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COMMENTARY

AMERICANS WITH DISABILITIES ACT: DISPELLING THE MYTHS. A PRACTICAL GUIDE TO EEOC'S VOODOO CIVIL RIGHTS AND WRONGS

*Charles D. Goldman**

I. INTRODUCTION

The time is at hand for reality to replace expectation as the employment provisions of the federal mandate not to discriminate against qualified individuals with disabilities, the Americans with Disabilities Act (the "ADA"),¹ are now the law of the land. A new era of rights, responsibilities, and opportunities dawned for private and governmental employers, and disabled persons when the rules of the United States Equal Employment Opportunity Commission ("EEOC") went into effect on July 26, 1992. A practical, common sense utilization of institutional solutions complemented by individualized applications, not ad hoc reactions, is essential. Otherwise employers' worst fears will be realized and the euphoria in the community of disabled persons will be dashed on the rocks of frustrated, raised expectations.

Ultimately, the success or failure of the new law will depend on the ability of employers and persons with disabilities to develop real world solutions to the issues. In the short run, both the employers and disabled persons must discern the meaning and impli-

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1. 42 U.S.C. §§ 12101, 12111-17, 12131-34, 12141-50, 12161-65, 12181-89, 12201-13 (1990).

cations of the law, despite the EEOC's lack of clear guidance on several potentially litigious issues.

This commentary presents a pragmatic approach to the employment provisions of the ADA, particularly the EEOC rules, and dispels the myths and regulatory inadequacies that could preclude effective, balanced implementation. Suggestions on avoiding litigation, including a sample reasonable accommodations policy, follow the legal analysis.

II. ADA: HISTORY AND OVERVIEW

The Americans with Disabilities Act has its roots in two key federal laws: the Civil Rights Act of 1964,² which had no disability-related provisions when enacted, and Title V of the Rehabilitation Act of 1973,³ which literally took years to implement. The precedents under these laws, particularly the Rehabilitation Act, as well as state and local laws prohibiting discrimination based on disability, shed light on how to interpret the ADA.

The Civil Rights Act of 1964 prohibits discrimination based on race, color, sex, national origin, and religion in employment⁴ and places of public accommodation.⁵ The law covers discrimination by state and local governments⁶ and private employers engaged in interstate commerce.⁷ Unions and employment agencies are likewise included.⁸ Finally, this law created a new federal agency, the United States Equal Employment Opportunity Commission, to enforce this mandate.⁹

The Rehabilitation Act of 1973 is fundamentally a law authorizing programs for state-provided and federally funded rehabilitation services, the modern era of which began after World War I to retrain returning veterans. Title V of the 1973 enactment embodies the foundation for the Americans with Disabilities Act.¹⁰

2. 42 U.S.C. §§ 2000a to h-6 (1988 & Supp. II 1990).

3. 29 U.S.C. §§ 790-94 (1988).

4. 42 U.S.C. §§ 2000e to e-17 (1988).

5. *Id.* §§ 2000a to a-6.

6. *Id.* § 2000e.

7. *Id.*

8. *Id.*

9. *Id.* § 2000e-4 (1989).

10. 29 U.S.C. §§ 790-94 (1988). For example, § 501 of the Rehabilitation Act prohibits discrimination by the federal government in employment against qualified individuals with disabilities, 29 U.S.C. § 791 (1988), and § 503, administered by the United States Depart-

The most significant civil rights provision in the Rehabilitation Act of 1973 is section 504.¹¹ This provision bans discrimination against qualified disabled persons in government-sponsored programs and activities as well as discrimination against recipients of financial assistance.¹² However, the meaning of this provision was not clear for several years, since the federal government did not issue section 504 regulations until 1977!¹³ Those regulations, which were issued from what was then the Department of Health, Education, and Welfare introduced such terms as "reasonable accommodation" in employment¹⁴ and "program accessibility" of services and activities.¹⁵ Subsequently, primary federal government responsibility was transferred to the Department of Justice by Executive Order Number 12,250.¹⁶ The Rehabilitation Act defined "handicapped person" as a person with a physical or mental impairment that substantially limits one or more major life activities of the person, who has a record of such an impairment, or who is regarded as having such an impairment.¹⁷

The Rehabilitation Act, for all its grandiose, hortatory language and ideals, is really quite limited; in order for the Act to apply, there must be a federal nexus.¹⁸ This scope was further narrowed in *Grove City College v. Bell*,¹⁹ a 1984 United States Supreme Court decision limiting the scope of federal civil rights to the specific program receiving aid, not to the entire scope of the recipient entity.²⁰ *Grove City* was subsequently overturned by the Civil

ment of Labor, requires that federal contractors take affirmative action in hiring and promoting qualified disabled persons. *Id.* § 794.

11. *Id.* § 794.

12. *Id.*

13. 42 Fed. Reg. 22,676 (1977).

14. 45 C.F.R. § 84.12 (1991). This is the concept of providing feasible adjustments in the workplace, such as modifying work schedules, making the workplace accessible, and providing recorders or interpreters. *See infra* pp. 89-94.

15. 45 C.F.R. §§ 84.21-23 (1991). The elements of the program, including employment opportunities, must be accessible. New structures and alterations are to be fully accessible. Older structures need only be partially modified, e.g., first floor, entrance, toilets, etc., as long as all services, activities and programs are accessible.

16. Exec. Order No. 12,250, 3 C.F.R. 298 (1980); *see also* 28 C.F.R. 42(G) (1980).

17. 29 U.S.C. § 706(8) (1988 & Supp. II 1990). Note that the Rehabilitation Act as originally enacted covered a "handicapped person." The popular term in usage today is "person with a disability." In the 1992 extension of the Rehabilitation Act the syntax of the law was changed to "person with a disability." Pub. L. No. 102-569, 106 Stat. 4344 (1992).

18. 29 U.S.C. §§ 701-96 (1988).

19. 465 U.S. 555 (1984).

20. *Id.*

Rights Restoration Act of 1988.²¹ This legislation's enactment was contemporaneous with the birth of comprehensive disability civil rights legislation.

The clarion call for a national law prohibiting discrimination against persons with disabilities, regardless of federal funding, came from a small federal agency, the National Council on Disability, in two mid-1980s reports.²²

In 1988, the Americans with Disabilities Act was introduced in both the Senate²³ and the House of Representatives.²⁴ However, the bills died with the end of the 100th Congress. In 1989, the legislative process accelerated; new bills were introduced in both chambers. Finally, the Senate held hearings and passed the ADA.²⁵ After four committees reviewed the proposed legislation, the House of Representatives passed its version of the ADA in 1990.²⁶ Following a conference between both chambers,²⁷ President Bush signed the ADA into law on July 26, 1990.²⁸ More than 2000 people, many of them persons with disabilities, were on the South Lawn of the White House for the historic occasion.

The ADA, like the Civil Rights Act of 1964, but unlike Title V of the Rehabilitation Act, bans discrimination regardless of whether the employer, the place of public accommodation, state or local government or any other covered entity receives any federal financial assistance, or has a federal contract or federal financial nexus.

The ADA has five major components. Title I²⁹ relates to employment. Discrimination is prohibited by employers of twenty-five or more persons as of July 26, 1992, and employers of fifteen or more persons as of July 26, 1994.³⁰ Title II³¹ bans discrimination in programs and activities, including employment, by all state and local

21. 29 U.S.C. § 794 (1988).

22. National Council on Disability, *Toward Independence* (1986); National Council on Disability, *On the Threshold of Independence* (1988).

23. S. 2343, 100th Cong., 2d Sess. (1988).

24. H.R. 4498, 100th Cong., 2d Sess. (1988).

25. S. REP. No. 116, 101st Cong., 1st Sess. (1989).

26. H.R. REP. No. 485, 101st Cong., 2d Sess. pts. I-IV (1990), *reprinted in* 1990 U.S.C.C.A.N. 267. The House of Representatives Committee on Education and Labor published a three-volume history on the Americans with Disabilities Act.

27. H.R. REP. No. 596, 101st Cong., 2d Sess. (1990).

28. *See* 1990 U.S.C.C.A.N. 601.

29. 42 U.S.C. §§ 12111-17 (Supp. II 1990).

30. 42 U.S.C. § 12111(5)(A) (Supp. II 1990).

31. 42 U.S.C. §§ 12131-65 (Supp. II 1990).

government entities, regardless of the number of employees or budget, and by the National Rail Passenger Corporation (AM-TRAK) as of January 26, 1992.³² Title II also has provisions related to non-discrimination by entities providing public transportation.³³ Title III bans discrimination in places of public accommodation as well as commercial facilities, effective January 26, 1992.³⁴ Public transportation provided by private entities, as their main business or in connection with their primary other business, is also under a Title III non-discrimination mandate.³⁵ Title IV requires telecommunication relay systems to be established by July 26, 1993, and federally funded public service announcements to be closed captioned.³⁶ Titles I through IV each require federal regulations to be finalized within one year after the enactment of the law; this is a congressional reaction to the failure of the Executive Branch to issue rules in a timely manner under section 504 of the Rehabilitation Act.³⁷ Title V³⁸ contains key sections, including provisions against insurance discrimination and no preemption of state/local laws which afford the person with a disability more protection than provided by the ADA.

While this commentary addresses employment from the perspective of the EEOC regulations under Title I, the importance of the other provisions of the ADA should not be understated. State and local governments are significant employers and providers of programs, services, and activities. As the programs, services, and activities become more accessible to persons with disabilities, so too will the workplaces. The Department of Justice regulations under ADA Title II provide that an employer subject to Title II, e.g. a city employing twenty-five or more persons as of July 26, 1992, should follow the EEOC rules. If not subject to the EEOC rules, the government entity should follow the Department of Justice's rules under section 504.³⁹ Like governmental entities, private entities which accommodate the public and commercial facilities will be making themselves more accessible to comply with the Department

32. *Id.* § 12131(1)(A)-(C).

33. *Id.* §§ 12141-65.

34. *Id.* §§ 12181-89.

35. *Id.* § 12184.

36. 47 U.S.C. § 225(c) (Supp. II 1990).

37. *See* 42 U.S.C. §§ 12116, 12134, 12164, 12186 (Supp. II 1990); 47 U.S.C. § 225 (Supp. II 1990).

38. 42 U.S.C. § 12201 (Supp. II 1990).

39. 28 C.F.R. § 35.140 (1992).

of Justice rules under Title III.⁴⁰ As entities make their programs and activities accessible, equal employment is enhanced. As relay systems under Title IV come into an area, communication in the workplace will be easier and more accessible. Title V, in conjunction with insurance reforms and stronger state and local laws, is important in the employment context.

III. EMPLOYMENT BASICS

Meeting its statutory obligation, the EEOC published final regulations on July 26, 1991.⁴¹ The ADA prohibits discrimination against qualified individuals with disabilities in all phases of employment, whether or not the employer or covered entity receives a federal contract or grant. The ADA covers everything related to employment: outreach and recruiting; interviewing, hiring, and promoting; making reasonable accommodation pay rates, compensation, job assignments, progression, and seniority; sick, annual, or other leave; benefits and training; layoff, termination, and recall; employer social and recreational functions; and any other job privileges, terms, and conditions. Employers may not limit, classify, or segregate an employee in a manner which adversely affects employment opportunity or status because of a disability. Contractual or other arrangements or relationships which effect discrimination on a covered entity's employees or applicants are also forbidden by the ADA.⁴² It is illegal to utilize standards, criteria, or methods of administration which are discriminatory or perpetuate job-related discrimination. Similarly prohibited are qualification standards, employment tests, or selection criteria that screen out or tend to screen out individuals with a disability unless the standard, test, or selection criteria is job-related for the position in question and consistent with business necessity.⁴³ Employment tests must be selected and administered on a non-discriminatory basis and must reasonably measure the skills, aptitude and other relevant employ-

40. 28 C.F.R. pt. 36 (1992).

41. 29 C.F.R. § 1630 (1992). That same day the Department of Justice published the final regulations for Title II, Non-discrimination on the Basis of Disability in State and Local Government Services, 28 C.F.R. pt. 35 (1992), and for Title III, Non-discrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 28 C.F.R. pt. 36 (1992).

42. 42 U.S.C. § 12112(b)(i)(2) (Supp. II 1990); 29 C.F.R. §§ 1630.5 to .6 (1992).

43. 42 U.S.C. § 12112(b)(3)(6) (Supp. II 1990); 29 C.F.R. §§ 1630.7 to .10 (1992).

ment factors. In brief, covered entities may not discriminate in any aspect of the job.⁴⁴

Although an employer is not required to be clairvoyant about a disabling condition, the employer may not ignore the existence of a disability either. The coverage of employers is extensive. Employers who engage in interstate commerce are covered. Unions and employment agencies are also under the ADA mandate, as they were under the Civil Rights Act of 1964. Indian tribes and bona fide tax exempt membership clubs, such as private clubs, are not covered by the ADA. The federal government is not covered by the ADA but is subject to the same non-discrimination mandate under the Rehabilitation Act.⁴⁵ However, Congress brought itself under the ADA umbrella.⁴⁶ Religious entities, including religious schools, are covered but can require conformance to the religious tenets of the organization.⁴⁷ It is interesting to note that lawyers can be employers under the ADA, just as they are under state anti-discrimination laws.⁴⁸

IV. DISPELLING THE MYTHS

A. *Employers Subject to the ADA*

While coverage of the ADA is quite broad, there are some misconceptions about which entities are subject to the law. The belief that the ADA covers all employers, even "mom and pop" employers, is erroneous. As of July 26, 1992, under Title I, the ADA covers entities which employ twenty-five or more persons. Beginning July 26, 1994, entities that employ fifteen or more persons will be covered. The smaller non-governmental employers, "mom and pop businesses," are not covered by the ADA.⁴⁹ All state and local government employers, regardless of size or budget, are covered by Title II and the Department of Justice regulations.⁵⁰ However, the definition of employer in Title I of the ADA leads to a misconception related to coverage.

44. 42 U.S.C. § 12112 (Supp. II 1990); 29 C.F.R. § 1630.4 to .11 (1992).

45. 29 U.S.C. § 794 (1988).

46. 42 U.S.C. § 12509(b) (Supp. II 1990).

47. *Id.* § 12113(c); 29 C.F.R. § 1630.16(a) (1992).

48. *Cain v. Hyatt*, 734 F. Supp. 671 (E.D. Pa. 1990).

49. 42 U.S.C. § 12111(5) (Supp. II 1990); 29 C.F.R. § 1630.2(e) (1992).

50. *See* 28 C.F.R. § 35.140 (1992). The regulation specifically prohibits employment discrimination by a "public entity." *Id.*

It is a myth that it is legal for entities with less than twenty-five employees (or less than fifteen employees after July 26, 1994) to discriminate against persons with disabilities. While it may not violate Title I of the ADA because it has fewer employees than Title I requires, a state/local government employer of any size that discriminated would violate Title II.⁵¹ A smaller private entity not subject to Title I could well violate *state* laws. Many states, including Virginia,⁵² currently prohibit employment discrimination against qualified persons with disabilities by entities employing fewer than fifteen persons.⁵³ Title V of the ADA requires that state and local laws affording persons with disabilities more protection than the ADA are not preempted.⁵⁴ Neither the EEOC nor the Department of Justice makes mention in their ADA rules of the state or local non-discrimination laws applicable to smaller employers. This glaring omission could leave the impression that these entities are not under any equal opportunity in employment mandate.⁵⁵

B. *Persons Protected by the ADA*

Just as there are misconceptions about which employers are covered, there is confusion as to who is protected. There is a myth that the ADA is a wheelchair rights law. However, the ADA includes persons in wheelchairs as well as other persons who are mobility-impaired. It is wrong to think of the ADA as a law only for persons in wheelchairs. Persons with other disabilities are clearly covered.

Under the ADA, "disability" with regard to an individual is: (a) a physical or mental impairment that substantially limits one or more major life activities of such individual; (b) a record of such an impairment; or (c) being regarded as having such an impairment.⁵⁶ A major life activity refers to functions such as caring for oneself, performing manual tasks, walking, talking, seeing, hearing, speaking, breathing, learning, and working.⁵⁷

51. *See id.*

52. VA. CODE ANN. § 51.5-41 (Repl. Vol. 1991).

53. *See* CHARLES D. GOLDMAN, *DISABILITY RIGHTS GUIDE, PRACTICAL SOLUTIONS TO PROBLEMS AFFECTING PEOPLE WITH DISABILITIES* app. I (2d ed. 1991).

54. 42 U.S.C. § 12201(b) (Supp. II 1990).

55. *Cf. Yates v. Volunteer Health Care Sys.*, 783 F. Supp. 1002 (W.D. Va. 1992).

56. 42 U.S.C. § 12102(2) (Supp. II 1990); *see also Sanchez v. Lagoudakis*, 486 N.W.2d 657 (Mich. 1992).

57. 29 C.F.R. § 1630.2(i) (1992).

There is no exhaustive list of disabling conditions or impairments which lead to coverage under the ADA in either the statute or the implementing regulations from the EEOC. Nor does the Department of Justice have a list in its regulations. Under the ADA, a person having multiple sclerosis, being HIV positive, or having full-blown AIDS is clearly covered just as the person who is vision, hearing, or mobility impaired, or a person who is learning disabled.⁵⁸

The belief that the ADA covers only qualified persons with disabilities and that able-bodied persons have no ADA rights is misplaced. The ADA states in no uncertain terms that it is also discrimination to deny equal employment opportunity to an otherwise qualified individual because of the known disability of a person with whom the qualified individual is known to have a family, business, social, or other relationship or association.⁵⁹ Thus, the parent of a child with special needs, such as diabetes, who is qualified and can perform essential job functions, may not be denied employment or terminated because he or she may need leave to take care of the child. An individual whose partner is HIV positive or an alcoholic may not be terminated on that basis since HIV and alcoholism are disabling conditions covered by the ADA.

Many people erroneously believe that the ADA protects drug users. The term "disability" does not include the illegal use of drugs and an employer or other covered entity may act on the basis of such use. However, an individual who has successfully completed a supervised drug rehabilitation program or has otherwise been successfully rehabilitated and is no longer engaging in the illegal use of drugs is covered. Also covered is an individual who no longer uses illegal drugs and participates in a supervised rehabilitation program. Persons erroneously perceived as taking illegal drugs are also protected. The ADA does not limit employer conducted random testing for illegal drugs; however, the EEOC does not encourage such tests.⁶⁰ The ADA does not limit an employer's ability to require adherence to alcohol or drug free workplace laws and policies.⁶¹

58. 28 C.F.R. pts. 35-36 (1992).

59. 42 U.S.C. § 12112(b)(4) (Supp. II 1990).

60. 42 U.S.C. § 12114(d)(2) (Supp. II 1990); see 29 C.F.R. § 1630.16(c) (1992).

61. 42 U.S.C. § 12114 (c) (Supp. II 1990). For the same under the Rehabilitation Act see *Cogeland v. Philadelphia Police Dept.*, 840 F.2d.1139 (3rd Cir. 1988), *cert. denied*, 109 S. Ct.

The ADA is not a gay rights bill. The ADA states clearly that homosexuality and bisexuality are not impairments, and thus, are not disabilities under the ADA. Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments or other sexual behavior disorders are not covered. Compulsive gambling, kleptomania, or pyromania, or psychoactive substance use disorders resulting from current illegal use of drugs are other conditions not considered to qualify as "disabilities" under the ADA.⁶²

While the ADA is not a gay rights bill, certain states, such as the District of Columbia, prohibit discrimination based on sexual orientation or preference.⁶³ Again, this emphasizes that employers should not rely exclusively on the ADA but must be cognizant of state and local law in this area.

C. *ADA Requirements*

Misconceptions also surround the requirements of covered entities and their obligations to persons protected by the ADA. What an employer must do, who is a qualified person, and determination of job standards are issues which arise in this regard. The ADA is not a hiring law, requiring employers to hire persons with disabilities. The ADA is not an affirmative action law as that term has come to be known. There are no goals or quotas set forth in the Act or the EEOC regulations. The ADA is fundamentally an equal opportunity law requiring that qualified persons with disabilities be afforded meaningful access to employment.⁶⁴ This means that employers have to take certain actions, such as expanding their outreach recruiting to include persons with disabilities, posting notices about the ADA in the work place, and making accommodations. ADA requires opportunities for qualified persons with disabilities. Employers will have to take meaningful, not token, actions to ensure that all phases of the employment relationship are truly grounded in equal opportunity for qualified individuals with disabilities.

1636 (1989); see also *Desper v. Montgomery County*, 727 F. Supp. 1959 (E.D. Pa. 1990); *Little v. F.B.I.*, 793 F. Supp. 652 (D. Md. 1992).

62. 42 U.S.C. §§ 12208, 12211 (Supp. II 1990).

63. D.C. CODE ANN. §§ 1-2501 to 1-2557 (1992).

64. *Alexander v. Choate*, 469 U.S. 287 (1985).

1. Determining Who is Qualified

It is wrong to believe that persons with disabilities are all qualified or unqualified. How this myth is approached depends on one's perspective; employers may think that all persons with disabilities are unqualified, and on the other hand, persons with disabilities may think that they are inherently qualified. Legalistically, the EEOC has made clear that whether an individual is qualified is based on education, skill, experience, and other job-related requirements of the job that the disabled person seeks or holds.⁶⁵ This can include a determination of whether the person with a disability has a license, such as a driver's license or a license to practice law, which is a bona fide requirement for the job. There is case law under the Rehabilitation Act that a court must look behind an employer's stated job requirements, including licensing, to determine if the individual is otherwise qualified.⁶⁶ Nothing in the ADA or the EEOC rules requires any employer to hire, to provide benefits to, or to consider any unqualified person whether or not the person has a disability.

2. "Essential Duties"

Under the ADA an "otherwise qualified individual with a disability" is an individual who can perform the essential duties of the job with or without reasonable accommodation.⁶⁷ Not all job functions are essential. "Essential functions" is an ADA introduced regulatory term. It embraces the skills, judgments, expertise, and tasks that the individual must actually perform in order to succeed in the position.⁶⁸ Functions which are not essential are deemed marginal. The EEOC enumerates several factors to be weighed in applying this definition. A function may be essential because the job may exist to perform that function, for example answering the telephone or opening the bridge, or the job may entail using a specialized skill, such as foreign language proficiency. Time devoted to a task is not dispositive. The firefighter must be able to carry a person from a burning structure, even though this may not happen every day or every week. However, the consequences of not being

65. 29 C.F.R. § 1630.2(m) (1992).

66. *Pandazides v. Virginia*, 946 F.2d 345 (4th Cir. 1991) (Individual found not qualified on remand, No. 90-1081-A (E.D. Va. 1992)).

67. 42 U.S.C. § 12101 (Supp. II 1990); 29 C.F.R. § 1630.2(m) (1992).

68. 29 C.F.R. § 1630.2(n) (1992).

able to perform that task are profound. The EEOC recognizes that the terms of collective bargaining agreements may be examined, but are not dispositive in determining essential job functions. The current work experience of incumbents in the actual job or similar jobs are also relevant.⁶⁹ The EEOC also notes that the employer's judgment and job description prepared before advertising or interviewing are also relevant.⁷⁰

This latter provision, much like the provision for employment standards, is the employer's institutional edge, particularly in cases involving hiring for a new position. Sound management will take a good, hard look at a job and make an honest assessment of what is expected of the incumbent. However, an unscrupulous employer could abuse the decision-making process related to determining what is an essential function. The ADA helps to prevent this by making the job description admissible only if prepared *before* the interview or job announcement.⁷¹

3. Job-Related Standards

The ADA does not set forth employment standards for employers; nevertheless, the ADA does require that any applicable performance standards be job-related and consistent with business necessity if used to screen out an otherwise qualified individual with a disability. In fact, the ADA does not require that an employer even have employment standards or position descriptions. Realistically though, larger employers invariably have them and, in fact, state and local governments' civil service laws and policies generally mandate them.

Furthermore, the ADA does not preclude an employer from having standards for an employee relating to co-worker or workplace safety.⁷² However, in attempting to apply this concept, the EEOC commits a patent error. It misinterprets the ADA's express provisions related to performance standards while abusing the public rulemaking process.

Under the statute, an employment qualification standard may require that an individual not pose a direct threat to the health or

69. 29 C.F.R. § 1630.2(n)(3)(iii)-(vi) (1992).

70. 29 C.F.R. § 1630.2(n)(3)(i)-(ii) (1992).

71. 42 U.S.C. § 12111(8) (Supp. II 1990).

72. *Id.* § 12113(b).

safety of other individuals in the workplace.⁷³ The EEOC's final regulation⁷⁴ clearly misconstrues this ADA provision⁷⁵ by interpreting it as banning discrimination when the individual with a disability is a danger to himself, not, as the statute clearly states, to other individuals in the workplace. The EEOC ADA regulation articulates the agency's interpolation of the criteria of *School Board of Nassau County v. Arline*,⁷⁶ to assess the risk of harm to the health or safety of the individual as well as to others in the workplace.⁷⁷

The EEOC makes a major gaffe. The employment provision in ADA Title I regarding safety is clear on its face. The Title I danger to others provisions do not mean danger to self. The danger to self provisions in Title I are consistent with a related provision in Title III regarding public accommodations which the Department of Justice interprets as a danger to others, not a danger to self rule.⁷⁸

Moreover, in reaching its erroneous conclusions EEOC was shamefully unfaithful to the public rulemaking process. In its final rulemaking, the EEOC makes no mention of the landmark case *International Association of United Auto Workers v. Johnson Controls, Inc.*⁷⁹ *Johnson Controls* invalidated, as contrary to the Civil Rights Act of 1964 Title VII, an employer's rule disqualifying childbearing-aged women from positions exposing them to potential dangers of lead batteries. *Johnson Controls* was decided after the EEOC published its proposed rules. At least two commentators on the proposed rule, the National Council on Disability and the Disability Rights Education Defense Fund cited *Johnson Controls* in their comments, urging that the EEOC rule be revised to be a danger to others or property, not a danger to self rule. In short, the

73. *Id.*

74. 29 C.F.R. §§ 1630.2(r), 1630.15(b)(2) (1992).

75. 42 U.S.C. § 12113(b) (1990).

76. 480 U.S. 273, 287-88 (1987).

77. See 56 Fed. Reg. 35,736 (1991) (to be codified at 29 C.F.R. § 1630.2(r)). For an example of a court applying the *Arline* criteria under the Rehabilitation Act of 1973, compare *Doe v. District of Columbia*, 59 Fair Empl. Prac. Cas. (BNA) 363 (D.D.C. 1992). For an example of a state court applying state anti-discrimination law in a danger to self situation involving a temporary sheriff officer with limited vision, see *Greenwood v. State Police Training Center*, No. A-47, 606 A.2d 336 (N.J. Sup. Ct. 1992), 3 NDLR8). See also *Doe v. Washington University*, 780 F. Supp. 628 (E.D. Mo. 1991); *In re Westchester County Medical Center*, 3 NAT. DISAB. L. REP. 152 (1992).

78. See 42 U.S.C. § 12182(b)(3); 28 C.F.R. § 36.208 (1992); see also *Anderson v. Little League Baseball*, 794 F. Supp. 342 (D.C. Ariz. 1992) (following *Arline* to interpret the direct threat provisions in ADA Title III to mean a danger to others, not self).

79. 111 S. Ct. 1196 (1991).

EEOC's interpretation is contrary to the clear language of the statute, and patently flaunts the Administrative Procedure Act⁸⁰ by not addressing significant public comments in promulgating the final danger to self rule.

The adverse public policy and practical risks of this provision are multiple. The EEOC sets employers up to fail by making them "Big Brother" of the qualified disabled person. The message that "Employer knows best" is incompatible with the core ADA concepts of ending discrimination and promoting full opportunity to participate.⁸¹ In addition to denigrating qualified disabled persons, the EEOC, by its obvious error, has exposed employers who rely on this provision to possible needless litigation.

As a practical matter, employers must focus, not on the individual's potential danger to himself, but on whether the person with a disability can do the essential functions with or without reasonable accommodation. For example, if an individual having epileptic seizures applies to work as a machinist, the employer might refuse to hire the applicant, believing, based on the employer's generalized knowledge of epilepsy and seizures, that the individual could harm himself. That would be discrimination and contrary to the statute. However, it would not be discriminatory for the employer to refuse to hire the applicant if the employer had reason to believe, based on a legal pre-employment physical examination given to all persons in that job category, the individual would be unable to operate the equipment, even with reasonable accommodation, or would actually somehow harm the equipment due to uncontrolled and irregular seizures.⁸² Employers are well advised to tread lightly in this area and pay particular attention to the distinction between essential and non-essential (marginal) job functions and the risks to property and co-workers. Employers should never articulate whatever unstated thoughts they may have about an individual being a danger to himself. Employers should think and act upon an individual's ability to perform essential job functions. Think and act upon real, not projected, danger to others or danger to property

80. 5 U.S.C. § 551 (1976).

81. See 42 U.S.C. § 12101 (1990).

82. Cf. *Chiari v. City of League City*, 920 F.2d 311, 318-19 (5th Cir. 1991); *Chalk v. United States District Court*, 840 F.2d 701 (9th Cir. 1988); *Tisch v. United States Postal Serv.*, H-83-333 (C.D. Conn. 1987); *Jansen v. Food Serv.*, C-2040-83, (N.J. Super. Ct. Ch. Div. 1992).

in the work place. Avoid danger to self like the proverbial plague when making a decision or when interviewing.

4. Interviewing

The general rule under the ADA regarding interviewing is that it is unlawful to ask an employee or an applicant whether he is an individual with a disability or about the severity of the disability.⁸³ Thus, the old laundry list of questions about specific conditions is illegal. However, an employer may ask an applicant — able-bodied or with a disability — questions about his ability to perform job-related functions and to demonstrate how, with or without reasonable accommodations, the person will perform the job-related functions. Again, although an individual is unable to perform the marginal job functions, if the person can perform the essential ones, the person is qualified.⁸⁴

A test which screens out or which tends to screen out individuals with disabilities is valid, if it is job-related, consistent with business necessity, and the performance of that job (or component test) cannot be achieved by reasonable accommodation.⁸⁵ Again, decisions must be based on facts, not subjective suppositions.⁸⁶

5. Physical Examinations

Physical examinations are another critical employment area. The EEOC makes clear that there are three circumstances in which such examinations may be given: pre-employment hiring; on the job “fitness for duty” examinations; and in wellness programs, i.e., an employee benefit.⁸⁷

The EEOC correctly notes that pre-employment physicals are lawful.⁸⁸ Employment offers may be conditioned on such exams provided all employees in the *same job category*, not all entering employees, are subject to the same examination or inquiry.⁸⁹ The

83. See 29 C.F.R. § 1630.13-14 (1992).

84. 29 C.F.R. § 1630.2(o) (1992).

85. 29 C.F.R. § 1630.14(a) (1992).

86. *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 284-85 (1987); *Antonsen v. Ward*, 571 N.E.2d 636, 638-39 (N.Y. 1991).

87. 29 C.F.R. § 1630.13-.14; see 56 Fed. Reg. 35,749-35,751 (1991).

88. 29 C.F.R. § 1630.14(b) (1992).

89. 42 U.S.C. § 12112(c)(3) (1990); 29 C.F.R. § 1630.14(b) (1992).

EEOC notes that agility tests given to all similarly situated applicants are not physical examinations.⁹⁰

A second area of legitimate physical examinations and inquiries is whether the employee can perform job-related functions, consistent with business necessity. This is the traditional "fitness-for-duty" examination which is given when job performance issues arise.⁹¹ Finally, the ADA allows "wellness examinations" when an employer provides medical benefits.⁹²

The EEOC cautions that all medical information must be kept as separate forms in separate, confidential medical records and used only for purposes of the ADA.⁹³ This includes allowing pre-employment information to be used for purposes of obtaining insurance. Also, supervisors and managers may be informed if the disabling condition necessitates restrictions on the employee's work or duties, and of any necessary accommodations.⁹⁴ First aid and safety personnel may be informed if the disability might require emergency treatment.⁹⁵ Finally, government investigators checking on ADA compliance may be informed.⁹⁶

D. *The Impact of State Laws*

Lamentably, in myopic Washington fashion, the EEOC fails to caution employers about state laws which may impose more stringent criminal penalties or unlimited civil damages for disclosure of a disability, such as AIDS.⁹⁷ Because section 501(b) of the ADA⁹⁸ provides that state provisions affording disabled persons with more protection are not pre-empted, the EEOC offers what is really an illusory list of potential circumstances for disclosure. This EEOC failure again raises the risk of employer error. While proceeding in accordance with the ADA, an employer may wrongfully disclose information resulting in a wrongful invasion of privacy, an action redressable with unlimited damages, compared to the limited damages recoverable under the ADA.

90. 29 C.F.R. § 1630.14(a) (1992).

91. *Id.* § 1630.14(c).

92. *Id.* § 1630.14(d).

93. *Id.* § 1630.14(d)(1) (1992).

94. *Id.* § 1630.14(d)(1)(i).

95. *Id.* § 1630.14(d)(1)(ii).

96. *Id.* § 1630.14(d)(1)(iii).

97. WIS. STAT. ANN. § 103.15 (West 1988 & Supp. 1991).

98. 42 U.S.C. § 12201(b) (1990).

E. Reasonable Accommodation

Perhaps the most visible term in the ADA, with its history dating back to the Rehabilitation Act, is that of "reasonable accommodation." The ADA requires a covered entity to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability unless the accommodation would impose an undue hardship on the operation of the business.⁹⁹ Also, a covered entity cannot deny an employment opportunity to an otherwise qualified individual with a disability because of the need for reasonable accommodation to the physical or mental impairment of the employee or applicant.¹⁰⁰

The concept of reasonable accommodation has been grist for the judicial mill under the Rehabilitation Act.¹⁰¹ Reasonable accommodation for employees means providing interpreters or readers, making the workplace accessible, modifying work schedules, (which can be done in the context of flex-time), acquiring or modifying equipment, and adjusting or modifying examinations, training materials, or policies. It may even include reassignment of a current employee.¹⁰² Reasonable accommodation may include allowing an employee to work at home¹⁰³ or granting a light duty assignment, depending upon the facts.¹⁰⁴ Allowing an individual who needs to take prescription drugs during the workday to store some medication in a company's health unit is another example.

Reasonable accommodation is a balancing of the employer's legitimate business needs with the employee's need for meaningful equal opportunity in employment.¹⁰⁵ Reasonable accommodation is not a fundamental alteration of the job or a requirement that an employer incur an undue hardship.¹⁰⁶

99. *Id.* § 12112(b)(5)(A); 29 C.F.R. § 1630.9(a) (1992).

100. *Id.* § 12112(b)(5)(B); 29 C.F.R. § 1630.9(b) (1992).

101. *Hall v. United States Postal Serv.*, 857 F.2d 1073 (6th Cir. 1988); *Simon v. St. Louis County*, 656 F.2d 316 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1982).

102. *See infra* pp. 91-92.

103. *See Langon v. Dep't of Health and Human Serv.*, 959 F.2d 1053, 1061 (D.C. Cir. 1992).

104. *Severino v. North Fort Myers Fire Control Dist.*, 935 F.2d 1179 (11th Cir. 1991) (HIV positive firefighter discharged after refusing light duty assignment was not discriminated against on the basis of his handicap).

105. *See Alexander v. Choate*, 469 U.S. 287 (1985).

106. *See* 29 C.F.R. § 1630.2(o), (p) (1992); *Desper v. Montgomery County*, 727 F. Supp. 959 (E.D. Pa. 1990); *cf. Southeastern Community College v. Davis*, 442 U.S. 397 (Rehabilita-

Despite all the history, experience, and case law, misconceptions about the concept of reasonable accommodation remain. These misconceptions commonly break down into four categories.

1. Financial Hardship to Employers

The first misconception is that reasonable accommodations will be a perennial problem and will bankrupt covered employers. However, the duty to make reasonable accommodation is perennial in the sense that it is an ongoing obligation of the employer. While regrettably not stated in the EEOC rules, most persons with disabilities do not require accommodation.¹⁰⁷ Bear in mind that those accommodations which are an "undue hardship" are not required of an employer. This means conducting an analysis to determine the net cost to the employer. The analysis covers tax breaks¹⁰⁸ and payments by outside sources, such as the state or local vocational rehabilitation agency, or even the individual employee. Other factors related to undue hardship include the employer's financial resources, operation of the employment site, and the employer's relationship, both financially and operationally, with any parent entity. The impact of the accommodation upon the operation of the facility, including the impact on the ability of employees to do their job and the facility's ability to conduct business is also considered.¹⁰⁹

No finite formula, based on the cost of the accommodation and the employer's profits or employee's salary, exists to determine whether a particular accommodation is reasonable. In fact, the EEOC notes in its Preamble to the final rules that Congress rejected an amendment which would have limited an employer's duty to accommodate to not more than ten percent of the employee's salary.¹¹⁰ In a landmark decision under the Rehabilitation Act, blind welfare caseworkers earning between \$21,000 and \$23,000 per year were entitled to readers, an expense of \$6,000 per year in the agency's overall budget of \$300 million.¹¹¹

tion Act does not require a college to eliminate oral communication in order to accommodate deaf students in a registered nursing program).

107. See S. REP. No. 116, 101st Cong., at 38 (1989).

108. See *infra* notes 112-113 and accompanying text.

109. See 42 U.S.C. § 12111(9), (10); 29 C.F.R. § 1630.2(o), (p) (1992).

110. 29 C.F.R. § 1630.2 (1992); 56 Fed. Reg. 3573 (1991).

111. *Nelson v. Thornburgh*, 567 F. Supp. 369 (E.D. Pa. 1983), *aff'd*, 732 F.2d 146 (3rd Cir. 1984), *cert. denied*, 469 U.S. 1188 (1985).

Another myth is that employers are not entitled to any financial breaks for complying with the ADA.

In fact, tax incentives as well as other funding sources are available to aid employers in complying with the ADA. Congress passed tax relief for small entities, defined as persons with thirty or fewer employees or less than \$1 million in sales. A tax credit of 50% of expenditures in excess of \$250 but not exceeding \$10,250 is offered for removing architectural, transportation and communication barriers.¹¹² Finally, all businesses can qualify for a tax deduction of up to \$15,000 for barrier removal.¹¹³

Another credit is the Targeted Jobs Tax Credit ("TJTC"), consisting of 40% of a "disadvantaged" (a term which includes disabled persons) new employee's salary. The maximum credit is \$2,400 per employee. State, local, and private vocational rehabilitation agencies also help employers by funding a person as a job coach to train the person with a disability on the job. It is not unknown for the disabled person to bring special equipment from home or otherwise contribute, although it is not required.

Funding issues are but one of the major myths surrounding reasonable accommodation.

2. A Lowered Quality Workforce

The second misconception is that reasonable accommodation will force employers to hire disabled persons for position they are not qualified to hold. This is false because it is not discriminatory to refuse a position to a disabled person if the person cannot perform the essential job functions even with the accommodation.¹¹⁴

Under the ADA, the duty to make reasonable accommodation in employment clearly applies for all applicants as well as current employees. A nonexhaustive list of examples of reasonable accommodations for applicants includes: providing a reader for a vision impaired person to help complete the application; making the interview site accessible to a mobility-impaired applicant; providing a sign language interpreter for a deaf person being interviewed;

112. I.R.C. § 44(a), (b) (Supp. II 1990).

113. I.R.C. §§ 190. (This expired in mid-1992 but is likely to be included in 1993 tax legislation).

114. 29 C.F.R. §§ 1630.2(m), 1630.4.56 (1992).

and providing alternative testing or additional time for a learning disabled applicant to complete a test.¹¹⁵

The EEOC makes clear that the duty to make reasonable accommodation for an applicant does not include reassignment to a vacant position. For an applicant to be protected by the ADA, the person must be qualified.¹¹⁶

Reassignment to a vacant position is but one method of reasonably accommodating current employees. However, as the EEOC notes, reassignment to a vacant position should be used when accommodation within the person's current position would pose an undue hardship. Reassignment from a food handling position is not discrimination and is required under the ADA if an individual has one of the contagious or infectious conditions (e.g., hepatitis) listed by the Secretary of Health and Human Services¹¹⁷ and the risk of transmission cannot be eliminated by reasonable accommodation. Having AIDS or being HIV positive is not on the list. If reassignment is not possible, it is not discriminatory to terminate an individual with such a condition.

Reasonable accommodation works best when the disabled employee is consulted by management after the need for accommodation has been identified. In its regulatory materials, the EEOC notes a four step process of analyzing the job to determine essential functions, while consulting with the individual to determine the job related limitations and potential accommodations. The employer is wise to consider, but need not implement, the preference of the individual with a disability.¹¹⁸ However, if the individual rejects an offer of reasonable accommodation, the individual could

115. 29 C.F.R. § 1630.9(b) (1992); *see also* *Stutts v. Freeman*, 694 F.2d 666 (11th Cir. 1983) (accommodation for testing required where written examination was not an accurate measure of qualifications).

116. *See, e.g., Wood v. School Dist. of Omaha*, 784 F. Supp. 1441, 1452 (D. Neb. 1992) (finding no reasonable accommodation possible in a case involving diabetic school bus drivers); *see also* *Pima Community College*, OCR No. 09-91-2070, 2NDLR § 186 in which the Office for Civil Rights found no discrimination because the applicant for a computer programmer analyst position, a person with paranoid schizophrenia, was not a qualified handicapped person. She did not have sufficient knowledge or experience of the language and programming skills required and no reasonable accommodation would have enabled performance of essential job functions.

117. 56 Fed. Reg. 40,897-98 (1991).

118. *Id.* at 35,748.

lose the protection of the ADA as he would no longer be considered a qualified individual with a disability.¹¹⁹

The 1991 amendments to the Civil Rights Act provide that if an employer, in consultation with the disabled person, makes a good faith effort to identify and make a reasonable accommodation to provide the disabled individual with an equally effective opportunity that is not an undue hardship on the business, damages may not be awarded.¹²⁰ This provision applies to claims under the ADA as well as against the federal government under section 501 of the Rehabilitation Act.¹²¹ Because the new law was adopted after the EEOC issued its final regulations, the EEOC did not mention the Civil Rights Act implications of a meaningful dialogue. Such good faith efforts by the employer can work to preclude a claim for damages.

3. Quadriplegics and Personal Assistants

The EEOC is very remiss in addressing the issue of accommodations for quadriplegics.

The belief that quadriplegics do not require personal assistants as a reasonable accommodation in the workplace, except as page turners or attendants when traveling, is misleading.¹²² In response to its proposed rule, the EEOC received comments from the public and the National Council on Disability urging that personal assistants be expressly recognized as a reasonable accommodation. Yet the EEOC provides no unequivocal guidance on this issue in the final rule. Unrealistically, the EEOC only mentions personal assistants as page turners or as travel companions. Every person must do certain non-work related activities during the work day. These include using bathroom facilities as well as eating lunch. The EEOC's failure to respond to public comment creates an unnecessary ambiguity which could lead employers in the wrong direction

119. 29 C.F.R. § 1630.9(d) (1992); *see* Guice-Mills v. Derwinski, 967 F.2d 794, 798 (2d Cir. 1992) (nurse who refused reassignment and reasonable accommodation offered by her federal employer was found unqualified to perform her old job and thus was not protected by the Rehabilitation Act); *LeMere v. Burnley*, 683 F. Supp. 275, 278 (D.C. 1988); *Franklin v. U.S. Postal Service*, 46 F.E.P. Case 1734 (D. Ohio 1988) (employee not qualified when not taking required medication.).

120. Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072 (to be codified at 42 U.S.C. § 1977A(a)(3)).

121. *Id.*

122. 29 C.F.R. § 1630.2(o) (1992).

and result in quadriplegic persons not being hired. Employers are best advised to weigh the issue of a personal assistant as an across-the-board issue, using the same criteria as they would to determine if any other accommodation were reasonable.

More than any other phrase, "reasonable accommodation" has become synonymous with the duty not to discriminate in the employment of qualified individuals with disabilities. However, the duty not to discriminate is actually more extensive, leading to the next myth.

4. Reasonable Accommodation and ADA Compliance

It is erroneously believed that the duty to make reasonable accommodation ensures compliance with the ADA's employment provisions. However, the duty not to discriminate includes not only the duty to make reasonable accommodation, but also extends to recruiting, advertising, job application procedures, hiring, promotions, layoffs, job assignments in terms of both substantive work and location, job classifications, job progressions, pay, administration of tests, seniority lists, leave, training, social and recreational activities, and fringe benefits.¹²³ An employer may not do by contract that which the employer cannot do directly.¹²⁴ Reasonable accommodation is the most notable and crucial requirement; however, it is not the exclusive one. For example, when doing outreach recruiting, the employer seeks to meet people from new groups and forums. When posting the required notice of compliance with the ADA,¹²⁵ no accommodation is involved. Building a new barrier free structure for employees meets the building code and the ADA. It is not an issue of reasonable accommodation. Utilizing a third party provider of benefits who is both accessible and non-discriminatory would be in compliance with the ADA, yet no accommodation has been made.

F. *Benefits*

Benefits issues, particularly health insurance and workers' compensation, are minefields for which the EEOC has provided only the sketchiest of roadmaps. The EEOC makes it clear that an em-

123. *Id.* § 1630.4.

124. 42 U.S.C. § 12112(b)(2) (Supp. II 1990); 29 C.F.R. § 1630.16 (1992).

125. 42 U.S.C. § 12115 (Supp. II 1990).

ployer may not refuse to hire an otherwise qualified individual with a disability simply because the employer's health or workers' compensation premiums may rise.¹²⁶

The EEOC should have consulted with the benefits experts in other federal agencies, such as the Department of Labor and the Internal Revenue Service, but did not do so. The EEOC could now issue added regulations; however, no consultations or added regulations are in process.

Lamentably, the EEOC barely restates the statute in its regulation. The EEOC clearly states that employers may administer actuarially based benefit plans.¹²⁷ Employer provided or administered health insurance plans can include exclusions for pre-existing conditions, but employers may not use insurance as a subterfuge to discriminate. Thus, a visually impaired person may be denied coverage for ophthalmologic treatment as a preexisting condition but not future orthopedic injuries.¹²⁸

The EEOC's abdication of its mandate under the ADA by its incomplete guidance is seen in the current employer benefits and insurance litigation. A critical case is *McGann v. H. and H. Music Co.*,¹²⁹ where the self-insured employer's cutting the maximum lifetime benefits from \$1 million to \$5,000 and eliminating certain other benefits was found not to be discriminatory. The employer took these actions after one employee, the now deceased Mr. McGann, began to file claims for AIDS-related treatment. Insurance companies have also tried to rescind policies after learning a covered individual has a disabling condition. In *New England Mutual v. William Johnson*,¹³⁰ the attempt to rescind was judicially rejected.¹³¹

The EEOC's final regulatory materials are sadly deficient by not recognizing the real world issues generated by covering a person

126. See 29 C.F.R. §§ 1630.2(m) (1992).

127. 29 CFR 1630.16(f) (1992).

128. 42 U.S.C. § 12201(c) (Supp. II 1990); S. REP. NO. 116, 101st Cong., 1st Sess. 8485 (1989), H.R. REP. NO. 485(II), 101st Cong., 2d Sess., pt. 2 at 136 (1990), reprinted in 1990 U.S.C.A.N. 303, 419-420. See 29 C.F.R. § 1630.6 (1992).

129. 946 F.2d 401 (5th Cir. 1991), cert. denied, 113 S. Ct. 482 (1992); see also *Greenberg v. H. & H. Music*, 112 S. Ct. 1556 (1992).

130. No. 28359 (N.Y. Sup. Ct. 1992).

131. See also *William Penn Life v. Sands*, 912 F.2d 359 (11th Cir. 1990) (life policy applicant's negative responses to application questions regarding prior specified medical conditions did not entitle insurer to rescind the policy when negative responses were later proved to be incorrect).

with a disability. The EEOC's regurgitation of the statute does not give either employees or employers adequate guidance about discrimination in benefits insurance. The EEOC should have given employers more guidance on when and under what circumstances an employer's changing of insurance coverage or benefit plans would or would not be discrimination in violation of the ADA.

Another variation on this theme, which the EEOC does not address in its regulation or appendix, is how an employer can cope with the rising cost of health insurance without violating the ADA. The EEOC makes no mention that "cafeteria plans" by third parties or on a self-indemnity basis would eliminate insurance bias. Under the cafeteria plan all employees are given the same sum certain as a benefit and then elect what coverages they seek, pre-natal, major medical, mental health, etc. The ADA permitted exclusions of pre-existing conditions still apply as do actuarially based rules. The EEOC is delinquent in not mentioning this.

The EEOC also deserves criticism for not recognizing that health insurance is among the most contracted for benefits which may not be discriminatory. The EEOC also fails to give guidance in working with subcontracts.¹³² An employer could violate the ADA by contracting for a benefit (or training session) at a site that is not accessible and by not making reasonable accommodation so that the employment benefit is either not denied totally or not equal (as opposed to the same as) to those provided able-bodied employees.¹³³

V. REMEDIES

The ADA is a critical law and the consequences of noncompliance can be profound. An individual can file a complaint with the EEOC; a private right of action also exists.¹³⁴ In addition to obtaining specific job related relief, backpay, benefits, and court costs, attorneys' fees and damages are now recoverable. This is the result of the Civil Rights Act of 1991,¹³⁵ which amended the ADA to allow jury trials and damages. Damages are also recoverable

132. See 29 C.F.R. § 1630.6 (1992).

133. See *Cooper v. ICC*, EEOC No. 01913514 (Dec. 1991, rev'd on other grounds June, 1992) in which a federal employer discriminated against a mobility impaired employee with multiple sclerosis by offering mammograms in a van that was not wheelchair accessible. See also 29 C.F.R. § 1630.20; 56 Fed. Reg. 35735.36 (1991).

134. 42 U.S.C. 12117(a) (1990).

135. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 1981 (1991)).

from the federal government under a Rehabilitation Act claim. While punitive damages are not recoverable against state and local government entities, they are available against private employers; compensatory damages are recoupable in cases of intentional discrimination against all employers. The amount of damages per claimant is capped, based on employer size as measured by the number of employees:

<u>No. of Employees</u>	<u>Damages Limit Not Recoverable</u>
0-14	\$0
15-100	\$50,000
101-200	\$100,000
201-500	\$200,000
501 and up	\$300,000

Readers are cautioned that the 102nd Congress considered but did not adopt measures to limit the caps.¹³⁶ It is likely that the 103rd Congress will address the issue and could well enact legislation. In light of the negative consequences of failing to comply, there is a premium on being pro-active to comply with the law.

VI. PRACTICAL GUIDELINES

The joke in the legal profession is that lawyers are now re-printing their cards, deleting "Asbestos" and replacing it with "Americans with Disabilities Act." Granted, although some litigation under any law is inevitable, there are actions that can be taken so that the ADA does not become a "lawyer's relief act." Positive interactions and employment practices can limit or avoid litigation.

Both private and public employers need to make managers and staff aware that the ADA is important. Moreover they must recognize and meet their duty to comply. This is leadership. As a practical matter, if the supervisors and staff know something is important to the boss, they will take it more seriously and will more vigorously attempt to comply. Legalistically, the good faith efforts to comply can mitigate potential penalties, as noted above.

As lawyers, you should examine the employer's present interactions with the community's disabled persons. The local commission designed to assist persons with disabilities may serve as an infor-

136. S. 2062, 102nd Cong., 2d Sess. (1991); H.R. 3975, 102nd Cong., 2d Sess. (1991).

mation resource and can effectively aid employers in outreach recruiting, reasonable accommodation, and other issues.

A. *Language*

Employers must learn how to interact and communicate with persons with disabilities. Just as the terms "African-American" and "Persons of Gender" are now acceptable when interacting with minorities and women, there is also a language of disability. Avoid terms such as "cripple," or "confined to a wheelchair." As noted previously, even the term "handicapped" has become passe, being superseded by the term "person with a disability" or other terms focusing on the person first, e.g. "person who is vision impaired," or "person who is hearing impaired." If you speak a person's language and treat the individual with respect and dignity, the same way as you would like to be treated, the individual will realize your good intent.

B. *Reviewing Employment Practices*

However, making the ADA work is more than semantics. Employment practices need to be reviewed, adopted, communicated and applied. Urge employers to regularly read each position description. When evaluating the incumbent and before announcing a vacancy are good times to do this. Is it accurate in describing what the incumbent really must do to succeed? Do not let a job description lay fallow. It will be cannon fodder for litigation. Having a current, complete, and accurate job description is good business and good government. Job descriptions prepared before a job is announced or before the job is advertised are admissible on the issue of essential job functions.¹³⁷ If you have an administrative/support position vacant and also need an interpreter/reader/attendant, the employer should consider the feasibility of revising the position description to include those duties as well.

C. *Review Employment Physical Examination Practices*

Employers should make sure all applicants in the particular job category are given the same examination, which, if used to screen out applicants, is job related consistent with business necessity. Avoid general physical examinations. Utilizing specialists when ad-

137. 42 U.S.C. § 12111(8) (Supp. II 1990).

addressing issues of a particular disability can reduce litigation. When considering issues of danger in the workplace, the decision should be made on the basis of the danger to co-workers or property in the workplace, not an individual being a danger to himself.

D. *Posting Notice*

Employers should post notices of compliance with the ADA just as employers post notices of complying with the Civil Rights Act of 1964.¹³⁸

E. *Review Outreach and Recruiting Practices*

Make sure that qualified persons with disabilities are part of the target of the outreach and recruiting. Use the same techniques which have proven effective in reaching minorities and women but apply them to disability focused individuals and organizations.

F. *Review Job Applications and Interviewing Techniques*

When interviewing, employers should make sure all questions which are used to screen out applicants are job related consistent with business necessity. Unrelated questions or questions about a disability or the severity of a disability should be avoided.

G. *Reasonable Accommodations*

Employers should develop and implement a policy on making reasonable accommodations. Create functioning committees of human resource/personnel, budgetary/financial, facilities, as well as business operation and legal. Delegate to supervisors specified levels of authority for expenditures. Let the committee decide the requests for accommodation that entail greater expenditures. Track all expenditures and interactions with the person seeking accommodation. Consider alternatives, and where possible go with the preference of the person seeking the accommodations. Such practices build good will and an institutional memory of sources of equipment and resources. This also shows a good faith effort, which is important under the Civil Rights Act of 1991.

138. *Id.* § 12115.

H. *AIDS and Communicable Diseases*

Persons who have AIDS or are HIV positive are covered by the ADA. The AIDS condition is very emotional and requires education in the workplace. In helping employers to craft practice and policy, bear in mind that state and local laws may afford the person with the disability more protection than the ADA. Consider AIDS and HIV in the context of first aid as well as other personnel policies. Develop a practice of universal protocols in which the person giving aid always wears gloves and a mask, regardless of whether the recipient of the help has a known disability. This measure maximizes privacy of all individuals and meets the state and local laws which may be more stringent than the ADA on disclosure.

I. *Emergency Evacuation*

Employers should also be prepared for a mobility or a vision impaired person being on the top floor of a building when there is a fire or power failure. Knowing where persons with disabilities are regularly assigned and being prepared to provide help if the elevator is out of order can aid in evacuation. Have a backup person designated in case the primary helpers are out of the office. Also communication with the persons with disabilities can make them aware of what to expect in an emergency.

J. *Contracting Policy*

When contracting for any personnel related service, be it a health benefit, training program, office holiday or social function, employers should make sure the services will be accessible to the known disabilities of employees. The employer is his "brother's keeper," and is liable under the ADA to the employee if his contractor errs. When contracting for a new office — either a new building, suite, or an alteration, insist on compliance with the ADA standards. Seeking to include clauses in the agreement whereby the contractor agrees to comply fully with the ADA and will indemnify the employer from the costs, including but not limited to damages, attorneys' fees, experts, and staff time in any action alleging a violation of the ADA, can shield an employer from liability. Make sure this clause "flows down," i.e., is required to be included in all subcontracts entered into by the prime contractor.

K. *Insurance, Worker's Compensation and Other Benefits*

Worker's compensation and insurance policies must be reviewed for adherence to the ADA. Light duty and employee reassignment policies can be prepared, as recognized reasonable accommodations, to keep qualified employees in the workforce, lowering compensation premiums. This can be blended with the employer's contracting practices.

L. *Linkages*

Tie your efforts to meet the requirements of Title I with efforts to comply with other parts of the ADA. A commercial entity should dovetail their compliance efforts under Title III with efforts under Title I. Similarly, state and local government entities want to have their efforts under Title II dovetail with the employment efforts under Title I. The objective is to build the biggest institutional resource, making sure the axiomatic right hand knows what the left is doing.

M. *Updates*

Employers should develop a policy of periodically reviewing their ADA efforts; the duty to comply with the ADA is continuous. The state of compliance at any one moment is but a freeze-frame photo of an ongoing unlimited motion picture.

VII. CONCLUSION

The ADA is no guarantee against litigation. Nor does it promise that persons with disabilities will get particular jobs. The EEOC's regulations leave much to be desired for their lack of complete, clear, correct guidance for employers as well as persons with disabilities. As the ADA employment provisions enter the era of legality, society, including both employers and persons with disabilities, must come to realize that the workplace is not limited to "perfect persons."¹³⁹ Perhaps the greatest myth here is that this is the Americans with Disabilities Act, when in reality the law is about the *abilities* of persons.

139. See *Ross v. Gama Shoes, Inc.*, 28 Fair Emp. Prac. Cas. (BNA) 150 (1980).

