Congress was particularly clear about the use of illegal drugs: 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,"[26] and a person who currently uses illegal drugs is not considered an individual with a disability.[27]

The regulations make clear that in determining whether a condition affects a major life activity, and hence is a disability, the effect of the condition on the worker is compared to what activities an "average person in the general population" can engage in without the condition.[28] The condition is to be considered, however, "without regard to mitigating measures such as medicine, or assistive, or prosthetic devices."[29] The regulations and Interpretive Appendix indicate that even a temporary condition, if severe enough, can qualify as a disability, although pregnancy is explicitly excluded as a disability.[30] Conversely, the Interpretive Appendix clarifies that "physical characteristics such as eye color, hair color, left-handedness, or height, weight or muscle tone that are within 'normal' range and are not the result of a physiological disorder" are not disabilities, nor can "personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder" qualify as a disability.[31] Obesity will normally not be considered to be a disability.[32]

Of particular significance, the regulations 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 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 to 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."[33] As examples, the Appendix notes that a commercial air-

26. ADA § 105(d), 42 U.S.C. § 12114(d) (1990).

27. ADA § 510(a), 42 U.S.C. § 12210(a) (1990). *See* 29 C.F.R. § 1630.3 (1991). A *former* illegal drug user does not lose the protection of the ADA, however, if he is completing or has completed a supervised drug rehabilitation program, *and* he is not currently using illegal drugs. 29 C.F.R. § 1639.3(b) (1991). The term "currently" means more than just the day in question, and includes "recently." Interpretive Appendix, § 1630.3(b), 56 Fed. Reg. 35,746 (1991).

28. 29 C.F.R. § 1630.2(j) (1991).

29. Interpretive Appendix § 1630.2(h), 56 Fed. Reg. 35,740 (1991).

30. 29 C.F.R. § 1630.2(j)(2)(ii) (1991); Interpretive Appendix § 1630.2(h), (j), 56 Fed. Reg. 35,741 (1991).

31. Interpretive Appendix § 1630.2(h), 56 Fed. Reg. 35,741 (1991).

32. Interpretive Appendix § 1630.2(j), 56 Fed. Reg. 35,741 (1991).

33. 29 C.F.R. § 1630.1(j)(3)(i) (1991).

line pilot with a minor vision impairment does not have a disability if he can still be a co-pilot or fly for a courier service. Conversely, a laborer with a bad back which prevents him from performing heavy labor jobs would be considered as a person with a disability.[34]

An employer generally cannot argue that while it rejected a worker due to a condition for a job, other employers in the same business might hire the worker despite the condition. If even one employer rejects an applicant because of "myths, fears and stereotypes," then that person is regarded as a person with a disability and is protected by the ADA.[35] In addition, the fact that the 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 mistakenly assumes that 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.[36]

C. Overview Of Employment Prohibitions

The ADA aims to eliminate all job standards and employment criteria that unnecessarily screen out individuals with disabilities, and the ADA imposes on employers an affirmative duty to make reasonable accommodations to disabled applicants and employees, unless the accommodations would be an undue hardship. A separate-but-equal accommodation is not acceptable.

The ADA seeks to accomplish these purposes by identifying a number of prohibited employment practices that the ADA defines as "discrimination" against the disabled:

> conducting *medical examinations or asking about disabilities* before making the individual an offer of employment;
>
> using *job standards or methods* that have the effect of discriminating or that perpetuate discrimination on the basis of disability;
>
> using *qualification standards, employment tests, or other selection criteria* that screen out or tend to screen out an individual with a disability, unless the criterion is "job-related" and "consistent with business necessity";
>
> failing to use *tests* in the most effective manner to ensure that results accurately reflect the abilities of an individual rather then his or her disability, unless the test is intended to measure the individual's impairments;
>
> *limiting, segregating, or classifying* an individual because of his or her disability in a way that adversely affects job opportunities or status;

34. Interpretive Appendix § 1630.2(j), 56 Fed. Reg. 35,742 (1991).
35. Interpretive Appendix § 1630.2(l), 56 Fed. Reg. 35,743 (1991).
36. Interpretive Appendix § 1630.2(l), 56 Fed. Reg. 35,742 (1991).

discriminating against a qualified individual (who himself may or may not be disabled) because that individual has a "*relationship or association with an individual with a disability*, such as a spouse;"

not making reasonable accommodation to the known disability of a qualified individual, unless the accommodation would create an undue hardship on the operation of the business; and

participating in a *collective bargaining agreement* or other arrangement that has the effect of discriminating against a qualified individual with a disability.[37]

It is unlawful for an employer to engage in any of these forms of discrimination.

III. MEDICAL EXAMINATIONS AND INQUIRIES

The ADA starts at the first hurdle which most disabled job applicants face in the employment process: the medical examination and inquiry, including any psychological testing.[38] 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 reforms these practices. It forbids an employer, before making a job offer, to "conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability."[39] On the other hand, to ensure that employers may continue to rely on certain pre-employment drug screens, the ADA provides that "a test to determine the illegal use of drugs shall not be considered a medical examination."[40]

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. 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

37. ADA § 102, 42 U.S.C. § 12112 (1990) (emphasis added).

38. H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 3, at 46 (1990).

39. ADA § 102(c)(2)(A), 42 U.S.C. § 12112(c)(2)(A) (1990). *See* 29 C.F.R. § 1630.13(a) (1991). An employer can ask applicants to *voluntarily* identify any disability in order to meet the affirmative action requirement of the Rehabilitation Act. Interpretative Appendix § 1630.13(a), 56 Fed. Reg. 35,750 (1991).

The Interpretive Appendix strangely provides that a physical agility test is not a medical examination. Interpretive Appendix § 1630.14(a), 56 Fed. Reg. 35,750 (1991). This leads to the questions of whether strength testing, a procedure which is becoming more common, is a medical examination, and where one crosses the line to a "medical examination."

40. ADA § 104(d), 42 U.S.C. § 12114(d) (1990). *See* 29 C.F.R. § 1630.16(c)(1) (1991). With respect to the effect of the Drug-Free Workplace Act, see 29 C.F.R. § 1630.16(b) (1991). If the employer misreads a drug test as being positive, when it is negative, the employer will be held liable. There is no good faith defense. 29 C.F.R. § 1630.3(b)(3) (1991).

condition or a disability. The Interpretive Appendix and the legislative history use the same example of a motor vehicle driver. The employer may ask whether the driver has a driver's license, but may not inquire as to his visual ability:

> *Employers may ask questions which relate to the ability to perform job-related functions. However, these questions should not be phrased in terms of disability.* An employer, for example, may ask whether the applicant has a *driver's license*, if driving is a job function, but may not ask whether the applicant has a *visual disability*.[41]

In terms of an allowed job-related function inquiry, an employer can ask all applicants how they believe they can perform the job. Moreover, even if the question is not routinely asked, if an applicant has an obvious disability which would appear to prevent the applicant from performing the job, the employer can ask the applicant to explain how he believes he can perform the job.

Thus, the ADA prohibits "medical examinations and inquiries" prior to the making of a tentative job offer,[42] although it permits an "employment entrance examination," on which the offer of employment may be conditioned.[43] Any such post-tentative job offer medical examination, however, must meet certain requirements: (1) it must apply to all applicants for a particular class of jobs, (2) the results must be treated as a confidential medical record, including being kept in a separate file and not used for any purpose inconsistent with the ADA, and (3) all parts of the examination which exclude a worker, *i.e.*, all "exclusionary criteria," must be "job-related and consistent with business necessity."[44]

The 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

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41. Interpretive Appendix § 1630.13(a), 56 Fed. Reg. 35,750 (1991); S. REP NO. 116, 101st Cong., 2d Sess. 39 (1990) (emphasis added). The Interpretive Appendix explicitly provides that the question of whether the applicant has ever had a workers' compensation injury or claim is "in terms of a disability," and thus can only be asked after a tentative job offer has been made. Interpretive Appendix § 1630.12(a), 56 Fed. Reg. 35,750 (1991).

42. Interpretive Appendix § 1630.14(a), 56 Fed. Reg. 35,750 (1991).

43. ADA § 102(c), 42 U.S.C. § 12112(c) (1990). *See* 29 C.F.R. § 1630.13(a) (1991). This prohibition does not extend to screening for illegal drugs. See *supra* text accompanying note 26.

44. ADA §§ 102(c)(3), (4)(A), 42 U.S.C. §§ 12212(c)(3), (4)(A) (1990). *See* 29 C.F.R. § 1630.14(b) (1991). "The legislation allows covered entities to require post-offer *medical examinations so long as they are given to all entering employees in a particular category.* For example, an entity can test all police officers rather than all city employees or all construction workers rather than all construction company employees." S. REP NO. 116, 101st Cong., 2d Sess. 39 (1990) (emphasis added). In terms of confidentiality, the records can be used in administering a workers' compensation program, as well as health insurance. Interpretive Appendix § 1630.14(b), 56 Fed. Reg. 35,751 (1991).

required by the Occupational Safety and Health Administration ("OSHA").[45] However, any state or local law which is inconsistent with the purpose of the ADA, *i.e.*, the requirement is not job-related and of business necessity, may be preempted by the ADA.[46] In addition, 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."[47]

The ADA thus allows inquiry into a worker's medical condition, once a tentative job offer is made. If an applicant is rejected because of that individual's medical examination, however, 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 relate to the physical requirements of the essential 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, a mandatory medical examination is permitted only if it can be shown to be "job-related and consistent with business necessity."[48] Within certain limits, voluntary medical examinations are allowed without such a showing.[49]

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45. 29 C.F.R. §§ 1630.16(b)(5)(6), 1630.16(c)(2) (1991); H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 3, at 46 (1990) (emphasis added). *See also* 29 C.F.R. § 1630.15(e) (1991) (conflicts with other federal laws).

46. Interpretive Appendix § 1630.1(a), 56 Fed. Reg. 35,740 (1991). *See also* 29 C.F.R. § 1630.15(e) (1991). The legislative history provides that "The committee does not intend for this Act to override any medical standards or requirements established by Federal, State or local law as a prerequisite for performing a particular job, *if the medical standards are consistent with section 504 — that is, if they are job-related and consistent with business necessity. See, e.g.*, Strathie v. Dep't of Transp., 716 F.2d 227 (3d Cir. 1983). For example, several health standards promulgated pursuant to the Occupational Safety and Health Act of 1970 (29 U.S.C. 655) and the Federal Coal Mine Health and Safety Act of 1969 and the amendments thereto adopted in 1977 (30 U.S.C. 801 et seq.) require that employees exposed to certain toxic and hazardous substances be medically surveyed at specified intervals to determine if the exposure to those substances have had any negative effect on the employees." H.R. REP No. 485, 101st Cong., 2d Sess., pt. 2, at 74 (1990) (emphasis added).

47. H.R. REP No. 485, 101st Cong., 2d Sess., pt. 2, at 74 (1990). *See also infra* notes 68-82 and accompanying text for a discussion of safety considerations.

48. ADA § 102(c)(4)(A), 42 U.S.C. § 12113(c)(4)(A) (1990). *See* 29 C.F.R. § 1630.14(c) (1991). For example, a "fit to return to duty examination" after an injury or illness would probably be proper. On the other hand, if a gay employee was missing a lot of time from work, that would not justify an AIDS test. Interpretive Appendix §§ 1630.13(a), (b), 56 Fed. Reg. 35,750, 35,751 (1991).

49. ADA § 102(c)(4)(B), 42 U.S.C. § 12113(c)(4)(B) (1990). *See* 29 C.F.R. § 1630.14(d) (1991).

IV. EMPLOYMENT STANDARDS

The ADA is primarily directed at employment standards, *e.g.*, job requirements which 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 related to the essential functions of the job. The employer must next determine if a reasonable accommodation would permit the disabled person to meet the employment standards and thus perform the essential functions of the job. The legislative history sums up this three-part requirement as follows:

> The three pivotal provisions to assure a fit between job criteria and an [individual's] actual ability to do the job are:
>
> (1) The requirement that persons with disabilities not be disqualified because of the inability to *perform non-essential or marginal functions of the job*;
>
> (2) The requirement that any selection criteria that screen out or tend to screen out be *job related and consistent with business necessity*; and
>
> (3) The requirement to provide *reasonable accommodation* to assist persons with disabilities to meet legitimate criteria.[50]

Each of these three mandates has a number of potential pitfalls for employers, who must carefully examine and meet *each* requirement for *each* disabled person.

A. Essential Functions Of The Job

The qualified individual with a disability "is an individual who with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[51] The identification of what are the essential functions of a job is key to assuring compliance with the ADA. Medical criteria and standard/test criteria must be keyed to the essential functions of the job. Similarly, an employer under the all-important job restructuring accommodation requirement need restructure only non-essential functions of the job. Nevertheless, the ADA itself does not define "essential functions." The legislative history is no more helpful: it defines "essential" as duties which are "fundamental and not marginal."[52]

The ADA provides 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 ad-

50. S. REP NO. 116, 101st Cong., 2d Sess. 37 (1990) (emphasis added).

51. ADA § 101(8), 42 U.S.C. § 12111(8) (1990). *See* 29 C.F.R. § 1630.2(m) (1991).

52. S. REP NO. 116, 101st Cong., 2d Sess. 26 (1990) (emphasis added).

vertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job."[53] While any previously created written job descriptions will be considered evidence of the essential functions of a job, the worker will be free to challenge the accuracy of the descriptions.[54] 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 thus the welder's inability to perform the remaining 12% of the job tasks was no defense to a discrimination claim.[55]

Moreover, as reflected by the legislative history, 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.[56] Furthermore, in evaluating an individual's capabilities, the employer can only consider the worker's current conditions. The "mere possibility of future incapacity does not by itself render the person not qualified."[57]

The regulations provide some guidance in applying the definition of "essential functions" to the practicalities of the real world. The regulations offer three examples of reasons why a job function may be considered essential: (i) the position exists to perform that

53. ADA § 101(8), 42 U.S.C. § 12111(8) (1990). *See* 29 C.F.R. § 1630.2(n) (1991).

54. An amendment that would have created a presumption in favor of the employer's determination of essential functions was rejected. This additional language adopted by the Committee is not meant to change the current burden of proof. This language simply assures that the employer's determination of essential functions is considered. *A plaintiff may challenge the employer's determination of what is an essential function.* H.R. REP NO. 485, 101st Cong., 2d Sess., pt. 3, at 33-34 (1990) (emphasis added).

55. Ackerman v. Western Elec. Co., 643 F Supp. 836 (N.D. Calif. 1986).

56. H.R. REP NO. 485, 101st Cong., 2d Sess., pt. 3, at 33 (1990).

57. S. REP. NO. 116, 101st Cong., 2d Sess. 26 (1990). "The determination of whether a person is qualified should be made at the time of the employment action, *e.g.*, hiring or promotion, and should *not be based on the possibility that the employee or applicant will become incapacitated and unqualified in the future.* Nor can paternalistic concerns about what is best for the person with a disability serve to foreclose employment opportunities." H.R. REP NO. 485, 101st Cong., 2d Sess., pt. 3, at 34 (1990). The employer cannot specualte as to future incapacitation. Interpretive Appendix § 1630.2(m), 56 Fed. Reg. 35,743 (1991). On the other hand, if it is known (as opposed to a mere possibility) that the applicant will have to miss work in the next three months due to his condition, and even with reasonable accommodations, the worker's job requres that he must be at work every day for the next three months, then he need not be hired. Interpretive Appendix § 1630.14(b), 56 Fed. Reg. 35,751 (1991).

function, (ii) "the limited number" of employees available to perform the function, and (iii) the function is so "highly specialized" that the incumbent in the position is hired to perform it.[58] The regulations then identify seven of the categories of evidence that may help determine whether a particular function is essential: (i) the employer's judgment, (ii) written job descriptions prepared before job advertising or interviews, (iii) the amount of time spent on the job performing the function, (iv) the consequences of not requiring the incumbent to perform the function, (v) the collective bargaining agreement, (vi) the work experience of past incumbents in the job, and (vii) the current work experience of incumbents in "similar jobs."[59]

The Interpretive Appendix notes that these examples and categories of evidence are not exhaustive and will not be given greater weight than evidence which is not on these lists. The Interpretive Appendix also notes that the small size of a workforce, and a "cycle of heavy demand for labor intensive work" will be considered.[60] The Interpretive Appendix observes that the employer's reasoned judgment regarding production standards will not be questioned and nit-picked, 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. [See section 1630.10 Qualification Standards, Tests and Other Selection Criteria]. 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.[61]

The employer must show, however, "that it actually imposes such requirements on its employees in fact, and not simply on paper."[62] This is a key requirement. An employer's judgment that all its welders must be able to lift 50 pounds will not be questioned,

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58. 29 C.F.R. § 1630.2(n)(2) (1991).

59. 29 C.F.R. § 1630.2(n)(3) (1991). The Interpretive Appendix stresses that an "individual assessment" of the job is needed: "analyzing the actual job duties and determining the true purpose or object of the job." Interpretive Appendix § 1630.9, 56 Fed. Reg. 35,749 (1991).

60. Interpretive Appendix § 1630.2(n), 56 Fed. Reg. 35,743 (1991).

61. *Id.* (emphasis added). The Interpretive Appendix 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" *Id.* at 35,744. *See* 29 C.F.R. § 1630.15(b)(c) (1991) (disparate treatment and impact). *See also* Interpretive Appendix § 1630.10, 56 Fed. Reg. 35,749 (1991) ("production standards will generally not be subject to a challenge under [Section 1630.10].").

62. Interpretive Appendix § 1630.2(n), 56 Fed. Reg. 35,744 (1991).

only if all welders on the job are, in fact, lifting 50 pounds as part of their job. If an applicant can show that several current welders for the employer have never lifted over 25 pounds on the job, then the 50 pound requirement will not be upheld.

Because courts will look closely at what really are the essential functions of a job, employers will need good industrial engineering back-up to justify most job duty requirements. Of critical import, the written job duty requirements must match the abilities of the current workforce. The applicant's current abilities, with reasonable accommodations, will then be measured in terms of the job's essential functions.

B. Use Of Objective Screening Criteria

1. Qualification And Testing Requirements

If an employer's job qualification requirement tends to screen out disabled persons, then the ADA requires the employer to prove that the requirement is "job related for the position in question and is consistent with business necessity."[63] Under established employment discrimination law, the job-related and business necessity standard is one of the more difficult requirements to meet.

Similarly, the ADA forbids tests that do not accurately reflect the disabled individual's skill, aptitude, or other factors which the tests purport to measure.[64] 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.[65]

The regulations and Interpretive Appendix appear to recognize some exceptions to this requirement. A smoke-free workplace is explicitly permitted, and the Interpretive Appendix provides that leave policies generally need not be justified.[66]

The lesson for employers is clear: if a standard, criterion or test excludes a disabled person from a job, then the employer will

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63. ADA § 102(b)(6), 42 U.S.C. § 12112(b)(6) (1990). *See* 29 C.F.R. § 1630.10(a) (1991). *See also* 29 C.F.R. § 1630.15(b)(c) (1991) (disparate treatment and impact).

64. ADA § 102(b)(7), 42 U.S.C. § 12112(b)(7) (1990). *See* 29 C.F.R. § 1630.11 (1991).

65. Stutts v. Freeman, 694 F.2d 666, 669 (11th Cir. 1983). *See* Interpretive Appendix § 1630.11, 56 Fed. Reg. 35,749 (1991).

66. 29 C.F.R. § 1630.16(d) (1991). *See* Interpretive Appendix § 1630.15(b)(c), 56 Fed. Reg. 35,752 (1991).

have to justify the need for the standard, criterion or test, and demonstrate that it excludes only those persons who can not perform the essential functions of the job, even with reasonable accommodations.

2. *Safety Standards*

Employers have an obvious interest in insisting that a worker be able to safely perform his job. The ADA and its regulations require, however, 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 . . and that the risk cannot be eliminated or reduced by a reasonable accommodation."[67] The Interpretive Appendix indicates that a substantial risk requires a "high probability."[68]

a. Protecting Safety Of Others

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."*[69] However, as the Supreme Court made clear in *School Board of Nassau County v. Arline*,[70] safety and health risks may 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, interpreting the Rehabilitation Act, considered the health and safety risk from a contagious disease — 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:

> [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.[71]

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67. 29 C.F.R. § 1630.2(r) (1991). *See* 29 C.F.R. § 1630.10(b) (1991). The worker's ability to safely perform the job must be based on his current condition, and not on speculation as to his future incapacitation. Interpretive Appendix § 1630.3(m), 56 Fed. Reg. 35,743 (1991).

68. Interpretive Appendix § 1630.2(r), 56 Fed. Reg. 35,745 (1991).

69. ADA §§ 101(3), 103(b), 42 U.S.C. §§ 12111(3), 12113 (1990). *See* 29 C.F.R. 1630.10(b) (1991).

70. 480 U.S. 273 (1987).

71. *Id.* at 288.

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."[72] The Court was unsure whether courts could also credit "the reasonable medical judgments of private physicians on which an employer has relied."[73]

The legislative history of the ADA 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. (See section 102(b) of the legislation). See also *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987). For 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."*[74]
>
> * * *
>
> 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.[75]

Thus, in evaluating a health or safety risk to others, employers should be prepared to demonstrate, with an objective medical opinion, which is not inconsistent with the opinions of public health officials such as the Surgeon General or the Center for Disease Control, that a worker represents a significant risk to the health or safety of others. At a minimum, the regulations require that the employer produce evidence of the "current medical knowledge and/or the best available objective evidence" which substantiates the significant risk.[76]

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72. *Id.* at 286-87 n.15.

73. *Id.* at 288 n.18.

74. S. REP NO. 116, 101st Cong., 2d Sess. 27 (1990) (emphasis added), *citing* Hall v. United States Postal Service, 857 F.2d 1073, 1079 (6th Cir. 1988), quoting *Arline*. *See also* Mantolete v. Bolger, 757 F.2d 1416 (9th Cir. 1985) and Strathie v. Department of Transp., 716 F.2d 227 (3d Cir. 1983).

75. H.R. REP NO. 596, 101st Cong., 2d Sess. 60 (1990) (emphasis added).

76. 29 C.F.R. § 1630.2(r) (1991). Special rules apply to food handlers with infections and communicable diseases designated by the Secretary of Health and Human Services. 20 C.F.R. 1630.16(e) (1991). The Secretary designated fifteen viruses and bacteria, *e.g.*, salmonella typhi, but not the AIDS HIV virus. 56 Fed. Reg. 40,897 (1991).

b. Safety Of The Disabled Individual

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*,"[77] conspicuous by its absence is any reference to the worker's own safety.

The legislative history suggests a concern over an employer's "paternalistic concerns for the disabled person's own safety."[78] The House Report 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:"

> A candidate, undergoing a post-offer, pre-employment medical examination may not be excluded, for example, solely on the basis of an abnormality on an x-ray. However, if the examining physician found that there was *high probability of substantial harm* if the candidate performed the particular functions of the job in question, the employer could reject the candidate, unless the employer could make a reasonable accommodation to the candidate's condition that would avert such harm and such accommodation would not cause an undue hardship.
>
> However, the Committee would like to stress three important points. First, the assessment that there exists a *high probability of substantial harm* must be strictly based on valid medical analyses. For example, back x-rays which reveal anomalies in asymptomatic persons usually have largely low predictive value. Therefore, employers should be diligent in assuring that their examining physicians make assessments based on testing measures that actually and reliably predict the *substantial, imminent degree of harm required.*
>
> * * *
>
> Third, 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.[79]

Remarks on the House and Senate floors further emphasized that in any case in which a company considers the individual's own

77. ADA § 101(3); 42 U.S.C. § 12111(3) (1990) (emphasis added).

78. S. REP NO. 116, 101st Cong., 2d Sess. 38 (1990).

79. H.R. REP NO. 485, 101st Cong., 2d Sess., pt. 2, at 73-74 (1990) (emphasis added) (citing Bentivenga v. United States Dep't of Labor, 694 F.2d 623 (9th Cir. 1982)).

health or safety, the individual should be consulted.[80]

Given the legislative history, as well as the requirement of the Occupational Safety and Health Act[81] that an employer provide a safe workplace, it seems clear that an employer may consider the worker's own safety. Indeed, the regulations adopt this viewpoint and allow an employer to consider the workers' own safety in the same manner the employer considers the safety of others. Thus, if current medical knowledge and the best available objective evidence demonstrates a significant risk of substantial harm to the worker himself, he need not be hired unless the risk can be eliminated or reduced to an acceptable level by reasonable accommodations.[82]

C. *The Need For An Individualized, Case-By-Case Approach*

Employers prefer to develop employment criteria and procedures that can be applied in a uniform manner. The legislative history to the ADA, however, 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:

> Section 102(b)(1) of the legislation specifies that the term *"discrimination" includes limiting, segregating,* or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee.
>
> Thus, covered entities are required to make employment decisions *based on facts applicable to individual applicants* or employees, and not on the basis of presumptions as to what a class of individuals with disabilities can or cannot do.
>
> 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

80. 136 CONG. REC. H4626 (July 12, 1990) (remarks of Rep. Waxman); 136 CONG. REC. S9697 (July 13, 1990) (remarks of Sen. Kennedy) (an employer should not refuse to hire a person with AIDS because the work would expose the employee to additional health risks).

81. 29 U.S.C. § 651 (1990).

82. 29 C.F.R. §§ 1630.2(r), 1630.10(b) (1991). The Interpretive Appendix provides the following example, indicating the definition of a substantial risk is a high probability of harm:

> If performing the particular functions of a job would result in a high probability of substantial harm to the individual, the employer could reject or discharge the individual unless a reasonable accommodation that would not cause an undue hardship would avert the harm. For example, an employer would not be required to hire an individual, disabled by narcolepsy, who frequently and unexpectedly loses consciousness for a carpentry job the essential functions of which require the use of power saws and other dangerous equipment, where no accommodation exists that will reduce or eliminate the risk.

Interpretive Appendix § 1630.2(r), 56 Fed. Reg. 35,745 (1991).

> 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.[83]

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 combines the efficiency of a standardized system with the flexibility the ADA requires.

V DISCRIMINATION ON BASIS OF ASSOCIATION

While the main thrust of the ADA is to eliminate unintentional and unnecessary barriers to employment of qualified individuals with disabilities, the ADA also resembles traditional employment discrimination laws in 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 also expressly forbidding discrimination on the basis of an individual's association: the ADA forbids an employer to rely on a person's "relationship or association with a disabled individual."[84] The historical origin of this provision was a concern that employers might discriminate against persons who, while not themselves disabled, care for or live with individuals who are disabled, particularly persons with AIDS.[85] This provision applies to many situations, such as an employee who has a child with Down's Syndrome. Indeed, the association need not be with a fam-

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83. S. REP NO. 116, 101st Cong., 2d Sess., pt. 2, at 28 (1990) (emphasis added). *See also* Interpretive Appendix § 1630.9, 56 Fed. Reg. 35,747-49 (1991).

84. ADA § 102(b)(4), 42 U.S.C. § 12112(b)(4) (1990). *See* 29 C.F.R. § 1630.8 (1991) (the relationship may be family, business, social or other).

85. H.R. REP NO. 485, 101st Cong., 2d Sess., pt. 3, at 39 (1990).

ily member.[86]

In these cases, the employer is forbidden to discriminate against an employee or applicant on the basis that the individual has a relationship with a person with a disability. For purposes of this provision, it is irrelevant, of course, whether the disabled individual is qualified for any particular job. By the same token, 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.[87]

VI. THE DUTY TO PROVIDE REASONABLE ACCOMMODATIONS

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. Thus, the ADA 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.[88]

In an effort to clarify this requirement, the ADA spells out several examples of possible reasonable accommodations:

1. "making existing facilities used by employees readily accessible to and usable by individuals with disabilities,"
2. "acquisition or modification of equipment or devices,"
3. "the provision of qualified readers or interpreters,"

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86. H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 61-62 (1990) (applies to any association and is not limited to family members).

87. The regulations thus do not speak in terms of reasonable accommodation, but simply forbid an employer to "exclude or otherwise deny equal jobs or benefits to a qualified individual" because of the "known disability" of the other, related, individual. 29 C.F.R. § 1630.8 (1991). This regulation is well-supported in the legislative history:

> In contrast, assume that the employer hires the applicant. If he or she violates a neutral employer policy concerning the attendance or tardiness, he or she may be dismissed even if the reason for the absence or tardiness is to care for the [disabled] spouse. The employer need not provide any accommodation to the non-disabled employee.

S. REP NO. 116, 101st Cong., 2d Sess. 30 (1990).

88. ADA § 102(b)(5), 42 U.S.C. § 12112(h)(5) (1990). *See also* 29 C.F.R. § 1630.9 (1991) (emphasis added).

4. "appropriate adjustment or modifications of examinations, training materials or policies,"
5. "part-time or modified work schedules,"
6. "job restructuring,"
7. "reassignment to a vacant position," and
8. a catch-all — "other similar accommodations for individuals with disabilities."[89]

The statutory list of possible reasonable accommodations is merely a guide, not an exhaustive list. The ADA requires a "fact-specific case-by-case approach."[90] 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).

A. Methods Of Reasonable Accommodations

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.[91] Moreover, as noted below, 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 ac-

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89. ADA § 101(9), 42 U.S.C. § 12111(9) (1990). *See also* 29 C.F.R. § 1630.2(o)(2) (1991). The order of reasonable accommodations listed in the statute has been rearranged to conform to the order of discussion in this article.

90. The legislative history states:

> The term "reasonable accommodation" is defined in section 101(8) of the legislation. The definition includes illustrations of accommodations that may be required in appropriate circumstances. The *list is not meant to be exhaustive*; rather, it is intended to provide general guidance about the nature of the obligation. Furthermore, the list is not meant to suggest that employers must follow all of the actions listed in each particular case. Rather, the decision as to what reasonable accommodation is appropriate is one which must be determined based on the particular facts of the individual case. This *fact-specific case-by-case approach* to providing reasonable accommodations is generally consistent with interpretations of this phrase under sections 501, 503, and 504 of the Rehabilitation Act of 1973.

S. REP NO. 116, 101st Cong., 2d Sess. 32 (1990) (emphasis added).

91. The duty to accommodate, however, is not limited to the employee's work station. The duty to accomodate includes all the benefits and privileges of employment. Interpretive Appendix §§ 1630.2(o), 1630.9, 56 Fed. Reg. 35,744, 35,748 (1991). Thus, the duty includes making accessible a company cafeteria or employee lounge. Interpretive Appendix § 1630.9, 56 Fed. Reg. 35,747 (1991).

commodate 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 legislative history include: (1) a $49.95 telephone headset, so that an insurance salesperson with cerebral palsy could write while talking; (2) a $26.95 timer with 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.[92]

Other examples of simple and inexpensive devices include (1) special computer systems, electronic visual aids, talking calculators, magnifiers, audio recordings, and brailled materials, for visually impaired individuals; (2) telephone handset amplifiers, telephones compatible with hearing aids, and special telecommunication devices, for individuals with hearing impairments; and (3) gooseneck telephone headsets, mechanical page turners, or raised or lowered furniture, for individuals with limited physical dexterity.[93]

The reasonable accommodation requirement does not, however, include "personal use items such as hearing aids and eyeglasses" unless such items are designed for a particular job. 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."[94]

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 read-

92. S. REP NO. 116, 101st Cong., 2d Sess. 10 (1990).

93. S. REP NO. 116, 101st Cong., 2d Sess. 32-33 (1990).

94. S. REP NO. 116, 101st Cong., 2d Sess. 33 (1990); Interpretive Appendix § 1630.9, 56 Fed. Reg. 35,747 (1991).

ers, interpreters, or even the provision of an attendant during the workday or for travel:

> The legislation also explicitly includes provision of qualified readers or interpreters as examples of reasonable accommodations. As with readers and interpreters, the provision of an *attendant to assist a person with a disability during parts of the workday* may be a reasonable accommodation depending on the circumstances of the individual case. Attendants may, for example, be required for *traveling and other job-related functions.* This issue must be dealt with on a case-by-case basis to determine whether an undue hardship is created by providing attendants.[95]

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.*[96] 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 in 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.[97]

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

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95. S. REP NO. 116, 101st Cong., 2d Sess. 33 (1990) (emphasis added). *See also* Interpretive Appendix § 1630.2(o), 56 Fed. Reg. 35,744 (1991) (personal assistants, travel attendant).

96. Nelson v. Thornburg, 567 F Supp. 369 (E.D. Pa. 1983), *aff'd*, 732 F.2d 146 (3d Cir. 1984).

97. DFEH v. City of Anaheim Police Dep't, 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 change 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 specially 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 — 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 House and Senate reports 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.*[98]

For many employers, how they do their work is viewed as their own business. The government may tell us who we must hire to

98. S. REP NO. 116, 101st Cong., 2d Sess. 32 (1990); H.R. REP NO. 485, 101st Cong., 2d Sess., pt. 2, at 62 (1990) (emphasis added). *See also* Interpretive Appendix § 1630.2(o), 56 Fed. Reg. 35,744 (1991) (job restructuring includes "altering when and/or how an essential function is performed").

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 healthy person. While the exact reach of this requirement is unclear, it does not, however, require job bumping, *i.e.*, placing another employee out of work:

> The committee also wishes to make clear that reassignment need only be to a vacant position — *"bumping" another employee out of a position to create a vacancy is not required.*[99]

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 does indicate an important limit on job restructuring. While the employer can be required to reallocate the marginal and peripheral job duties, the employer is not required to reallocate essential job functions:

> An 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. See Coleman v. Darden, 595 F.2d 533 (10th Cir. 1979).[100]

A fitting end note to job restructuring and work reassignments is the fact that unpaid leave is also considered a possible reasonable accommodation, although paid leave is excluded as such.[101] Thus, reasonable accommodation without undue hardship may include a

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99. S. REP NO. 116, 101st Cong., 2d Sess. 32 (1990) (emphasis added); *see also* H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 63 (1990).

100. Interpretive Appendix § 1630.2(o), 56 Fed. Reg. 35, 744 (1991).

101. H.R. REP NO. 485, 101st Cong., 2d Sess., pt. 2, at 63 (1990); S. REP NO. 116, 101st Cong., 2d Sess., pt. 2, at 63 (1990); Interpretive Appendix § 1630.2(o), 56 Fed. Reg. 35,744 (1991).

duty to cover for an ill employee when the inconvenience of doing so is not greater than that of covering the absences of other employees.[102]

7. *Reassignment To A Vacant Position*

Sometimes an incumbent employee, because of a 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. An employer must first, however, try to accommodate a worker in his current job, before transferring him to a vacant position:

> Efforts should be made to accommodate an employee in the position that he or she was hired to fill before reassignment is considered.[103]

The employer need not, however, displace any other worker to accommodate the disabled employee; the reassignment need only be to a vacant position. The ADA thus does not create "bumping" rights.[104] Nor does the ADA require that an individual be promoted to fill a vacant position, or that they be paid while the search for a vacant position is made.[105] It does, however, require giving the disabled current employee the first crack at a job opening, if no reasonable accommodation would permit the employee to perform his current job.

Reassignment is *not* a reasonable accommodation required for *applicants*, as opposed to current employees.[106] 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 which enables 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

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102. *See* DFEH v. Kingburg Cotton Oil Co., California FEHC Decision No. 84-30 (1984).

103. S. REP NO. 116, 101st Cong., 2d Sess. 32 (1990). *See also* H.R. REP NO. 485, 101st Cong., 2d Sess., pt. 2, at 63 (1990). The effort to locate a vacant position need only be made for a reasonable time. Interpretive Appendix § 1630.2(o), 56 Fed. Reg. 35,744 (1991).

104. *Id.*

105. Interpretive Appendix § 1630.2(o), 56 Fed. Reg 35,744 (1991).

106. *Id.*, S. REP NO. 116, 101st Cong., 2d Sess. 32 (1990).

include seating rearrangements,[107] and the Interpretive Appendix states that personal assistants, employer-provided transportation or reserved parking may be a reasonable accommodation.[108] The only limitation is the imagination of the disabled person and his attorney.

B. Procedure And Employee Input

The reasonable accommodation requirement can impose a significant burden on employers, and the legislative history makes clear that employers' adherence to the ADA and implementation of appropriate procedural safeguards will be closely monitored.

The legislative history and Interpretive Appendix recommend that employers follow a step-by-step approach towards meeting the reasonable accommodation requirement. The employer first must notify the applicant or worker that the employer has a duty to provide reasonable accommodations.[109] The employer then should await a request for an accommodation.

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:

> [T]he legislation clearly states that employers are obligated to make reasonable accommodations only to the *"known"* physical or mental limitations of a qualified individual with a disability. Thus, *the duty to accommodate is generally triggered by a request from an employee or applicant for employment.* Of course, if a person with a known disability is having difficulty performing his or her job, it would be permissible for the employer to discuss the possibility of a reasonable accommodation with an employee.
>
> *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.[110]

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107. *See, e.g.*, DFEH v. Fresno County, California FEHC Decision No. 84-22 (1984) (employer required to permit non-smoker sensitive to smoke to sit apart from smokers in office); Arneson v. Heckler, 879 F.2d 393 (8th Cir. 1989) (easily-distracted employee could have been reasonably accommodated by transferring him to job that separated him from co-workers).

108. Interpretive Appendix § 1630.2(o), 56 Fed. Reg. 35,744 (1991).

109. ADA § 104, 42 U.S.C. § 12114 (1990). *See* S. REP NO. 116, 101st Cong., 2d Sess. 33 (1990).

110. S. REP NO. 116, 101st Cong., 2d Sess. 34 (1990) (emphasis added) (citing Chalk v. United States Dist. Court, 840 F.2d 701 (9th Cir. 1988)). *See* H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 3, at 39 (1990) ("the employer is not liable for failing to provide an accommodation if it was not requested"). *See also* Interpretive Appendix § 1630.9, 56 Fed. Reg. 35,748 (1991).

Of course, if a person with a disability is having problems performing his job, the employer "may inquire whether the employee is in need of a reasonable accommodation."[111] An employer may also ask for documentation, presumably a doctor's note, establishing the need for an accommodation.[112]

In considering possible accommodations, it is very important that the employer obtain the thoughts of the individual involved:

> The 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.[113]

The Interpretive Appendix 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.[114]

The regulations refer to an "informal, interactive process with the qualified individual with a disability."[115] The Interpretive Appendix refers to an example of a dolly or hand truck being provided to a worker with a bad back who could lift fifty pound sacks but could not carry them the required distance.[116]

The employer ultimately must decide whether a possible accommodation is reasonable. In addition to the ADA statutory ex-

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111. Interpretive Appendix § 1630.9, 56 Fed. Reg. 35,748 (1991).
112. Interpretive Appendix § 1630.9, 56 Fed. Reg. 35,748 (1991).
113. S. REP NO. 116, 101st Cong., 2d Sess. 34 (1990) (emphasis added).
114. Interpretive Appendix § 1630.9, 56 Fed. Reg. 35,748 (1991). *See also* S. REP NO. 116, 101st Cong., 2d Sess. 35 (1990).
115. 29 C.F.R. § 1630.2(o)(3) (1991).
116. Interpretive Appendix § 1630.9, 56 Fed. Reg. 35,749 (1991).

amples, 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.[117] 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.[118] 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.[119]

If an employer can identify more than one effective accommodation, the legislative history 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."[120] While the Interpretive Appendix is not clear on this point, it appears to give the "ultimate discretion" to the employer.[121]

In this respect, Title VII law on religious accommodation may provide some guidance. In one case, 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.[122] 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.

C. The Role Of Collective Bargaining Agreements

The ADA permits some consideration of collective bargaining agreements in determining what is a reasonable accommodation. Provisions of a collective bargaining agreement cannot, however,

117. Smith v. Admin. of Veterans Affairs, 32 F.E.P 986 (C.D. Cal. 1983).

118. Jasany v. United States Postal Serv., 755 F.2d 1244 (6th Cir. 1985).

119. Treadwell v. Alexander, 707 F.2d 473 (11th Cir. 1983).

120. S. REP NO. 116, 101st Cong., 2d Sess. 35 (1990) (emphasis added). H.R. Rep. No. 485, 101st Cong., 2d Sess. 66-67 (1990). If the employee refuses an accommodation, then he may be considered as no longer being disabled. Interpretive Appendix § 1630.9(d), 56 Fed. Reg. 35,749 (1991).

121. Interpretive Appendix § 1630.9, 56 Fed. Reg. 35,748-49 (1991) (also indicating the "best" accomodation is not necessary).

122. Hudson v. Western Airlines, Inc., 851 F.2d 261, 266 (9th Cir. 1988) (citing Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 40 (1986)).

justify an employer to do what the ADA forbids:[123]

> *[t]he 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 criteria.* 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.[124]

The exact role of a collective bargaining agreement is uncertain. The regulations and Interpretive Appendix provide that the collective bargaining agreement can be considered in determining what are the essential functions of a job and what is a disruptive force and, thus, a potential undue hardship.[125] Conversely, for any agreement negotiated after the ADA's effective date of July 26, 1992, Congress expects that the agreement will explicitly authorize the employer to take any action needed 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.*[126]

Thus, for collective bargaining agreements entered into after July 26, 1992, it is unclear to what extent provisions in the agreements can be considered in determining the essential functions of the job and what is a disruptive force[127]

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123. The legislative history makes plain that reliance on a collective bargaining agreement will not automatically avoid liability:

> An employer cannot use a collective bargaining agreement to accomplish what it otherwise would be prohibited from doing under this legislation. For example, a collective bargaining agreement that contained physical criteria which caused a disparate impact on individuals with disabilities and were not job-related and consistent with business necessity could be challenged under this legislation.

S. REP. NO. 116, 101st Cong., 2d Sess. 32 (1990). *See also* H.R. REP NO. 485, 101st Cong., 2d Sess., pt. 2, at 63 (1990).

124. S. REP. NO. 116, 101st Cong., 2d Sess. 32 (1990) (emphasis added). *See also* H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 63 (1990).

125. 29 C.F.R. § 1630.2(n)(2)(v) (1991). *See* Interpretive Appendix § 1630.15 (d), 56 Fed. Reg. 35,752 (1991).

126. S. REP. NO. 116, 101st Cong., 2d Sess. 32 (1990) (emphasis added). *See also* H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 63 (1990).

127. The limitation on contracts and other arrangements is not limited to collective bargaining agreements. It applies to any contract which has the effect of discriminating against an employer's applicants or employees. Interpretive Appendix § 1630.6, 56 Fed. Reg. 35,746-47 (1991).

VII. 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."[128] As such, this defense may be of limited value.

The ADA provides the following definition of undue hardship:

> (A) IN GENERAL — The term *"undue hardship"* means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).
> (B) FACTORS TO BE CONSIDERED — In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include —
> (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*; 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 workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.[129]

The regulations add a fifth factor to be considered — the disruption to the other workers and the production process:

> (v) 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.[130]

This addition is important because it recognizes the practical realities of the workforce and the importance of avoiding disruptive

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128. 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. 485, 101st Cong., 2d Sess., pt. 3., at 41 (1990).

129. ADA § 101(10), 42 U.S.C. § 12111(10) (1990) (emphasis added). The regulations provide that in determining the cost, one must consider the net cost, "taking into consideration the availability of tax credits and deductions, and/or outside financing." 29 C.F.R. § 1630.2(p)(2)(i) (1991).

130. 29 C.F.R. § 1630.2(p)(2)(v) (1991). However, an adverse effect on morale is insufficient to meet the disruptive undue hardship test. Interpretive Appendix § 1630.15(d), 56 Fed. Reg. 35,752 (1991).

forces.[131]

Under the foregoing standards, it will be difficult for any large employer to show that any one accommodation truly imposes an "undue hardship" unless the accommodation is extreme. It is clear, moreover, that substantial cost alone will not necessarily constitute an undue hardship. The legislative history explicitly denies any precedential value to the holding in *TWA v. Hardison*,[132] rendered in the context of religious accommodation under Title VII, that anything more than a *de minimis* cost is an undue hardship.[133]

The undue hardship defense is also much harder for an employer to meet than the defense, under Title III, that a physical modification in public accommodation is not "readily achievable":

> The ADA defines "undue hardship" in Section 101(10)(A) to mean an action requiring significant difficulty or expense, when considered in light of the factors set forth in subsection (B). This definition was included for two reasons. First, a definition of undue hardship was included in order to distinguish it from the definition of "readily achievable" in title III governing the requirement to alter existing public accommodations. *Readily achievable* means "easily accomplishable and able to be carried out without much difficulty or expense." The duty to provide reasonable accommodation, by contrast, is a much higher standard than the duty to remove barriers in existing buildings (if removing the barriers is readily achievable) and creates a more sub-

131. Two examples in the Interpretive Appendix reflect the disruptive force factor. The first provides:

> For example, suppose an individual with a disabling visual impairment that makes it extremely difficult to see in dim lighting applies for a position as a waiter in a nightclub and requests that the club be brightly lit as a reasonable accommodation. Although the individual may be able to perform the job in bright lighting, the nightclub will probably be able to demonstrate that that particular accommodation, though inexpensive, would impose an undue hardship if the bright lighting would destroy the ambience of the nightclub and/or make it difficult for the customers to see the stage show.

Interpretive Appendix § 1630.2(p), 56 Fed. Reg. 35,744-45 (1991). The second example provided for in the Interpretive Appendix provides:

> Alternatively, for example, an employer could demonstrate that the provision of a particular accommodation would be unduly disruptive to its other employees or to the functioning of its business. The terms of a collective bargaining agreement may be relevant to this determination. By way of illustration, an employer would likely be able to show undue hardship if the employer could show that the requested accommodation of the upward adjustment of the business' thermostat would result in it becoming unduly hot for its other employees, or for its patrons or customers. The employer would thus not have to provide this accommodation. However, if there were an alternate accommodation that would not result in undue hardship, the employer would have to provide that accommodation. It should be noted, moreover, that the employer would not be able to show undue hardship if the disruption to its employees was the result of those employees' fears or prejudices toward the individual's disability and not the result of the provision of the accommodation.

Interpretive Appendix § 1630.15(d), 56 Fed. Reg. 35,752 (1991).

132. 432 U.S. 63 (1977).

133. S. REP NO. 116, 101st Cong., 2d Sess. 36 (1990).

stantial obligation on the employer.[134]

The legislative history on "undue hardship" further emphasizes the difficulty of showing undue hardship by favorably citing a court decision that rejected an "undue hardship" defense on the basis that the large sums of money involved were only a "small fraction of the [entity's] budget."[135] Creating still further difficulties for an employer who would seek to show that an accommodation creates an undue hardship is the legislative history to the effect that if a reasonable accommodation potentially would benefit more than one disabled person, *e.g.*, a wheelchair ramp, then that fact reduces the impact of the employer's undue hardship argument.[136]

As if all this were not enough, whenever an employer can prove an undue hardship, 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.[137] 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 that the ADA does not require accommodations that would cause closure of a plant or bankruptcy.[138]

VIII. HEALTH BENEFITS

The ADA covers discrimination with regard to "terms, conditions and privileges of employment," including health benefits. The ADA, however, 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 does not prohibit or restrict:

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134. H.R. REP NO. 485, 101st Cong., 2d Sess., pt. 3, at 40 (1990) (emphasis added).

135. H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 3, at 41 (1990). *Accord* Interpretive Appendix § 1630.15(d), 56 Fed. Reg. 35,752 (1991).

136. H.R. REP NO. 485, 101st Cong., 2d Sess., pt. 2, at 69 (1990).

137. S. REP NO. 116, 101st Cong., 2d Sess. 35-36 (1990).

138. The Committee is responding particularly to concerns about employers who operate in depressed or rural areas and are operating at the margin or at a loss. Specifically, concern was expressed that an *employer may elect to close a store* if it is losing money or only marginally profitable rather than undertake significant investments to make reasonable accommodations to employees with disabilities. The Committee does not intend for the requirements of the Act to result in the closure of neighborhood stores or in loss of jobs. The Committee intends for courts to consider, in determining 'undue hardship,' whether the local store is threatened with closure by the parent company or is faced with *job loss* as a result of the requirements of this Act.

H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 3, at 40-41 (1990) (emphasis added). *But see id.* at 40 (parent corporation's assets, and its relationship to subsidiary, can be considered).

(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.[139]

The legislative history 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.[140] Second, employers may continue to use insurance policy clauses that exclude pre-existing conditions, so long as these clauses are not used as a subterfuge to evade the purposes of the ADA.[141]

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

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139. ADA § 501(c), 42 U.S.C. § 1201(c) (1990). *See* 29 C.F.R. § 1630.16(f) (1991).

140. [E]mployers may not deny health insurance coverage completely to an individual based on the person's diagnosis or disability. For example, while it is permissible for an employer to offer insurance policies that limit coverage for certain procedures or treatments, e.g., only a specified amount per year *for mental health coverage*, a person who has a mental health condition may not be denied coverage for other conditions such as for a broken leg or for heart surgery because of the existence of the mental health condition. A limitation may be placed on reimbursements for a procedure or the types of drugs or procedures covered e.g., a limit on the number of x-rays or *non-coverage of experimental drugs* or procedures; but, that limitation must apply to persons with or without disabilities. All people with disabilities must have equal access to the health insurance coverage that is provided by the employer to all employees.

S. REP NO. 116, 101st Cong., 2d Sess. 29 (1990) (emphasis added).

141. *The ADA does not, however, affect pre-existing condition clauses included in insurance policies offered by employers.* Thus, employers may continue to offer policies that contain pre-existing condition exclusions, even though such exclusions adversely affect people with disabilities, so *long as such clauses are not used as a subterfuge to evade the purposes of this legislation.*

S. REP NO. 116, 101st Cong., 2d Sess. 29 (1990) (emphasis added). *See also* Interpretive Appendix § 1630.5, 56 Fed. Reg. 35,746 (1991).

adopted. One possibility is an 18-month exclusion, which would be co-extensive with the applicant's right to continue his health insurance from his prior employer for 18 months.[142]

IX. 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 (which prohibits handicap discrimination by federal contractors and grantees, as well as federal agencies) or a similar state handicap discrimination law. It is true that most of the concepts behind the ADA are borrowed from the Rehabilitation Act and its regulations. Additionally, the ADA 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."[143]

There are, however, two critical differences which will make the ADA as different from the current law as night is from day. First, as noted above, the ADA explicitly prohibits certain practices, *e.g.*, pre-offer medical examinations, and spells out certain examples of reasonable accommodations which currently the vast majority of employers do not 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 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: "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 seek compensation for their clients, and a fee for themselves, against all employers with 15 or more employees. In addition, because medical examinations will

142. 29 U.S.C. § 1162(2)(A) (1990). The applicant's right to continue his health insurance from his prior employer is pursuant to the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"). *See* Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82 (1986).

143. ADA § 501(b), 42 U.S.C. § 12501(b) (1990).

be given after a tentative job offer, rejected applicants will know they were not hired because of their disability.

Moreover, because the ADA incorporates the remedies of Title VII of the Civil Rights Act, amendments to Title VII to 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 provisions for jury trials and compensatory damages, and only mildly objected to punitive damages. Thus, it is possible 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.

X. COMPLIANCE

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 so as to allow disabled employees 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:

A. 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 these 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.

B. Eliminate all pre-offer medical examinations, except any screening for the use of illegal drugs. Even as to these drug-screening tests, the employer should assure that the only information reported is use of illegal drugs; otherwise the employer may receive information about legal drug usage that indicates such protected disabilities as epilepsy or HIV disease.

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

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

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

F Do not reject an applicant or dismiss a current employee because of an individual's disability unless: (1) the disability prevents the individual from performing the essential functions of the job; or (2) the disability means that the individual cannot perform the job without substantial risk of injury to the individual or others.

G. 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.

H. Base each employment decision on factors *other than* the individual's disability.

I. When considering possible reasonable accommodations, make a written record of the following: (1) all the individual's suggestions as to what accommodations would address the disability in question; (2) the costs imposed by the accommodations considered in terms of immediate outlay, disruption, and job efficiency; (3) the sources the employer consulted, such as other employers in the industry and disability advisory groups; and (4) the options the employer considered.

J. 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 a substantial risk to the individual's safety, based on the established views of public health officials or the medical profession.

K. Along these same lines, never take 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.

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

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