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Disability Law Compliance Manual

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BOOK REVIEW

DISABILITY LAW COMPLIANCE MANUAL. By Gary S. Marx and Gary G. Goldberger. Boston: Warren, Gorham & Lamont, 1991. 982 pages. \$70.00

*Reviewed by Kathe A. Klare**

The Americans with Disabilities Act (ADA),¹ signed into law by President Bush on July 26, 1990, is viewed by many as the most significant civil rights legislation since the Civil Rights Act of 1964. As a result of census data, national polls, and other studies, there was a recognition that persons with disabilities, as a group, have been relegated to an inferior status in all realms of society. Thus, persons with disabilities have been, and remain, severely disadvantaged in achieving social interactions and vocational, economic and educational goals.² The enactment of the ADA seeks to provide persons with disabilities the power they have been denied for so long: the power to achieve equal opportunities, full participation in society, independent living status, and economic self-sufficiency.³

Marx and Goldberger have written a manual, aimed primarily at the practicing attorney, with an in depth analysis of the statute, its implementing regulations, legislative history, and case decisions. The manual is written in a simple and straightforward manner, containing comparisons to existing laws and providing examples which will assist lawyers in becoming knowledgeable about the guiding principles which may be used by the courts in deciding cases brought under the ADA.

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1. 42 U.S.C.A. § 12107 (West 1992).

2. *Id.* § 12101 (a)(6) (West 1992).

3. *Id.* § 12101(a)(8).

The first half of the manual tracks the ADA and its five Titles. Each chapter is further broken down into component parts which enhance the ability for a comprehensive analysis. The chapters generally begin with an overview describing the purpose of that particular section of the law. Relevant case law, regulations and agency interpretative guidelines are integrated into each section, providing a comprehensive analysis of each title and subtitle. This format makes the manual a useful and valuable reference for an attorney practicing in this area of the law.

The remainder of the manual consists of four appendices. Appendix A contains case digests; Appendix B reproduces the statute itself; Appendix C provides relevant regulations; and Appendix D lists names and addresses of organizations, committees and agencies serving as a resource for persons with disabilities in the employment area.

In the Introduction, Marx and Goldberger discuss the history behind the enactment of the ADA. Significantly, the introduction concisely discusses the pre-ADA statutes designed to prohibit discrimination against the disabled as well as those mandating affirmative action.⁴ As the authors indicate, critical to any understanding of the ADA is the understanding of one of these statutes: the Federal Rehabilitation Act of 1973 as amended.⁵

Throughout the manual the authors compare statutes, but specifically emphasize the comparisons between section 504 of the Rehabilitation Act of 1973 and the ADA. This discussion of section 504 is crucial since case decisions under this provision will likely provide the guiding principles of interpretation of cases under the ADA, unless a different standard is expressly adopted.⁶ In addition, an understanding of the Rehabilitation Act is important since it continues in effect and, unlike the ADA, requires affirmative obligations of the covered employers. Also, the penalties for violating the Rehabilitation Act are potentially greater than those imposed under the ADA.⁷

Title I of the ADA prohibits employment discrimination against persons with disabilities. Typical of the authors' analysis is their

4. GARY S. MARX & GARY A. GOLDBERGER, *DISABILITY LAW COMPLIANCE MANUAL* 1-5 (1991).

5. 29 U.S.C.A. §§ 701-96 (West 1992).

6. MARX & GOLDBERGER, *supra* note 4, at 1-6.

7. *Id.*

definition of what constitutes a disability. First, the authors define the term according to the three prong definition of section 3(2) of the ADA which includes:

1. A physical or mental impairment that substantially limits one or more of the major life activities;
2. A record of such impairment;
3. Being regarded as having such an impairment.

The definition is then compared to the definition under section 504 including the change in terminology from "handicapped" to "disabled." The legislative history advocating the need for a broad definition rather than a specific list of disabilities is discussed. The authors then cite to the definitions of individuals with handicaps under the implementing regulations of section 504 and the Fair Housing Amendments Act of 1988.⁸

The manual's effectiveness results from the detailed analysis of the language of the laws, and its interplay with case decisions and interpretative regulations. The various sections and their many exceptions are dissected by the authors and often are highlighted by their objective comments. Marx and Goldberger also provide many case examples and/or agency interpretative guidelines which will provide the guiding principles upon which cases brought under the ADA will be decided.

For example, the authors provide a lengthy discussion of whether a condition is covered by the ADA when it limits the individual's access to one or more types of employment, but does not limit his or her general employability or impair a major life function. The authors cite *E.E. Black, Ltd. v. Marshall* in support of the proposition that working is a major life activity. In *Black*, the court listed five factors for determining whether a person's impairment substantially limits employment opportunities,⁹ including:

The number and types of jobs from which the impaired individual is disqualified;

The geographic area to which the applicant has reasonable access;

The applicant's own job expectations and training;

8. *Id.* at 2-9.

9. *Id.* at 2-31.

The criteria or qualifications generally in use; and

The types of jobs to which the rejection would apply.

The authors then discuss subsequent cases which support the proposition that being found "unsuited for one position in one plant is not a substantial limitation of a major life activity."¹⁰

Marx and Goldberger also discuss the Equal Employment Opportunity Commission's regulations and factors which "may" be considered in determining whether a limitation on working is considered a disability.¹¹

Chapter Three is devoted to a discussion of reasonable accommodations and provides a practical approach for making the proper accommodations. Employers are given a four step analysis to determine how to meet their obligations under Title I. The four step approach includes (1) determination of the fundamental job tasks; (2) determination of the individual's abilities; (3) determination of the conflicts between the fundamental job tasks and the individual's abilities; and (4) determination and evaluation of solutions to those conflicts.¹² The chapter provides the neophyte lawyer with necessary questions to ask when advising employers regarding reasonable accommodations.

Title II of the ADA prohibits discrimination in public accommodations and services operated by public entities. Subtitle A contains the responsibilities of state and local governments. Because the scope of Title II is congruent with the requirements of section 504, the authors again compare the two statutes. First, Title II extends section 504 coverage to all state and local government activities, whether or not they receive federal financial assistance. Second, Title II clarifies the requirements of section 504 regarding commuter railroads.¹³ Some of the general guidelines that serve section 504 also will apply to Title II. The authors give the example of a public entity's requirement to provide equal opportunity and access to the disabled unless it causes an "undue burden" or "undue hardship." The factors utilized to determine an "undue

10. *Id.* at 2-32. For example, the authors discuss a case where a utility repairman who stated acrophobia prevented him from climbing high ladders did not suffer a substantial limitation of a major life activity. In another case, a person was found ineligible for employment as a police officer because of poor judgment, poor impulse control, and irresponsible behavior was not substantially limited. *Id.*

11. *Id.* at 2-33 to 21-36.

12. *Id.* at 3-4.

13. *Id.* at 4-4.

hardship" are very similar to the factors considered in section 504 and under Title I of the ADA, including size and budget of the employer. The authors give the hypothetical of a small day care center which might be required to spend a nominal sum of money to equip a telephone for a hearing impaired person; whereas a large school district might be required to hire an aide to assist a blind teacher.¹⁴

Marx and Goldberger also explain the reasons for the different language of the two acts. For example, the words of section 504 "solely by reason of his or her handicap" are not included in section 202 of the ADA.¹⁵ As a result, it will be more difficult to defend a "mixed motive" personnel action under the ADA.

Subtitle B of Title II prohibits discrimination by public entities in transportation. The authors provide a complete analysis including the laws covering other aspects of discrimination. Specifically mentioned is the Air Carrier Access Act, which will address discrimination by air carriers.¹⁶

The authors follow the same format to analyze Title III of the ADA, which guarantees the right to full and equal enjoyment of goods, services, facilities, and privileges by a place of public accommodation, and Title IV regarding telecommunications. As with the previous sections, there is significant discussion of the effective dates, enforcement mechanism, and remedies available.

The Virginia lawyer must also be aware of any interplay between the state law which protects persons with disabilities and the ADA. For example, the Virginians With Disabilities Act protects against discrimination in employment, education, voting, public places and accommodations, housing, and programs receiving state financial assistance.¹⁷

Marx and Goldberger have produced an objective and neutral analysis of the status of discrimination law. Their manual provides the practicing attorney with a comprehensive analysis and understandable reading of disability discrimination law.

14. *Id.* at 4-5.

15. *Id.* at 4-7.

16. *Id.* at 4-19.

17. VA. CODE ANN. § 51.5-1 (Michie 1990).

