Employment Protections

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EDITOR'S NOTE

The orientation of many disability policies requires people with disabilities to spend their energy proving that they cannot work (or learn, or care for themselves . . .) so they can qualify for the support of public dollars. One of the great contributions of the Americans with Disabilities Act (ADA) to disability policy is its mandated change of focus—from asking people what they cannot do to asking them what they can do, and then providing them with the necessary supports to use their skills and proceed.

At the heart of this disability-policy orientation is the equal-employment-opportunity mandate in ADA. The employment provisions are remarkably precise and at the same time flexible, reflecting an understanding of the wide range and complex nature of disabilities and the necessity of individualization. Building on the 17-year history of section 504 of the Rehabilitation Act, the ADA equal-employment-opportunity mandate is not so much new as it is refined and revisited. Chai R. Feldblum examines the requirements of the law, paying particular attention to how employers can use the flexibility of the law to maximize opportunities for employees with disabilities and business effectiveness.

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Having a stable and fulfilling job is a basic component of the American dream. Every one of us would like to have a job that is enjoyable and stimulating and that provides us with sufficient income to meet our needs. People with disabilities are no different. People with disabilities would like to obtain jobs that meet their needs and are suited to their talents, and, like everyone else, they would like to secure promotions and advance in their careers.

The difficulty faced by many people with disabilities, however, is that they are often not given the opportunity to demonstrate their talents and abilities to perform certain jobs. Instead, myths and stereotypes regarding the person's inability to perform a job, or simply fears about hiring a person with a disability for a particular job, preclude the individual from receiving offers of employment or promotion.

Title I of the Americans with Disabilities Act (ADA) addresses the employment of people with disabilities. It establishes a general prohibition against discrimination in employment on the basis of disability and sets forth, in some detail, what constitutes "discrimination" in the context of employment.

The employment title of the ADA can be best understood as deriving from two distinct laws. The substantive provisions of the title stem from the Rehabilitation Act of 1973, which is examined by Nancy Jones in her article in this volume. The Rehabilitation Act prohibits discrimination, including employment discrimination, on the basis of handicap by the federal government, federal contractors, and entities that receive

federal funds.[1] Thus, decisions such as who is a person with a "disability," what constitutes "discrimination" on the basis of disability, or what is required as a "reasonable accommodation," are derived from similar substantive requirements established under the Rehabilitation Act. The goal of the dratters of the ADA was to draw as much as possible from 15 years of experience under the Rehabilitation Act in order to create a workable and understandable law.

The procedural requirements of the ADA's employment title, by contrast, are drawn from title VII of the Civil Rights Act of 1964. Title VII prohibits discrimination on the basis of race, sex, religion, or national origin by employers with 15 or more employees.[2] One of the purposes of the ADA was to establish long-awaited parity in federal civil-rights laws between people with disabilities and other minorities and women. Thus, the procedural requirements of the ADA—which employers are covered under the ADA and which remedies are provided by the law—are drawn from and are essentially equal to those in title VII.

PERSON WITH A DISABILITY[3]

A "person with a disability" under the ADA, as derived substantially from the Rehabilitation Act, is defined as someone who

1. Has a physical or mental impairment that substantially limits that person in one or more major life activities, or
2. Has a record of such a physical or mental impairment, or
3. Is regarded as having such a physical or mental impairment.[4]

This three-prong definition of disability in the ADA dates back to 1974. In 1973, when Congress passed the Rehabilitation Act and included within it the affirmative action and anti-discrimination protections of sections 501, 503, and 504, a person with a handicap was defined as someone whose disability limited his or her employability and who could therefore be expected to benefit from vocational rehabilitation.[5]

One year later, after reviewing attempts by the Department of Health, Education and Welfare (DHEW) to devise regulations to implement the Act, Congress concluded that this definition—although

appropriate for the vocational rehabilitation sections of the Rehabilitation Act—was too narrow to deal with the range of discriminatory practices in housing, education, and health care programs covered by section 504. Congress, therefore, amended the definition in 1974, broadening it to include the three prongs that have remained the basis of the section 504 definition ever since.[6]

The first prong of the definition of a person with a disability is someone who has a "physical or mental impairment that substantially limits one or more of the major life activities of such individual."[7] The various committee reports to the ADA, as well as the regulations issued by DHEW in 1977 to implement section 504 of the Rehabilitation Act, explain that a "physical or mental impairment" is

> any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; [or] any mental or psychological disorder . . .[8]

Neither the regulations issued to implement the Rehabilitation Act nor the ADA legislative reports attempt to set forth a list of specific diseases or conditions that would make up physical or mental impairments. The reason is straightforward: it would be impossible to ensure the comprehensiveness of such a list given the variety of possible physical and mental impairments that may exist.[9] The ADA legislative reports, however, give examples of some of the diseases and conditions that would be covered:

> orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, infection with the Human Immunodeficiency Virus, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, drug addiction and alcoholism.[10]

An impairment, therefore, is some physiological or mental disorder. It does not include simple physical characteristics, such as eye or hair color.

Having a physical or mental impairment, however, is only the first part of the definition. The impairment must also be one that "substan-

tially limits" the person in a "major life activity." The legislative reports to the ADA set forth an illustrative list of major life activities: "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[11]

Most serious medical conditions do have a substantial impact on basic life activities. For example, someone with emphysema will have substantial difficulty in breathing; someone who is a paraplegic will have substantial difficulty in walking; and someone with dyslexia will have substantial difficulty in learning.[12]

The term "people with disabilities," therefore, is not limited to what has sometimes been termed "traditional disabilities." The ADA covers a wide range of individuals—from people who use wheelchairs, to people who have vision or hearing impairments, to people with epilepsy or cerebral palsy or HIV disease or lung cancer or manic depression.

The second prong of the definition of disability covers a person with a "record" of an impairment. This prong is designed to extend protection to an individual who had a physical or mental impairment at some point in the past, who has recovered from that impairment, but who nevertheless experiences discrimination based on the *record* of having the impairment. Examples of such discrimination would include individuals who have recovered from cancer or from a mental illness, but who experience discrimination because of the stigma or the fear associated with such disabilities.[13]

The third prong of the definition covers people who are "regarded as" having an impairment. This prong is designed to extend protection to a person who may not have any impairment at all, or to a person who has some relatively minor impairment, but who is regarded by others as having a physical or mental disorder serious enough to limit him or her in some major life activity. For example, a person may have a significant physiological cosmetic disorder, such as a large birthmark on a cheek, that does not, in fact, substantially limit the person in any way. An employer, however, may view that disorder as substantially limiting that person's ability to work and to interact with others, and may discriminate against the person on that basis. Similarly, a person may not have any disorder at all, but may be erroneously perceived by an employer as having a mental or physical illness and may be discriminated against on that basis.[14]

As can be seen, the definition of disability under the ADA—as under the Rehabilitation Act—is a broad and comprehensive one.

However, it is important to keep in mind that it is the responsibility of the person alleging discrimination to prove that he or she is covered under the law. In other words, the individual who alleges that discrimination has occurred must prove either that he or she has a physical or mental impairment that substantially limits him or her in a major life activity, or that he or she has a record of such an impairment, or that he or she was regarded by the person who engaged in the discriminatory act as having such an impairment. This burden of proof always rests with the individual who alleges the discrimination.[15]

Specific categories of people with various disabilities received special attention during the passage of the ADA—either to emphasize their inclusion or to establish their exclusion:

PEOPLE WITH AIDS

People with HIV disease (which includes individuals who have any form of Human Immunodeficiency Virus [HIV] illness, from asymptomatic HIV infection to full-blown AIDS) are included within the first prong of the definition of "disability."[16] People with HIV disease have been covered under the Rehabilitation Act for years.[17] In order to receive protection under the law, such individuals, just like people with any other disability, may not pose a "direct threat" to the health or safety of others.[18]

PEOPLE WITH ALCOHOL DEPENDENCY

A person who is dependent on alcohol is covered under the ADA as a person with a disability.[19] Such individuals are covered under title V of the Rehabilitation Act as well.[20] By contrast, a person who simply uses alcohol on a casual basis, and is not dependent on alcohol, would not be considered to have an "impairment" and therefore would not be covered under the first prong of the definition of disability.[21]

PEOPLE WHO ILLEGALLY USE DRUGS

Individuals who are current illegal users of drugs are not covered under the ADA.[22] Although such individuals had previously been covered under the Rehabilitation Act, the ADA amends that Act as well to provide for the same exclusion of current illegal drug users.[23] Under this exclusion, an employer may take adverse actions against an individual who currently illegally uses drugs, because of the use of such drugs,

regardless of whether the drug use has any adverse impact on the person's job performance.

Although individuals who currently illegally use drugs are not protected under the ADA, individuals who have overcome drug problems are protected. For example, individuals who have successfully completed (or are successfully enrolled in) a supervised rehabilitation program and are no longer using drugs, or individuals who have been successfully rehabilitated through other means and are no longer using drugs, are considered as individuals with a "record" of a disability and are protected from discrimination. In addition, individuals who are erroneously perceived as being illegal drug users are covered as well.[24]

PEOPLE WITH SELECTED MENTAL AND SEXUAL DISORDERS

Most individuals with mental impairments are covered under the ADA. Such individuals have been covered under the Rehabilitation Act for years.[25] There is a long history of discrimination against people with mental disabilities in this country, often based on ungrounded myths and fears regarding such disabilities. Of course, such individuals, just like people with any other disability, must be qualified for the jobs they desire in order to seek redress for discrimination under the ADA.[26]

Despite the fact that the qualification requirements of the ADA protect employers against individuals with mental disabilities who would not be able to perform a job, or would pose a threat to others, the ADA also removes, as a blanket matter, a select group of mental and sexual disorders from the list of impairments covered under the Act. The excluded impairments are: pedophilia, exhibitionism, voyeurism, gender identity disorders that are not the result of physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from the current illegal use of drugs. Transvestism and transsexualism, which are officially defined as mental impairments by the American Psychiatric Association, are also listed among the exclusions.[27]

PEOPLE WHO ARE GAY

A person who is gay or bisexual is not considered, under current medical or psychological diagnoses, to have either a mental or physical impairment.[28] Thus, such individuals were never covered, solely by

virtue of their sexual orientation, under the Rehabilitation Act, and are not covered under the ADA. Section 511(a) of the ADA explicitly states that "homosexuality and bisexuality are not impairments and as such are not disabilities under this Act."

PEOPLE WHO ASSOCIATE WITH PEOPLE WITH DISABILITIES

The ADA also extends antidiscrimination protection to a class of individuals not covered under the Rehabilitation Act. The ADA prohibits an employer from discriminating against a qualified applicant or employee who does not have a disability because the employer knows that the applicant or employee associates with a person who has a disability.[29] For example, an employer could not refuse to hire an applicant simply because the applicant's wife or husband uses a wheelchair. Similarly, an employer could not fire an employee simply because the employee lives with a person who has AIDS.[30]

The ADA does not limit the forms in which the association with the person with a disability must take place. Thus, individuals who associate with persons with disabilities through a range of activities—being their friend, spouse, domestic partner, relative, business associate, advocate or caregiver—are covered under the association provision. The individual alleging discrimination, however, bears the burden of proving that the discrimination occurred because of his or her known association with a person with a known disability.[31]

QUALIFIED PERSON WITH A DISABILITY

The fact that an individual has a disability establishes the initial coverage for that person under the ADA. The law also requires, however, that the person be a "qualified person with a disability."[32] The requirement that a person with a disability be "qualified" was placed in the ADA, as Congress had previously placed it in the Rehabilitation Act, essentially to address (often misplaced) fears that the laws' antidiscrimination provisions would mandate the hiring or retention of people with disabilities, even when those disabilities made the individuals unable to perform particular jobs.

A qualified person with a disability is defined, in the ADA, as a person who, "with or without reasonable accommodation, can perform

the essential functions of the employment position that such individual holds or desires."[33]

This requirement consists of two basic components. The first component deals with "essential functions." It is not the purpose of the ADA, just as it is not the purpose of other civil-rights laws, to force employers to hire individuals who cannot actually perform the particular jobs under consideration. Often, however, employers may list among a job's functions certain activities that are not necessary for the performance of the job. For example, an employer might require—perhaps for ease of identification—that all employees have a driver's license, even though driving is not a basic requirement for the job. Or an employer may require that a clerical person be able to answer the telephone, even though the basic job is one of filing.

Many times these additional nonbasic job requirements have no impact on people with disabilities. However, sometimes a person with a disability is perfectly qualified to perform all the essential functions of a job, but is unable to perform one marginal or nonbasic job requirement. If the person with a disability is denied the job because of inability to perform that requirement, the person's employment opportunities have been unjustifiably limited because of his or her disability.

To address this concern, the ADA establishes that employers may refuse to hire or to retain individuals who cannot perform the "essential functions" of a job. "Essential functions" mean basically what they sound like: functions that are not marginal or tangential to the job in question. Thus, an employer is allowed to refuse to hire or retain a person with a disability who, because of the disability, truly cannot perform an essential function of the job. It is not legitimate, however, for the employer to refuse to hire or to retain a person with a disability who cannot perform some job task that is marginal to the job."[34]

The second component of a "qualified person with a disability" is that of reasonable accommodation. A person with a disability is often qualified to perform a job—if some adjustment is first made in the structure, schedule, physical layout, or equipment. For example, a person who uses a wheelchair may need a table adjusted for height or may need a ramp built to allow access. Persons with varying degrees of hearing impairments may need a telephone amplifier or an interpreter. Someone with a chronic physical condition may need some time off each week for medical treatments. If these adjustments or modifications—which are called "reasonable accommodations"—are

made, a person with a disability might then be qualified for the particular job he or she seeks.[35]

As described in greater detail below, the ADA requires that employers provide such reasonable accommodations to their applicants and employees. Moreover, in assessing whether an individual is qualified to perform the essential functions of a job, an employer must first take into account whether there are any reasonable accommodations that will enable the individual to perform those functions.[36]

FORMS OF DISCRIMINATION PROHIBITED

Like most other civil-rights laws, the ADA sets forth a general prohibition against employment discrimination. Unlike most other civil-rights laws, however, the ADA also sets forth specific examples of what constitutes such discrimination.

As a general rule, the ADA provides that no "covered entity"[37] shall discriminate against a qualified person with a disability because of the disability of such individual in a range of employment decisions: in job-application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms and conditions of employment.[38] Essentially, every type of employment decision is covered. The basic requirement is that a qualified person with a disability may not be discriminated against—simply on the basis of his or her disability—in terms of hiring, firing, promotions, recruitment, conditions of the employment position, or any other aspect of employment.

The ADA then lists specific examples of what discrimination "on the basis of disability" includes. First, an employer may not limit, segregate, or classify applicants or employees on the basis of disability in a way that adversely affects the opportunities or status of such individuals.[39] This is a relatively straightforward application of the antidiscrimination provision. An employer could not, for example, have all employees with disabilities work in a separate, segregated section of the workplace, or pay employees with disabilities on a lower pay scale for work equivalent to that performed by other employees.

Second, an employer may not enter into a contractual arrangement that has the effect of subjecting the employer's employees to discrimination.[40] In other words, an employer may not do indirectly, through a

contract or a license, what he or she may not do directly under the ADA. Although this is a logical requirement, employers will need to reflect on its ramifications. For example, this provision means that if an employer contracts with another entity to provide training for employees of the business, the training must be given in a place and manner that is accessible to any employees with disabilities. Similarly, if the employer holds an annual retreat or convention for its employees, the employer must pick a site that is accessible to its employees with disabilities.[41] These would be the types of reasonable accommodation requirements the employer would have if it were acting directly. Just as there is an "undue hardship" limitation on reasonable accommodations that must be offered by the employer, however, there is also an identical "undue hardship" limitation that applies when the employer contracts with other entities.[42]

Third, an employer must provide reasonable accommodations to the known physical or mental limitations of a person with a disability who is otherwise qualified to perform a particular job, unless providing such accommodations would impose an "undue hardship" on the employer. In addition, an employer may not refuse to hire a person with a disability simply because the person will require a reasonable accommodation.[43] This area is discussed in greater detail below.

Fourth, an employer may not have a qualification standard, employment test, or other job-selection criterion that "screens out" people with disabilities.[44] For example, an employer may not have, as a qualification standard for a job, that applicants may not depend on physical devices in order to walk. Such qualification standards would directly "screen out" people with certain disabilities—for example, people who use wheelchairs or crutches.

An employer may also not have a qualification standard, employment test, or other job-selection criterion that "tends to screen out" people with disabilities.[45] For example, an employer may not have, as a qualification standard for a job, that applicants possess a driver's license. Although this standard appears neutral on its face, because it does not refer directly to any disability, in application this standard will "tend to screen out" people with disabilities—for example, some people with epilepsy and some people who use wheelchairs who cannot drive.

There is also a necessary and logical limitation to this prohibition. An employer *may* have a qualification standard, test, or criterion that directly screens out, or that tends to screen out, people with disabilities,

if that standard or criterion is in fact *necessary* for the individual to meet in order to perform a particular job. In the words of the ADA, the standard or criterion must be "job-related and consistent with business necessity."[46]

Fifth, there are a series of requirements regarding medical exams and inquiries, as well as requirements regarding general testing, that fall within the antidiscrimination prohibition. These are discussed separately in a later section, "Medical Exams and Inquiries."

In setting forth these specified forms of prohibited action, the ADA is different from most other civil-rights laws. The majority of civil-rights laws simply set forth a general prohibition on discrimination. The regulations issued to implement such laws, and the subsequent cases brought under such laws, then fill out the types of action that are considered to be "discrimination."[47]

The detailed form of the ADA is primarily the result of three factors. First, it took significant time and effort for the first section 504 regulations to be issued by the relevant federal agencies. Supporters of the ADA were therefore interested in having the ADA be as explicit and detailed as possible so as to ensure that implementation of the ADA would not be excessively dependent on the issuance and content of regulations.

Second, existing section 504 regulations and case law acted as a guiding principle for the extensive negotiations that took place on the ADA. As a result, many detailed section 504 regulations were transported, almost verbatim, into the ADA.[48]

Third, and perhaps of key importance, there are aspects of discrimination against people with disabilities that often are not readily apparent to many individuals. By having the ADA address these issues explicitly in the statute, Congress ensured that it would review those areas directly—and would provide direction and/or limitations in these areas if it chose to do so. The following three sections, which explain the reasonable accommodation requirements, the prohibitions on medical exams and inquiries, and the available defenses for employers, form a good example of areas that benefited from explication in the statute and in the accompanying legislative reports.

REASONABLE ACCOMMODATION

Reasonable accommodation is a key aspect of antidiscrimination protection for people with disabilities. As explained above, a person with a disability may often be perfectly qualified to perform a job—if some modification or adjustment is first made in the job structure or environment. The ADA mandates that employers provide these modifications and adjustments, called "reasonable accommodations," to applicants and employees with disabilities.[49]

The ADA lists a number of modifications that fall within the framework of reasonable accommodations:

1. Modifying the physical layout of a job facility so as to make it accessible to individuals who use wheelchairs or who have other impairments that make access difficult
2. Restructuring a job to enable the person with a disability to perform the essential functions of the job[50]
3. Establishing a part-time or modified work schedule (for example, to accommodate people with disabilities who have treatment needs or fatigue problems)[51]
4. Reassigning a person with a disability to a vacant job[52]
5. Acquiring or modifying equipment or devices (such as buying a hearing telephone amplifier for a person with a hearing impairment)
6. Adjusting or modifying exams, training materials, or policies (for example, giving an application examination orally to a person with dyslexia or modifying a policy against dogs in the workplace for a person with a service dog)
7. Providing qualified readers or interpreters for people with vision or hearing impairments[53]

These are simply examples of types of accommodations that could be required. The basic characteristic of a reasonable accommodation is that it is designed to address the unique needs of a person with a particular disability. Thus, an accommodation for one person might be one that falls within one of the above categories, or it might be a different type of accommodation personally identified by the person with a disability or by the employer. The underlying goal is to identify aspects of the disability that make it difficult or impossible for the person with a disability to perform certain aspects of a job, and then to determine if

there are any modifications or adjustments to the job environment or structure that will enable the person to perform the job.

As can be imagined, some accommodations are inexpensive and easy to institute, whereas others are costly and difficult to implement. In light of that fact, the ADA sets a limitation on the employer's obligation to provide a reasonable accommodation. Under the law, an employer need not provide an accommodation if doing so would impose an "undue hardship" on the employer. An accommodation is considered to rise to the level of an undue hardship if providing it would result in a "significant difficulty or expense" for the employer.[54]

Whether an accommodation is considered to be a significant difficulty or expense for the employer depends on a series of factors about the particular business. The ADA sets forth the following factors to be weighed:

1. What is the nature of the needed accommodation and how much will it cost?
2. What are the financial resources available to the employer, how big is the employer (i.e., how many individuals are employed), and what effect will the accommodation have on the employer's expenses, resources, or other areas?
3. What type of operation does the employer run, and what impact will the accommodation have on it and on the work force?[55]

The ADA's approach to undue hardship, therefore, is to require an assessment of the nature and cost of the accommodation in light of the employer's financial resources, workplace, and operations. As the legislative reports to the ADA emphasize, the undue-hardship standard is thus a *relative* standard. An accommodation that would constitute an undue hardship for one employer would not necessarily be so for another.[56]

This flexible approach in determining undue hardship is well illustrated in the section 504 case of *Nelson v. Thornburgh*.[57] In that case, a court ordered the Pennsylvania Department of Public Welfare to provide several accommodations, including the use of readers, computers, and braille forms, for a number of workers who were blind. Although the costs of the accommodations were substantial, the court concluded that they did not rise to the level of an undue hardship because they were only a small fraction of the state agency's personnel budget.[58]

The fact that the ADA's undue-hardship standard is a flexible one caused some concern to representatives of the business community during passage of the ADA. Understandably, businesses want certainty; it is hard for an employer to imagine providing reasonable accommodations if the employer can never be sure whether a particular accommodation would ultimately be required under the law or not.

Although this desire for certainty is understandable, the various alternatives to the flexible approach would in all likelihood restrict the opportunities available to people with disabilities and would restrict needed flexibility for employers as well. For example, a requirement that employers spend up to 10 percent of their gross income on reasonable accommodations would not take into account the employer's other expenses or whether those expenses have been particularly heavy in a specific year. A requirement that employers spend up to 10 percent of their net income on accommodations would allow employers to allocate all of their income to other expenses (including discretionary expenses) before any resources would be considered for accommodations. An approach that tied the accommodation limit to a certain percentage of an employee's salary would mean that a wide range of accommodations, which would be perfectly reasonable to expect large employers to provide, would not be required simply because the person with a disability was in a low-paying job.

In the final analysis, therefore, Congress chose to continue the flexible undue-hardship approach that had been used successfully under the Rehabilitation Act for over 15 years. This approach ensures that the different resources and needs of small companies, compared with large ones, are appropriately taken into account in each individual case, while still providing the essential protection of reasonable accommodations for people with disabilities.

Although the undue-hardship standard is a flexible one, there is a specific process for determining whether a reasonable accommodation is necessary and what is the best reasonable accommodation to adopt. This process is spelled out in the legislative reports to the ADA and may provide useful guidance to employers.

First, an employer's duty to provide a reasonable accommodation is triggered by a request from an employee or applicant.[59] Employers do not have to speculate about what particular disability a person might have or about what particular accommodation might be useful for that person. Rather, if a person with a disability needs some accommodation in order to perform the essential functions of a job, it is the responsibil-

ity of that person to identify for the employer the general nature of his or her disability and the type of accommodation needed.

Second, the employer—through consultation with the individual with a disability—should identify what the barriers are to the individual's performance of particular job functions. There are two components to this analysis. The employer and the individual should first identify the abilities and limitations of the individual and should then identify those job tasks or work-environment factors that limit the individual's effectiveness or performance in light of the disability.[60]

Third, the employer should identify possible accommodations that will address the problematic work-environment factors or job tasks and will allow the individual to perform the job. The first source of information should be the person with the disability. As the legislative reports to the ADA recognize, people with disabilities often have significant life experience in ways to accomplish tasks differently and may have suggestions for accommodations that are substantially cheaper or easier to implement than an employer might devise independently.[61] Other resources to consult include state vocational rehabilitation agencies, the Job Accommodation Network of the President's Committee on the Employment of People with Disabilities, private rehabilitation centers, private disability organizations, and employer networks.[62] See Appendix B in this book for a list of resources.

Fourth, having identified various possible accommodations, the employer should assess the potential effectiveness of each accommodation—that is, the employer should assess which accommodation will best achieve the goal of giving the employee the maximum opportunity to perform the job functions.[63]

Finally, the employer should implement the most appropriate accommodation that does not impose a significant difficulty or expense for the employer. As the legislative reports make clear, if there are two equally effective accommodations, which cost essentially the same and are equally easy to implement, the expressed choice of the person with a disability should be given primary consideration.[64] Nevertheless, as a bottom line, the employer can decide which accommodation to choose—as long as the chosen accommodation meets the requirement of giving the individual a meaningful opportunity to perform the job.[65]

The provision of reasonable accommodations is a key component for ensuring real and effective employment opportunity for people with disabilities. Although some people with disabilities do not need any

reasonable accommodations at all, others do require reasonable accommodations as an integral aspect for ensuring their effective performance of job functions.

MEDICAL EXAMS AND INQUIRIES

The ADA includes detailed requirements for medical examinations and inquiries. These requirements are designed to accommodate two necessary and legitimate concerns—one on the part of people with disabilities and the other on the part of employers. The concern of people with disabilities is to get a fair chance to demonstrate their abilities for a particular job before an employer is informed about a disability that is irrelevant to a job. The concern of employers is to be allowed to assess whether an applicant or employee is qualified for, or remains qualified for a particular job.

JOB APPLICANTS

In order to understand the ADA's requirements for medical exams and inquiries of job applicants, it is useful to first contemplate the following common scenario. A person with a disability, such as epilepsy, or diabetes, or Hodgkin's cancer in remission, applies for a job. One of the first steps in the application process is to fill out a medical questionnaire, which asks, "What medical conditions do you have or have you ever had?" The person with the disability truthfully fills out the questionnaire. The person then completes various other steps in the application process, including an interview, submission of a writing sample, and listing of references. At the end of the process, the applicant is denied the job.

At this point, the applicant has no firm knowledge of why he or she was denied the job. It could be that the prospective employer, seeing that the person had a disability, such as diabetes, epilepsy, or a slight hearing impairment, decided not to offer the person the job. In that case, the other steps in the process were basically irrelevant. On the other hand, it could be that the employer was not affected at all by the applicant's disability, but that the applicant's references or writing sample did not meet the employer's standards. The problem for the person with a disability, however, is that although the discrimination *may* have occurred because of his or her disability, that person can never

definitively know the truth. In fact, many people with disabilities are often denied jobs because their disability is identified early in the application process and that fact taints the remainder of the application process.[66]

To address this problem, the ADA, following the precedent of section 504 of the Rehabilitation Act,[67] establishes a two-step process for medical examinations and inquiries of job applicants.

The first step is the initial application stage. At that point, an employer may not require an applicant to submit to any medical examination, or to respond to any medical inquiries, such as filling out medical history questionnaires.[68] The employer may, however, ask the applicant whether the applicant can perform job-related functions.[69] Thus, for example, an employer may ask, in the initial application stage, whether the person has the educational and professional qualifications necessary for the job. The employer may also ask whether the applicant can do specific job functions, such as drive a car, lift 50 pounds, or answer the telephone, if these are essential functions of the job. The employer may not, however, ask generally whether the applicant has a disability that would prevent the person from doing the essential functions of the job.

After an employer has determined that the applicant possesses the necessary qualifications for a particular job, and decides (for whatever other reasons) to hire this person, the employer must extend to that applicant a conditional job offer, which then triggers the second step of the process. At this point, the employer may require the applicant to undergo a medical examination or respond to medical inquiries, and may condition the final offer of employment on the results of those medical tests or inquiries.[70]

Certain conditions, however, are placed on the use of such examinations or inquiries. First, if an employer wishes to require a medical examination, the examination must be required of *all* applicants for a particular job category, not simply of selected applicants. For example, an employer may not require that only applicants who "look weak" must fill out a medical questionnaire. Rather, the requirement of filling out a medical questionnaire must be a routine one requested of all applicants for a particular job category.[71]

Second, the information obtained as a result of the medical examinations must be kept strictly confidential. This information must be maintained on forms separated from the general application forms, in separate medical files that are treated as confidential medical records.

Only a limited number of individuals may gain access to these records.[72]

This confidentiality requirement represents an important protection for applicants with disabilities. Although there is no general federal confidentiality law for medical records, the ADA creates a cause of action for breaches of confidentiality of medical records obtained by the employer through testing of job applicants. This protection supplements whatever other causes of action an individual may have under state laws for breaches of confidentiality (e.g., through medical records or privacy laws).

Third, and of key importance, the results of the medical examination may not be used to withdraw the conditional job offer from an applicant unless the results indicate that the applicant is no longer qualified to perform the job.[73] Thus, assume for example, that a necessary qualification for a job was to lift 50 pounds on a regular basis. If the examination or inquiry revealed that the applicant, even with reasonable accommodation, could not fulfill this necessary requirement of the job, then the results of the exam could legitimately be used to withdraw the conditional job offer. By contrast, if the exam revealed that the person had Hodgkin's cancer in remission, or some other disability that did not affect the person's lifting ability, the conditional job offer could not legitimately be withdrawn.

This two-step process addresses the two concerns outlined above. On the one hand, it protects applicants with disabilities by allowing them to isolate the occurrence of a discriminatory hiring practice. On the other hand, it protects employers by allowing them to discover possible disabilities that will, in fact, limit an applicant's ability to perform a job prior to the applicant's receiving a final job offer.

ON-THE-JOB EMPLOYEES

The ADA's restrictions on medical exams and inquiries of employees are different from those for applicants. As the legislative reports to the ADA explain, once an employee is on the job, the person's *actual* performance is the best measure of that person's ability to do the job. Thus, under the ADA, the only medical exams or inquiries that an employer may require of employees are those that are "job-related and consistent with business necessity."[74]

The reasoning for this requirement is straightforward. Under the ADA, an employer does not have the right to pry into an employee's

medical condition simply for the sake of curiosity. As the legislative reports explain, "An inquiry or examination that is not job-related serves no legitimate employer purpose, but simply serves to stigmatize the person with a disability."[75]

By contrast, an examination or inquiry that is necessary to ascertain the person's actual ability to continue to perform an essential function of the job would be valid under the ADA as "job-related and consistent with business necessity."[76] The employer could demand that an employee undergo such a valid examination. Moreover, unlike medical examinations for job applicants, such examinations can be required of a specific employee if the need arises to question his or her continued ability to do the job.

The ADA makes clear that employers may continue to offer voluntary medical examinations to their employees—for example, as part of "corporate wellness" programs. Results of such examinations, however, are subject to the same confidentiality requirements that govern pre-employment tests and similarly may not be used to discriminate against an individual who remains qualified for a job.[77]

HEALTH INSURANCE BENEFITS

The ADA provides some protection to people with disabilities in the area of health insurance benefits, although final resolution in this area will probably come only in court decisions.

The ADA provides that a covered entity may not discriminate against an employee in the "terms or conditions of employment."[78] The legislative reports note that these terms and conditions include "fringe benefits available by virtue of employment, whether or not administered by the covered entity."[79] A covered entity may also not participate in a contractual relationship that has the effect of subjecting the employees of the covered entity to discrimination, including a contractual relationship with "an organization providing fringe benefits to an employee of the covered entity."[80]

The ADA, therefore, does seem to contemplate that certain practices in the provision of fringe benefits, including presumably health insurance, would be illegal under the Act. The ADA, however, does include a general provision for insurance: An insurer cannot be prohibited or restricted from underwriting or classifying risks in a way that complies

with or is not inconsistent with state law; nor can a covered entity, such as an employer, be restricted in establishing a benefit plan that underwrites or classifies risks in a manner that is based on, or not inconsistent with, state law.[81]

This provision, however, also has its own exception built into it. According to the provision, these insurance exceptions may not be used as a "subterfuge" to evade the purposes of the ADA.[82]

The various legislative reports, and some members of Congress, attempted to provide guidance in this area.[83] Various principles may be derived from this legislative guidance:

1. Employers may not refuse to hire an individual because the individual will cost the employer more in terms of insurance premiums (or, in the case of self-insured plans, in terms of health-care costs). Thus, an employer could not refuse to hire a person with diabetes because such an individual might cost more in terms of health insurance coverage.[84]
2. Employers and insurance companies may continue to include preexisting-condition clauses in their health plans, even though such clauses eliminate benefits for a specified time period for people with disabilities. Thus, an employer could have a health plan that does not cover treatment for diabetes for a specified time period, if the employee had diabetes upon entering the health plan.[85]
3. Employers and insurance companies may limit coverage for certain *procedures* or *treatments*. For example, a health plan presumably may place a limit on the amount of kidney dialysis it will cover or the number of blood tranfusions it will reimburse.[86]
4. An employer may not, however, have a health plan that denies coverage "completely" to an individual based on diagnosis. For example, although a plan may include certain limitations for people with kidney disease (e.g., a limit on the amount of kidney dialysis), the plan cannot deny coverage to that person with kidney disease for conditions not connected to the permissible procedure limitations—for example, coverage for treatment of a broken leg.[87] Moreover, the plan could also not deny coverage to that individual for *other* procedures or treatments connected with the kidney disease itself.[88]

The overall thrust of the ADA's legislative history appears to be that insurance companies, and employers buying insurance plans, should be allowed to continue offering such plans as long as exclusions or limitations in the plan are based on sound actuarial principles. Obviously, however, it may make some sense, as an actuarial matter, to try to deny coverage completely for people with kidney or heart disease. Such an attempt, however, may well be seen as a subterfuge for evading the purposes of the law, if in practice it will prevent people with such diseases from being employed. Thus, it is quite possible that it would not be permissible to deny coverage completely, as a blanket matter, for one disability—such as kidney or heart disease.

DEFENSES

There are a number of defenses to a charge of discrimination under the ADA. Some of these defenses are similar to those existing under general civil-rights law; other defenses are specific to the ADA.

First, the ADA prohibits discrimination on the basis of *disability*, not on any other ground. Thus, a general defense for the refusal to hire a person with a disability might be that there was no longer money to fund the desired position or that the company was moving into a different area of emphasis than that offered by the person with a disability. These reasons may result in refusal to hire a particular person (including a person with a disability) that has nothing to do with disability per se. Even reasons that may appear completely irrational—for example, a policy of hiring only graduates of Northwestern University for particular jobs—are not invalid as long as they are not based on disability and do not result in a disparate impact on people with disabilities.

Second, the framework for proving intentional discrimination is essentially the same under the ADA as it is for other employment antidiscrimination laws. The person alleging discrimination bears the initial burden of proving the facts of discrimination: (1) the person is a member of the protected class (i.e., the person has a disability or associates with someone with a disability); (2) the person possesses the necessary qualifications, apart from the disability, to do the desired job; and (3) the person was rejected for (or fired from) the job under

circumstances that give rise to an inference that the decision was based on the person's disability.[89]

Once the person alleging discrimination establishes this prima facie case of discrimination, the burden shifts to the employer. At that point, the employer could prove that the employment decision was made for reasons *other* than the applicant's or employee's disability. Or the employer could admit that the employment decision *was* based on the person's disability, but could prove that the plaintiff's disability made him or her *not* "qualified" for the job. For example, the employer could prove that the person's disability prevented him or her from doing the job, that there was no reasonable accommodation that would allow the person to do the job, or that the only possible reasonable accommodation would impose an undue hardship on the employer.

At that stage, the burden shifts back to the person alleging discrimination. If the employer has produced evidence to prove that the employment decision was made for reasons other than disability, the applicant or employee could produce evidence to prove that this was a pretext and that, in fact, the decision *was* based on disability. Conversely, if the employer has produced evidence to prove that the person was not qualified for the job, the applicant or employee could produce evidence to show that he or she was qualified for the job, that there was an available reasonable accommodation, and/or that the available reasonable accommodation was not an undue hardship.[90]

The ADA also sets forth some specific defenses of qualification standards. For example, an employer may have, as a qualification standard, that a person with a disability not pose a "direct threat to the health or safety of other individuals in the workplace."[91] "Direct threat" is defined in the ADA as posing "a significant risk to the health or safety of others which cannot be eliminated by reasonable accommodation."[92]

This direct-threat qualification standard is a long-standing requirement under the Rehabilitation Act. It is a logical requirement: in order for a person with a disability to be qualified for a particular job, that person cannot pose a direct threat to the health or safety of others in the workplace. The definition of direct threat in the ADA is taken directly from a case decided under section 504 of the Rehabilitation Act—the Supreme Court decision in *School Board of Nassau County v. Arline*.[93] The essential requirement for this defense is that the perceived health

or safety threat posed by the person with a disability must be based on solid facts and not on speculation or generalizations.[94]

The ADA also provides that religious entities may require that all applicants and employees "conform to the religious tenets" of the religious entity.[95] In other words, a valid qualification standard for a religious entity may be that all individuals conform with that entity's religious tenets and requirements. Even if it is an individual's disability that makes him or her incapable of fulfilling those tenets, the ADA allows religious entities to apply those requirements and to refuse to hire or retain such an individual.

In general, the defenses allowed under the ADA comport with the basic principles underlying the law: to ensure that people with disabilities are given full and meaningful opportunities for employment, while protecting the right of employers to hire individuals who can appropriately perform the essential functions of particular jobs.

COVERAGE AND ENFORCEMENT

The employment title of the ADA adopts the same scope of coverage of employers, and the same administrative and judicial remedies, that are provided under title VII of the Civil Rights Act of 1964 for individuals who are discriminated against on the basis of race, sex, religion, or national origin.[96] This parity was specifically adopted by the sponsors of the ADA in order to ensure that people with disabilities were granted the same rights and remedies that are available to other minorities and to women.

Like title VII, therefore, the employment title of the ADA will ultimately cover all businesses that employ 15 or more employees. However, the ADA also includes a significant phase-in period. In July 1992, the employment title becomes effective for employers with 25 or more employees. Two years later, in July 1994, the employment title becomes effective for employers with 15 or more employees.[97]

The employment title of the ADA also adopts the same enforcement mechanism and remedies provided under title VII of the Civil Rights Act of 1964. As under title VII, a person charging discrimination must first go through the administrative process established under the Equal Employment Opportunity Commission (EEOC). The EEOC has well-established procedures that individuals who allege discrimination on

the basis of race, sex, religion, or national origin have used for years under title VII and these same procedures will apply to people with disabilities.[98]

Apart from the administrative procedures available through the EEOC, a person charging discrimination also has the right to bring a private lawsuit in court.[99] The rules that apply to title VII lawsuits will apply to the ADA as well. Thus, for example, if a person alleging discrimination wins his or her case, the relief available will be "injunctive relief." This may include a judicial order reinstating the person in a job, an order requiring the person to be granted a specific job, and/or an order requiring that money be paid to compensate the person for lost wages (known as "backpay" and, at times, "frontpay").[100] The relief currently available under title VII does not, however, include the right to receive compensatory or punitive damages.[101]

Finally, the ADA explicitly provides that the law should not be construed to invalidate or limit the remedies or rights of any federal law or state law that provides greater or equal protection to people with disabilities.[102] This "antipreemption" provision is designed to ensure explicitly that other federal laws (such as the Rehabilitation Act of 1973) and other state laws will continue to provide protection to people with disabilities. This also includes the remedies, such as compensatory and punitive damages, that may be available under state laws.[103]

CONCLUSION

The ADA is a remarkably comprehensive law, addressing the broad-ranging areas of employment, public services, transportation, public accommodations, and communications. The decision to pursue a comprehensive law was a very deliberate one on the part of its sponsors. Each of these areas is interdependent. In order for people with disabilities to enter the mainstream of America, they must have meaningful opportunities to obtain employment; access to public services and to goods and services offered by private businesses; accessible transportation to reach these jobs, goods, and services; and a means of communicating with employers, businesses, and others.

The employment section of the ADA addresses the employment piece of this interdependent picture. The basic principle underlying this section is that qualified persons with disabilities must be judged on

their merits and abilities for particular jobs and must not have employment opportunities unjustly foreclosed to them because of myths or stereotypes regarding their disabilities. At the same time, the employment section is designed to be workable for the thousands of employers who will be required to abide by its requirements.

The two- to four-year phase-in period before the ADA fully applies to private employers will be most effective if it is used for comprehensive education. With such education and understanding, the ADA can be a source of support for both employers and for people with disabilities.

NOTES

1. See 29 U.S.C. §791, 793, 794 (1985 & Supp.).
2. 42 U.S.C. §2000e et seq. (1981 & Supp.).
3. Parts of this section are based on C.R. Feldblum (1991): The Americans with Disabilities Act: The Definition of Disability, 7 *ABA Labor Lawyer* 1:11–27.
4. ADA §3(2). This is the same definition of a "person with a handicap" that Congress adopted for purposes of title V of the Rehabilitation Act of 1973. People with disabilities, and their advocates, prefer to use the term "disability" rather than "handicap." In recognition of that preference, the term "disability" is used throughout the ADA.
5. 29 U.S.C. §706(8)(A) (1985 & Supp.).
6. See S. Rep. No. 1297, 93rd Cong., 2d. Sess., 16, 37–38, 50 (1974).
7. ADA §3(2)(A).
8. See Report of the Senate Committee on Labor and Human Resources, 101st Cong., 1st Sess., S. Rep. No. 101–116 at 22 (henceforth Senate Report); Report of the House Committee on Education and Labor, 101st Cong., 2d. Sess., H. Rep. No. 101–485, Part 2 at 51 (henceforth Education and Labor Report); Report of the House Committee on the Judiciary, 101st Cong., 2d. Sess., H. Rep. No. 101–485, Part 3 at 28 (henceforth Judiciary Report). See also 45 C.F.R. §84.3(j) and Appendix A, No. 3 (1985).
9. Another reason it is difficult to develop a comprehensive list is that there is no way of knowing what specific physiological disorders may develop in the future. See Senate Report at 22; Education and Labor Report at 51; Judiciary Report at 28 (noting the advent of new disabilities, such as AIDS).
10. Education and Labor Report at 51; see also Senate Report at 22; Judiciary Report at 28. Although drug addiction is a recognized physical disorder, the current illegal use of drugs is not protected under the ADA. See Judiciary Report at 28, note 17.
11. See Senate Report at 22; Education and Labor Report at 52; Judiciary Report at 28.
12. These are all examples of major life activities. As the Department of Justice

has pointed out, another significant life activity is that of procreation and intimate personal relations, in which people infected with the human immunodeficiency virus are substantially limited. See Memorandum of Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, September 27, 1988 at 9.

13. See Senate Report at 23; Education and Labor Report at 52–53; Judiciary Report at 29.
14. See Senate Report at 23; Education and Labor Report at 53; and Judiciary Report at 29.
15. See, e.g., *Prewitt v. United States Postal Service*, 662 F.2d 292, 309 (5th Cir. 1981); *Pushkin v. Regents of the University of Colorado*, 658 F.2d 1372, 1385 (10th Cir. 1981).
16. See Education and Labor Report at 52; Judiciary Report at 28, note 18; Senate Report at 22; statement of Rep. Edwards, 136 Cong. Rec. H 4624 (July 12, 1990).
17. See, e.g., *Ray v. School District of DeSoto County*, 666 F.Supp. 1524 (M.D.Fla. 1987); *Thomas v. Atascadero Unified School District*, 662 F.Supp. 376 (C.D.Cal. 1986); *Chalk v. United States District Court*, 840 F.2d 701 (9th Cir. 1988).
18. See discussion under section on defenses for explication of the "direct threat" qualification standard.
19. See, e.g., Education and Labor Report at 78.
20. See, e.g., 45 C.F.R. Part 84, Appendix A, No.3 (1985); *Simpson v. Reynolds Metals Co.*, 629 F.2d 1226 (7th Cir. 1980); *Crew v. OPM*, 834 F.2d 140 (8th Cir. 1987).
21. The person, however, could be covered under the third prong of the definition if he or she were regarded as being an alcoholic.
22. ADA §104(a), §510.
23. ADA §512.
24. ADA §104(b)
25. See, e.g., *Gardner v. Morris*, 752 F.2d 1271 (8th Cir. 1985); *Doe v. New York University*, 666 F.2d 761 (2nd Cir. 1981).
26. See discussion of qualification requirements under the ADA in the section entitled "Qualified Person with a Disability."
27. ADA §511(b).
28. Homosexuality was removed in 1973 by the American Psychiatric Association from the list of mental disorders set forth in the *Diagnostic and Statistical Manual III.*
29. ADA §102(b)(4).
30. Although protection for people who associate with people with disabilities does not appear in the Rehabilitation Act, it is not a new concept. Such protection was also included in the Fair Housing Act when Congress passed a series of amendments to that law in 1988. See 42 U.S.C. §3604(f)(1)–(2) (1977 & Supp.).
31. See Judiciary Report at 38.
32. ADA §102(a).
33. ADA §101(8).

34. This concept of "essential functions" comes directly from the 1977 DHEW regulations issued to implement Section 504. See 45 C.F.R. §84.3(k) (1985).
35. See Senate Report at 34–35; Education and Labor Report at 33–34; Judiciary Report at 31–32.
36. ADA §102(b)(5)(A)–(B). See also Education and Labor Report, at 62–67.
37. The term "covered entity" includes employers, employment agencies, labor organizations, and joint labor-management committees. ADA §101(2).
38. ADA §102(a).
39. ADA §102(b)(1).
40. ADA §102(b)(2).
41. See Education and Labor Report at 60; Judiciary Report at 37.
42. See Education and Labor Report at 60–61; Judiciary Report at 37–38.
43. ADA §102(b)(5)(A)–(B).
44. ADA §102(b)(6).
45. Id.
46. ADA §102(b)(6).
47. See, e.g., title II, title VII, and title VIII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a, 2000e, 2000f. See also section 504 of the Rehabilitation Act, 29 U.S.C. §794(a) (1985 & Supp.).
48. See C.R. Feldblum: Medical Exams and Inquiries under the Americans with Disabilities Act: A View from the Inside—Symposium on the Americans with Disabilities Law, *Temple Law Review* (summer 1991).
49. ADA §102(b)(5)(A).
50. Job restructuring may include eliminating nonessential elements of the job, exchanging assignments with other employees, or redesigning procedures for task performance. See Education and Labor Report at 62.
51. See Education and Labor Report, at 62. See also statement of Rep. Edwards, 136 Cong. Rec. H 4624 (July 12, 1990); statement of Rep. Owens, 136 Cong. Rec. H 4623 (July 12, 1990).
52. An employer is not required to create a new job for an employee with a disability who is no longer able to perform his or her present job. However, if a vacant job exists that the person is qualified to perform, reassignment to that job would be a required reasonable accommodation. See Education and Labor Report at 63.
53. ADA §101(9). A reasonable accommodation could also include providing an attendant. See Education and Labor Report at 64.
54. ADA §101(10) (definition of undue hardship); §102(b)(5)(A) (requirement to provide a reasonable accommodation unless it imposes an undue hardship).
55. ADA §101(10). The factors regarding the type of operation and work force of the employer (category three) are probably best understood as simply a subset, or an application, of the factors in category two.
56. See Judiciary Report at 41; Senate Report at 35–36; Education and Labor Report at 67.
57. 567 F.Supp. 369 (E.D.Pa. 1983)
58. Id., at 380. As one legislative report noted, after summarizing the *Nelson v. Thornburgh* case: "[T]he same accommodations may be an undue hardship

for a small employer because they would require expending significant proportions of available resources." Judiciary Report at 41.

59. See Senate Report at 34; Education and Labor Report at 64.
60. Senate Report at 35; Education and Labor Report at 66.
61. Senate Report at 34; Education and Labor Report at 65.
62. The Education and Labor Report included the "800 number" for the Job Accommodation Network in its report. Education and Labor Report at 64 (1-800-526-7234). Some private rehabilitation agencies, such as Allied Services in Scranton, Pennsylvania, are taking a strong role in offering technical assistance to employers. As employers recognize the usefulness of having trained consultants to turn to in the reasonable accommodation area, one hopes that more companies trained in the latest technology and sensitive to disability issues will be available for use by employers.
63. Senate Report at 35; Education and Labor Report at 66.
64. Senate Report at 35; Education and Labor Report at 66–67. In fact, if the accommodations are equal to that extent, most employers would probably take into account the preference of the individual with the disability.
65. Senate Report at 35; Education and Labor Report at 66–67; Judiciary Report at 40.
66. See Senate Report at 39; Education and Labor Report at 72.
67. See 45 C.F.R. §84.11 (1985).
68. ADA §102(c)(2)(A).
69. ADA §102(c)(2)(B).
70. ADA §102(c)(2)(B). There is no requirement for the employer to "job validate" these medical exams or inquiries.
71. ADA §102(c)(3)(A). The requirement of a "particular job category" is an important one for employers. In other words, an employer can give a test to check lifting strength to all its construction employees, without having to require that the same test be given to all its management and clerical employees. See Education and Labor Report at 73.
72. ADA §102(c)(3)(B).
73. ADA §102(c)(3)(C).
74. ADA §102(c)(4)(A). See Education and Labor Report at 75; Senate Report at 39.
75. Education and Labor Report at 75; see also Senate Report at 39.
76. ADA §102(c)(4)(A).
77. ADA §102(c)(4)(B)–(C).
78. ADA §102(a)
79. See Judiciary Report at 35; Education and Labor Report at 55.
80. ADA §102(b)(2).
81. ADA §501(c). The provision also provides that a covered entity may establish or administer a bona fide benefit plan that is not subject to state laws that regulate insurance.
82. ADA §501 (c).
83. See Senate Report at 29 and 84–86; Education and Labor Report at 59 and 136–138; Judiciary Report at 37–38 and 70–71. See also statement of Rep. Owens, 136 Cong. Rec. H4623 (July 12, 1990); statement of Rep. Edwards,

136 Cong. Rec. H4624 (July 12, 1990); statement of Rep. Waxman, 136 Cong. Rec. H4626 (July 12, 1990); statement of Sen. Kennedy, 136 Cong. Rec. S9697 (July 13, 1990).

84. See, e.g., Education and Labor Report at 136; statement of Rep. Owens, supra note 83 at 4623; statement of Rep. Edwards, supra note 83 at 4624.
85. See, e.g., Education & Labor Report at 59; Judiciary Report at 38.
86. See, e.g., Education and Labor Report at 59; Judiciary Report at 38.
87. See Education and Labor Report at 59; Judiciary Report at 38.
88. See Judiciary Report at 38. See also statement of Rep. Waxman, supra note 83 at 4626; statement of Rep. Edwards, supra note 83 at 4624. This last example seems to indicate that it would not be legitimate to have a blanket exclusion of a particular disability.
89. See *Pushkin v. Board of Regents of the U. of Colorado*, 658 F.2d 1372, 1385–1387 (10th Cir. 1981); see also *Prewitt v. United States Postal Service*, 662 F.2d 292, 309–310 (5th Cir. 1981).
90. See, e.g., *Prewitt*, 662 F.2d, at 307–310.
91. ADA §103(b).
92. ADA §101(3).
93. 480 U.S. 273 (1987).
94. See, e.g., Judiciary Report at 45.
95. ADA §103(c).
96. ADA §101(5) and §102(a) (coverage); §107(a) (enforcement).
97. ADA §101(5)(A).
98. ADA §107(a) (incorporating by reference the administrative procedures of title VII, 42 U.S.C. §2000e-5).
99. ADA §107(a) (incorporating by reference the private right of action available under title VII, 42 U.S.C. §2000e-5[f]).
100. See 42 U.S.C. §2000e-5(g) (incorporated in ADA §107[a]).
101. See, e.g., *Shah v. Mt. Zion Hospital & Medical Center*, 642 F.2d 268, 272 (9th Cir. 1981).
102. ADA §501(b).
103. See Education and Labor Report at 135; Judiciary Report at 69–70; statement of Rep. Hoyer, 136 Cong. Rec. E1920–21 (June 13, 1990).