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The Americans with Disabilities Act of 1990: An Overview

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THE AMERICANS WITH DISABILITIES ACT OF 1990: AN OVERVIEW
BONNIE P. TUCKER*

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I. INTRODUCTION

The Americans with Disabilities Act of 1990 ("ADA")\(^1\) was signed into law by President Bush on July 26, 1990, after receiving overwhelming support from Congress.\(^2\) As many as twenty-six years after federal law ensured other citizens of this country the right to move freely within

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our society without confronting discrimination, that right was finally extended to persons with physical and mental disabilities. Thus, the ADA has been termed the “Emancipation Proclamation” for people with disabilities in America, and its date of enactment “Liberation Day for the Disabled.”

The purported forty-three million Americans with disabilities had long awaited this historic moment. Prior to passage of the ADA, the majority of employers, program administrators, owners and managers of places of public accommodation, and others were free to discriminate at will against people with disabilities. Thus, Americans with disabilities have not suffered just from commonly recognized forms of discrimination in areas such as employment, education, transportation, housing, and the provision of social services; they have suffered discrimination in all walks of life. Indeed, in the late 1980s Americans with disabilities were sometimes prevented from going to movies or other places of entertainment, or from dining in restaurants, because managers or owners of such facilities did not like their looks. One person with a disability recounted a situation in which people attempted to forcibly remove her and her friend with a disability from an auction house because they were “disgusting to look at.” A person with cerebral palsy recounted a 1988 incident in which the owner of a movie theater prohibited her from attending movies at his theater because “I don’t have to let her in here, and I don’t want her in here.” People who use wheelchairs frequently tell of being refused service in restaurants.

3. See, e.g., the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a to a-6, 2000e to e-17 (1982) (prohibiting discrimination in employment and public accommodations on the basis of race, color, creed, national origin, or sex). Discrimination in places of public accommodation on the basis of race was prohibited in 1964; discrimination in places of public accommodation on the basis of sex was prohibited in 1972.

4. See, e.g., Horvath, Disabled-Rights Bill Praised and Feared, NEWSDAY, Sept. 9, 1989, at 2 (“Senate lead sponsor Tom Harkin (D-Iowa) called the [ADA] a ‘20th-century Emancipation Proclamation for people with disabilities’”); Elsasser, Senate Oks Rights Bill for Disabled, Chicago Tribune, Sept. 8, 1989, § 1, at 1 (the ADA “is a 20th-century Emancipation Proclamation for people with disabilities,” said Sen. Tom Harkin (D-Iowa), the bill’s chief sponsor) [hereinafter Elsasser].

5. Chapman, Waving a Magic Wand at the Needs of the Handicapped, Chicago Tribune, Sept. 24, 1989, § 4, at 3 (the ADA “has been dubbed ‘Liberation Day for the disabled’”).


7. Prior to the enactment of the ADA, some forms of discrimination against persons with disabilities were prohibited by the Rehabilitation Act of 1973, 29 U.S.C. §§ 501-05 (1982 with Supp. 1990). Section 501 of the Act prohibits federal employers from discriminating against persons with disabilities; section 503 prohibits employers having contracts with the federal government in excess of $2,500 from discriminating against persons with disabilities; section 504 prohibits recipients of federal financial assistance from discriminating against persons with disabilities. None of these laws, however, prohibit the private sector from discriminating against persons with disabilities. Further, while most states have laws that prevent some forms of discrimination against persons with disabilities, those laws vary substantially in scope and effect, and in many—or most—cases merely provide minimal relief.


10. See, e.g. id., at 70 (testimony of Ronald L. Mace—a wheelchair user—explaining that he
Other recent illustrative incidents of discrimination against people with disabilities include: (1) the refusal of a New Jersey private-zoo owner "to admit children with Down Syndrome to the monkey house because, he claimed, they upset his chimpanzees;" (2) the refusal of a bank to allow a man who was mentally retarded to open a bank account because he did not fit the image the bank wanted to project; (3) the action of "an airline employee in New York who resented having to help a 66-year-old double amputee board a plane [and thus] instead threw him on a baggage dolly;" (4) the refusal of a taxi driver in Washington, D.C. to pick up a woman in a wheelchair; and (5) the action of a police officer in pointing his gun at the head of a person with a disability, cocking it, and "pull[ing] the trigger on an empty barrel because he thought it would be 'funny' since [the individual had] quadrapareses and couldn't flee or fight."

The ADA clearly provides that it is no longer permissible to treat persons with disabilities in such a discriminatory fashion. As stated by Evan Kemp, Jr., then Chairman of the United States Equal Employment Opportunity Commission, the ADA serves as a "policy statement to the world: We are not going to exclude disabled people anymore . . . ." As another commentator opined: "The ADA is a pronouncement that our society will no longer tolerate lost potential—that we will no longer judge people by their disabilities, but by their abilities—that we will no longer design a society which excludes, but one that includes."

Legislation was necessary to assure the opportunity to attain this goal, because experience has proven the unfortunate fact that "no civil right has ever been secured without legislation." Whether the ADA will succeed in reaching that goal, of course, remains an open question. People with disabilities have long recognized that the greatest barriers they confront are not the physical barriers created by their disabilities and his wife were refused service in a seafood restaurant because they "could not sit on the stools at the oyster bar"; when asked about other arrangements Mr. and Mrs. Mace and their party were told "to get out and don't ever come back"); Oversight Hearings on H.R. 4498, Americans With Disabilities Act of 1988: Hearing Before the Subcommittee on Select Education of the Committee on Education and Labor, 100th Cong., 2d Sess. 39 (1989) (statement of Linda Pelletier explaining that a restaurant in Boston refused to serve alcohol to her and her friend who used a wheelchair) [hereinafter Oversight Hearing on H.R. 4498].


but the attitudinal barriers created by the so-called "able-bodied" members of our society.\(^1\) Thus, many of the so-called experts in the field of disability policy view the expectations of the ADA as somewhat unrealistic.\(^2\) Clearly, however, the ADA sets forth a sharp mandate against discrimination on the basis of disability. As such, this nation is finally on the right track.

The final version of the ADA represents a series of compromises between advocates for people with disabilities and the business community. The ADA contains several major titles prohibiting discrimination against qualified individuals with disabilities with respect to employment, public transportation, places of public accommodation, and the provision of telecommunication services. This article will present a brief overview of each of those sections and of miscellaneous sections of the ADA that are important to a full understanding of the Act's scope and import.

### II. INDIVIDUALS WITH DISABILITIES

At the onset it should be explained that the ADA follows sections 501, 503, and 504 of the Rehabilitation Act\(^2\) in defining the term "disabled" individual. A disabled (or handicapped) individual\(^2\) under both the ADA and the Rehabilitation Act is one who has a physical or mental impairment that substantially limits one or more of that individual's major life activities, has a record of such an impairment (i.e., has either a history of such an impairment or has been misclassified as having such an impairment), or is regarded as having such an impairment—even if he or she does not, in fact, have such an impairment (such as a cured cancer victim or an individual disfigured by burns).\(^2\)

There has been much litigation under section 504 with respect to this definition, particularly concerning the following questions: (1) What is a "major life activity"?; (2) What constitutes a "substantial impairment" of such a major life activity?; (3) What constitutes a "physical" or "mental" impairment?; and (4) What is meant by the term "regarded as" having

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19. One commentator has stated that "only the young and idealistic believe passage of the ADA will prompt change." Widman, Iowa's Disabled Fight Job Discrimination, 85 BUSINESS RECORD, Sept. 11, 1989, § 1, at 2 (quoting Mario G. Barillas, coordinator of planning at the Des Moines, Iowa Division of Vocational Rehabilitation Services). In the words of that commentator, the ADA is "necessary legislation, the timing is right, but I wouldn't hold my breath waiting for any real changes." Id.

20. See infra text accompanying notes 783-84.


22. The Rehabilitation Act utilizes the term "handicapped" rather than "disabled." The two terms are used interchangeably in common practice, however, and are regarded as having the same meaning. Many persons with disabilities prefer to be called "disabled" rather than "handicapped." The term "handicap" is felt by many to have a derogatory connotation, because literally translated it means "hand in cap," which implies that people with disabilities must ask for handouts or charity. Indeed, some people with disabilities would prefer to utilize the term "physically challenged" rather than "handicapped" or "disabled." The ADA follows the modern trend by referring to persons with disabilities as "disabled" rather than as "handicapped."

a physical or mental impairment? The section 504 case law on these issues will be applicable to cases arising under the ADA.

In some respects, however, the ADA and the regulations promulgated under the Act serve to clarify the section 504 case law with regard to who is an individual with a disability and to resolve some unanswered questions.

A. The Regulations

Issues addressed by the ADA regulations include the following:

1. Substantial Limitation of a Major Life Activity

Both the title I regulations promulgated by the Equal Employment Opportunity Commission ("EEOC") (dealing with employment) and the title III regulations promulgated by the Department of Justice ("DOJ") (dealing with places of public accommodation and commercial facilities) define and discuss the terms "substantial limitation" of a "major life activity."

With respect to the requirement that an individual is "disabled" within the meaning of the Act if his or her disability substantially limits a major life activity, the EEOC regulations provide that major life activities include functions "such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." The term "substantially limits" is defined in the EEOC regulations as meaning that the individual is:

(i) [u]nable to perform a major life activity that the average person in the general population can perform; or
(ii) [s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

The EEOC regulations further note that, when determining whether the "substantially limited" test is satisfied, three factors should be considered: the nature and severity of the impairment, the duration or expected duration of the impairment, and the expected permanent or long term impact of the impairment. The EEOC regulations clarify that a determination of whether a disability substantially limits a major life activity should be made without considering the effects of accommodations, assistive devices, or medication on the individual.

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26. Id. § 1630.2(j).
27. Id.
28. 56 Fed. Reg. 35,727 (1991) (section-by-section analysis); 29 C.F.R. § 1630.2(h) app. Under this definition, for example, an individual with a severe hearing impairment should be held to be "substantially limited" in the ability to hear regardless of the individual's ability to use hearing-aids.
In a similar vein, the DOJ regulations explain that "[m]ajor life activities include such things as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." The DOJ regulations further explain that, with respect to title III of the Act (relating to places of public accommodation), the "substantial limitation" prong of this definition is satisfied "when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people." 

Significantly, under its proposed regulations pursuant to title III the DOJ stated that while the duration or expected duration of an impairment is one factor to consider when determining whether an impairment substantially limits a major life activity, an "impairment is not excluded from the definition of 'disability' simply because it is temporary." Under the DOJ's final regulations, however, this proviso was omitted following public comment. The final regulations provide that "[t]he question of whether a temporary impairment is a disability must be resolved on a case-by-case basis, taking into consideration both the duration (or expected duration) of the impairment and the extent to which it actually limits a major life activity of the affected individual." 

Like the EEOC regulations, the DOJ regulations provide that the determination of whether an individual has a disability should be made "without regard to the availability of mitigating measures" (such as hearing aids for an individual with a hearing impairment or medication for an epileptic).

2. Major Life Activity of "Working"

The issue of "how to determine whether an employer regards a particular individual as having an impairment that substantially limits the major life activity of working" was considered by the EEOC to be an "especially complex area." Ultimately the EEOC defined the term "substantially limits" with respect to the major life activity of "working" as:

29. 28 C.F.R. § 36.104.
32. Id.
34. Id. It should also be noted that, when discussing the question of what constitutes a physical or mental disability under title I, the EEOC's regulations provide that: (1) "temporary, non-chronic impairments of short duration, with little or no long term or permanent impact [such as broken limbs, concussions, appendicitis, influenza] are usually not disabilities," (2) pregnancy is not a disability; (3) obesity, "except in rare circumstances," is not a disability; and (4) advanced age, in and of itself, is not a disability (although medical conditions resulting from old age, such as hearing loss, arthritis or osteoporasis, are disabilities). 28 C.F.R. §§ 16.30(h), (i) app.
35. Id.
Significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.\(^{37}\)

In accord with this rule, the EEOC regulations provide that the following factors may be considered when deciding whether an individual is substantially limited in the major life activity of working:

(A) the geographical area to which the individual has reasonable access;
(B) the job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
(C) the job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).\(^{38}\)

Similarly, because the ADA prohibits discrimination against persons who are "regarded as" being disabled, even if in fact they are not disabled,\(^{39}\) the EEOC regulations address the question of when an individual is regarded as being substantially limited in a major life activity.\(^{40}\) The "regarded as" test is held to be satisfied when an individual:

1. has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
2. has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
3. has none of the impairments defined in paragraphs (1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.\(^{41}\)

In applying the above test to employers in the context of when an individual would be substantially limited in the major life activity of working, the appendix to the EEOC's proposed regulations noted that

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38. Id. § 1630.2(i). This rule is subject to criticism on two grounds: First, job applicants who are disabled will, in some cases, be required to expend time and money to resolve the issue of whether they are, in fact, "disabled," prior to addressing the substantive aspects of the case. Second, the geographical limitations may result in bizarre situations whereby an individual would be classified as "disabled" if he or she resided in one part of a state, but would not be classified as "disabled" if he or she lived in another part of the same state.
39. See supra note 23 and accompanying text.
40. 29 C.F.R. § 1630.2(e).
41. Id.
"it should be assumed that all similar employers would apply the same exclusionary qualification standards that the employer charged with discrimination has used."  

By way of example, the appendix to the proposed regulations explained:

[s]uppose an individual has a heart murmur that has gone undetected and has not caused any limitations on the individual’s activities. In the course of a routine medical examination given to all newly employed heavy machine operators, the murmur is discovered. The employer then withdraws the offer of employment because it believes the heart murmur disqualifies the individual from operating the heavy machinery. Assuming all employers hiring heavy machine operators use this standard, the individual would be excluded from the broad range of jobs requiring the use of heavy machinery. Therefore, the employer is regarding the impairment as a substantial limitation of the major life activity of working and has acted on the basis of that perception.

Subsequently, however, that provision was deleted from the final regulations. Rather, the appendix to the final regulations simply explains that the "regarded as" test will be satisfied if an employer makes an employment decision based on "myth, fear, or stereotype."

B. The Act

The ADA itself further clarifies the issue of who are persons with disabilities under the Act:

1. Sexual Orientation/Disorders, Gambling

Courts interpreting section 504 have held that the term "handicapped individual" under that section includes transsexuals and compulsive gamblers. To ensure that such individuals—and others—are not covered under the ADA, Congress provided that the term "disability" as used in the ADA does not include homosexuality or bisexuality, transvestism, transsexualism or other sexual orientations or disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current use of illegal drugs.

2. Drug Abusers

The ADA provides that an individual with a disability under the Act "does not include an individual who is currently engaging in the illegal
use of drugs, when the covered entity acts on the basis of such use."  

The Act contains a rule of construction, however, providing that:

Nothing in subsection (a) shall be construed to exclude as an individual with a disability an individual who—

1. has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

2. is participating in a supervised rehabilitation program and is no longer engaging in such use; or

3. is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this Act for a covered entity to adopt or administer reasonable policies or procedures including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs; however, nothing in this section shall be construed to encourage, prohibit, restrict, or authorize the conducting of testing for the illegal use of drugs.

Similarly, title I of the ADA (covering employment discrimination) provides that an employee or job applicant who is a current user of illegal drugs is not protected under the Act when the employer acts on the basis of such use. Title I contains a similar rule of construction to the one noted above, however, that makes it clear that rehabilitated drug users are protected from employment discrimination under the ADA, as they are under section 504; on the other hand, employers may adopt policies, including drug testing, to ensure that an employee is no longer using illegal drugs. It is important to note, however, that the ADA takes no position on drug testing—it neither provides authority for nor prohibits such testing. The ADA does, however, expressly permit employers to prohibit the use of illegal drugs in the work place and to hold an employee who is a drug user to the same standards as required of non-drug-users.

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48. Id. § 12210(a). The term "illegal use of drugs" means the use of drugs proscribed under the Controlled Substances Act, 21 U.S.C. § 812. 42 U.S.C.A. § 12210(d). Under the ADA, it is unlawful to illegally use legal prescription drugs that are controlled substances by virtue of their potential for abuse. It does not constitute illegal use of drugs, however, to take controlled substances under the supervision of a licensed health care provider. Id.

49. Id. § 12210(b).

50. Id. § 12114(a).

51. See id. § 12114(b)(1), (2).

52. Id. § 12114(d). This section provides that "a test to determine the illegal use of drugs shall not be considered a [discriminatory] medical examination." Id.

53. Id. § 12114(b). The Act shall not be "construed to encourage, prohibit, or authorize the conducting of drug testing . . . ." Id. Similarly, section 12114(e) provides that the Act shall not be "construed to encourage, prohibit, restrict, or authorize" the Department of Transportation to test employees or applicants for illegal drug or alcohol use and to remove persons who test positive to such tests from employment. Id. § 12114(e).

54. Id. § 12114(a).
Despite the above provisions, the Act clearly provides that "an individual shall not be denied health services, or services provided in connection with drug rehabilitation, on the basis of the current illegal use of drugs if the individual is otherwise entitled to such services." 55

3. Alcoholics

Alcoholics (both rehabilitated and non-rehabilitated) are protected from discrimination under the ADA. In the employment situation, however, an employer:

- (1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;
- (2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;
- (3) may require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. §§ 701 et seq.);
- (4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee. 56

Further, an employer may require that employees comply with standards relating to alcohol and drug use established by the Department of Defense, the Nuclear Regulatory Commission, and the Department of Transportation. 57

4. Smokers

The ADA specifically provides that it shall not "be construed to preclude the prohibition of, or the imposition of restrictions on, smoking [in places of employment, public accommodation, or transportation covered by the Act]." 58

5. Associates of People with Disabilities

The ADA provides that employers covered by title I and entities covered by title III (relating to places of public accommodation) may not discriminate against an individual without disabilities due to that individual's association with a person with a disability. 59

55. Id. § 12210(c).
56. Id. § 12114(c).
57. Id. § 12114(c)(5).
58. Id. § 12201(a).
59. Id. §§ 12112(b)(4), 12182(b)(E). See infra notes 91-93 and accompanying text for a discussion of this mandate as it applies in the employment context. See infra note 418 and accompanying text for a discussion of this mandate as it applies in the public accommodations context.
III. EMPLOYMENT DISCRIMINATION

The first title of the ADA is intended to open the world of employment to people with disabilities. Studies show that in the late 1980s only two-thirds of working-age Americans with disabilities who were able to be employed had jobs, and those who did were working in positions below their capabilities. This was so because many employers refused to hire people with disabilities, and because those people with disabilities who were employed were often left in entry-level positions and not promoted in accord with their abilities. Indeed, despite the existence of the Rehabilitation Act of 1973 and some state laws prohibiting employment discrimination on the basis of disability, in the late 1980s people with disabilities lost ground in their fight for equal employment opportunities.

A 1989 report from the United States Census Bureau showed that: (1) in 1981, 29.8% of men with disabilities worked full-time, while in 1988 only 23.4% of men with disabilities worked full-time; (2) in 1988 only 13.1% of women with disabilities worked full-time (up from 11.4% in 1981); (3) the earnings of men with disabilities fell from 77% of what all workers made in 1981 to 64% of what all workers made in 1988; and (4) the earnings of women with disabilities fell from 69% of what all workers made in 1981 to 62% of what all workers made in 1988.

There is no logical reason for these statistics. The stereotypical fear that hiring employees with disabilities is excessively costly is more myth than fact. In a recent survey, three-quarters of the managers who had hired both employees with and without disabilities, reported that the average cost of employing a person with a disability is approximately the same as the cost of employing a person without a disability. Moreover, frequently the cost to employ a worker with a disability involves minimal expenditures, such as the purchase of a $50 headset for a phone to allow an insurance salesperson with cerebral palsy to write while talking, or the purchase of a $27 timer with an indicator light to allow a medical technician who is deaf to perform laboratory tests. Indeed, a 1982 study of accommodations provided to employees with disabilities by federal

60. See, e.g., Oversight Hearing on H.R. 4498, supra note 10, at 9 (concluding that "about 8.2 million people with disabilities want to work but cannot find a job"); Senate Committee Report, supra note 8, at 9 ("[t]wo-thirds of all disabled Americans between the age of 16 and 64 are not working at all; yet . . . sixty-six percent of working age disabled persons, who are not working, say that they would like to have a job").

61. See, e.g., Study on Disabled and Jobs Finds Work and Good Pay are Scarce, N.Y. Times, Aug. 16, 1989, A2 (stating, inter alia, that there is powerful evidence that there is a tendency by employers to leave [employees with disabilities] stuck in entry-level positions) [hereinafter Study on Disabled].


63. Louis Harris & Assoc., Inc. Study No. 8640009, the ICD Survey II: Employing Disabled Americans 9 (1987) [hereinafter Harris Study]. Only 13% to 17% of managers considered it "more expensive to employ a disabled person." Id.

64. Senate Committee Report, supra note 8, at 10.
contractors pursuant to Section 503 of the Rehabilitation Act found that only 22% of workers with disabilities required special accommodations; of that 22%, 31% of the accommodations required were achieved at no cost and 30% were achieved at a cost of under $500 per worker. And, contrary to the fears of some employers, the insurance and workers' compensation fees do not increase when an employer hires workers with disabilities. Moreover, employees with disabilities are often found to be better workers than employees without disabilities. An executive of E.I. DuPont de Nemours and Company, which employs more than 1,452 workers with disabilities, sums this information up handily: "Every one of [the] reasons for not [hiring employees with disabilities] is not only a myth—but has been proven to hold no semblance of fact whatsoever." Nevertheless, employment discrimination against Americans with disabilities is so prevalent that as recently as early 1990 over eight million Americans with disabilities who wanted to work were denied jobs and thus were forced to depend on government subsidies—to the disadvantage of all Americans.

To remedy the grave employment situation confronted by people with disabilities, title I of the ADA provides that employers, employment agencies, labor organizations, or joint labor-management committees (collectively called employers) may not discriminate against qualified individuals with disabilities with respect to "job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."
Title I of the ADA becomes effective in July 1992, two years after enactment of the Act.\textsuperscript{73} Between July 1992 and July 1994, however, only employers having twenty-five or more employees are covered by the Act.\textsuperscript{74} Thereafter, all employers having fifteen or more employees are covered.\textsuperscript{75} Despite the broad definition of the term "employer," religious organizations are not precluded under the Act from giving preferences in hiring decisions to members of their own religion or from requiring that all employees be members of that religion.\textsuperscript{76} Further, the term "employer" does not include the United States or a private membership club that is exempt from ordinary tax rules.\textsuperscript{77}

When an employer controls a corporation whose place of incorporation is a foreign country, any discriminatory practice under the ADA engaged in by the corporation "shall be presumed to be engaged in by such employer."\textsuperscript{78} The ADA does not apply "with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer."\textsuperscript{79} The determination of whether an employer controls a corporation is to be based on four factors: "(i) the interrelation of operations; (ii) the common management; (iii) the centralized control of labor relations; and (iv) the common ownership or financial control, of the employer and the corporation."\textsuperscript{80}

An "employee" within the meaning of the ADA means "an individual employed by an employer;"\textsuperscript{81} where employment in a foreign country is at issue "such term includes an individual who is a citizen of the United States or an individual who has a home in the United States."\textsuperscript{82} The Act also applies to all state and local government entity employers, regardless of the number of employees at such an entity. See infra note 587 and accompanying text.

\textsuperscript{73} 42 U.S.C.A. § 12111.
\textsuperscript{74} Id. § 12111(5).
\textsuperscript{75} Id. Note, however, that all state and local government entity employers are covered under title I, regardless of the number of employees at such an entity. See infra note 587 and accompanying text.

\textsuperscript{76} 42 U.S.C.A. § 12113(c). A religious entity, however, may not discriminate against an individual who satisfies the permitted religious criteria because of that individual’s disability. See 29 C.F.R. § 1630.16(a) (1992).

\textsuperscript{77} 42 U.S.C.A. § 12111(5)(B).
\textsuperscript{78} Id. § 12112(c)(2)(A).
\textsuperscript{79} Id. § 12112(c)(2)(B).
\textsuperscript{80} Id. § 12112(c)(2)(C).
\textsuperscript{81} Id. § 12111(4).
When an employee is employed in a work place in a foreign country, however, an employer may take an action that affects an employee with a disability that would otherwise constitute discrimination under the ADA if compliance with the ADA would cause the employer to violate the law of the foreign country in which the work place is located.\textsuperscript{83}

The ADA’s mandate against employment discrimination is far-reaching. Indeed, title I prohibits employers from entering into contracts with other parties or entities that would have the effect of discriminating against people with disabilities.\textsuperscript{84} Thus, for example, an employer could not escape the requirement that its business premises be accessible to persons with disabilities by entering into a lease to rent non-accessible premises. Similarly, title I’s prohibition against the adoption of administrative procedures that have a discriminatory effect against persons with disabilities\textsuperscript{85} prohibits an employer from refusing to hire a person with a disability because the employer’s insurance does not cover accidents or injuries to people with disabilities.\textsuperscript{86}

Further, title I prohibits employment actions that have a discriminatory effect on people with disabilities even when the employer has no intent to discriminate.\textsuperscript{87} Thus, in the employment context the ADA prohibits both disparate treatment of persons with disabilities and the implementation of policies that have a disparate impact on persons with disabilities.\textsuperscript{88}

\begin{itemize}
  \item \textsuperscript{83} Id. § 109(b)(2) (to be codified at 42 U.S.C. § 12112(c)).
  \item \textsuperscript{84} 42 U.S.C.A. § 12112(b)(2); 29 C.F.R. § 1630.6 (1992). A covered entity is "only liable in contractual arrangements for discrimination against its own applicants or employees;" however, the covered entity will not be liable if a party with whom the entity contracts discriminates against that party’s own employees. See H.R. Rep. 558, 101st Cong., 2d Sess., at 57 (1990) [hereinafter Committee of Conference Report].
  \item \textsuperscript{85} 42 U.S.C.A. § 12112(b)(3)(A), (B).
  \item \textsuperscript{86} H.R. Rep. No. 485, pt. 3, supra note 72, at 38.
  \item \textsuperscript{88} This raises the question of the applicable burdens of proof in an employment action under the ADA with respect to a claim that an employment practice or policy has a disparate impact on people with disabilities. As noted infra, notes 175-176, the remedies and procedures of title VII of the Civil Rights Act govern with respect to title I of the ADA. In Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), the Supreme Court placed the burden of proof on the employee to show that the employer had no legitimate business reason for following the allegedly discriminatory practice. Subsequently, in November 1991, President Bush signed the Civil Rights Act of 1991, S. 1745, 137 Cong. Rec. S15503 (Oct. 30, 1991). That Act reverses the Wards Cove decision and places the burden on the employer to prove business necessity, in accord with the law existing prior to Wards Cove. Section 105 of the Civil Rights Act of 1991 (amending 42 U.S.C. § 2000e) provides, \textit{inter alia}, that in disparate impact cases an unlawful employment practice is established when the plaintiff meets its burden of proving that the defendant’s employment practice causes a disparate impact on the basis of a protected classification, and the defendant fails to meet its burden of proving that the challenged practice is job related and consistent with business necessity. If the defendant employer meets its burden of proving job relatedness and business necessity, the plaintiff presumably may rebut that defense by: “demonstrating the availability of an alternative selection practice, comparable in cost and equally effective in measuring job performance or achieving the respondent’s legitimate employment goals, that will reduce the disparate impact, and that the respondent refuses to adopt such alternative.” 137 Cong. Rec. S15473 (Oct. 30, 1991) (remarks of
Actions that have a discriminatory effect are permissible, however, if shown to be job related and consistent with business necessity, and performance of the required conduct cannot be accomplished with reasonable accommodation. Moreover, the title I regulations provide that

Senator Dole with respect to S. 1745).

The Civil Rights Act of 1991 provides that in establishing that a particular employment practice causes a disparate impact, the plaintiff must demonstrate that each particular challenged employment practice causes a disparate impact. If the plaintiff can show that the elements of the defendant's decisionmaking process are not capable of separation for analysis, however, the decisionmaking process may be analyzed as one employment practice. 42 U.S.C.A. § 2000e-2(k)(1)(B)(i). If the defendant shows that a specific employment practice does not cause the disparate impact, the defendant need not show that the practice is required by business necessity. Id. § 2000e-2(k)(1)(B)(ii). Further, the Civil Rights Act provides that an employer may not defend against a charge of intentional discrimination by showing that an employment practice is required by business necessity. Id. § 2000e-2(k)(1)(C).

The legislative history of the ADA, however, provides, that the burden of proof under title I of the ADA is intended to be the same as under section 504. See, e.g., H.R. Rep. 485, pt. 2, supra note 87, at 72; Senate Committee Report, supra note 8, at 38. The courts have disagreed over whether—and to what extent—title VII burdens of proof should apply in section 504 cases. For a discussion of this issue, see B. Tucker & B. Goldstein, Legal Rights of Persons with Disabilities: An Analysis of Federal Law 3:9-11 (1990). Thus, which party has the burden of proof under the ADA with respect to this question remains unclear. It is important to note, however, that where reasonable accommodations are at issue, the ADA expressly provides that the burden is on the employer to prove that an accommodation is not reasonable because it would provide an undue hardship. See infra note 110 and accompanying text.

It must also be noted that the Civil Rights Act of 1991 provides that an unlawful employment practice is established under title VII when the plaintiff meets its burden of proving that a protected classification was "a motivating factor" for the practice, "even though other factors also motivated the practice." 42 U.S.C.A. § 2000e-2(m) (emphasis added). That Act further provides that when more than one motivating factor for the alleged discriminatory practice is established, and the employer meets its burden of proving that it would have taken the same action in the absence of the impermissible motivating factor, the court may grant declaratory or injunctive relief and attorneys' fees and costs directly attributable to pursuit of the claim, but may not "award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment ..." Id. § 2000e-5(g). As a matter of policy, the same test should be held to apply under the ADA.

89. See 29 C.F.R. § 1630.15(c) (1992). In Wards Cove Packing Co. v. Atonio, 490 U.S. 642, the Supreme Court held that under title VII all an employer must show with respect to business necessity is that "the challenged practice serves, in a significant way, the legitimate goals of the employer." Id. at 659. "[T]here is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster ..." Id. The Civil Rights Act of 1991 overruled Wards Cove. A stated purpose of that Act is "to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to Wards Cove ...." S. 1745, § 3(2), 137 Cong. Rec. S15503 (Oct. 30, 1991). While the Civil Rights Act does not define the term "business necessity," in Griggs the Supreme Court held that "any given requirement must have a manifest relationship to the employment in question," 401 U.S. at 432. It is this "manifest relationship" test that the Civil Rights Act of 1991 adopts. See 137 Cong. Rec. S15475-76 (Oct. 30, 1991) (remarks of Senator Dole with respect to S. 1745); see also Statement by President Bush (Nov. 21, 1991) (noting that Senator Dole's statements with respect to the "business necessity" defense "will be treated as authoritative interpretive guidance by all officials in the executive branch with respect to the law of disparate impact as well as the other matters covered in the documents"). The same standard will apply under the ADA.

One difference between the business necessity test applied under title VII and that applied under the ADA is that:

under the ADA the standard may be applied to an individual who is screened out by a selection procedure because of a disability, as well as to a class of persons. It is not necessary to make statistical comparisons between a group of people with disabilities and people who are not disabled to show that a person with a disability
an employer charged with violating title I may claim as a defense that the challenged action is required or necessitated by another federal law or regulation.90

In addition to prohibiting employment discrimination against people with actual or perceived disabilities, title I prohibits discrimination in employment against *associates* of individuals with disabilities.91 Thus, for example, an employer may not discriminate against an individual without a disability who lives with someone with AIDS, or who has a family member with a disability that the employer fears will cause the applicant or employee without a disability to incur excessive absences from work.92 The burden lies with the individual claiming discrimination to prove that the employer's allegedly discriminatory conduct was motivated by that individual's relationship or association with a person with a disability.93

### A. Reasonable Accommodations

Title I of the ADA incorporates many of the standards set forth under section 504 of the Rehabilitation Act.94 Thus, title I, like section 504, provides that employers must make "reasonable accommodations"95 for

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90. 29 C.F.R. § 1630.15(e). This regulation was included in response to legislative history of the Act providing that the ADA's employment provisions would not require employers to violate safety regulations promulgated by the Department of Transportation or the Occupational Safety and Health Administration. Telephone conversation with Christopher Bell, Acting Associate Legal Council for ADA Services at the United States Equal Employment Commission ("EEOC") (Oct. 1, 1991). The intent was to avoid placing the employer between a rock and a hard place when determining which regulatory rules to follow. To the extent that the regulation is interpreted more broadly than in those circumstances addressed in the congressional hearings, however, the regulation may be held to contravene the basic precept of statutory construction that the more recent, and more specific law controls over an earlier, and more general law.

91. 42 U.S.C.A. § 12112(b)(4). This section prohibits "excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association." H.R. Rep. No. 485, pt. 3, supra note 72, at 38.

92. Reasonable accommodations need not be provided for non-disabled employees, however. By way of example, the ADA does not require an employer to modify the work schedule of the mother of a child with a disability to allow the mother to spend more time with the child; rather, the Act simply prohibits the employer from refusing to hire the mother due to fear that she will incur excessive absences from work. If, in fact, the mother proves unable to meet the attendance policies of the work place, the employer would be free to fire her.


"otherwise qualified"96 individuals with disabilities. The term "reasonable accommodation" is defined in the regulations promulgated under title I as: (1) modifications or adjustments to the job application process, to the work environment, or to "the manner or circumstances under which the position held or desired is customarily performed," or (2) a modification or adjustment that allows an employee with a disability to enjoy the same benefits and privileges enjoyed by employees without disabilities, as long as such modification or adjustment does not impose an undue hardship on the employer's business.97

Suggested "reasonable accommodations" under the ADA, as under section 504, include, but are not limited to: (1) making existing facilities readily accessible to and usable by people with disabilities; (2) job restructuring (by reallocating or redistributing non-essential job functions);98 (3) development of part-time or modified work schedules; (4) reassignment to a vacant position (when accommodation within an employee's current job cannot satisfactorily be made);99 (5) acquisition or modification of equipment or devices; (6) modification or adjustment of examinations, training materials, or policies; and (7) the provision of qualified readers or interpreters for employees who are blind or deaf.100

98. 29 C.F.R. § 1630 app. A (interpretive guideline to 29 C.F.R. § 1630.2(o))). The interpretive guidelines explain that employers are not required to reallocate essential functions of a job, although an employer may restructure a job "by altering when and/or how an essential function is performed" (such as by moving the time of day that the function must be performed or by permitting an employee who is unable to write to computerize records rather than maintain the records manually). Id.
99. 29 C.F.R. § 1630 app. A. The interpretive guidelines state that "[i]n general, reassignment should be considered only when accommodation within the individual's current position would pose an undue hardship." Id. Further, the interpretive guidelines provide that:
(1) Reassignment may not be used to limit, segregate, or otherwise discriminate against employees with disabilities by forcing reassignments to undesirable positions or to designated offices or facilities; and
(2) An employer may reassign an individual to a lower graded position if there are no accommodations that would enable the employee to remain in the current position and there are no vacant equivalent positions for which the individual is qualified with or without reasonable accommodation. An employer, however, is not required to maintain the reassigned individual with a disability at the salary of the higher graded position if it does not so maintain reassigned employees who are not disabled. It should also be noted that an employer is not required to promote an individual with a disability as an accommodation.
100. 42 U.S.C.A. § 12111(9)(A), (B); see also 29 C.F.R. § 1630.2(0)(2). For similar suggestions under section 504 see 45 C.F.R. § 84.12(b) (1989) (DHHS regulation); 29 C.F.R. § 32.3 (1989) (DOL regulation).

The reasonable accommodation requirement, however, does not require an employer to provide personal items for an employee's use. The House Committee on Education and Labor includes hearing-aids and eyeglasses among such "personal items" not required to be provided. H.R. REP. 485, pt. 2, supra note 87, at 64.
The regulations promulgated under title I do not address the question of whether an employer is required to provide a person to assist an employee with a disability with personal needs at work—such as eating and toileting. The interpretive guidelines to the regulations state that “[p]roviding personal assistants, such as a page turner for an employee with no hands or a travel attendant to act as a sighted guide to assist a blind employee on occasional business trips, may also be a reasonable accommodation.”

The explanatory section to the regulations notes that the interpretive guidelines “make clear that it may be a reasonable accommodation to provide personal assistants to help with specified duties related to the job.” The regulations do not address the question of whether it should constitute a reasonable accommodation for an employer to provide assistance with non-job related tasks, such as toileting and eating, to allow an employee with a disability to remain on the job. Apparently the EEOC intends for this issue to be resolved on a case-by-case basis.

When a qualified individual with a disability seeks provision of a reasonable accommodation, the employer, “using a problem solving approach,” should:

1) Analyze the particular job involved and determine its purpose and essential functions;
2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual’s disability and how those limitations could be overcome with a reasonable accommodation;
3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and
4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.

Moreover, if consultation with the individual with a disability does not uncover potential appropriate accommodations, the employer should seek technical assistance from the EEOC, the state or local rehabilitation agencies, or disability constituent organizations. Failure to obtain technical assistance, however, “will not excuse the employer from its reasonable accommodation obligation.”

Ultimately, however, the employer has the discretion to choose the accommodation to be provided, and may choose the less expensive accommodation or the accommodation easiest for it to provide.

101. 29 C.F.R. § 1630 app.
103. 29 C.F.R. § 1630.9 app.
104. Id.
105. Id.
106. Id.
B. Undue Hardship

An accommodation is not reasonable under the ADA if it would impose an "undue hardship" on the employer's business. The term "undue hardship" is defined as "an action requiring significant difficulty or expense." Factors to be considered when determining whether an accommodation would constitute an undue hardship under the ADA are of the same general nature as those to be considered when making that determination under section 504: the size, type, and budget of the employer's program and the nature and cost of the accommodation at issue. The ADA, however, provides a more comprehensive listing of specific factors to be reviewed when deciding whether an accommodation would constitute an undue hardship. Under the ADA, the following factors must be considered:

(i) the nature and cost of the accommodation needed under this Act;
(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

107. 42 U.S.C.A. § 12112(5)(A). For similar standards under section 504, see 45 C.F.R. § 84.12(a) (DHHS regulation); 29 C.F.R. § 32.3 (DOL regulation); 28 C.F.R. § 41.53 (DOJ regulation). Note, however, that the responsibility lies with the employee or applicant with a disability to request a reasonable accommodation; "the employer is not liable for failing to provide an accommodation if it was not requested." H. Rep. No. 485, pt. 3, supra note 72, at 39.


109. Id. § 12111(10)(B). The EEOC's regulations promulgated under title I add a fifth factor: "The impact of the accommodation upon the operation of the facility, including the impact upon the ability of other employees to perform their duties and the impact on the facility's ability to conduct business." 29 C.F.R. § 1630.2(p) (1992). Note that with respect to the impact on other employees referred to in the latter factor, the EEOC regulations provide that an employee could not "demonstrate undue hardship by showing that the provision of the accommodation has a negative impact on the morale of its other employees but not on the ability of these employees to perform their jobs." 29 C.F.R. § 1630.15(d) app.

The legislative history to the ADA evidences that when deciding whether an accommodation would pose an undue hardship to the employer, consideration should be given to the number of present and future employees who will benefit from the proposed accommodation. See, e.g., H.R. Rep. No. 485, pt. 2, supra note 87, at 69. The House Report succinctly explains, however, that if an accommodation is to be shared among employees, the employer must ensure that "each employee is not denied a meaningful equal employment opportunity caused by limited access to the needed accommodation." Id.

One commentator has noted that:

the fact that a large number of employees would derive a significant benefit from a particular accommodation may contribute to the likelihood that the employer will eventually provide the accommodation, regardless of whether it is required by a disabled employee. If an employer would eventually provide the proposed accom-
Significantly, under the ADA the “burden is on the employer to demonstrate that the needed accommodation would cause an undue hardship,” rather than on the employee or applicant with a disability to prove the converse.\textsuperscript{100}

The “undue hardship” standard represents one of the Act’s areas of compromise. The original version of the ADA required employers to provide reasonable accommodations for employees with disabilities unless such accommodations would “threaten the existence of the [employer’s] business.”\textsuperscript{111} Proponents of the business sector termed that requirement the “bankruptcy provision”\textsuperscript{112} and it was subsequently altered in the spirit of compromise. Clearly, however, the term “reasonable accommodations” is to be read broadly under the ADA.

C. Collective Bargaining Agreements

Congress has stated that a collective bargaining agreement will not necessarily serve as a defense to an employer who fails to accommodate an employee with a disability as required under the ADA. The legislative history of the ADA notes, for example, that “if a collective bargaining agreement reserves certain jobs for employees with a given amount of seniority, it may be considered as a factor in determining whether it is a reasonable accommodation to assign an employee with a disability without seniority to that job. \textit{However, the agreement would not be determinative on the issue.}”\textsuperscript{113} That report further notes that “... if the collective bargaining agreement lists job duties, such a list may be taken into account in determining whether a given task is an essential function of the job. \textit{Again, however, the agreement would not be determinative on the issue.}”\textsuperscript{114}

The courts have consistently held, however, that section 501 of the Rehabilitation Act never requires the United States government to make

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\item modulation, but refuses to provide it when it is needed to accommodate an applicant or employee with a disability, the employer should be liable for discrimination, unless changing the timing would itself cause an undue hardship.
\end{itemize}


The statutory list of factors to consider under the ADA is more explicit than the list provided under the section 504 regulations. The DHHS section 504 regulations, for example, simply provide that the factors to be considered when determining whether an accommodation would impose an undue hardship to a covered entity under section 504 include:

\begin{enumerate}
\item the overall size of the recipient’s program with respect to the number of employees, number and type of facilities, and size of budget;
\item the type of the recipient’s operation, including the composition and structure of the recipient’s workforce; and
\item the nature and cost of the accommodation needed.
\end{enumerate}

45 C.F.R. § 84.12(c) (1989).

111. See, e.g., \textit{Hearings Before the Senate Committee on Labor and Human Resources and the Subcommittee on the Handicapped}, 100th Cong., 1st Sess. 90 (1989).
112. \textit{Id.}
114. \textit{Id.} (emphasis added).
accommodations for employees with disabilities that would contravene the provisions of an otherwise applicable collective bargaining agreement. Thus, although the ADA purportedly follows the Rehabilitation Act with respect to the issue of collective bargaining agreements, in this respect the "reasonable accommodation" requirement may be broader under the ADA than under parts of the Rehabilitation Act. Because the issue of when a reasonable accommodation may contravene the provisions of an otherwise applicable collective bargaining agreement remains unclear, the EEOC plans to promulgate guidelines on this subject (among others).

D. Qualified Individual with a Disability

Only a "qualified individual with a disability" is protected from discrimination under title I. A "qualified individual with a disability" is defined in title I as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the position . . . ." The regulations promulgated pursuant to title I provide that a "qualified individual with a disability" is a person with a disability "who satisfies the requisite skill, experience, education and other job-related requirements of the employment position . . . and who, with or without reasonable accommodation, can perform the essential functions of such position." The term "other job-related requirements" is intended to recognize that other factors, in addition to skill, experience, and education, may be relevant to determining whether an individual is qualified for a position.

The appendix to the regulations notes that a two-step procedure should be followed when determining whether an individual with a disability is qualified. The first step is to determine whether the individual satisfies the job prerequisites. The second step is to determine whether the individual can perform the essential functions of the job with or without reasonable accommodations. The determination as to whether the individual is qualified "should be based on the capabilities of the individual with a disability at the time of the employment decision, and should not be based on speculation that the employee may become unable in the future or may cause increased health insurance premiums or workers compensation costs."


116. See, e.g., H.R. REP. 485, pt. 2, supra note 87, at 63 ("The Section 504 regulations provide that 'a recipient's obligation to comply with this subpart [employment] is not affected by any inconsistent term of any collective bargaining agreement to which it is a party.' 45 C.F.R. 84.11(c). This policy also applies to the ADA . . . .").

117. 42 U.S.C.A. § 12112(a).

118. Id. § 12111(8).

119. 29 C.F.R. § 1630.2(m) (1992).

120. 56 Fed. Reg. 35,728 (1991) (section-by-section analysis of 29 C.F.R. § 1630.2(m)).

121. 29 C.F.R. § 1630.2(m) app.

122. Id.
E. Essential Functions

Title I of the ADA, like section 504, defines a "qualified individual with a disability" as one "who, with or without reasonable accommodation, can perform the essential functions" of the job in question. The term "essential functions" means "job tasks that are fundamental and not marginal." By way of illustration, the House Judiciary Report explains that employers cannot require that employees possess drivers' licenses unless the ability to drive is essential to the job. Suppose, for example, that a counselor at a juvenile hall is epileptic and does not possess a driver's license. Suppose, further, that in emergencies counselors are required to transport juveniles to the hospital or for court appearances. Although it would be necessary for some counselors to be able to drive, it would not be essential that all counselors be able to drive. Thus, possession of a driver's license would not constitute an essential function of a counselor's job, and it would violate the ADA to fire or to refuse to hire the counselor with epilepsy based on his or her lack of a driver's license.

Moreover, the term "essential functions" refers only to the tasks to be performed, and not to the manner in which those tasks are performed. Thus, the House Judiciary Report explains:

[In a job requiring the use of a computer, the essential function is the ability to access, input, and retrieve information from the computer. It is not "essential" that a person be able to use the keyboard or visually read the information from a computer screen. Adaptive equipment or software may enable a person with no arms or a person with impaired vision to control the computer and access information.]

It should be noted, however, that the House Judiciary Report further provides that:

consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

The employer's definition of the essential functions of the job, while of evidentiary value, is not presumed to be correct.

123. 42 U.S.C.A. § 12111(8).
126. Id.
127. Id.
128. Id.; see also 29 C.F.R. § 1630.2(n) (noting that evidence of whether a particular function is essential includes, inter alia: (i) The employer's judgment as to which functions are essential; (ii) written job descriptions prepared before advertising or interviewing applicants for a job). A similar provision is not incorporated into the regulations promulgated under section 504.
129. A proposed amendment to the ADA that would have created a presumption in favor of the employer's definition of the essential functions of a job was rejected by Congress. See, e.g., H.R. Rep. No. 485, pt. 3, supra note 72, at 33.
Other factors to review when resolving the essential functions issue include:

(iii) the amount of time spent on the job performing the function;
(iv) the consequences of not requiring the incumbent to perform the function;
(v) the terms of a collective bargaining agreement;
(vi) the work experience of past incumbents in the job; and/or
(vii) the current work experience of incumbents in similar jobs.  

None of these factors is determinative of the issue, but all are relevant.

The title I regulations cite several factors that may lead to the conclusion that a job function is essential:

(i) The function may be essential because the reason the position exists is to perform that function;
(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or
(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

These factors are not intended to be exclusive.

F. Safety Defense

Title I of the ADA, like section 504, recognizes a "safety" defense for employers. Thus, the Act provides that an individual with a disability is not qualified for a job if he or she poses a direct threat to the health or safety of other individuals in the work place. The term "direct threat" is defined as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." The regulations promulgated by the EEOC under title I explain that a determination that an individual with a disability poses a "direct [health or safety] threat" must be made on a case-by-case basis, through consideration of the following factors:

(1) the duration of the risk;
(2) the nature and severity of the potential harm;
(3) the likelihood that the potential harm will occur; and

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130. 29 C.F.R. § 1630.2(n)(3); see also H. REP. No. 596, 101st Cong. 2d Sess. 58 (1990).
131. 29 C.F.R. § 1630.2(n)(2). These factors are self explanatory. Factor one simply codifies the principle that if an employee is hired to repair computers he or she must know how to repair computers, because that is the reason the job was created. Factor two codifies the principle that if an employer has only a small number of employees, and requiring those employees to perform so many of the functions of the plaintiff's job would reduce the efficiency of their jobs (and, in some cases, cause safety concerns), such accommodation is not required. Factor three codifies the position that if an employer hires a computer programmer because of the employee's expertise with a particular computer language, the employee must be able to program computers in that language.
132. Id.
133. 42 U.S.C.A. § 12113(b).
134. Id. § 12111(3).
(4) the imminence of the potential harm.\textsuperscript{135}

This individualized inquiry "must be based on the behavior of the particular disabled person, not merely on generalizations about the disability."\textsuperscript{136} Thus, the ADA rejects the broad notion that the fact that a particular disability may pose a statistically significant risk of harm is sufficient ground to hold the safety defense satisfied. Rather, an assessment as to whether an individual who is disabled would pose a direct safety threat must be based on objective evidence, including valid medical analyses and individualized factual data relating to a specific safety risk.

Interestingly, although the Act itself provides only that an employer need not hire or promote an individual with a disability who poses a direct threat to the health or safety of others in the work place,\textsuperscript{137} the regulations further provide that an individual is not qualified for a job if he or she would pose a direct threat to the health or safety of the individual or others. According to the regulations, a "direct threat" means "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."\textsuperscript{138} Permitting a focus on the health or safety of the individual with a disability will greatly expand the safety defense of employers, and could encourage the very type of paternalistic attitudes that the ADA was intended to eradicate.\textsuperscript{139} In this regard, the regulations exceed the scope of the Act.\textsuperscript{140}

The ADA requires the Secretary of Health and Human Services, no later than six months after the enactment of the Act (January 26, 1991), to:

\textsuperscript{135} 29 C.F.R. § 1630.2(r) (1992). This regulation simply codifies the standard set forth by the Supreme Court for dealing with safety defenses under section 504. See Arline v. School Bd. of Nassau County, 480 U.S. 273 (1987).
\textsuperscript{137} See supra note 133 and accompanying text.
\textsuperscript{138} 29 C.F.R. § 1630.2(r).
\textsuperscript{139} See, e.g., 42 U.S.C.A. § 12101(a)(5). That section provides that a basic premise of the ADA is to eliminate "overprotective rules and policies" that have the effect of discriminating against persons with disabilities.
\textsuperscript{140} The drafters of the regulations opine that the words "or reduced" serve to clarify "that the risk need not be eliminated entirely to fall below the direct threat definition; instead, the risk need only be reduced to the level at which there no longer exists a significant risk of substantial harm." 56 Fed. Reg. 35,730 (1991) (section-by-section analysis of 29 C.F.R. § 1630.2(r)). Moreover, the drafters find it significant that this section applies to all employees, not just to employees with disabilities (despite the fact that the ADA only applies to people with disabilities). Id.; 29 C.F.R. § 1630 app. In the opinion of the author, these factors do not eliminate the serious concern that the regulation exceeds the scope of the ADA.

Further, the EEOC's safety regulations appear to contravene the Supreme Court's ruling in International Union, United Automobile, Aerospace & Agriculture Implement Workers of America, UAW v. Johnson Controls, Inc., 111 S. Ct. 1196 (1991). In that case the Court held that Johnson's policy of barring all fertile women from jobs involving actual or potential lead exposure that exceeded standards set by the Occupational Safety and Health Administration ("OSHA") violated title VII. The Court held that title VII prohibits employers from denying employment opportunities to a woman based on the view that a job posed a risk to the safety of the woman, unless the woman is unable to perform the job. Since the enforcement section of title I of the ADA is premised on and patterned after title VII, the same principle should apply under the ADA, unless the Act itself expressly states otherwise.
(A) review all infectious and communicable diseases which may be transmitted through handling the food supply;
(B) publish a list of infectious and communicable diseases which are transmitted through handling the food supply;
(C) publish the methods by which such diseases are transmitted; and
(D) widely disseminate such information regarding the list of diseases and their modes of transmissibility to the general public.
Such list shall be updated annually.141

If an individual has an infectious or communicable disease that can be transmitted through the handling of food—as included on the DHHS list—and the risk of transmission cannot be eliminated by the provision of reasonable accommodation(s), the Act provides that “a covered entity may refuse to assign or continue to assign such individual to a job involving food handling.”142

Prior to the final passage of the ADA, an attempt was made to amend the Act to permit employers to discriminate at will against persons with infectious diseases (such as AIDS) with respect to jobs involving the handling of foods.143 After much controversy, that proposed amendment was deleted from the final version. The ADA is premised on the philosophy that absent an actual (rather than imagined) threat, an employer cannot refuse to hire a person with a disability based on fears relating to safety.144 For example, an individual with AIDS, which the medical profession (and the DHHS) states is not transmitted by casual contact, will generally not fall within the safety exception to the ADA and will, therefore, be protected from employment discrimination under the ADA—even with respect to food-handling jobs (unless, of course, DHHS changes its position and includes AIDS on its list of diseases transmittable through the handling of food).

The DHHS seemed to have great difficulty formulating the requisite list. On May 16, 1991, almost four months after the January 26 statutory deadline, DHHS published a notice of interim list and request for comments regarding infectious and communicable diseases that are transmitted through handling the food supply and the methods by which such diseases

141. 42 U.S.C.A. § 12113(d)(1)(A), (B), (C), (D).
142. Id. § 12113(d)(2).
144. The Joint Explanatory Statement of the Committee of Conference explains that the provisions allowing employers to preclude only those persons having infectious diseases contained on a list to be compiled by the Secretary of DHHS from working at jobs involving the handling of food carry out:

both the letter and the spirit of the underlying requirements of the ADA. Instead of allowing false perceptions to determine whether an employee may remain in a particular job, this provision ensures that valid public health guidelines, rather than false perceptions, will determine the protections afforded under this title. In addition, and of critical importance, this provision should reassure the American public by requiring the Secretary to evaluate this area carefully by reviewing all communicable diseases and by publishing a list of diseases that are transmitted through food handling and by ensuring that the American public will be educated regarding those diseases which are transmitted through the handling of food.

are transmitted. The only substantive information contained in the notice stated that: (1) "Pathogens that can cause diseases after an infected person handles food are . . . : Hepatitis A virus, Norwalk and Norwalk-like viruses, Salmonella typhi, Shigella species, Staphylococcus aureus, Streptococcus pyogenes;" and (2) "Preventing food contact by persons who have an acute diarrheal illness will decrease the risk of transmitting the following pathogens: Campylobacter jejuni, Entamoeba histolytica, Enterohemorrhagic Escherichia coli, Enterotoxigenic Escherichia coli, Giardia lamblia, Nontyphoidal Salmonella, Rotavirus, Vibrio cholerae 01, Yersinia enterocolitica." Subsequently, on August 16, 1991, the DHHS published its final list. The final list includes the same pathogens included in DHHS's proposed list.

G. Employment Tests/Criteria

To ensure that misconceptions do not bias the employee merit selection process, the ADA, like section 504, provides that employers may not utilize employment tests or criteria that tend to screen out people with disabilities unless such criteria are shown to be job-related and consistent with business necessity. Selection criteria that exclude people with disabilities and do not concern an essential function of the job are not consistent with business necessity. Moreover, even selection criteria that are related to an essential job function may not be used to exclude a person with a disability if that person could satisfy the criteria with the provision of reasonable accommodations.

Employers must select and administer employment tests in a manner that will ensure that such tests accurately reflect the skill or aptitude of the applicant or employee, rather than reflecting any impaired sensory, manual, or speaking skills of the applicant or employee. When an applicant or employee has a disability that is known to the employer, where necessary the employer must provide reasonable accommodations for the test-taker (such as substituting an oral test for a written test for an applicant or employee who is blind or dyslexic). Where it is not possible to test in an alternative format, the employer may be required to test the applicant or employee in another manner (such as via licensing or work experience requirements). If an applicant or employee does
not realize that an accommodation is required and thus does not request accommodation, retesting should be performed upon request unless to do so would constitute an undue hardship to the employer. An employer, however, may ask on a test announcement or application form that individuals who require accommodation inform the employer within a reasonably established time prior to the test. Moreover, the employer may request documentation of the need for an accommodation.

It is important to realize that these rules do not apply when employment tests are actually intended to measure the sensory, manual, or speaking skill at issue. Thus, for example, if a test is designed to measure the ability to read, an individual with dyslexia may be required to take the written test; if speed is being tested, no extra time must be provided to the test-taker. In no event, however, may test results be utilized to exclude an applicant or employee unless the skill measured is necessary to perform an essential function of the job and no reasonable accommodation is possible to allow the individual to perform that function.

H. Medical Examinations and Inquiries

Employers may not conduct pre-employment medical examinations of an applicant or make inquiries of a job applicant or employee regarding whether such individual has a disability. But employers may make pre-employment inquiries into the ability of an applicant to perform job-related functions, regardless of whether such job functions are essential or non-essential. As previously explained, however, an employer may not refuse to hire an applicant due to the applicant’s inability to perform non-essential job functions.

An employer may require an employee with a disability to submit to a medical examination after he or she has been hired, and may condition an offer of employment on the results of such a medical examination when all entering employees, regardless of disability, are subjected to such an examination. Information about the medical history or condition of the applicant or employee must be kept in separate medical files and treated as confidential and may only be divulged in the following circumstances:

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

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155. Id. at 35,749-50.
156. See 56 Fed. Reg. 35,750 (section-by-section analysis of 29 C.F.R. § 1630.14(a)).
157. Id.
159. Id. at 35,750.
160. Id.
163. 42 U.S.C.A. § 12112(c)(3).
(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and
(iii) government officials requesting compliance with this Act shall be provided relevant information on request.¹⁶⁴

Further, the results of such examinations may not be used for any purpose inconsistent with the ADA.¹⁶⁵

Medical examinations and inquiries may be conducted of employees after they have begun working if such examinations and inquiries are job related and consistent with business necessity.¹⁶⁶ The same restrictions noted in the previous paragraph with respect to post-offer medical examinations and inquiries apply.¹⁶⁷ This provision allows an employer, *inter alia*, to make inquiries or require medical examinations necessary to determine what reasonable accommodations are required and may be provided to an employee with a disability.

Voluntary medical examinations and medical histories may be obtained by an employer as part of an employee health program available to employees at the work site.¹⁶⁸ Again, however, the same restrictions noted when discussing post-offer examinations and inquiries apply.¹⁶⁹

I. Providing Harassment Free Environments

Title V of the ADA provides, *inter alia*, that:

> It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this act.¹⁷⁰

This proviso should be interpreted as requiring an employer to provide harassment free environments for employees with disabilities. By way of example, an employer would bear responsibility for prohibiting employees without disabilities on its work force from harassing employees with disabilities.¹⁷¹

¹⁶⁴. 42 U.S.C.A. § 12112(c)(3)(B), (C); 29 C.F.R. § 1630.14(b).
¹⁶⁵. 42 U.S.C.A. § 12112(c)(3)(B), (C); 29 C.F.R. § 1630.14(b).
¹⁶⁷. See, e.g., 29 C.F.R. § 1630.14(c).
¹⁶⁸. Id. § 1630.14(d).
¹⁶⁹. Id. Note that physical agility tests are not medical tests and may thus be given at any point in the application or screening process. See 56 Fed. Reg. 35,750 (1991) (section-by-section analysis of 29 C.F.R. § 1630.14(a)). If such a test screens out or tends to screen out individuals with disabilities, however, the employer will have to show that the test is job-related and consistent with business necessity and that performance cannot be achieved with reasonable accommodation. Id.
¹⁷⁰. 42 U.S.C.A. § 12203(b).
¹⁷¹. According to Christopher Bell, Acting Associate Legal Council for ADA Services at the EEOC, the EEOC interprets this provision in the same manner. Telephone conversation with Christopher Bell (Sept. 26, 1991).
J. Enforcement of Title I

The EEOC is responsible for overseeing and enforcing the employment discrimination provisions of the ADA. The EEOC was required to issue regulations to carry out title I within one year of the ADA's enactment. In addition, the EEOC is obligated to work in conjunction with the Offices of Civil Rights of all agencies having enforcement authority under the Rehabilitation Act of 1973 (primarily section 504) to ensure that administrative complaints filed under both Acts are "dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements [under the two Acts]."

Title I of the Act provides that the powers, remedies, and procedures set forth in sections 705, 706, 707, 709, and 710 of the Civil Rights Act of 1964 (commonly known as title VII of the Civil Rights Act) are available to the EEOC, to the Attorney General, and to "any person alleging discrimination" in violation of the employment provisions of the ADA or regulations promulgated thereunder. Thus the Act contemplates both governmental and individual enforcement of the employment provisions. Before an individual may take judicial action against a covered entity under this section, however, administrative remedies must be pursued, just as they must be pursued under title VII.

Until promulgation of the Civil Rights Act of 1991, the only remedies available under title VII were equitable in nature, and generally included injunctive relief (including orders requiring reinstatement or hiring of employees) and awards of back pay (and in some cases front pay).

177. See, e.g., H.R. Rep. No. 485, pt. 3, supra note 72 at 491. Under the title VII procedures that must be followed under the ADA, an employee who claims to have been discriminated against on the basis of disability must file a charge with a state agency having jurisdiction over the alleged discriminatory action, and may then file a claim with the EEOC within 300 days after the conduct at issue. An individual may not file suit with the EEOC under title VII before the expiration of sixty days after proceedings have been commenced under state or local law unless the proceedings have been terminated. 42 U.S.C. § 2000e-5(c), (e) (1982). If no state agency has jurisdiction, the individual must file a charge with the EEOC within 180 days of the alleged discriminatory conduct. Id. § 2000e-5(c). The EEOC then has 180 days to seek a conciliation agreement from the employer or to file judicial action. Id. § 2000e-5(b). At the expiration of the 180 days the individual is entitled to a "right to sue" letter from the EEOC, whereupon the individual may sue the employer in federal district court within 90 days of receipt of the letter. Id. § 2000e-5(f)(1).

It should be noted that the Supreme Court has held that state and federal courts have concurrent jurisdiction over matters arising under title VII. Yellow Freight System Inc. v. Donnelly, 494 U.S. 820 (1990). Because the ADA's title I enforcement provisions follow title VII this same rule should apply under title I.

179. It has been held that courts have the discretion to award title VII plaintiffs front pay "to compensate a victim for the continuing future effects of discrimination until the victim can be made whole." Carter v. Sedgwich County, 929 F.2d 1501, 1505 (10th Cir. 1991).
The remedies available for disparate impact discrimination under title VII, and thus under the ADA, remain equitable in nature. Under the Civil Rights Act of 1991, however, Congress provided for compensatory and punitive damages to be awarded in title VII cases, and cases arising under the ADA, against an employer who engages in unlawful intentional discrimination. Where an employer is found liable for intentional discrimination, a plaintiff may recover—in addition to equitable remedies—compensatory damages ("for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses") and punitive damages not to exceed the combined amount of: (a) $50,000 when the defendant employer has between 15 and 100 employees, inclusive, in each of twenty or more calendar weeks in the current or preceding calendar year; (b) $100,000 when the defendant employer has between 101 and 200 employees, inclusive, during that period; (c) $200,000 when the defendant employer has between 201 and 500 employees, inclusive, during that period; or (d) $300,000 when the defendant employer has more than 500 employees during that period. The Civil Rights Act expressly provides, however, that where a discriminatory practice involves the provision of reasonable accommodation pursuant to the ADA, damages may not be awarded where the employer:

- demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

While a plaintiff claiming intentional discrimination in a title VII or ADA action may seek punitive damages against a respondent, punitive damages are not available against "a government, government agency or political subdivision." Moreover, punitive damages are only available when the plaintiff meets its burden of proving that "the respondent engaged in a discriminatory practice ... with malice or with reckless indifference to the federally protected rights of an aggrieved individual." The right to seek damages for intentional employment discrimination applies in all cases, regardless of whether the complaining party is the EEOC, the Attorney General, or an individual plaintiff. Further, when

181. Id.
182. Id. The number of employees in each category includes part-time and temporary employees. See Memorandum from Evan J. Kemp, Jr., EEOC Chairman (Dec. 27, 1991) (on file with the author).
183. 42 U.S.C.A. § 12112(b)(5). For a discussion of this provision, see supra notes 94-106 and accompanying text.
184. S. 1745, 101st Cong., 1st Sess. § 102, 137 CONG. REC. S15504.
185. Id.
186. Id.
187. Id. Because the damage provisions appear in an amendment to 42 U.S.C. § 1981, complaining parties must make their claims for damages under that statute rather than directly under the ADA.
a plaintiff seeks damages under the Civil Rights Act of 1991, any party may demand a trial by jury and the court is precluded from informing the jury of the monetary limitations upon damage awards. 188

The ADA expressly provides that, in any action or proceeding under the Act, the court or agency has discretion to award attorneys’ fees to any prevailing party other than the United States. 189 Such fees may be assessed against the United States to the same extent that they may be assessed against private individuals or entities. 190 Attorneys’ fees are also available to plaintiffs who prevail on their claims for damages under the Civil Rights Act of 1991. 191

K. Effects of Title I

Prior to enactment of the ADA, the employment provisions of the Act were criticized by various commentators as opening the door to a never-ending stream of litigation over the vagaries of such terms as “reasonable accommodations,” "otherwise qualified,” “essential functions,” and “undue hardship.” The Act was called “a lawyer’s dream” that “would create thousands of court cases.” 192 Critics contended that while the Civil Rights Act of 1964 focuses on consideration and cooperation, the ADA “encourages adversarial relations, with direct resort to civil litigation the preferred approach.” 193 The Wall Street Journal went so far as to call the ADA the “Lawyer’s Employment Act.” 194 Indeed, immediately after the Act’s passage an attorney specializing in employment law termed the Act a “lawyer’s dream and an employer’s nightmare.” 195

While those comments appear extreme, it is clear that litigation will ensue as a result of the Act’s passage, just as it has arisen under all civil rights laws. Case law relating to section 504 will prove very helpful in resolving issues arising under the ADA, and should lessen the need for excessive litigation because the two Acts contain many of the same

188. Id. It should be noted that during congressional discussions about the ADA, several amendments were proposed that would have excluded people with disabilities—as covered under the ADA—from the benefits of the proposed Civil Rights Act of 1990, the predecessor to the Civil Rights Act of 1991. Congress refused to adopt those proposed amendments to the ADA, on the ground that people with disabilities should be entitled to the same rights and the same remedies for discrimination as those available to members of other minorities. See, e.g., 136 Cong. Rec. H 2611-2623 (May 22, 1990) (Senate discussion, vote, and rejection of the Senenbrenner Amendment to the ADA).

189. 42 U.S.C.A. § 12205. Note, however, that attorneys' fees against a plaintiff will only be awarded if the suit is found to be "frivolous, unreasonable, or groundless." H.R. REP. No. 485, pt. 2, supra note 87, at 140.

190. Id.


192. Elsasser, supra note 4, at 4 (quoting Sen. David Pryor (D. Ark.)).


requirements and use many of the same terms. Moreover, as Congress obviously recognized, the fact that litigation might result did not provide sufficient reason for denying passage of a law that was needed to redress injustices in the lives of Americans with disabilities.

Critics also contended that the ADA, particularly the Act’s employment provisions, would impose unfair and unwarranted costs upon the private sector. Congress was accused of enacting the ADA to impose an “invisible tax” on businesses. The same commentator accused Congress of “escaping the budget pinch” by “load[ing] costly burdens on the private sector, to be paid for with private dollars.” In the employment context, it was remarked that the ADA was a ploy:

which will force employers to spend unknown sums to accommodate handicapped employees and customers. If Congress were forced to pay the costs out of the Treasury, taxpayers would be howling at the potentially crushing load. By putting the burden on employers, Congress can portray the benefits as manna falling miraculously from Capitol Hill.

These comments evidence the very attitude that necessitated passage of the ADA. Rather than constituting an invisible tax upon businesses, the employment provisions of the ADA are intended to overturn the effects of the stereotypical, prejudicial, and frequently unfounded beliefs as to the lack of capabilities of people with disabilities. The practical effect of the ADA’s employment provisions—assuming that they are enforced adequately—could be to enable over eight million workers with disabilities to enter the work force, thereby removing those individuals from government subsidy rolls and empowering them to become contributing, taxpaying members of society.

The overall cost of the law to employers should be minimal. Larger employers were given two to four years to devise means of complying with the Act, which was intended to allow sufficient time to implement routine or general policies; with respect to specific accommodations, only reasonable accommodations are required. And, smaller employers—those with fewer than fifteen employees—will never have to comply. Moreover,

197. Chapman, supra note 196.
198. Id.
199. The Report of the Senate Committee on Labor and Human Resources concludes that “about 8.2 million people with disabilities want to work but cannot find a job.” Senate Committee Report, supra note 8, at 9.
200. Moreover, under the Revenue Reconciliation Act of 1990 (I.R.C. § 44) a tax credit is available to “an eligible small business for expenditures incurred to make the business accessible to disabled individuals.” An “eligible small business” is one with gross receipts for the preceding tax year that did not exceed $1 million, or one that had no more than 30 full-time employees during the preceding tax year. The tax credit “is equal to 50 percent of the amount of the eligible access expenditures for that year that exceed $250 but do not exceed $10,250.” See 48 CCH Special 5, Revenue Reconciliation Act of 1990, Nov. 6, 1990, at pp. 52, 155; 47 CCH Special 3, Revenue Reconciliation Act of 1990, Oct. 29, 1990, at pp. 151-57. Eligible expenses include expenditures for: (i) removal of architectural, communication or transportation barriers; (ii) aids for hearing and/or visually impaired persons, such as interpreters or readers; and (iii) modification or obtainment of equipment or devices for disabled employees.
the ADA does not contain an affirmative action component. Employers are not required to affirmatively seek to hire employees with disabilities. Congress made clear when passing the ADA that the ADA was *not* intended to "undermine an employer's ability to choose and maintain qualified workers." Rather, under the ADA "an employer is still free to select the most qualified applicant available and to make [employment] decisions based on reasons unrelated to the existence or consequence of a disability."202

On February 28, 1991, the EEOC issued proposed regulations with respect to title I of the Act.203 The proposed regulations contain an extensive preliminary Regulatory Impact Analysis.204 This preliminary analysis discusses several major issues:

The analysis estimates that fifteen million additional employees—not protected by the Rehabilitation Act or state statutes—will be protected by the ADA.205 A study conducted by the EEOC led to the conclusion that "[t]itle I is expected to increase productivity because employers will use a larger labor pool, and there will be more optimal investments in human capital."206 The EEOC estimates the increased productivity resulting from implementation of title I of the ADA as $164,430,000 per year.207 Further, the EEOC opines that, assuming the very "modest estimate of [yearly] tax and support savings of $8,000 per worker," if the two-thirds of working-age persons with disabilities who wanted to work, but could not find employment prior to the ADA, are employed following implementation of the ADA, the resulting tax and support savings will be $221,760,000 per year.208 Even after subtracting an estimated $16,443,000 for reasonable accommodation expenses209 and

201. Senate Committee Report, supra note 8, at 26.
202. *Id.* It should be noted that, in conjunction with the employment provisions of the ADA, the Medicaid-Buy-In plan that became effective in July 1990 will assist some persons with disabilities in entering the work force. Prior to July 1990, persons on social security disability income (SSDI) who worked more than 48 months would lose their Medicaid benefits. 20 C.F.R. §416.260 (1989). Medical expenses—including costs for periodic hospitalization, medicine and supplies—can be so extensive for some persons with disabilities that, when faced with the potential loss of Medicaid benefits, individuals might have found themselves financially unable to work in spite of the job opportunities made available as a result of the ADA. Many disabled people could simply not afford to work longer than 48 months if that meant they would lose their Medicaid benefits. Under the law effective as of July 1990, however, SSDI beneficiaries may continue their Medicaid Part A benefits (which include inpatient hospitalization, skilled nursing facility care and home health care) by paying the cost of the premiums themselves. 42 U.S.C.A. §§ 1395i-2a (West Supp. 1990). Moreover, those persons with disabilities with low earning power are entitled to receive a Medicaid subsidy to cover all or part of the premium.
206. *Id.* at 8584.
207. *Id.*
208. *Id.* at 8585.
209. The impact analysis noted that this estimate may be excessively high due to a variety of factors, including the facts that: (a) an initial expenditure for an accommodation may be used to assist more than one employee at a time, as well as future employees; (b) reasonable accommodation
$25,000,000 for expenses incurred in administering title I, the EEOC notes that "the cost benefit ratio of title I is clearly positive." If title I of the Act is not implemented, the EEOC estimates the annual total benefits lost at a minimum of $386,190,000.

The proposed Regulatory Impact Analysis concludes that the employment provisions of the ADA are:

unlikely to have a significant economic impact on smaller entities. Because small entities employ fewer workers, the chance that an individual small business will be required to make reasonable accommodation is quite low. Further, the availability of tax credits, the two year exemption period and the lack of reporting requirements all reduce the economic effect of the rule on these firms.

Subsequently, on July 26, 1991, the EEOC issued final regulations under title I of the Act. These regulations do not contain a final Regulatory Impact Analysis. That final Analysis was scheduled to be issued prior to January 1, 1992. Nevertheless, in its final regulations issued on July 26, 1991, the Commission "certif[ied] that this final rule will not have a significant economic impact on a substantial number of small businesses."  

L. Glass Ceiling Act of 1991

In November 1991, as part of the Civil Rights Act of 1991, Congress passed, and President Bush signed, the Glass Ceiling Act of 1991. Congress recognized that women and minorities (including people with disabilities) remain underrepresented in management and decisionmaking positions in business, and face artificial barriers that preclude their advancement in the work place. In an effort to remedy this situation, Congress established a Glass Ceiling Commission to conduct a study and prepare recommendations concerning ways of eliminating artificial barriers, and of increasing the opportunities and developmental experiences of women and minorities to foster the advancement of such individuals to management and decisionmaking positions in business. In addition, an annual award will be established to recognize businesses "for excellence in promoting a more diverse skilled work force at the management and position in business."

estimates are based on experience implementing section 503 of the Rehabilitation Act which, unlike title I of the ADA, requires affirmative action with respect to the hiring of people with disabilities; and (c) the estimates do not account for tax deductions or tax credits available to firms making accommodations.

211. Id.
212. Proposed regulations, Executive Summary, 56 Fed. Reg. 8579 (1991); see also proposed regulations, Impact on Smaller Businesses, Id. at 8586.
215. Id.
217. Id. § 203.
decisionmaking levels in business.' The award shall be titled the "Francis Perkins-Elizabeth Hanford Dole National Award for Diversity and Excellence in American Executive Management." Businesses qualifying for the award include corporations (both for-profit and non-profit), partnerships, professional associations, labor organizations, education referral programs, training or similar programs, and joint programs formed by a combination of such entities.

IV. TRANSPORTATION

Congress recognized that access to public transportation services is imperative for Americans with disabilities. Generally, public bus transportation is the only travel available to poor or rural Americans, and Americans with disabilities are "three times more likely to fall below the Federal poverty line than non-disabled Americans" and "live in rural areas in higher concentrations than the nondisabled." Moreover, because people with disabilities often have low incomes and are unable to afford the cost of private cars (much less the cost of specially equipped private cars for some persons with mobility-impairments), and because some disabilities (blindness, for example) preclude people from driving, people with disabilities must often rely heavily upon public transportation to conduct their daily lives. Thus, as one commentator has noted:

To have less than adequate accessible public transportation services for an individual who is protected from discrimination in employment, or who has received other numerous federally funded services, is analogous to throwing an 11-foot rope to a drowning man 20 feet offshore and then proclaiming you are going more than halfway.

The Senate Committee on Labor and Human Resources has recognized that "access to transportation is the key to opening up education, employment, [and] recreation," and thus it is imperative that we have an "accessible public transportation system in this country." Yet, despite the necessity for us to provide these non-discriminatory public transportation services, Americans with disabilities continue to confront serious discrimination in that area. By way of example, as of early 1990 very few rail and only approximately one-third of the public buses in this country were accessible to riders with disabilities.

218. Id. §§ 202(b)(2), 205.
219. Id. § 205(a).
220. Id. § 205(d).
222. Id.
223. Senate Committee Report, supra note 8, at 13 (testimony of Harold Russell on behalf of the President's Committee on Employment of People With Disabilities).
224. Id. at 13.
225. According to John Cikota, Chief, Passenger Service Division, Federal Railroad Administration, at best only about 20% of the country's passenger rail stations were accessible to people with disabilities in early 1990. Moreover, in 1989 the American Public Transit Authority conducted a survey of its approximately 375 member transit companies. Three hundred and two companies responded to the survey. Of the 52,888 buses possessed by those companies, 19,087, or 36%, were equipped with lifts or ramps for wheelchair access.
The transportation provisions of the ADA, therefore, constitute a major hub of the Act. Those provisions are found in both titles II and III of the Act.

A. Title II: Public Entities

Title II of the ADA deals with the provision of public transportation by public entities. The term "public entity" is defined as including any state or local government (including any department, agency, or other instrumentality of such government) and the National Railroad Passenger Corporation and any rail commuter authority.

To ensure effective implementation of this part of the Act, Congress required the Attorney General to promulgate regulations for carrying out the provisions of title II. Such regulations were to be consistent with the regulations enacted under section 504 of the Rehabilitation Act. Moreover, the regulations must include standards with respect to covered facilities and vehicles that are consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board under the Architectural Barriers Act.

1. Part I of Division B of Title II

Part I of division B of title II covers "public transportation" provided by bus or by rail (excluding commuter rail services, which are covered by part II of division B of title II, and excluding public school transportation), or by any other conveyance (such as vans or limousines), not including air travel, that provides the general public with transportation services on a regular basis. The major components of part I provide as follows:

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226. 42 U.S.C.A. §§ 12131(1)(A), (B), (C).
227. Id. § 12134(a). Regulations were promulgated on September 6, 1991. See 49 C.F.R. §§ 27, 37, 38.
228. 42 U.S.C.A. § 12134(b).
230. 42 U.S.C. §§ 4151-4157 (1982). The Architectural Barriers Act authorized three federal agencies to promulgate standards with regard to the design, construction and alteration of federally owned, leased, or financed buildings to allow ready access to and use by people with disabilities.
231. The exemption for public school transportation "also applies to transportation of pre-school children to Head Start or special education programs which receive Federal assistance." 49 C.F.R. § 37.27 app.; see infra note 354 and accompanying text for the responsibilities of private school transportation systems under the Act.
233. 42 U.S.C.A. § 12141(2). It is important to note that while public entities are free to enter into contracts with private entities for the latter to provide transportation services, in such a case the private entity "stands in the shoes" of the contracting public entity. See 49 C.F.R. § 37.23. That section provides that the public entity may not contract away its responsibilities under the ADA. Rather, the private entity performing services for the public entity must meet the requirements of the Act applying to the provision of transportation services by public entities. Note that employer-provided transportation for employees is not covered by either titles II or III of the ADA but is covered by regulations promulgated by the EEOC under title I of the ADA.
a. New Vehicles

All new buses or rail vehicles solicited for purchase or lease by public entities operating fixed route systems must be "readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs." Thus, new buses and rail systems must be fitted with lifts or ramps and fold-up seats or other wheelchair spaces with appropriate securement devices. An exception to this rule is made where lifts for new vehicles are unavailable despite good-faith efforts by the public entity to locate them. A public entity must apply for any such exemption to the Secretary of Transportation, however, and any exemption granted will be temporary and limited in duration by a specified date.

b. Used Vehicles

A public entity operating a fixed route system that purchases or leases a used vehicle must demonstrate good-faith efforts to purchase or lease a used vehicle that is readily accessible to and usable by individuals with disabilities.

c. Remanufactured Vehicles

A public entity operating a fixed route system that remanufactures a vehicle so as to extend its life for five years, or purchases or leases such a remanufactured vehicle, shall ensure that "to the maximum extent feasible," the vehicle is readily accessible to and usable by individuals with disabilities.

d. Paratransit Services

If a public entity operates a public transportation fixed route system that is not accessible to certain people with disabilities, the entity must provide paratransit or other special transportation services sufficient to provide a "comparable level of services" to people with disabilities and their companions as that provided to persons without disabilities, unless the provision of such services would constitute an "undue financial

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234. A "fixed route system" is defined as "a system of providing designated public transportation on which a vehicle is operated along a prescribed route according to a fixed schedule." 42 U.S.C.A. § 12141(3).

235. Id. § 12142(a). A violation of this requirement constitutes a violation of both the ADA and section 504 of the Rehabilitation Act. Id.

236. Id. § 12145(a)(2).

237. Id. § 12145(a), (b).

238. Id. § 12142(b). A violation of this requirement constitutes a violation of both the ADA and section 504 of the Rehabilitation Act. Id.

239. Id. § 12142(c)(1)(A), (B). An exception is made for "historic vehicles," however, if alteration of the vehicle would significantly alter the historic character of the vehicle. Id. § 12142(c)(2). Again, a violation of the rule regarding remanufactured vehicles will constitute a violation of both the ADA and section 504 of the Rehabilitation Act.

240. The term "paratransit" is not defined in the Act. Generally, however, paratransit services are those provided by van, taxi, car, or limousine rather than by bus or rail.

burden." If the provision of comparable special transportation services would, in the opinion of the Secretary of Transportation, constitute an undue financial burden, the entity must provide such services to the extent that to do so would not impose an undue financial burden. The Secretary also has the discretion to require a public transit authority to provide paratransit services beyond those required by this section.

Four parameters relating to the provision of paratransit services are worthy of note. First, this section of the Act does not require a public entity that only provides commuter bus service to provide paratransit services. Second, this section requires only that public entities respond to the request of persons with disabilities for paratransit services “to the extent practicable” to meet the comparable level of services provided to individuals without disabilities. This provides the entity with considerable leeway. Third, public entities are required to provide paratransit services for persons with disabilities only in three circumstances: (1) when an individual’s disability precludes him or her from boarding, riding, or disembarking on or from accessible transportation vehicles without the assistance of another individual; (2) when a person with a disability requires an accessible transportation vehicle during the hours of operation of the fixed route service, but an accessible vehicle is not being provided during the time that the disabled individual requires transportation services; and (3) when an individual’s disability prevents him or her from traveling to a boarding or disembarking location and he or she is thus unable to utilize public transportation services. Finally, the requirement

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242. Id. § 12143(c)(4). A violation of these provisions constitutes a violation of both the ADA and section 504 of the Rehabilitation Act. Id.
243. Id.
244. Id. § 12143(c)(5).
245. Id. § 12143(a). In addition, paratransit services need only be provided in the service area in which the public entity operates a fixed-route service, and not in any portion of the service area in which the entity provides only commuter bus service. Id. § 12143(c)(2). “Commuter bus service” is defined as:

fixed route bus service, characterized by service predominantly in one direction during peak periods, limited stops, use of multi-ride tickets, and routes of extended length, usually between the central business district and outlying suburbs. Commuter bus service may also include other service, characterized by a limited route structure, limited stops, and a coordinated relationship to another mode of transportation.


Fixed route transportation systems operated by public airports (e.g., shuttles between or among terminals or parking lots, and connector systems along the airport) are regarded as fixed route commuter bus systems. As such, while airport shuttle or connector systems must acquire accessible vehicles, they are not subject to the complementary paratransit requirements. Id. § 37.33 and the appendix to that section. Similarly, systems in which “an operator of another transportation mode uses bus or other service to connect its service with limited other points” such as bus service run by a train company from its central station to the major urban center that is the actual destination for many passengers are regarded as commuter bus systems. Id. § 37.35 and the appendix to that section. Again, while such systems must acquire accessible vehicles, they are not subject to the complementary paratransit requirements.

246. 42 U.S.C.A. § 12143(a) (emphasis added).
247. Id. § 12143(c)(1)(A). In all, or virtually all, urban areas it can be anticipated that there will be persons who meet one of these criteria. Although it is not clear from the language of the Act, in the author’s opinion the combination of weather (e.g., snow) or topographical (e.g., hills) factors combined with a disabling condition may form the basis for meeting this requirement. This view appears consistent with the regulations. See 49 C.F.R. § 123(e)(3)(i), (ii) (1992).
that paratransit services be provided to people with disabilities and their companions is limited to one companion of the individual, except that other companions will be permitted to ride with the person with a disability to the extent that space is available.\textsuperscript{248} The intent is to allow persons with disabilities to attend functions with family members and friends who are not disabled, but at the same time refrain from overburdening the paratransit system.

While the substantive requirements relating to the provision of paratransit services took effect eighteen months after enactment of the Act (January, 1992), the remaining portions of this section became effective on July 26, 1990, the date of the ADA's enactment.\textsuperscript{249} The Act provides that within eighteen months of its enactment, and annually thereafter, each public entity operating a fixed route system must submit to the Secretary a plan for providing the required paratransit services.\textsuperscript{250}

On September 6, 1991, the DOT published regulations\textsuperscript{251} to implement the provisions of the Act requiring public transportation agencies to make paratransit services available to people with disabilities. The regulations provide that public entities operating fixed route systems\textsuperscript{252} (excluding public bus companies that operate only commuter bus services and commuter rail or intercity rail systems)\textsuperscript{253} must provide complementary paratransit or other special service to individuals with disabilities "comparable to the level of service provided to individuals without disabilities who use the fixed route system."\textsuperscript{254} Specifically, public entities operating fixed route systems must comply with the following rules:

(a) Persons eligible for paratransit services include individuals with permanent or temporary disabilities who: (1) are unable to independently board, ride, or disembark on or from accessible vehicles; (2) can use an accessible vehicle but cannot use a route on the fixed route system for lack of accessible vehicles; or (3) have a "specific impairment related condition" that prevents them from reaching boarding or exit locations.\textsuperscript{255} Individuals with disabilities may be paratransit eligible for some trips but not others.\textsuperscript{256} Entities must establish a process for determining paratransit eligibility.\textsuperscript{257} Complementary paratransit services for visitors who do not

\begin{footnotes}
\textsuperscript{248} 42 U.S.C.A. § 12143(c)(1)(B), (C).
\textsuperscript{249} Id. § 12141(b). Section 223(a) is effective 18 months after enactment, but the remaining provisions of section 223 were effective on the date of enactment.
\textsuperscript{250} Id. § 12143(c)(7)(A).
\textsuperscript{251} 49 C.F.R. § 37.
\textsuperscript{252} See supra note 234.
\textsuperscript{253} See supra note 245 and accompanying text for an explanation of the fact that a public entity that only provides commuter bus services does not have to provide paratransit services. See also 49 C.F.R. § 37.121(c) ("requirements for complementary paratransit do not apply to commuter bus, commuter rail, or intercity rail systems").
\textsuperscript{254} 49 C.F.R. § 37.121(a).
\textsuperscript{255} Id. § 37.123(c), (e); see also id. §§ 37.123(e)(3)(i), (ii).
\textsuperscript{256} Id. § 37.123(b) provides that "if an individual meets the eligibility criteria of this section with respect to some trips but not others, the individual shall be ADA paratransit eligible only for those trips for which he or she meets the criteria." 56 Fed. Reg. 45,634 (1991).
\textsuperscript{257} 49 C.F.R. § 37.125 (1992). Entities are entitled to establish an administrative process to suspend, "for a reasonable time," the provision of paratransit services to eligible individuals who have established a "pattern or practice of missing scheduled trips." Id. § 37.125(h).
\end{footnotes}
reside in the entity's jurisdiction but are paratransit eligible must be provided for up to twenty-one days.\textsuperscript{258}

(b) Paratransit services must be "origin-to-destination" services.\textsuperscript{259}

(c) One companion without a disability (in addition to a personal attendant) must always be able to accompany a paratransit rider with a disability; other companions without disabilities may accompany the rider with a disability when space is available.\textsuperscript{260}

(d) Paratransit service provided by bus companies must be provided to all destinations within a width of three-fourths of a mile on each side of each fixed route.\textsuperscript{261} With respect to paratransit services provided by rail systems, the service area "shall consist of a circle with a radius of 3/4 of a mile around each station . . . ; [a]t end stations and other stations in outlying areas, the entity may designate circles with radii of up to 1 1/2 miles as part of its service area, based on local circumstances."\textsuperscript{262}

(e) Riders with disabilities must reserve rides at least one day in advance.\textsuperscript{263} The fare may not exceed twice the fare that would be charged on the entity's fixed route system.\textsuperscript{264} Restrictions or priorities based on trip purpose are prohibited.\textsuperscript{265} Paratransit services must be available during the same days and hours of operation as fixed route services.\textsuperscript{266} "Capacity constraints" (such as restrictions on the number of trips available to an individual, waiting lists, untimely pickups, or a substantial number of trips with excessive trip lengths) are prohibited.\textsuperscript{267}

(f) Paratransit services may include a subscription service component.\textsuperscript{268} Subscription service, however, "may not absorb more than fifty percent of the number of trips available at a given time of day, unless there is non-subscription capacity."\textsuperscript{269}

(g) Entities are free to provide additional paratransit services for people with disabilities. Costs of such additional service, however, do not count when an entity requests a waiver due to undue financial burden.\textsuperscript{270}

(h) The regulations set forth specific criteria that must be included in plans outlining the paratransit services that each transit agency will provide.\textsuperscript{271}

\textsuperscript{258.} Id. § 37.127.
\textsuperscript{259.} Id. § 37.129(a).
\textsuperscript{260.} Id. § 37.123(f).
\textsuperscript{261.} Id. § 37.131.
\textsuperscript{262.} Id. § 37.131(a)(2)(i), (ii).
\textsuperscript{263.} Id. § 37.131(b).
\textsuperscript{264.} Id. § 37.131(c).
\textsuperscript{265.} Id. § 37.131(d).
\textsuperscript{266.} Id. § 37.131(e).
\textsuperscript{267.} Id. § 37.131(f).
\textsuperscript{268.} Id. § 37.133(a). The term "subscription service" is not defined. Presumably, however, it refers to instances in which individuals regularly utilize paratransit service for a given trip and reserve such rides on a periodic basis.
\textsuperscript{269.} Id. § 37.133(b). Note, however, that an entity providing paratransit service "may establish waiting lists or other capacity constraints and trip purpose restrictions or priorities for participation in the subscription service only." Id. § 37.133(c).
\textsuperscript{270.} Id. § 37.131(g).
\textsuperscript{271.} Id. §§ 37.135-.149.
(i) A transit agency may obtain a waiver from the requirement that it provide paratransit services if it can demonstrate that the provision of such services would impose an undue financial burden upon the agency.\textsuperscript{272} Decisions as to whether to grant such a waiver will be made on a case-by-case basis by the Administrator of the Urban Mass Transit Administration (hereinafter the "Administrator"), after consideration of the following factors:

1. Effects on current fixed route service, including reallocation of accessible fixed route vehicles and potential reduction in service, measured by service miles;
2. Average number of trips made by the entity's general population, on a per capita basis, compared with the average number of trips to be made by registered ADA paratransit eligible persons, on a per capita basis;
3. Reductions in other services, including other special services;
4. Increases in fares;
5. Resources available to implement complementary paratransit service over the period covered by the plan;
6. Percentage of budget needed to implement the plan, both as a percentage of operating budget and a percentage of entire budget;
7. The current level of accessible service, both fixed route and paratransit;
8. Cooperation/coordination among area transportation providers;
9. Evidence of increased efficiencies, that have been or could be effectuated, that would benefit the level and quality of available resources for complementary paratransit service; and
10. Unique circumstances in the submitting entity's area that affect the ability of the entity to provide paratransit, that militate against the need to provide paratransit, or in some other respect create a circumstance considered exceptional by the submitting entity.\textsuperscript{273}

Any waivers granted must be for a limited, specified time.\textsuperscript{274} Once a waiver is granted, the Administrator will either: (a) require the entity to provide complementary paratransit services to the extent that it can do so without incurring an undue financial burden; or (b) require the entity to provide basic complementary paratransit services along the corridors of the entity's key routes during core service hours, even if doing so would cause the entity to incur an undue financial burden.\textsuperscript{275}

e. Demand Responsive Systems

If a public entity operates a "demand responsive system"\textsuperscript{276} for the general public, all vehicles solicited for purchase or lease must be readily

\textsuperscript{272} Id. § 37.151.
\textsuperscript{273} Id. § 37.155(a).
\textsuperscript{274} Id. § 37.153(b).
\textsuperscript{275} Id. § 37.153(c). "Key routes" are defined as "routes along which there is service at least hourly throughout the day." Id. § 37.153(c)(i). "Core service hours" are defined as those that "encompass at least peak periods, as these periods are defined locally for fixed route service, consistent with industry practice." Id. § 37.153(c)(ii).
\textsuperscript{276} A "demand responsive system" is defined as "any system providing designated public transportation which is not a fixed route system." 42 U.S.C.A. § 12141(1).
accessible to and usable by individuals with disabilities, unless the entity can demonstrate that its system, when viewed in its entirety, provides "equivalent" services to persons with disabilities as those provided to persons without disabilities.277

f. New Facilities

All new facilities built by public entities after January 25, 1992,278 that will be used to provide public transportation services must be made readily accessible to and usable by individuals with disabilities.279

g. Altered Facilities

Alterations made to existing facilities or parts of existing facilities more than eighteen months after enactment of the Act280 must be made in such manner that "to the maximum extent feasible" the altered portions are readily accessible to and usable by individuals with disabilities.281

Alterations made to primary function areas282 must be made in such a manner to ensure that the path of travel283 to the altered area, including the restrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities.284 If the cost and scope of making alterations to the path of travel and to drinking fountains, telephones and restrooms along that path is "disproportionate" to the cost of the overall alteration, however, an entity is not required to make those portions accessible.285 Such alterations will be deemed disproportionate to the overall alteration "when the cost exceeds 20 percent of the cost of the alteration to the primary function area (without regard to the costs of accessibility modifications)."286 When the costs of altering the path of travel are shown to be disproportionate to the cost of the entire alteration, the path of travel must be made "accessible to the maximum extent without resulting in disproportionate

277. Id. § 12144. A violation of this provision constitutes a violation of both the ADA and section 504 of the Rehabilitation Act. Id.
278. See id. § 12146 (explaining that this section becomes effective 18 months after enactment of the Act).
279. Id. § 12146. A violation of this section constitutes a violation of both the ADA and section 504 of the Rehabilitation Act. Id.
280. See supra text accompanying notes 249 and 278.
281. 42 U.S.C.A. § 12147(a). A violation of this section constitutes a violation of both the ADA and section 504 of the Rehabilitation Act. Id.
282. "Primary function areas" are those areas that serve to carry out a major activity for which the facility is intended, such as waiting areas, ticket purchase and collection areas, train or bus platforms, baggage checking and return areas, and employment areas. 49 C.F.R. § 37.43(c) (1992).
283. "Path of Travel" is defined as including "a continuous unobstructed way of pedestrian passage by means of which the altered area may be approached, entered, and exited, and which connects the altered area with an exterior approach (including sidewalks, parking areas, and streets), an entrance to the facility, and other parts of the facility." Id. § 37.43(d). Further, the term "path of travel" also "includes the restrooms, telephones and drinking fountains serving the altered area." Id.
284. Id. § 37.43(a)(2).
285. Id.
286. Id. § 37.43(e).
In such a case, alterations should be made in the following order of priority:

(i) an accessible entrance;
(ii) an accessible route to the altered area;
(iii) at least one accessible restroom for each sex or a single unisex restroom (where there are one or more restrooms);
(iv) accessible telephones;
(v) accessible drinking fountains;
(vi) when possible, other accessible elements (e.g., parking, storage, alarms).

The term "to the maximum extent feasible" is meant to apply:

to the occasional case where the nature of an existing facility makes it impossible to comply fully with applicable accessibility standards through a planned alteration. In these circumstances, the entity shall provide the maximum physical accessibility feasible. Any altered features of the facility or portion of the facility that can be made accessible shall be made accessible. If providing accessibility to certain individuals with disabilities (e.g., those who use wheelchairs) would not be feasible, the facility shall be made accessible to individuals with other types of disabilities (e.g., those who use crutches, those who have impaired vision or hearing, or those who have other impairments).

h. Key Stations

"Key stations" of rapid-rail, light-rail, and commuter rail systems must be made readily accessible to and usable by individuals with disabilities "as soon as practicable but in no event later than" three years after the Act's enactment—July 26, 1993. A "key station" is one that is designated as such by a light/rapid rail operator, through planning and public participation processes set forth in the DOT regulations, and taking into consideration the following criteria:

(1) Stations where passenger boardings exceed average station passenger boardings on the rail system by at least fifteen percent, unless such a station is close to another accessible station;
(2) Transfer stations on a rail line or between rail lines;

287. Id. § 37.43(f)(1).
288. Id. § 37.43(f)(2).
289. Id. § 37.43(b).
290. 42 U.S.C.A. §§ 12147(b)(1), (2)(B), 12162(e)(II) (1992); see also 49 C.F.R. §§ 37.47, 37.51 (1992); see 42 U.S.C.A. § 12147 note, for an explanation that section 227(b) becomes effective on the date of the Act's enactment. Again, a violation of this provision constitutes a violation of both the ADA and section 504 of the Rehabilitation Act.
(3) [m]ajor interchange points with other transportation modes, including stations connecting with major parking facilities, bus terminals, intercity or commuter rail stations, passenger vessel terminals, or airports;

(4) [e]nd stations, unless an end station is close to another accessible station; and

(5) [s]tations serving major activity centers, such as employment or government centers, institutions of higher education, hospitals or other major health care facilities, or other facilities that are major trip generators for individuals with disabilities.  

The regulations note an exception to this rule for New York City and Philadelphia. Those cities entered into settlement agreements which contain lists of key stations for the public entities that are parties to those agreements. The regulations provide that "[t]he identification of key stations under these agreements is deemed to be in compliance with the requirements of . . . [the ADA]."

The three-year period within which to comply may be extended up to thirty years by the Secretary for stations that need "extraordinarily expensive structural changes." Where key stations for light or rapid rail systems are at issue, extensions may only be granted "[w]ith respect to key stations which need extraordinary expensive structural changes to, or replacement of, existing facilities (e.g., installations of elevators, raising the entire passenger platform, or alterations of similar magnitude and cost)." Where key stations for commuter rail systems are at issue, extension may only be granted "in a case where raising the entire passenger platform is the only means available of attaining accessibility or where other extraordinarily expensive structural changes (e.g., installation of elevators, or alterations of magnitude and cost similar to installing an elevator or raising the entire passenger platform) are necessary to attain accessibility."

As of twenty years after enactment of the Act, at least two-thirds of all key stations for light or rapid rail systems (but not commuter rail systems) must be readily accessible to and usable by individuals with disabilities. Public entities must develop plans for compliance with these requirements.

i. Programs and Activities

Public entities operating transportation programs and activities in existing facilities must do so in such a manner that "when viewed in the

291. 49 C.F.R. §§ 37.47-.51.
292. Id. § 37.53.
293. Id.
295. 49 C.F.R. § 37.47(e).
296. Id. § 37.51(e).
298. Id. § 12147(b)(3).
entirety” each program or activity is readily accessible to and usable by individuals with disabilities. This is a lower standard than the standard applied to key stations, because in the latter case the “when viewed in the entirety” language is omitted. The Act further provides that it shall not be construed to require public entities to make facilities wheelchair accessible except to the extent required by the previously discussed sections relating to alteration of existing facilities and key stations.

The purpose of the statutory language addressing programs and activities in existing facilities is to ensure that entities conduct their programs in an accessible manner. The DOT explains that examples of possible actions that entities might take to render their programs accessible include:

user friendly farecards, schedules of edge detection on rail platforms [sic], adequate lighting, telecommunication display devices (TDDs) or text telephones, and other accommodations for use by persons with speech and hearing impairments, signage for people with visual impairments, continuous pathways for persons with visual and ambulatory impairments, and public address systems and clocks.

In addition, the Act states that even when facilities must be made wheelchair accessible (such as in the case of alteration of an existing facility or required accessibility of key stations), services made available to the general public need not be made available to individuals who use wheelchairs who “could not utilize or benefit from such services provided at such facilities.” When individuals who use wheelchairs “could not utilize or benefit from such services” is unclear, and is not explained in the DOT regulations promulgated under the Act. This appears to be a rather subjective standard and will have to be considered on a case-by-case basis. For obvious reasons, this phrase cannot be relied upon as a bootstrap excuse to deny services based on a facility’s inaccessibility in the first instance.

j. Light or Rapid-Rail Systems

When a public entity operates a light- or rapid-rail train containing two or more cars, at least one vehicle per train must be accessible to individuals with disabilities “as soon as practicable but in no event later” than five years after enactment of the Act (by July 26, 1995).
2. Part II of Division B of Title II

Part II of division B of title II deals with public transportation by intercity and commuter rail services. The salient provisions of this Part are as follows:

a. Accessible Cars

A person or entity that provides intercity rail transportation or commuter rail transportation must have at least one passenger car per train that is readily accessible to and usable by individuals with disabilities "as soon as practicable, but in no event later than July 26, 1995." This proviso contains very detailed requirements with respect to the wheelchair accessibility of coach cars and dining cars. Generally, this section requires coach cars to be able to be entered by an individual who uses a wheelchair, to have space to park and secure a wheelchair, to have a seat to which a passenger in a wheelchair can transfer, and to have a restroom accessible to an individual who uses a wheelchair. Dining cars are generally not required to be wheelchair accessible from the station, however, single level dining cars must be accessible from within the train.

Moreover, with respect to the purchase of new rail passenger cars for use in commuter rail transportation, the requirement that new cars be readily accessible:

shall not be construed to require—(i) a restroom usable by an individual who uses a wheelchair if no restroom is provided in such car for any passenger; (ii) space to fold and store a wheelchair; or (iii) a seat to which a passenger who uses a wheelchair can transfer.

304. The term "intercity rail transportation" is defined as "transportation provided by the National Railroad Passenger Corporation." Id. § 12161(3).

305. The term "commuter rail transportation" is given the same meaning as such services under section 103(9) of the Rail Passenger Service Act, 45 U.S.C. § 502(9) (1982); see 42 U.S.C.A. § 12161(2). Section 103(9) of the Rail Passenger Service Act defines the term "commuter service" as "short-haul rail passenger service operated in metropolitan and suburban areas, whether within or across the geographical boundaries of a state . . . characterized by reduced fare, multiple-ride and commutation tickets and by morning and evening peak period operations."

306. 42 U.S.C.A. § 12162(a)(1), (b)(1). A violation of these provisions constitutes a violation of both the ADA and section 504. Id.

307. Id. § 12162(a)(2), (b)(2); see the note accompanying section 12161 for an explanation that section 242 of the Act becomes effective on the date of enactment of the Act. A violation of this provision constitutes a violation of both the ADA and section 504.

308. See id. § 12162(a)(2)(B).

309. See id. § 12162(a)(2)(C), (D); id. § 12162(a)(4)(A), (B).

310. Id. § 12162(b)(2)(B).
This substantially limits the requirement that newly purchased cars used for commuter rail transportation be wheelchair accessible. Apparently the mandated accessibility and usability for new commuter rail vehicles is limited to accessibility for entry and space to park and secure a wheelchair.

c. Used Cars

A person or entity that purchases or leases a used rail passenger car for use in intercity or commuter rail transportation must make "demonstrated good faith efforts to purchase or lease a used rail car that is readily accessible to and usable by individuals with disabilities . . . ."311

d. Remanufactured Cars

A person or entity that remanufactures a rail passenger car, or purchases or leases a remanufactured rail passenger car, for use in intercity or commuter rail transportation so as to extend its life for ten years must ensure that the rail car, "to the maximum extent feasible," is made readily accessible to and usable by individuals with disabilities.312

e. New Stations

A person or entity that builds a new station for use in intercity or commuter rail transportation must ensure that the station is readily accessible to and usable by individuals with disabilities.313

f. Existing Stations

All existing stations used in intercity rail transportation systems must be made accessible to and usable by persons with disabilities "as soon as practicable" but in no event later than twenty years after the Act’s enactment.314 The obligation to implement this provision falls upon the statutorily defined "responsible person," which is the public entity if it owns more than fifty percent of a station, the persons providing transportation to a station when more than fifty percent of the station is owned by a private party, or the persons providing transportation and the public owners of a station when no party owns more than fifty percent of the station.315

g. Existing Key Stations

Existing key stations used in commuter rail transportation systems must be made readily accessible to and usable by individuals with disabilities—

311. Id. § 12162(c). A violation of this provision constitutes a violation of both the ADA and section 504 of the Rehabilitation Act. Id.
312. Id. § 12162(d)(1), (2). A violation of this provision constitutes a violation of both the ADA and section 504 of the Rehabilitation Act. Id.
313. Id. § 12162(e)(1). A violation of this provision constitutes a violation of both the ADA and section 504 of the Rehabilitation Act. Id. See also, 49 C.F.R. sections 37.41-.45 for regulations addressing the construction of new stations by public entities and private entities, respectively.
314. 42 U.S.C.A. § 12162(e)(2)(A)(i), (ii). A violation of this provision constitutes a violation of both the ADA and section 504 of the Rehabilitation Act. Id.
315. Id. § 12161(5)(A), (B), (C).
by the responsible person—"as soon as practicable," but in no event later than three years after the Act's enactment. The Secretary of Transportation, however, may extend this time limit up to twenty years after the Act's enactment "in a case where the raising of the entire passenger platform is the only means available of attaining accessibility or where other extraordinarily expensive structural changes are necessary to attain accessibility."

h. Altered Stations

Alterations to existing stations or parts thereof used in intercity or commuter rail transportation systems must be made—by the responsible person, owner or person in control of the station—in a manner to ensure that "to the maximum extent feasible" the altered portions are readily accessible to and usable by individuals with disabilities.

i. Designation of Responsible Persons

The DOT regulations set forth a mechanism for determining who bears the legal and financial responsibility for accessibility modifications to commuter or intercity rail stations. Basically, the regulations authorize—and encourage—all covered parties to come to their own agreement regarding the allocation of responsibility. In the event the parties do not reach an agreement, the regulations allocate responsibility as follows: First, if a single public entity owns more than fifty percent of the station, the public entity is totally responsible. Second, if a private entity owns more than fifty percent of the station, the private entity owns no re-

316. Id. § 12162(e)(2)(A)(ii)(I). A violation of this provision constitutes a violation of both the ADA and section 504 of the Rehabilitation Act. Id.; see 49 C.F.R. section 37.49 (1992) for the methodology for computing the relative financial responsibility of the responsible persons.
318. See 49 C.F.R. section 37.49 (1992) for the methodology for computing the relative financial responsibility of the responsible persons.
319. 42 U.S.C.A. § 12162(e)(2)(B)(i). A violation of this provision constitutes a violation of both the ADA and section 504 of the Rehabilitation Act. Id. This section further provides that when an alteration will:

affect or could affect the usability of or access to an area of the station containing a primary function . . . the alterations [must be made] in such manner that, to the maximum extent feasible, the path of travel to the altered area, and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon completion of such alterations, where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area are not disproportionate to the overall alterations in terms of cost and scope (as determined under criteria established by the Attorney General).

Id. § 12162(e)(2)(B)(ii). When public entities are at issue, the provisions of 49 C.F.R. section 37.43, discussed supra at notes 282-89 and corresponding text, apply. The DOT regulations provide that when constructing and altering transit facilities, private entities must comply with the regulations promulgated by the DOJ under title III of the ADA, 28 C.F.R. § 36. 49 C.F.R. § 37.45 (1992). The specific DOJ regulations applying to altered facilities are to be codified at 28 C.F.R. sections 36.403-36.406.
321. Id. § 37.49(e) and appendix.
322. Id. § 37.49(b).
responsibility. Rather, "[t]he total responsibility is divided between passenger railroads operating service through the station, on the basis of respective passenger boardings."323

Third, if no single party owns fifty percent of the station, public entity owners and persons providing intercity or commuter rail service share the responsibility (with fifty percent of the responsibility being allocated between public entity owners in proportion to their ownership, and the remaining fifty percent of the responsibility being allocated between service providers in proportion to the amount of service provided).324

3. Enforcement of Title II

Enforcement of title II is intended to parallel enforcement under section 504. Thus, title II incorporates the remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act.325 In addition to private suits, it is anticipated that the DOJ will oversee compliance with title II and file suit under the Act when appropriate.326

Both public and private recipients of federal financial assistance from DOT are subject to DOT’s section 504 administrative procedures.327 Under those procedures, the complainant files an administrative complaint with the DOT’s Office of Civil Rights. The Office of Civil Rights investigates the complaint, and, if a violation is found, attempts to enter into a conciliation agreement with the entity. Only if all else

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323. See Appendix to 49 C.F.R. § 37.49(c) app.
324. Id. § 37.49(d).
   (a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.
   (2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C.A. §2000d et seg.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.
   (b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs.

Because subpart (a)(1) of section 505 deals only with employment discrimination, subpart (a)(2) is the governing section with respect to available remedies under title II of the ADA. Subsection (a)(2) of section 505 incorporates the rights and remedies under title VI of the Civil Rights Act of 1964. Remedies under title VI include termination or suspension of federal funds, injunctive relief where appropriate, and monetary damages in some situations.
326. See Senate Hearings May/June 1989, supra note 9 at 57-58; see also, 49 C.F.R. § 37.11(b), (c) (1992).
327. See 49 C.F.R. § 37.11.
fails, does the DOT resort to taking necessary action to cut off funds to a noncomplying recipient.\textsuperscript{328} The goal of the administrative scheme is to follow "a policy that emphasizes compliance."\textsuperscript{329} It is important to note, however, that exhaustion of administrative remedies is not required. Thus, "[a]n aggrieved individual can complain to DOT about an alleged transportation violation and go to court at the same time."\textsuperscript{330}

B. **Title III: Private Entities**

Title III of the ADA includes within its coverage the provision of public transportation by private entities.\textsuperscript{331} If a private entity is primarily engaged in the business of transporting people it is governed by one set of standards.\textsuperscript{332} If a private entity is not primarily engaged in the business of transporting people it is governed by another set of standards.\textsuperscript{333}

1. **Provision of Public Transportation By Private Entities Primarily Engaged in the Business of Transporting People**

As of January 26, 1992,\textsuperscript{334} private entities that are primarily engaged in the business of transporting people (other than by air travel),\textsuperscript{335} and

\begin{itemize}
\item \textsuperscript{328} See 49 C.F.R. § 37.11 app.
\item \textsuperscript{329} Id.
\item \textsuperscript{330} Id.
\item \textsuperscript{331} The term "private entity" is not defined in the Act. Presumably, any entity that does not fit within the definition of a "public entity" falls within this category. See 42 U.S.C.A. § 12181(6). The DOT regulations provide that a private entity that receives a subsidy or franchise from a state or local government or is regulated by a public entity does not fall within the category of a public entity. See 49 C.F.R. § 37.37 and the appendix to that section. The regulations specifically provide that "[t]ransportation service provided by public accommodations is viewed as being provided by private entities not primarily engaged in the business of transporting people . . . ." 49 C.F.R. § 37.37 app.
\item It should be noted that "conveyances used for recreational purposes, such as amusement park rides, ski lifts, or historic rail cars or trolleys operated in museum settings, are not viewed as transportation . . . at all." Id.
\item \textsuperscript{332} See 42 U.S.C.A. § 12184.
\item \textsuperscript{333} See id. § 12182(b)(2)(B), (C).
\item \textsuperscript{334} See generally § 12161 note. There are some exceptions to the 18 month rule—some provisions of title III became effective on the date of the Act's enactment. When applicable, those exceptions will be set forth.
\item \textsuperscript{335} With respect to the question of whether an entity is or is not primarily engaged in the business of transporting people, the regulations look "to the private entity actually providing the transportation service in question . . . ." 49 C.F.R. § 37.41 app. The appendix to the regulations provides the following example:
\begin{quote}
Conglomerate, Inc. owns a variety of agribusiness, petrochemical, weapons system production, and fast food corporations. One of its many subsidiaries, Green Tours, Inc., provides charter bus service for people who want to view National Parks, old-growth forests, and other environmentally significant places. It is probably impossible to say in what business Conglomerate, Inc. is primarily engaged; but it clearly is not transporting people. Green Tours, Inc., on the other hand, is clearly primarily engaged in the business of transporting people, and the rule treats it as such.
\end{quote}
\end{itemize}
whose operations affect commerce, are prohibited from discriminating on the basis of disability. The most crucial requirements to be followed by private entities primarily engaged in the business of transporting people are as follows:

a. New Vehicles

All new vehicles (other than automobiles, vans with seating capacities of fewer than eight passengers, and over-the-road buses) used to provide specified public transportation services must be readily accessible to and usable by individuals with disabilities (including individuals who use wheelchairs). If, however, a new vehicle is to be used solely in a demand responsive system, and the entity can "demonstrate that such system, when viewed in its entirety, provides a level of service to individuals [with disabilities] equivalent to the level of service provided to the general public," compliance with this provision is not required.

All new vans with a seating capacity of fewer than eight passengers used to provide specified public transportation services must be readily accessible to and usable by persons with disabilities unless "the entity can demonstrate that the system for which the van is being purchased or leased, when viewed in its entirety, provides a level of service to individuals [with disabilities] equivalent to the level of service provided to the general public.

The DOT regulations explain that airport shuttle systems that "operate in a route-deviation or similar variable mode in which there are passenger-initiated decisions concerning destinations" constitute demand responsive transportation operated by private entities primarily engaged in the business of transporting people.

336. 42 U.S.C.A. § 12184(a). The term "commerce" is defined as: travel, trade, traffic, commerce, transportation, or communication -
(A) among the several states;
(B) between any foreign country or any territory or possession and any State; or
(C) between points in the same State but through another State or foreign country. Id. § 12181(1).

337. The term "over-the-road bus" is defined as "a bus characterized by an elevated passenger deck located over a baggage compartment." Id. § 12181(5).

338. The term "specified public transportation" is defined as "transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special service (including charter service) on a regular and continuing basis." Id. § 12181(10).

339. Id. § 12184(b)(3).

340. See supra note 276 and accompanying text.


Providers of taxi service (including limousine services) are subject to the requirements of title III with respect to private entities primarily engaged in the business of transporting people that provide demand-responsive service. Providers of taxi service, however, are not required to purchase or lease accessible automobiles but, if they purchase other vehicles, such as vans, they are required to comply with accessibility requirements. Moreover, providers of taxi services are prohibited from discriminating against people with disabilities by actions such as: (i) refusing to provide service to individuals with disabilities; (ii) refusing to assist with the stowing of mobility devices; or (iii) charging higher fares or fees for carrying individuals with disabilities and their equipment. 49 C.F.R. § 37.29 and the appendix to that section.

342. 42 U.S.C.A. § 12184(b)(5).

343. 49 C.F.R. § 37.33 app. The regulations note that since many operators of such shuttle
b. New Rail Vehicles

All new rail passenger cars used to provide specified public transportation must be readily accessible to and usable by individuals with disabilities.\(^44\)

c. Remanufactured Rail Vehicles

All rail passenger cars used to provide specified public transportation that are remanufactured so as to extend their life for ten years or more, or any such remanufactured rail car newly purchased or leased, must, to the maximum extent feasible, be readily accessible to and usable by individuals with disabilities.\(^45\)

d. Over-The-Road Buses

The Senate version of the ADA would have required all new over-the-road buses solicited for purchase or lease by “small providers” more than seven years after enactment of the Act to be accessible to users with disabilities, and all new over-the-road buses solicited for purchase or lease by “other providers” more than six years after enactment of the Act to be accessible to users with disabilities. Those time periods were deleted from the final version of the Act. Rather, the ADA, as enacted, provides that the purchase of new over-the-road buses must be made in accord with regulations to be issued by the DOT.\(^3\)

The DOT has promulgated final regulations with respect to accessibility standards that over-the-road-buses\(^347\) are to follow.\(^348\) The Office of Technology Assessment is required to undertake a study—to be completed within thirty-six months of the Act’s enactment (by July 26, 1993)\(^349\) to determine:

1. the access needs of individuals with disabilities to over-the-road buses and over-the-road bus service; and
2. the most cost-effective methods for providing access to over-the-road buses and over-the-road bus service to individuals with disabilities, particularly individuals who use wheelchairs, through all forms of boarding options.\(^350\)

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\(^344\) 42 U.S.C.A. § 12184(b)(6).

\(^345\) Id. § 12184(b)(7). An exception is made, however, for historical or antiquated rail passenger cars—or a rail station served exclusively by such cars. Id. § 12184(c).

\(^346\) Id. § 12186.

\(^347\) An “over-the-road” bus is “a bus characterized by an elevated passenger deck located over a baggage compartment.” Id. § 12181(5).

\(^348\) 49 C.F.R. §§ 38.151-57. For the citation to those regulations, see infra note 366 and accompanying text.

\(^349\) 42 U.S.C.A. § 12185(d). The President of the United States has the discretion to extend that deadline by one year if he or she finds that the effect of the earlier deadline would be to “result in a significant reduction in intercity over-the-road bus service.” Id.

\(^350\) Id. § 12185(a). See infra note 384 and accompanying text for a discussion of the additional study to be undertaken by the Office of Technology Assessment.
Within one year after submission of this study, the Secretary of Transportation is required to issue new regulations relating to the ADA provisions requiring accessibility of over-the-road buses. With respect to "small providers" of transportation—as that term is defined by the Secretary—the regulations will take effect seven years after the Act’s enactment (July 26, 1997); with respect to "other" providers of transportation, the regulatory provisions—whatever those provisions may be—will take effect six years after the Act’s enactment (July 26, 1996). The regulations may “not require the installation of accessible restrooms in over-the-road buses if such installation would result in a loss of seating capacity.”

2. Provision of Public Transportation By Private Entities Not Primarily Engaged in the Business of Transporting People

Title III of the ADA also deals with the provision of public services by private entities that are not primarily engaged in the business of transporting people, and thus are not covered by Section 304 of the Act. Such entities must follow the following requirements:

a. A private entity (not subject to section 304 [42 U.S.C.A. § 12184]) that operates a fixed route system and makes a solicitation for the purchase or lease of a vehicle with a seating capacity in excess of sixteen passengers (including the driver) for use in such system, must ensure that such vehicle is readily accessible to and usable by individuals with disabilities.

b. A private entity (not subject to section 304 [42 U.S.C.A. § 12184]) that operates a fixed route system, and makes a solicitation for the purchase or lease of a vehicle with a seating capacity of sixteen or fewer passengers (including the driver) for use in such system, must ensure that such vehicle is readily accessible to and usable by individuals with disabilities. A private entity might be exempt from this provision, however, if it can show that its fixed route system, when viewed in its entirety, ensures a level of service to individuals with disabilities equivalent to the level of service provided to individuals without disabilities.
c. A private entity (not subject to section 304 [42 U.S.C.A. § 12184]) that operates a demand-responsive system must operate its system so that, when viewed in its entirety, the system ensures a level of service to individuals with disabilities equivalent to the level of service provided to individuals without disabilities.358

Neither of the latter two provisions, however, apply to over-the-road buses.359 Rather, the provisions relating to regulations to be promulgated by the Secretary of Transportation, explained above, apply with respect to all over-the-road buses operated by private entities.360

C. Accessibility Provisions

The regulations provide comprehensive, detailed minimum guidelines and requirements for accessibility standards for transportation vehicles covered under the ADA. Specifically, the regulations provide accessibility standards to be followed by: (1) buses and vans and systems;361 (2) rapid rail vehicles and systems;362 (3) light rail vehicles and systems;363 (4) commuter rail cars and systems;364 (5) intercity rail cars and systems;365 (6) over-the-road buses and systems;366 (7) automated guideway transit vehicles and systems (e.g., "people movers" in airports);367 (8) high speed rail cars, monorails and systems;368 and (9) trams and similar vehicles and systems.369 A description of these very technical accessibility standards is outside the scope of this article.

D. Other Significant Regulations

Because the DOT regulations are voluminous, complex, and technical this article can only present a broad overview, rather than a detailed, section-by-section explanation of those regulations. In addition to the DOT regulations previously discussed, a few other regulatory provisions are worthy of mention.

1. Colleges and Universities

The regulations clarify that public colleges and universities are treated as public entities subject to the requirements of title II—and, if the college or university operates a fixed route system, the commuter bus service requirements are to be applied.370 Further, private colleges and

358. Id. § 12182(b)(2)(C).
359. Id. § 12182(b)(2)(D)(i).
360. Id. § 12182(b)(2)(D)(ii).
361. 49 C.F.R. §§ 38.21-.39.
362. Id. §§ 38.51-.63.
363. Id. §§ 38.71-.87.
364. Id. §§ 38.91-.109.
365. Id. §§ 38.111-.127.
366. Id. §§ 38.151-.159.
367. Id. § 38.173.
368. Id. § 38.177.
369. Id. § 38.177.
370. Id. § 37.25.
universities are subject to the requirements governing private entities not primarily engaged in the business of transporting people. 371


The regulations provide that: (1) providers of transportation services may not charge people with disabilities for the provision of reasonable accommodations; 372 (2) training for employees of operators of fixed route and demand responsive systems shall involve training to a level of proficiency concerning the "differences among [the abilities of] individuals with disabilities;" 373 and (3) accessibility features must be in working order and accommodations must be provided for travelers with disabilities when accessibility features break down. 374

Other significant provisions mandate that: (1) notwithstanding the provision of special services for individuals with disabilities, an entity covered under the transportation provisions of the Act may not deny an individual with a disability the opportunity to use services provided to the general public if the individual is capable of using such services; 375 (2) an entity may not require an individual with a disability to use designated priority seats if the individual does not choose to do so; 376 (3) an entity may not require that an individual with a disability be accompanied by an attendant; 377 and (4) an entity may not refuse to serve an individual with a disability or require anything contrary to the ADA "because its insurance company conditions coverage or rates on the absence of individuals with disabilities or requirements contrary to [the Act]." 378 Further, while an entity may refuse service to an individual with a disability who engages in "violent, seriously disruptive or illegal conduct," an entity may not refuse to provide service to an individual with a disability "solely because the individual's disability results in appearance or involuntary behavior that may offend, annoy, or inconvenience employees of the entity or other persons." 379

E. General

The transportation provisions of the ADA were among the most hotly contested provisions of the Act. Thus, notably absent from those provisions are requirements that currently existing buses, whether leased or owned by public or private entities, be retrofitted to accommodate people with disabilities. And private entities will not be obligated to purchase

371. Id.
372. Id. § 37.5(d).
373. Id. § 37.173.
374. Id. §§ 37.161, 37.163.
375. Id. § 37.5(b).
376. Id. at § 37.5(c).
377. Id. at § 37.5(e). An entity is not required, however, "to provide attendant services (e.g., assistance in toileting, feeding, or dressing)." See e.g., 49 C.F.R. § 37.5 app.
378. Id. at § 37.5(g).
379. Id. § 37.5(h). This provision will provide protection to individuals with Tourette's Syndrome, for example.
accessible over-the-road buses for several years. Indeed, protests abounded over the initial (Senate) requirement that over-the-road buses purchased or leased by private entities more than five or six years after enactment of the Act must be accessible. Greyhound Corporation, for example, argued that compliance with the ADA would cost $40 million a year, "a sum that dwarfs its expected 1989 profit of $8.5 million." Greyhound claimed that while it could "survive by raising fares and dropping unprofitable rural routes, . . . the [ADA] could significantly harm other inter-city buses." Disability rights advocates, however, have contended that the cost estimates cited by the transportation companies are unrealistic and erroneous. For example, during congressional hearings on the ADA, Greyhound alleged that it costs $35,000 to purchase one lift for an over-the-road bus. Other testimony, however, indicated that lifts could be purchased for less than $8,000. In order to reconcile these conflicting viewpoints, and to uncover the truth, the ADA provides that the Office of Technology Assessment must undertake a study to determine, inter alia, "the most cost effective methods for providing access to over-the-road buses and over-the-road bus service to individuals with disabilities, particularly individuals who use wheelchairs, through all forms of boarding options."

V. TITLE III: PLACES OF PUBLIC ACCOMMODATION/COMMERCIAL FACILITIES

Title III of the ADA is intended to make it possible for people with disabilities to move freely within our society by removing barriers,
created whether intentionally or unintentionally. Thus, title III prohibits private entities from discriminating on the basis of disability in places of public accommodation, requires all newly constructed and altered places of public accommodation and commercial facilities to be designed and constructed in such a manner that they are readily accessible and usable by persons with disabilities, and mandates that all examinations and courses offered with respect to licensing and certification for professional and trade purposes be accessible to disabled people. Accordingly, title III applies to any: "(1) Public accommodation; (2) Commercial facility; or (3) Private entity that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes." 386

Not all sections of title III apply to all covered entities, however. Thus, for example (as noted later in this section), only subpart D of title III, relating to new construction and alteration, applies to commercial facilities, while only those sections of title III relating to examinations and courses apply to private entities offering the same. 387

A. Public Accommodations

For purposes of title III, a "public accommodation" is a "private entity that owns, leases (or leases to), or operates a place of public accommodation." 388 A "place of public accommodation" means "a facility, operated by a private entity, whose operations affect commerce and fall within at least one of the following categories:"

(1) [a]n inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of the establishment as the residence of the proprietor;
(2) [a] restaurant, bar, or other establishment serving food or drink;
(3) [a] motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
(4) [a]n auditorium, convention center, lecture hall or other place of public gathering;
(5) [a] bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
(6) [a] laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office

386. 28 C.F.R. § 36.102(a).
387. Id. § 36.102(c), (d).
388. Id. § 36.104.
389. The term "commerce" means:
    travel, trade, traffic, commerce, transportation, or communication—
    (1) [a]mong the several States;
    (2) [b]etween any foreign country or any territory or possession and any State; or
    (3) [b]etween points in the same State but throughout another State or foreign country.

Id. § 36.104.
of an accountant or lawyer, pharmacy, insurance office, professional
office of a health care provider, hospital, or other service establish-
ment;
(7) [a] terminal, depot, or other station used for specified public
transportation;
(8) [a] museum, library, gallery, or other place of public display
or collection;
(9) [a] park, zoo, amusement park, or other place of recreation;
(10) [a] nursery, elementary, secondary, undergraduate, or post-
graduate private school, or other place of education;
(11) [a] day care center, senior citizen center, homeless shelter,
food bank, adoption agency, or other social service center establish-
ment; and
(12) [a] gymnasium, health spa, bowling alley, golf course, or
other place of exercise or recreation.\textsuperscript{390}

To fall within the coverage of title III as a public accommodation,
an entity must fit within one of these twelve exhaustive categories. The
examples given in each category, however, are not exhaustive, but merely
illustrative.\textsuperscript{391} Because the examples given in the DOJ’s title III regulations
are not all-inclusive, several grey areas remain. It is unclear, for example,
whether a telephone rental business—that rents goods solely over the
telephone and has no physical facility open to the public—would be
classified as either a “rental establishment” pursuant to category number
(5) or as a “service establishment” under category number (6). Arguably
such a business would not fall within either category and would thus be
exempt from title III’s requirements.

Unlike the definition of the term “employer” under the ADA, the
definition of the term “places of public accommodation” is not limited
to entities of a certain size or having a certain number of employees.
Thus, \textit{all} places of public accommodation must comply with title III’s
accessibility requirements. Title III covers only non-resident portions of
covered entities, however. Residential accommodations (places of per-
manent residency as opposed to temporary lodging in hotels and inns)
are covered by the federal Fair Housing Act.\textsuperscript{392}

\textsuperscript{390} \textit{Id.; see also} 42 U.S.C.A. § 12181(7). It should be noted that while places of education are
included among the public accommodations that must be accessible to disabled people, substantively
the ADA will offer no more relief to disabled students than is presently available under section
including educational institutions among the places of public accommodation that must be accessible
to disabled students is apparently to ensure that such facilities are accessible to \textit{all} disabled people—
such as members of the public who attend community or other functions at an educational facility.

of illustrations, category number (11), which covers “social service center establishments,” would
also include substance abuse treatment centers, rape crisis centers and halfway houses; category
number (5), which covers “sales or rental establishments,” is intended to include wholesale estab-
lishments to the extent that they sell to individual members of the public and not exclusively to
other businesses. \textit{Id.} at 35,551-52.

B. Commercial Facilities

"Commercial facilities" covered by title III are defined as facilities:

1. Whose operations will affect commerce;
2. That are intended for nonresidential use by a private entity; and
3. That are not:
   i. Facilities that are covered or expressly exempted from coverage under the Fair Housing Act of 1968, as amended (42 U.S.C. 3601-3631);
   ii. Aircraft;
   iii. Railroad locomotives, railroad freight cars, railroad cabooses, commuter or intercity passenger rail cars (including coaches, dining cars, sleeping cars, lounge cars, and food service cars), any other railroad cars described in section 242 of the Act or covered under title II of the Act, or railroad rights-of-way. For purposes of this definition, “rail” and “railroad” have the meaning given the term “railroad” in section 202(e) of the Federal Railroad Safety Act of 1970 (45 U.S.C. 431(e)).

This definition is intended to cover places such as factories, warehouses, office buildings, and other buildings where employment may occur.

Only those sections of title III and the DOJ’s implementing regulations concerning new construction and alteration apply to commercial facilities. The intent was to make new construction and alteration of places where employment would occur accessible to disabled people.

Because title I of the ADA, rather than title III, proscribes employment discrimination on the basis of disability, however, commercial facilities are not required to comply with the remaining non-discrimination mandates of title III.

C. Private Clubs

Private clubs or other establishments that are exempt from coverage under title II of the Civil Rights Act of 1964 are exempt from title III’s requirement, “except to the extent that the facilities of such establishments are made available to the customers or patrons” of a place of public accommodation. The DOJ’s title III regulations explain that the factors to be looked at when determining whether a private entity qualifies as a private club include:

394. Originally the Senate version of the Act would have required that “all potential places of employment” be covered by this proviso. Critics contended that wording was too broad, and it was deleted in the spirit of compromise.
396. Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-2000a(6) (1988), prohibits discrimination on the basis of race, color, religion or national origin with respect to the “equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation ....” That title exempts from coverage private clubs not open to the public, “except to the extent that the facilities of such establishment are made available to the customers or patrons of” a public establishment. 42 U.S.C. § 2000a(e)(1988).
such factors as the degree of member control of club operations, the selectivity of the membership selection process, whether substantial membership fees are charged, whether the entity is operated on a non-profit basis, the extent to which the facilities are open to the public, the degree of public funding, and whether the club was created specifically to avoid compliance with the [law] . . .

If a private club makes its facilities available to the general public (e.g., if the club rents its facilities to a day care center open to the public), however, the club then becomes subject to the mandates of title III. In that case, both the private club, as a "landlord," and the public accommodation lessee (e.g., the day care center), will be subject to title III.

D. Landlords/Lessees

The non-discrimination mandate of title III applies to "any person who owns, leases (or leases to), or operates a place of public accommodation." The DOJ regulations explain that responsibilities under this proviso will be allocated among owners, lessors and operators; such allocation may be determined by lease or contract.

The proposed DOJ regulations provided for an elaborate scheme for allocation of responsibilities among owners, lessors and operators. That elaborate scheme was deleted from the final regulations in response to extensive public comments highlighting the limited applicability of the proposed allocation rule. Accordingly, the final rule notes that where appropriate the suggested allocation of responsibilities contained in the proposed rules may be followed. The final rule is intended to reflect the principles that: (1) both landlords and tenants are covered by the public accommodation requirements of title III; and (2) title III was not intended to change existing responsibilities between landlords and tenants as set forth in leasing agreements.

The final rule makes it clear that while "allocation of all areas" (not just the removal of barriers and the provision of auxiliary aids) is left to lease negotiations, "in general landlords should not be given responsibilities for policies a tenant applies in operating its business, if such policies are those of the tenant." By way of example, the rule explains:

- if a restaurant tenant discriminates by refusing to seat a patron, it would be the tenant, and not the landlord, who would be responsible, because the discriminatory policy is imposed solely by the tenant and

399. Id.
400. Id. at 35,556 (section-by-section analysis of 28 C.F.R. § 36.201).
402. 28 C.F.R. § 36.201(b).
403. See generally 56 Fed. Reg. 7484 (1991) (proposed 28 C.F.R. § 36.201(b)).
not by the landlord. If, however, a tenant refuses to modify a "no pets" rule to allow service animals in its restaurant because the landlord mandates such a rule, then both the landlord and the tenant would be liable for violation of the ADA when a person with a service dog is refused entrance.406

An entity that is not itself a public accommodation (e.g., a trade association or organization such as the American Bar Association ("ABA") or a performing artist), that leases space for a conference, performance or the like at a place of public accommodation, thereby becomes a provider of public accommodations subject to the ADA.407 This rule, however, only applies when the entity at issue gives some form of consideration (i.e., payment in cash or services) to lease the space.408 In such circumstances the leasing entity (the ABA or artist, for example) must comply with title III.409

Similarly, if a private club that would not otherwise be covered by the Act were to rent its facilities to an entity (such as the ABA) that is not generally a public accommodation but becomes a public accommodation by leasing space for a conference, that entity (the ABA), as well as the private club (which has now become subject to title III as previously explained), becomes subject to title III.410 The ABA became a public accommodation when it leased space for a conference, and the private club became a public accommodation when it leased the space for purposes of holding a conference.

E. Religious Entities

Religious entities are exempt from title III.411 The term "religious entity" means "a religious organization including a place of worship."412 The exemption applies to entities controlled by a religious organization. Thus, for example, if a school or social service program operated by a religious organization is governed by a lay board, the school or social service program remains exempt from title III.413 Moreover, the exemption applies even if a religious organization conducts an activity that would otherwise make it a public accommodation (such as operating a day care center or nursing home that is open to the public).414 The test with respect to the religious entity exemption (unlike the test with respect to the private club exemption415) is whether the public accommodation activity (e.g.,

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406. Id. The rule emphasizes, however, that "the parties are free to allocate responsibilities in any way they choose." Id. For a definition of "service animal," see infra note 438.
408. Id.
409. Id.
410. Id.
412. 28 C.F.R. § 36.104.
414. Id.
415. See supra note 400 and accompanying text.
the day care center or nursing home) is operated by the religious organization, not who benefits from the services provided.\textsuperscript{416}

A public accommodation that is not itself a religious organization or controlled by a religious organization that leases space on the property (other than as a place of worship) of a religious entity—for consideration, is subject to title III’s requirements, however.\textsuperscript{417}

\section*{F. Discrimination Prohibited}

Title III of the ADA prohibits discrimination against disabled people—or against others because of their affiliation with a disabled person—by all public accommodations as of January 26, 1992.\textsuperscript{418} Title III provides that:

\begin{quote}
No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person [or private entity] who owns, leases (or leases to), or operates a place of public accommodation.\textsuperscript{419}
\end{quote}

\section*{1. Eligibility Criteria}

A public accommodation may not impose or apply eligibility criteria that screen out or tend to screen out people with disabilities from "fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations," unless such criteria are necessary to enable the entity to provide the goods or services it is in the business of providing.\textsuperscript{420}

Pursuant to this mandate, for example, a public accommodation may not require that an individual with a disability be accompanied by an attendant;\textsuperscript{421} nor may a public accommodation require an individual to unnecessarily identify a disability.\textsuperscript{422} Similarly, a public accommodation may not require presentation of a driver's license as the sole means of identification before being permitted to pay by check, because such a policy would discriminate against disabled people who were unable to pay by personal checks.\textsuperscript{423}

\begin{footnotes}
\item[416] 56 Fed. Reg. 35,554.
\item[417] Id.
\item[418] 42 U.S.C.A. § 12182(b)(E). That section provides:
It shall be discriminatory to exclude or otherwise deny equal goods, services, facilities, privileges, advantages, accommodations, or other opportunities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.
\item[419] For the effective date of title III, see id. § 12181 note. There are a few exceptions to the rule that title III becomes effective on January 26, 1992. Those exceptions have been noted in this article.
\item[420] Id. § 12182(a); 28 C.F.R. § 36.201(a).
\item[421] 28 C.F.R. § 36.301(a).
\item[422] 56 Fed. Reg. 35,564 (section-by-section analysis of 28 C.F.R. § 36.301(a)). Note, however, that a public accommodation is not required to provide services of a personal nature, such as assistance with toileting, eating, or dressing. 28 C.F.R. § 36.306.
\item[423] 56 Fed. Reg. 35,564 (section-by-section analysis of 28 C.F.R. § 36.301(a)). Thus, for example, a retail store could not require an individual to state on a credit application whether he has epilepsy, is mentally ill, tests positive for HIV, or has any other disability. Id.
\end{footnotes}
obtain drivers' licenses (such as certain individuals with severe vision impairments, active seizure disorders or developmental disabilities). Moreover, a surcharge may not be assessed to a disabled individual to cover the cost of making a facility accessible.

A public accommodation may impose neutral safety rules that may screen out, or tend to screen out, disabled people, however, if such safety rules are “based on actual risks and not on speculation, stereotypes, or generalizations about individuals with disabilities.” As examples of such safety qualifications the regulations cite height requirements for specific amusement park rides or requirements that all participants in a recreational rafting expedition meet standards of swimming proficiency.

2. Providing Non-Discriminatory Services

Owners and operators of places of public accommodation must allow disabled people to participate in an equal fashion or to benefit equally from the goods, services, facilities, advantages, or accommodations provided by the entity. Further, “[g]oods, services, facilities, privileges, advantages, and accommodations [must] be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual.” Thus, “[m]odified participation for persons with disabilities must be a choice, not a requirement.” For example, while a museum may offer special “touching” tours for blind persons, people who are blind are free to decline such special services and tour the exhibit at their own pace; while an entity might offer specially designed recreational programs for children with mobility impairments, those children must also be free to attend recreational programs made available to children without disabilities.

Owners and operators of places of public accommodation are required to make “reasonable modifications” in their practices, policies or procedures, or to provide “auxiliary aids and services” for persons with disabilities, unless such modifications would “fundamentally alter” the nature of the goods, services, facilities, privileges, advantages and accommodations offered or would result in an “undue burden.”

425. 28 C.F.R. § 36.301(c). Completely refundable deposits are permissible, however. 56 Fed. Reg. 35,564 (section-by-section analysis of 28 C.F.R. § 36.301(c)). Moreover, a professional who charges on the basis of time may charge for the extra time it may take in certain cases to provide services to individuals with disabilities. Id. Further, if extra services are provided, they may be charged for. Id.
427. Id.
428. 42 U.S.C.A. § 12182(b)(1)(A)(i), (ii), (iii), (iv). These provisions preclude discrimination against persons with disabilities “directly, or through contractual, licensing or other arrangements.” Moreover, these provisions prohibit discrimination on the basis of disability against “the clients or customers of the covered public accommodation that enters into the contractual, licensing or other arrangement.” Id. § 12182(b)(1)(A)(iv).
429. Id. § 12182(b)(1)(B); see also 28 C.F.R. § 36.203(a).
431. Id.
The term "undue burden" is defined as encompassing "significant difficulty or expense." When determining whether an action would result in an undue burden, the following factors should be considered:

1. The nature and cost of the action needed under this part;
2. The overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures; or the impact otherwise of the action upon the operation of the site;
3. The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity;
4. If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation with respect to the number of its employees; the number, type, and location of its facilities; and
5. If applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.

Title III, however, does not require that persons with disabilities "must achieve the identical result or level of achievement of persons without disabilities, but does require that persons with disabilities must be afforded equal opportunity to obtain the same result." Thus, for example, a restaurant need not provide Braille menus for blind patrons if it provides a waiter or other employee to read the menu.

A public accommodation may refuse to deal with a disabled person, and may refer that disabled person to another public accommodation, only if the public accommodation would do so in the normal course of its operations if the person were not disabled.

A public accommodation must modify its policies, practices or procedures to permit use the use of a service animal in any area open to the public. Title III intends that the broadest feasible access be given to service animals. The regulations recognize, however, that in rare

433. 28 C.F.R. § 36.104.
434. Id.
436. Senate Subcommittee Report, supra note 435, at 63.
437. 28 C.F.R. § 36.302(b). Thus, for example, if a lawyer does not handle divorce cases the lawyer may refer a disabled person who seeks a divorce to another attorney.
438. The term "service animal" means:
any guide dog, signal dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability, including, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair, or fetching dropped items.
439. Id. § 36.104.
439. Id. § 36.302(c)(1).
circumstances accommodation of service animals may not be required because it would require a fundamental alteration of the goods, services, facilities, or accommodations offered or would jeopardize the safe operation of the public accommodation.  

A store with check-out aisles must ensure that an adequate number of accessible check-out aisles are kept open during store hours, or must modify its policies and practices to ensure that an equivalent level of convenient service is provided to people with disabilities as is provided to others.  

It is important to remember, however, that public accommodations are not required to make fundamental alterations to their programs or operations. Thus, for example, the interpretive guidelines to the regulations explain that a museum would not have to modify a policy barring the touching of delicate works for blind patrons if the touching threatened the integrity of the works.  

3. Providing Auxiliary Aids and Services  
As previously noted, unless it would constitute an undue burden owners of places of public accommodation are required to provide auxiliary aids and services for individuals with disabilities. The term “auxiliary aids and services” is defined in title III as including:

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;
(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;
(C) acquisition or modification of equipment or devices; and
(D) other similar services and actions.

The DOJ’s regulations promulgated under title III provide an expanded list of suggested auxiliary aids and services. The regulations cite as possible auxiliary aids and services:

(1) qualified interpreters, notetakers, computer-aided transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDDs), videotext dis-

441. 28 C.F.R. § 36.302(d)). For example, if only one check-out aisle is accessible, and that aisle is generally for express service only, one means of providing equivalent service would be for the store to allow persons with mobility impairments to make all their purchases at that aisle. Id.
442. See text accompanying note 432.
443. 56 Fed. Reg. 35,565 (section-by-section analysis of 28 C.F.R. § 36.302). The analysis states that “[d]amage to a museum piece would clearly be a fundamental alteration that is not required by this section.” Id.
444. See text accompanying note 432.
plays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments;
(2) qualified readers, taped texts, audio recordings, Brailled materials, large print materials, or other effective methods of making visually delivered materials available to individuals with visual impairments;
(3) acquisition or modification of equipment or devices; and
(4) other similar services and actions.\textsuperscript{446}

The regulations make it clear, however, that this list is not all-inclusive or exhaustive, because "[i]t is not possible to provide an exhaustive list, and such an attempt would omit new devices that will become available with emerging technology."\textsuperscript{447}

With respect to the suggested auxiliary aids to be provided for individuals with hearing-impairments, two factors are worthy of note. First, the regulations use the word "aurally" rather than "orally" when providing that one suggested accommodation is to utilize any effective method of making "aurally delivered materials" available to such individuals.\textsuperscript{448} The term "aurally" is meant to include "nonverbal sounds and alarms and computer-generated speech."\textsuperscript{449} Second, the interpretive guidelines to the regulations make it clear that "use of the most advanced technology is not required so long as effective communication is ensured."\textsuperscript{450}

With respect to the broad category of "[o]ther similar services and actions,"\textsuperscript{451} the interpretive guidelines provide several examples, such as for store personnel to retrieve an item from a shelf for a blind person who could not locate the item without assistance, or for an individual in a wheelchair who could not reach the item.\textsuperscript{452}

The auxiliary aid requirement is flexible. A public accommodation can choose among various alternatives so long as the result is effective.\textsuperscript{453} The regulations do not require public accommodations to give primary consideration to the request of an individual with a disability with respect to which aid or service to provide. Rather, public accommodations are "strongly encouraged" to consult with the disabled individual before providing a particular aid or service.\textsuperscript{454} Again, however, the key is the effectiveness of the provided aid or service.\textsuperscript{455}

\textsuperscript{446} 28 C.F.R. § 36.303(b) (1992).
\textsuperscript{448} See supra note 446 and accompanying text.
\textsuperscript{450} Id.
\textsuperscript{451} See supra note 446 and accompanying text.
\textsuperscript{452} 56 Fed. Reg. 35,566 (section-by-section analysis of 28 C.F.R. § 36.303). Note, however, that a store is not required to provide an individual with a disability with a personal shopper. Id.
\textsuperscript{453} Id.
\textsuperscript{454} Id. at 35,566-67.
\textsuperscript{455} The requirement of effectiveness is emphasized particularly with respect to individuals with hearing impairments. The DOJ's title III regulations specifically provide that a public accommodation "shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities." 28 C.F.R. § 36.303(c). The interpretive guidelines to the regulations note that use of a pad and paper would not suffice in most situations to provide effective communications with a deaf individual. 56 Fed. Reg. 35,567 (section-by-section analysis of 28 C.F.R. § 36.303). Similarly, readers and interpreters provided for vision-impaired or hearing-impaired individuals must be qualified to provide effective services. Id.
The regulations specifically address the question of when TDDs and decoders must be provided for individuals with hearing impairments. If a public accommodation customarily offers its customers and clients the opportunity to make outgoing telephone calls on more than an incidental basis, it must make a TDD available to an individual with impaired hearing or speech. Hotels must possess a TDD or similar device at the front desk to permit receipt of calls from guests who use TDDs in their rooms. Further, the regulations provide that places of lodging that provide televisions in five or more guest rooms and hospitals that provide televisions for patient use must provide, on request, a means for decoding closed captions for a hearing-impaired customer or patient.

With the exception of these specifically mandated accommodations, whether a particular auxiliary aid or service must be provided will depend upon whether the "fundamental alteration" or "undue burden" tests are satisfied. It is important to note, however, that if provision of one auxiliary aid or service would result in a fundamental alteration or undue burden, the public accommodation must provide an alternative aid or service that would not result in a fundamental alteration or undue burden, to the extent that such an accommodation is possible.

G. Removal of Barriers From Existing Facilities

Public accommodations are required to remove structural, architectural and communication barriers in existing facilities, and transportation barriers in existing vehicles used for transporting individuals, where such removal is "readily achievable." The "readily achievable" standard is much lower than the "undue burden" or "undue hardship" standards, and is defined as meaning

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456. For a description of TDDs, see infra text accompanying note 570.
457. For a description of decoders, see infra text accompanying note 583.
458. 28 C.F.R. § 36.303(d)(1) (1992). Note, however, that due to the requirement that relay services for hearing-impaired persons must be available (see infra notes 564-83 and accompanying text, discussing title IV of the ADA), this proposed regulation does "not require a public accommodation to use a TDD for receiving or making telephone calls incident to its operations." 28 C.F.R. § 36.303(d)(2). In response to protests from hearing-impaired individuals that relay services are not sufficient to provide effective access to the telephone in numerous situations, the EEOC opined "that it is more appropriate for the Federal Communications Commission [FCC] to address these issues in its rulemaking under title IV." 56 Fed. Reg. 35,567 (section-by-section analysis of 28 C.F.R. § 36.303). Not surprisingly, the FCC's title IV regulations do not address this issue (see 56 Fed. Reg. 36,729), since the subject is outside the scope of title IV.
460. 28 C.F.R. § 36.303(e). For an explanation of close-captioning, see infra text accompanying notes 583-84.
“easily accomplishable and able to be carried out without much difficulty or expense.”\textsuperscript{463} Factors to be considered when determining whether barrier removal is readily achievable include the nature and cost of the action needed; the financial resources of, and the number of persons employed at, the facility; the effect of the action on the entity’s expenses or resources or the impact of the action upon the operation of the facility; and the size, nature, type and financial resources of the covered entity.\textsuperscript{464}

The “readily achievable” standard, like the “undue hardship” standard in the employment context, represents a compromise between proponents of the ADA and the business sector. The original version of the ADA required that architectural barriers be removed in two to five years unless such removal would threaten the existence of the entity’s business.\textsuperscript{465} That proviso was subsequently changed to the more modest “readily achievable” standard.\textsuperscript{466}

2. Barrier Removal

Examples of steps to remove barriers that may be readily achievable include, but are not limited to:

1. Installing ramps;
2. Making curb cuts in sidewalks and entrances;
3. Repositioning shelves;

\textsuperscript{463} 42 U.S.C.A. § 12181(9); 28 C.F.R. § 36.104.

\textsuperscript{464} 42 U.S.C.A. § 12181(9)(A)-(D); 28 C.F.R. § 36.104. Specifically, the regulations provide that when determining whether an action is readily achievable the following factors should be considered:

1. The nature and cost of the action needed under this part;
2. The overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures; or the impact otherwise of the action upon the operation of the site;
3. The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity;
4. If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type and location of its facilities; and
5. If applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.

28 C.F.R. § 36.104.

The regulations do not set forth any numerical formula for determining whether an action is readily achievable or an undue burden. The analysis of the DOJ’s proposed regulations noted that: proposals to establish such numerical standards were rejected by Congress after careful consideration. It would be difficult to devise a specific ceiling on compliance costs that would take into account the vast diversity of enterprises covered by the ADA’s public accommodations requirements and the economic situation that any particular entity would find itself in at any moment. The proposed rule, therefore, implements the flexible case-by-case approach chosen by Congress.\textsuperscript{56}

56 Fed. Reg. 7470 (section-by-section analysis of proposed 28 C.F.R. § 36.306). The final rule, like the proposed rule, declined to include a numerical formula. \textit{Id.}

\textsuperscript{465} See \textit{Hearings Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped}, 100th Cong., 1st Sess. 90 (1989) [hereinafter Senate Hearings 1989].

\textsuperscript{466} \textit{Id.}
(4) rearranging tables, chairs, vending machines, display racks, and other furniture;
(5) repositioning telephones;
(6) adding raised markings on elevator control buttons;
(7) installing flashing alarm lights;
(8) widening doors;
(9) installing offset hinges to widen doorways;
(10) eliminating a turnstile or providing an alternative accessible path;
(11) installing accessible door hardware;
(12) installing grab bars in toilet stalls;
(13) rearranging toilet partitions to increase maneuvering space;
(14) insulating lavatory pipes under sinks to prevent burns;
(15) installing a raised toilet seat;
(16) installing a full-length bathroom mirror;
(17) repositioning the paper towel dispenser in a bathroom;
(18) creating designated accessible parking spaces;
(19) installing an accessible paper cup dispenser at an existing inaccessible water fountain;
(20) removing high pile, low density carpeting; or
(21) installing vehicle hand controls.467

This list is not exhaustive. Nor does the fact that an item is on the list mean that it will always be readily achievable. Whether any of these barrier removals will be readily achievable must be determined on a case-by-case basis.468

Measures taken to comply with this section need not meet the stringent standards required for the accessibility of new facilities. The EEOC explains that:

[i]n striking a balance between guaranteeing access to individuals with disabilities and recognizing the legitimate cost concerns of businesses and other private entities, the ADA establishes different standards for existing facilities and new construction. In existing facilities . . . where retrofitting may prove costly, a less rigorous degree of accessibility is required than in the case of new construction and alterations . . . where accessibility can be more conveniently and economically incorporated in the initial stages of design and construction.469

Thus, measures taken to remove barriers in existing facilities are subject to the technical standards that must be followed when alterations are made to the facilities of a public accommodation, to the extent that

467. 28 C.F.R. § 36.304(b). The purpose of this section is to ensure that places of public accommodation are accessible to customers, clients, and patrons. Thus, the obligation to remove barriers under this section applies only to portions of a facility open to the public, and does not extend to areas of a facility used exclusively as employee work areas. Employment issues are the focus of title 1 of the ADA. See 56 Fed. Reg. 35,568 (section-by-section analysis of 28 C.F.R. § 36.304).
468. Id.
469. Id.
compliance with such technical requirements is readily achievable.\textsuperscript{470} To the extent that the compliance with these technical requirements is not readily achievable, noncomplying measures may be taken to achieve accessibility to the extent they do not pose a "significant risk to the health or safety of individuals with disabilities or others."\textsuperscript{471}

There is one exception to the rule that measures be taken to remove barriers in existing facilities are subject to the technical standards applying to alteration of public accommodation, however. That is, when removing barriers in existing facilities, public accommodations are not required to comply with the path of travel requirements set forth in 28 C.F.R. section 36.403.\textsuperscript{472} Further, when determining the extent to which a public accommodation must remove barriers in existing facilities, the standards for alterations under the ADA Accessibility Guidelines [ADAAG] incorporated with respect to the regulatory sections applying to new construction or alteration apply.\textsuperscript{473} Thus, for example, a hotel would satisfy the requirement that it remove structural barriers in existing facilities merely by achieving accessibility to the extent required by the ADA Accessibility Guidelines.

The obligation of public accommodations to remove barriers in existing facilities includes the obligation to remove "structural communication barriers."\textsuperscript{474} This term includes barriers that are "an integral part of the physical structure of a facility" (such as permanent signage and alarm systems, the lack of adequate sound buffers, and the presence of physical partitions that hamper the passage of sound waves between employees and customers).\textsuperscript{475}

The obligation to remove architectural barriers includes removal of any kind of physical barrier, even those caused by the location of temporary or movable structures such as furniture, equipment, or display racks. To make premises accessible to persons who use wheelchairs, for example, restaurants may need to reconfigure tables and chairs; stores may need to rearrange display racks and shelves.\textsuperscript{476} But, such actions are not readily

\textsuperscript{470} 28 C.F.R. § 36.304(d)(2). For a discussion of the technical standards to be followed when alterations are made to the facilities of a public accommodation, see infra notes 525-42 and accompanying text.

\textsuperscript{471} 28 C.F.R. § 36.304(d)(2). Portable ramps may be used to comply with this regulation "only when installation of a permanent ramp is not readily achievable." Moreover, when using portable ramps "due consideration should be given to safety features such as nonslip surfaces, railings, anchoring, and strength of materials." \textit{Id.} § 36.304(d)(2)(e).

\textsuperscript{472} See infra notes 536-42 and accompanying text. Generally, 28 C.F.R. section 36.403 provides that any alteration that could affect the usability of or access to an area of a facility that contains a "primary function" (i.e., "a major activity for which the facility is intended") must ensure that, to the maximum extent feasible, the path of travel to the altered area (including restrooms, drinking fountains, and telephones serving the altered area) are readily accessible to and usable by people with disabilities, unless the cost and scope of such alterations is disproportionate to the cost of overall alteration. When removing barriers in existing facilities, public accommodations are not required to comply with this requirement. 28 C.F.R. § 36.403.

\textsuperscript{473} 28 C.F.R. § 36.304(g). See infra note 521 and accompanying text for a discussion of the fact that the ADAAG standards apply to new construction and alteration under title III.

\textsuperscript{474} See supra note 462 and accompanying text.


\textsuperscript{476} \textit{Id.}
achievable to the extent that they would "result in a significant loss of selling or serving space." 477

If barrier removal is not readily achievable, a public accommodation must make its goods or services available to people with disabilities through alternative measures that are readily achievable. 478 Proposed examples of alternatives to barrier removal include, but are not limited to:

1. Providing curb service or home delivery (if, for example, it is not possible to ramp a long flight of stairs to a restaurant or pharmacy);
2. Retrieving merchandise from inaccessible shelves or racks;
3. Relocating activities to accessible locations (such as by offering the same menu in an accessible portion of the restaurant—perhaps the bar—if the main dining room is inaccessible). 479

The regulations specifically provide that if it is not readily achievable for a multiscreen cinema to make all of its theaters accessible, "the cinema shall establish a film rotation schedule that provides reasonable access for individuals who use wheelchairs to all films" and shall provide reasonable notice with respect to the location and time of accessible showings. 480

A public accommodation is not required to alter its inventory to include special goods (e.g., brailled books, closed-captioned video tapes, special foods, specially designed clothing) designed for individuals with disabilities. 481 If the public accommodation normally makes special orders upon request for special goods, however, it must order special goods at the request of an individual with a disability to the extent that such special goods may be obtained from a supplier with whom the public accommodation customarily does business. 482

To the extent that it is readily achievable to do so, public accommodations must provide a reasonable number of wheelchair seating spaces and seats with removable aisle-side arm rests in assembly areas, and these seats must be dispersed throughout the seating area in such a fashion that allow persons in wheelchairs to sit with their companions and must adjoin an accessible emergency exit. 483 Such seats should provide lines of sight and choice of admission prices comparable to those provided to the general public. 484 If removal of seats is not readily achievable, a

479. 28 C.F.R. § 36.305(b). This section does not require provision of "personal devices, such as prescription eyeglasses or hearing aids; or services of a personal nature including assistance in eating, toileting or dressing." Id. § 36.306.
480. 28 C.F.R. § 36.305(c).
481. Id. § 36.307.
482. Id.
483. Id. § 36.308.
484. Id.
portable chair or other means that will permit a companion to sit with an individual who uses a wheelchair should be provided to the extent that it is readily achievable to do so.485

Because entities subject to title III may lack the resources to remove all existing barriers at a given time, the regulations recommend that public accommodations follow specified priorities for removing barriers in existing facilities.486 The first priority is to "take measures to provide access to a place of public accommodation from public sidewalks, parking or public transportation" (such as installing entrance ramps, widening entrances and providing accessible parking).487 The second priority is to "take measures to provide access to those areas of a place of public accommodation where goods and services are made available to the public" (such as by adjusting the layout of display racks, rearranging tables, widening doors, providing Brailled and raised signage and visual alarms, and installing ramps).488 The third priority is to "take measures to provide access to restroom facilities" (such as by removing obstructing furniture or vending machines, widening doors, installing ramps, providing accessible signage, widening toilet stalls and installing grab bars).489 The fourth priority is to "take any other measures necessary to provide access to the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodations."490

Some commentators strongly objected to this list of priorities as placing the least emphasis on communication areas. In response, the DOJ emphasized that this order of priority applies only to the removal of structural barriers. The rule requiring the provision of auxiliary aids and services is the rule that primarily deals with communication barriers—there is no priority list in that regard.491 To the extent that 28 C.F.R. section 36.304 deals with structural communication barriers, however, removal of those barriers is placed at the lowest level of priority.

4. Continuing Obligation

The obligation to engage in readily achievable barrier removal is continuing. Barrier removal that was initially not readily achievable may become readily achievable due to changed circumstances.492

5. Development of Implementation Plans

There is no requirement that covered entities perform an annual assessment or self-evaluation with respect to their compliance with title

485. Id.
486. Id. § 36.304(c).
487. Id. § 36.304(c)(1).
488. Id. § 36.304(c)(2).
489. Id. § 36.304(c)(3).
490. Id. § 36.304(c)(4).
492. Id.
III. The DOJ, however, "urges public accommodations to establish procedures for an ongoing assessment of their compliance with the ADA's barrier removal requirements" and that such procedures "include appropriate consultation with individuals with disabilities or organizations representing them." Moreover, the DOJ recommends that entities subject to title III develop an "implementation plan designed to achieve compliance with the ADA's barrier removal requirements before they become effective on January 26, 1992. Such a plan, if appropriately designed and diligently executed, could serve as evidence of good faith effort to comply with the requirements of § 36.104."

H. Safety

A public accommodation is not required to permit an individual with a disability to participate in or benefit from its goods, services, facilities, or privileges if the individual would pose a direct threat to the health or safety of others. A "direct threat" means "a significant risk" that "cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services." To determine whether the "direct threat" test is satisfied, an individualized assessment must be made:

- based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk.

I. Courses and Examinations

Any private entity that "offers examinations or courses related to applications, licensing, certification or credentialing for secondary or postsecondary education, professional, or trade purposes" must offer such examinations or courses in an accessible setting or offer alternative accessible arrangements for persons with disabilities.

Examinations must be selected and administered to ensure that results reflect the individual’s aptitude or achievement level rather than reflecting any impaired sensory, manual, or speaking skill of an individual. Examinations specifically designed for people with disabilities must be offered as often and in as timely a manner as other examinations.

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493. Id.
494. Id.
495. Id.
496. Id.
498. 28 C.F.R. § 36.208(b).
499. Id. § 36.208(c).
502. Id. § 36.309(b)(1)(ii).
They must also be offered at locations that are as convenient as the locations of other exams.\textsuperscript{503} Examinations must be administered in accessible facilities or alternative accessible arrangements must be made (such as to offer an exam at an individual's home with a proctor).\textsuperscript{504} Where necessary, examinations must be modified for people with disabilities. Required modifications may include changes in the length of time permitted to complete the exam or adaptation of the manner in which the exam is given.\textsuperscript{505}

Auxiliary aids and services must be provided for disabled test takers when necessary, unless offering a particular aid or service would "fundamentally alter the measurement of the skills or knowledge the examination is intended to test or would result in an undue burden."\textsuperscript{506} An example of such an auxiliary aid or service is the provision of a reader for an individual with a learning disability.\textsuperscript{507} In such a situation, the reader would have to be qualified. The interpretive guidelines to the DOJ's regulations note that "a reader who is unskilled or lacks knowledge of specific terminology used in the exam may be unable to convey the information in the questions or to follow the applicant's instructions effectively."\textsuperscript{508}

The DOJ refused to include a requested rule that would hold that entities providing exams for licensing or certification for a particular occupation or profession be permitted to refuse to provide aids or modifications for disabled people who—according to some advance determination—would be unable to perform the essential functions of the profession or occupation and would thus not be able to become certified.\textsuperscript{509} In refusing to include such a rule, the DOJ opined that an exam is merely one stage in a licensing or certification process—which an individual with a disability should be permitted to attempt to pass.\textsuperscript{510}

The regulations do not state that an individual with a disability must provide advance notice and appropriate documentation—at his or her own expense—of any disability and any modification or aids that would be required. In the interpretive guidelines to the regulations, however, DOJ has opined that it is permissible for entities that administer tests to make such requirements providing that they are reasonable and that the deadline for notice is no earlier than the deadline for other applicants taking the exam.\textsuperscript{511}

Courses must also be modified to accommodate the needs of individuals with disabilities (such as by changing the length of time permitted for completion, substituting alternative requirements or adapting the manner...
in which the course is conducted), unless that would fundamentally alter the nature of the course.\textsuperscript{512} Again, courses must be administered in accessible locations, and auxiliary aids must be provided where appropriate.\textsuperscript{513}

\section*{J. Transportation}

Public accommodations not primarily in the business of transporting people (e.g., airport shuttle services, customer bus shuttle services operated by private companies and shopping centers, student transportation systems such as a university tram, and transportation provided within recreational facilities such as zoos and ski resorts) must make their transportation services accessible to disabled people.\textsuperscript{514}

Barriers in existing vehicles must be removed to the extent it is readily achievable to do so; but the installation of hydraulic or other lifts is not required.\textsuperscript{515}

Public accommodations subject to the transportation section must comply with the DOT's regulations issued pursuant to section 306 of the ADA, which requires the DOT to issue regulations concerning transportation accessibility under the Act.\textsuperscript{516}

\section*{K. Newly Constructed or Altered Facilities}

All newly constructed places of public accommodation and "commercial facilities"\textsuperscript{517} designed for first occupancy after January 26, 1993 must be readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.\textsuperscript{518} Further, when altering their facilities or portions thereof, public accommodations and commercial facilities must make such alterations in a manner that "to the maximum extent feasible" renders the altered portions readily accessible to and usable by individuals who use wheelchairs.\textsuperscript{519}

The DOJ's title III regulations set forth detailed criteria to be followed when making newly constructed or altered facilities accessible.\textsuperscript{520} These include the ADA Accessibility Guidelines for Buildings and Facilities, which must be complied with under title III.\textsuperscript{521} An extensive analysis of those regulations and technical building criteria is outside the scope of

\textsuperscript{512} 28 C.F.R. § 36.309(c).
\textsuperscript{513} Id. § 36.309(c)(3), (4), (5).
\textsuperscript{514} Id. § 36.310.
\textsuperscript{515} Id. § 36.310(b).
\textsuperscript{516} Id. § 36.310(c). The DOT's transportation regulations are discussed in section IV of this article.
\textsuperscript{517} For the definition of "commercial facilities," see supra note 393 and accompanying text. Originally the Senate version of the Act would have required that "all potential places of employment" be covered by this proviso. Critics contended that wording was too broad, and it was deleted in the spirit of compromise.
\textsuperscript{520} See generally 28 C.F.R. §§ 36.401-999, 36 app.
\textsuperscript{521} Id.
this article. A few significant regulatory provisions deserve explanation, however:

1. Newly Constructed Facilities
The term "newly constructed facility" within the meaning of title III covers situations in which a completed application for a building permit or permit extension is filed after January 26, 1992, and a certificate of occupancy is filed after January 26, 1993. The requirement that a newly constructed facility be accessible applies to the entire facility, including work areas; it does not just apply to areas open to the public.

2. Commercial Facilities in Private Residences
When a commercial facility is located in a private residence, the portion used either exclusively or in part as a commercial facility must be accessible. The portion used exclusively as a residence need not be accessible, but the entrance to the facility must be accessible, and those portions of the residence available to or used by employees or visitors of the commercial facility, including restrooms, must be accessible.

3. Structural Impracticability
Full compliance with the requirement that newly constructed places be accessible is excused if the entity can demonstrate that it is "structurally impracticable" to meet accessibility requirements due to the "unique characteristic of the terrain." In such a case, the facility shall be made accessible to the extent it is not structurally impracticable to do so.

4. Elevator Exemption
Elevators are not required to be installed in a newly constructed or altered facility that has less than three stories or has less than 3000 square feet per story. This exemption does not apply, however, if the facility is a professional office of a health care provider, a shopping center, or a shopping mall.

The term "shopping center or shopping mall" includes a "building housing five or more sales or rental establishments" or:

- a series of buildings on a common site connected by a common pedestrian access route above or below the ground floor, that is either under common ownership or common control or developed either as

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522. Id. § 36.401(a).
524. 28 C.F.R. § 36.401(b) (1992).
525. Id. § 36.401(c).
526. Id. Moreover, if providing accessibility to one group of disabled individuals (such as individuals who use wheelchairs) would be structurally impracticable, accessibility shall be ensured to persons with other types of disabilities (such as individuals who use crutches or have other disabilities). Id.
527. 42 U.S.C.A. § 12183(b); 28 C.F.R. §§ 36.401(d), 36.404(a).
528. 28 C.F.R. § 36.404.
If this test is satisfied, any sales or rental establishment covered in category (5) of the twelve categories of public accommodations covered in title III will be required to have an elevator. The other types of public accommodations (such as restaurants, laundromats, banks, travel services, health services) are not required to have elevators unless they have three stories or 3000 or more square feet per story. With respect to shopping malls or centers that fit within the regulatory definitions, however, only those floor levels housing (or designed to house) one or more sales or rental establishments must be elevator accessible. Still, restroom facilities must be accessible pursuant to ADA Accessibility Guideline 4.1.3(5).

The ADA specifies that the Attorney General may determine that a particular category of facilities requires the installation of elevators based on the usage of the facilities. Pursuant to that provision, the DOJ has issued a regulation mandating that the elevator exemption does not apply to a terminal, depot, or other station used for specified public transport or an airport passenger terminal.

Entities may not circumvent the requirements of title III with respect to new alteration or construction of facilities by designing a facility in such a way that no story is intended to constitute a ground floor. Thus, for example, the interpretive guidelines to the regulations provide that:

if a private entity constructs a building whose main entrance leads only to stairways or escalators that connect with upper or lower floors, [DOJ] would consider at least one level of the facility a ground story.

5. Path of Travel in Altered Facilities

Where a public accommodation or commercial facility is undertaking an alteration that affects, or could affect, the usability of an access to an area of a facility that contains a “primary function” (i.e., “a major activity for which the area is intended”), the entity must ensure that, to the maximum extent feasible, “the path of travel to the altered area and the bathrooms, telephones, and drinking fountains serving the altered area” are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. An entity does not have to

529. Id. § 36.404(2)(i), (ii).
530. See supra note 390 and accompanying text.
533. 42 U.S.C.A. § 12183(b).
534. 28 C.F.R. § 36.404(a).
536. 28 C.F.R. § 36.403(b) (1992).
comply with this exemption, however, if "the cost and scope of such alterations is disproportionate to the cost of the overall alteration."538

Alterations will be deemed disproportionate when the cost to provide an accessible path to the altered area "exceeds 20% of the cost of the area to the primary function area."539 When the costs are found to be disproportionate, the path of travel must be made accessible to the extent that can be accomplished without incurring disproportionate costs.540 In such a case, when choosing which accessible element to provide, the regulations provide that "priority should be given to those elements that will provide the greatest access, in the following order:

(i) [a]n accessible entrance;
(ii) [a]n accessible route to the altered area;
(iii) [a]t least one accessible restroom for each sex or a single unisex restroom;
(iv) [a]ccessible telephones;
(v) [a]ccessible drinking fountains; and
(vi) [w]hen possible, additional elements such as parking, storage, and alarms.541

Further, the regulations mandate that an entity may not evade the obligation to provide an accessible path of travel "by performing a series of small alterations to the area served by the path of travel if those alterations could have been performed as a single undertaking."542

6. Historic Preservation

It is not feasible to provide physical access to a building or facility that is eligible for listing in the National Register of Historic Places or that is designated as historic under state or local law, because to do so would threaten or destroy the historic significance of the building or facility, the DOJ’s title III regulations provide for alternative methods of providing access.543

L. Regulations Promulgated by the Architectural and Transportation Barriers Compliance Board

On July 26, 1991, the Architectural and Transportation Barriers Compliance Board ("Compliance Board") published final guidelines to assist

538. 42 U.S.C.A. § 12183(g)(2); 28 C.F.R. § 36.403(a).
539. 28 C.F.R. § 36.403(f) (1992). This section further provides that the following costs may be counted as expenditures required to provide an accessible path of travel:
(i) [c]osts associated with providing an accessible entrance and an accessible route to the altered area, for example, the cost of widening doorways or installing ramps;
(ii) [c]osts associated with making restrooms accessible, such as installing grab bars, enlarging toilet stalls, insulating pipes, or installing accessible faucet controls;
(iii) [c]osts associated with providing accessible telephones, such as relocating the telephone to an accessible height, installing amplification devices, or installing a telecommunications device for deaf persons (TDD);
(iv) [c]osts associated with relocating an inaccessible drinking fountain.

Id.
540. Id. § 36.403(g)(1).
541. Id. § 36.403(g)(2).
542. Id. § 36.403(h).
543. Id. § 36.405.
the DOJ in establishing accessibility standards for new construction and alterations in places of public accommodation and commercial facilities as required by titles II and III.\footnote{36 C.F.R. § 1191 (1992).} Subsequently, on September 6, 1991, the Compliance Board published guidelines to assist the DOJ in formulating accessibility standards for transportation facilities covered under title III (as well as under title II).\footnote{Id.; see infra text accompanying notes 652-721 for a discussion of these guidelines.}

\section{M. Enforcement of Title III}

Title III (including the sections relating to the provision of transportation services by private entities—as discussed in section IV of this Article) may be enforced both privately and publicly by the United States Attorney General.\footnote{42 U.S.C.A. § 12188(a)(1).} Any person who is subjected to discrimination on the basis of disability in violation of title III, and any person who has "reasonable grounds" for believing that he or she is "about to be subjected to discrimination" in violation of the provisions relating to the construction or alteration of places of public accommodation, may file suit under the Act.\footnote{Id.} The Act provides that "[n]othing in this section shall require a person with a disability to engage in a futile gesture if such person has actual notice that a person or organization covered by this title does not intend to comply with its provisions."\footnote{Id.}

The remedies and procedures set forth in section 204(a) of the Civil Rights Act of 1964\footnote{42 U.S.C. 2000a-3(a) (1982). That section provides as follows: Whenever any person has engaged [in] or there are reasonable grounds to believe that person is about to engage in any act or practice prohibited [under the Act], a civil action for preventive relief, including an application for permanent or temporary injunction, restraining order, or other order, may be instituted by the aggrieved and ... the court may, in its discretion permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon application of the complainant ... the court may appoint an attorney for such complainant and may authorize the commencement of the civil action without the payment of fees, costs, or security.} are the remedies and procedures available under title III.\footnote{42 U.S.C.A. § 12188(a)(1).} With respect to violations of the provisions relating to: (1) the failure to remove architectural and communication barriers in existing vehicles and rail passenger cars,\footnote{Id. § 12182(b)(2)(A)(iv). The requirements of private entities engaged in the business of transporting people are discussed in section IV of this article.} and (2) the failure to make newly constructed or altered facilities readily accessible to and usable by persons with disabilities,\footnote{Id. § 12183(a)(1), (2). For a discussion of these provisions, see supra notes 518-19 and accompanying text.} injunctive relief may include an order requiring that facilities be made readily accessible to and usable by persons with disabilities.\footnote{42 U.S.C.A. § 12188(a)(2).} Moreover, the Act provides that "[w]here appropriate, in-
junctive relief shall also include requiring the provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods, to the extent required by [title III]."

The Attorney General has authority to institute "pattern and practice" lawsuits when there is "reasonable cause" to believe that any person or group of persons is engaged in a pattern or practice of discriminating against individuals with disabilities, or to institute a suit when "any person or group of persons has been discriminated against under [title III] and such discrimination raises an issue of general public importance." Monetary damages, while not recoverable in private suits, are recoverable in suits filed by the Attorney General. Further, with respect to actions filed by the Attorney General, the court has discretion to "vindicate the public interest" by assessing penalties of up to $50,000 for a first violation and $100,000 for subsequent violations. In determining the amount of any such penalty, however, the court must consider "any good faith effort or attempt to comply with this Act by the entity."

After much controversy, however, punitive damages are not available under title III. Moreover, the Act precludes suits under title III against small businesses with twenty-five or fewer employees having gross receipts of $1,000,000 or less for twenty-four months after the Act's enactment, and against small businesses with ten or fewer employees having gross receipts of $500,000 or less for thirty months after the Act's enactment. The Joint Explanatory Statement of the Committee of Conference explains that in order to file suit against such a small business:

the discriminatory act must occur after the applicable period has expired. The conferees note that this section gives small businesses additional time to learn the requirements of the ADA and to come into compliance with the Act before they will be subject to a civil action. The conferees fully expect that businesses will, however, make good faith efforts to comply with the Act during this additional phase-in period.

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554. Id.
555. Id. § 12188(b)(1)(B).
556. Id.
557. Id. § 12188(b)(2)(B).
558. Id. § 12188(b)(2)(C).
559. Id. § 12188(b)(5). This provision explains that when: evaluating good faith, the court shall consider, among other factors it deems relevant, whether the entity could have reasonably anticipated the need for an appropriate type of auxiliary aid needed to accommodate the unique needs of a particular individual with a disability.
560. Id. § 12188(b)(4).
561. Id. § 12181 note. This 24-month grace period does not apply with respect to a claim that a covered entity has violated the provision of the ADA (§ 303) requiring that newly constructed or altered facilities be made accessible to disabled people. Id.
562. Id. This 30-month grace period does not apply with respect to a claim that a covered entity has violated the provision of the ADA (§ 303) requiring that newly constructed or altered facilities be made accessible for disabled people. Id.
563. 136 Cong. Rec. H4606 (1990). Thus, while the provisions of title III take effect 18 months after enactment of the ADA, businesses with 25 or fewer employees are protected from suit for 24 months after the Act's enactment, and businesses with 10 or fewer employees are protected from suit for 30 months after the Act's enactment.
VI. TELECOMMUNICATION RELAY SERVICES

Another major component of the ADA involves the provision of telecommunication services for Americans with hearing and/or speech impairments. There are over 24 million individuals who are hearing impaired and 2.8 million individuals who are speech impaired in the United States, many of whom are unable to use the telephone, an essential part of modern American life. Title IV of the ADA amends the Communications Act of 1934 to require all common carriers (generally, telephone companies) to provide "functionally equivalent" telecommunication services to allow individuals who are hearing and/or speech-impaired to communicate with people who can hear. To fulfill this mandate, within three years of the Act's enactment (by July 26, 1993) providers of telecommunication services are obligated to provide "telecommunications relay services," either "individually, through designees, through a competitively selected vendor, or in concert with other carriers."

Telephone relay services work as follows: People who are hearing and/or speech-impaired may utilize Telecommunications Devices for the Deaf ("TDDs") to communicate via the telephone. When using a TDD, the telephone receiver is placed into two headset cups (similar to a modem) on a machine that resembles a small typewriter with a video screen and/or a paper printout. The TDD user types a message on a keyboard, which is relayed to a party on the other end of the line with a similar device. The receiver returns his or her message by typing it to the sender and the conversation proceeds via typewriter and video screen or printout. Because most people who are not hearing impaired do not have TDDs, a relay service is required to allow TDD users to communicate with non-TDD users. Thus, the TDD user calls a relay service, and a relay operator answers via TDD and places the call to the non-TDD user (or vice versa). The operator then relays messages back and forth between the TDD and

565. 47 U.S.C.A. §§ 151-757 (1991). The Communications Act mandates that communication services be made "available, so far as possible, to all the people of the United States..." Id. § 151 (emphasis added).
566. The term "common carrier" includes "any common carrier engaged in interstate communication by wire or radio..." Id. § 225(a)(1).
567. Id. § 225(a)(3), (b).
568. The term "telecommunications relay services" is defined as:

- telephone transmission services that provide the ability for an individual who has a hearing impairment or speech impairment to engage in communication by wire or radio with a hearing individual in a manner that is functionally equivalent to the ability of an individual who does not have a hearing impairment or speech impairment to communicate using voice communication services by wire or radio.
- Such term includes services that enable two-way communication between an individual who uses a TDD or other non-voice terminal device and an individual who does not use such a device.

Id. § 225(a)(3).
569. Id. A common carrier must only provide relay services "throughout the area in which it offers service," however. Id. § 225(c).
non-TDD users, typing messages for the TDD user and speaking messages for the non-TDD user.

The ADA requires the Federal Communications Commission ("FCC") to formulate regulations relating to the provision of relay services within one year after the Act's enactment.\textsuperscript{571} To ensure the functional equivalence of telecommunication services provided for people who are hearing and/or speech impaired, the Act mandates that such relay services shall: (1) operate 24 hours a day, 365 days a year;\textsuperscript{572} (2) cost no more than regular telephone services;\textsuperscript{573} (3) prohibit relay operators from refusing calls or limiting the length of calls;\textsuperscript{574} (4) require relay operators to maintain strict confidentiality with respect to all telephone messages relayed;\textsuperscript{575} and (5) prohibit relay operators from intentionally altering relayed conversations.\textsuperscript{576} Relay operators are subject to the same standard of conduct that other operators are subject to under the Communications Act.\textsuperscript{577}

The ADA gives the FCC sufficient enforcement authority to ensure that relay services are provided everywhere in the nation and that minimum federal standards are met by relay service providers.\textsuperscript{578} The Act also provides for procedures to be established under which individual states may retain jurisdiction over the provision of intrastate telecommunication relay services by applying to the FCC for certification.\textsuperscript{579} While complaints concerning alleged violations relating to the provision of intrastate services within a state with a certified program are to be filed with the FCC,\textsuperscript{580} the FCC is required to refer such complaints to individual certified states.\textsuperscript{581} The FCC cannot thereafter exercise jurisdiction over the complaint unless final action has not been taken by the certified state program within 180 days.\textsuperscript{582}

The ultimate cost of the requisite relay services is to be borne by all users of telephone services, not just users with disabilities. The ADA provides that the regulations to be promulgated by the FCC:

\textit{shall generally provide that costs caused by interstate telecommunication services shall be recovered from all subscribers for every interstate service and costs caused by intrastate telecommunication services shall be recovered from the intrastate jurisdiction. In a State that has a certified program under subsection (f) of this section, a State commission shall permit a common carrier to recover...}

\textsuperscript{571} Id. § 225(d)(1). Final regulations were published by the FCC on August 1, 1991. 47 C.F.R. §§ 0, 64.
\textsuperscript{572} Id. § 225(d)(1)(C).
\textsuperscript{573} Id. § 225(d)(1)(D).
\textsuperscript{574} Id. § 225(d)(1)(E).
\textsuperscript{575} Id. § 225(d)(1)(F).
\textsuperscript{576} Id. § 225(d)(1)(G).
\textsuperscript{579} Id. § 225(f).
\textsuperscript{580} Id. § 225(e)(2).
\textsuperscript{581} Id. § 225(g).
\textsuperscript{582} Id.
the costs incurred in providing intrastate telecommunications relay services by a method consistent with the requirements of this section.\textsuperscript{583}

While the ADA will provide people who are hearing impaired with access to the telephone, the Act will not provide broad access to television. The original version of the ADA would have required television broadcasters to take specified action to close caption television programs for viewers who are hearing impaired (pursuant to which decoders portray written captions setting forth the audio portions of a show). That section was also eliminated from the ADA in the spirit of compromise. Thus, people who are hearing impaired remain severely disadvantaged by their inability to watch television in general.\textsuperscript{584} As enacted, however, title IX of the ADA does require amendment of the Communications Act to require closed captioning of all television public service announcements produced or funded by the federal government.\textsuperscript{585}

VII. STATE AND LOCAL GOVERNMENTS

Title II of the ADA prohibits all departments, agencies, special purpose districts or other instrumentalities of any state or local government from excluding a person with a disability from participating in, or denying a person with a disability the benefits of, the services, programs, or activities of the entity, or from otherwise discriminating against a person with a disability as of January 26, 1992.\textsuperscript{586} This provision, in effect, extends the protections of section 504 to \textit{all} state and local government entities, regardless of whether they receive federal financial assistance.

Title II's prohibition of discrimination by state and local government entities applies both with respect to employment discrimination and to the accessibility of places of public accommodation.

A. Employment

With respect to employment, title II covers \textit{all} state and local government entities, not just those having fifteen or more employees.\textsuperscript{587} Thus,

\textsuperscript{583} Id. \$ 225(d)(3)(B)(1991).
\textsuperscript{584} On October 15, 1990, however, the Television Decoder Circuitry Act of 1990 was enacted into law. S. 1974, 101st Cong., 2d Sess. (1990); 47 U.S.C.A. \$s 609 note, 303(u) (1991). This Act amends section 303 of the Communications Act of 1934, 47 U.S.C. \$ 303 (1982), to require all television sets manufactured in—or for use in—the United States, having picture screens of at least 13 inches in size, to be equipped "with built-in decoder circuitry designed to display closed-captioned television transmissions." S. 1974, \$ 3, 136 CONG. REC. H8544 (1990); 47 U.S.C.A. \$ 303(u) (1991). It is anticipated that if all sets are equipped with built-in decoders (allowing the display of captions at the option of the viewer), television broadcasters and producers will voluntarily increase the number of closed-captioned television programs. This law becomes effective on July 1, 1993.
\textsuperscript{585} 47 U.S.C.A. \$ 611.
\textsuperscript{586} 42 U.S.C.A. \$s 12131-33. For the effective date of title II, see 56 Fed. Reg. 35694 (1991) (final rules under title III promulgated by the DOJ).
\textsuperscript{587} See supra notes 73-75 and accompanying text for an explanation of the fact that under title I of the ADA, employers (other than state or local government employers) having 25 or more employees are subject to the employment provisions of the Act as of January 26, 1992, while employers (other than state or local government employers) having 15-24 employees are subject to the employment provisions of the Act as of January 26, 1994.
state and local government employers having fewer than fifteen employees, while subject to title II of the ADA, must follow regulations promulgated under Section 504, rather than the ADA title I regulations.\textsuperscript{588} State and local government employers having in excess of twenty-five employees, however, must comply with the ADA title I regulations.\textsuperscript{589}

State and local government employers having between fifteen and twenty-four employees are in a unique position. The section of title II applying to them becomes effective on January 26, 1992.\textsuperscript{590} The ADA employment provisions that apply to them, however, do not become effective until January 26, 1994.\textsuperscript{591} Thus, while all state and local government employers must comply with the ADA as of January 26, 1992, state and local government employers having between fifteen and twenty-four employees must comply with the section 504 regulations until January 26, 1994,\textsuperscript{592} and with the ADA title I regulations after January 26, 1994.\textsuperscript{593}

\textbf{B. Program and Facility Accessibility}

Under title II, state and local government entities are required to identify and correct any policy or practice that is inconsistent with the ADA's mandate of nondiscrimination on the basis of disability.\textsuperscript{594} Such self-evaluations must be completed by January 26, 1993.\textsuperscript{595} Entities with fifty or more employees must keep their self-evaluations on file for at least three years.\textsuperscript{596} They must also establish procedures for handling complaints filed under the ADA\textsuperscript{597} and must designate at least one individual to coordinate compliance efforts.\textsuperscript{598}

1. Existing Facilities and Programs

All facilities of state and local government entities that are open to the public must be accessible to individuals with disabilities. Thus, for example, all state and local courts must be fully accessible to people with disabilities,\textsuperscript{599} as must all state and local government offices. The standards for accessibility for state and local entities are somewhat higher.

\textsuperscript{588} 28 C.F.R. § 35.140 (1992). The section 504 regulations to be followed are those promulgated by the Department of Justice at 28 C.F.R. section 41. Id.
\textsuperscript{589} Id. The regulations to be followed are those promulgated by the EEOC at 29 C.F.R. section 1630.
\textsuperscript{590} 42 U.S.C.A. § 12131 note.
\textsuperscript{591} See supra notes 574-75 and accompanying text.
\textsuperscript{592} 28 C.F.R. § 35.140 (1992).
\textsuperscript{593} Id.
\textsuperscript{594} Id. § 35.105(a).
\textsuperscript{595} Id.
\textsuperscript{596} Id. § 35.105(c).
\textsuperscript{597} Id. § 35.107(b).
\textsuperscript{598} Id. § 25.107(a).
\textsuperscript{599} Interestingly, neither section 504 nor the ADA covers federal courts. Thus, there is no law requiring that federal courts be accessible to people with disabilities (although constitutional equal protection principles should apply). It is not inconceivable, therefore, that a person with disabilities might appear in an inaccessible federal court to protest the fact that a state court is not accessible in violation of the ADA.
than the standards for places of public accommodation under title III. Under title III existing facilities must only be made accessible to the extent that accessibility is "readily achievable."600 Under title II, however, the programs or activities of public entities must be made accessible to people with disabilities unless that would cause a "fundamental alteration" to the program or activity or constitute an "undue financial and administrative burden" to the entity.601 The latter exception is much narrower.602

The decision regarding whether making facilities or programs accessible would constitute a fundamental alteration or an undue burden must be made by the head of the public entity or a high-ranking designee.603 Further, the burden is on the public entity to prove that compliance would be burdensome and to set forth the reasons for that conclusion in writing.604 It is intended that disabled individuals should have access to public services and facilities in all but extraordinary circumstances. Thus, if one action would result in a fundamental alteration or undue burden, the public entity must take other actions that would not have such a result.605 The regulations cite several ways in which public entities can make programs or facilities accessible to people with disabilities, such as by redesigning equipment, reassigning services to accessible buildings, assigning aids to beneficiaries, providing home visits, delivering services at alternative accessible sites, altering existing facilities, constructing new facilities, using "accessible rolling stock or other conveyances," or via any other method that provides accessibility.606 Structural changes are not required if other methods would provide effective accessibility.607

Where non-structural changes or accommodations are at issue, state and local government entities must make their programs and facilities accessible to people with disabilities as of January 26, 1992.608 Where it is not possible to make programs or facilities accessible to people with disabilities except by making structural changes (such as by widening a doorway, installing a ramp or lowering a table or drinking fountain) the Act provides public entities with a three-year leeway. All structural changes to existing facilities must be made by January 26, 1995 at the latest, "but in any event as expeditiously as possible."609 Public entities having fifty or more employees must develop a transition plan by July 26, 1992

600. See supra notes 462-66 and accompanying text.
602. The DOJ regulations codifying the responsibilities of state and local government entities to provide accessible public services are codified at 28 C.F.R. §§ 35.149-64; see 56 Fed. Reg. 35,719-21 (1991).
603. 28 C.F.R. 35.150; see also 56 Fed. Reg. 35,709.
604. 28 C.F.R. 35.150.
605. Id.
606. 28 C.F.R. § 35.150(b)(1).
607. Id. Note, however, that carrying a person with disabilities is considered an ineffective, and thus unacceptable, method for achieving program accessibility. See 56 Fed. Reg. 35,709 (1991).
609. 28 C.F.R. § 35.150(c).
that details the structural changes necessary to achieve program accessibility. Because title II requires public entities having authority over streets and walkways to provide curb ramps at existing sidewalks, a schedule for installing curb ramps must be included in the transition plan.

Public entities are not required to provide program accessibility in a historic property if the result would be to threaten or destroy its historic significance. Where an accommodation is not required because it would threaten or destroy the historic significance of a historic property, alternative methods of achieving accessibility must be provided, such as audio-visual materials and devices, guides or "other innovative methods." Moreover, public entities are not required to provide personal devices or services for people with disabilities, such as wheelchairs, eyeglasses or hearing aids, or "assistance in eating, toileting or dressing."

2. New Construction or Alterations

Public entities are required to follow requirements with respect to new construction and alteration of existing buildings that are similar, but not identical, to those under title III of the Act. The most significant difference between the title II and title III requirements is that under title II public entities are not entitled to the elevator exemption extended to private entities under title III of the Act. Under title III, private entities (with some exceptions) are not required to install elevators when constructing or altering buildings that have fewer than three stories or less than 3,000 square feet per floor. This exception does not apply under title II. Further, the title II regulations provide that state and local government entities may follow either the Uniform Federal Accessibility Standards ("UFAS") or the ADA Accessibility Guidelines.

C. Communications

The title II regulations provide comprehensive, yet somewhat ambiguous, requirements with respect to communications accessibility. State

610. Id. § 35.150(d).
611. Id. § 35.150(d)(2).
612. Id. Priority must be given "to walkways serving entities covered by the Act, including state and local government offices and facilities, transportation, places of public accommodation, and employers, followed by walkways serving other areas." Id.
613. Id. § 35.150(a)(2).
614. Id. § 35.150(b)(2)(i)-(iii).
615. Id. § 35.135.
616. See supra section V(K) of this article, for a discussion of the requirements under title III. Title II regulations dealing with new construction and alteration of existing facilities are found at 28 C.F.R. section 35.151. These requirements apply with respect to buildings leased by, as well as owned by, public entities. Id.
617. See supra notes 527-32 and accompanying text.
618. Id.
619. 28 C.F.R. § 35.151(c) (1992).
620. Id. The elevator exemption in the ADA Accessibility Guidelines, however, does not apply under title II.
and local government entities have an affirmative obligation to ensure effective communication with disabled individuals, subject to the "fundamental alteration" and "undue burden" exceptions. Public entities are required to furnish appropriate auxiliary aids and services necessary to ensure that communications with hearing or speech impaired persons are "as effective as communications with others." When determining what type of auxiliary and or service is necessary, the entity is required to give primary consideration to the requests of individuals with disabilities. The public entity must honor the individual's choice "unless it can demonstrate that another effective means of communication exists..." or unless it meets its burden of proving that the fundamental alteration/undue burden test is satisfied.

When a public entity "communicates by telephone with applicants and beneficiaries," the entity must provide a TDD or "equally effective telecommunication system" to communicate with hearing or speech impaired individuals. All telephone emergency services, including 911 services, must provide direct access to individuals who use TDDs or computer modems. Public entities must provide adequate information and signage to ensure that all interested persons, including persons with impaired hearing or vision, can obtain information as to the existence and location of accessible services, activities and facilities.

D. Enforcement and Remedies

The title II regulations set forth procedures for filing and receiving complaints. An individual with a disability or his or her authorized representative must file a complaint with the appropriate federal agency within 180 days from the date of the alleged discrimination, unless the federal agency extends the time upon a showing of good cause. The "appropriate" federal agency is either the designated agency under subpart G of the regulations or any federal agency that provides funding to the public entity that is the subject of the complaint; alternatively, an individual may file a complaint with the Department of Justice for referral to the proper agency. While an individual may file a grievance with

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621. Id. §§ 35.160-.162.
622. Id. § 35.164.
623. Id. § 35.160(a), (b).
624. Id. § 35.160(b)(2).
626. 28 C.F.R. § 35.161. For a description of TDDs see supra text following note 570. Note that a relay service is not considered to be equally effective to a TDD.
628. Id. § 35.163.
629. Id. § 35.170(a), (b).
630. Title 28 C.F.R. section 190 provides a list of designated agencies having responsibility for enforcing title II "for components of state and local governments that exercise responsibilities, regulate or administer services, programs, or activities in . . . [specified] functional areas." The federal agencies listed are the Departments of Agriculture, Education, Health and Human Services, Housing and Urban Development, Interior, Justice, Labor and Transportation.
631. Id. § 35.170(c).
the state or local entity at issue, that is not a necessary prerequisite to filing a complaint with the appropriate federal agency.

After receiving a complaint and determining that it has jurisdiction over the matter, the federal agency must either resolve the complaint or issue a "Letter of Findings" that describes the findings of fact, conclusions of law, and remedies for each violation found.\textsuperscript{632} To resolve the complaint the agency should attempt to negotiate a voluntary compliance agreement with the public agency.\textsuperscript{633} If that effort fails, the agency must refer the complaint to the Department of Justice for further action.\textsuperscript{634}

Individuals with disabilities may also file an action against an allegedly discriminatory public entity in federal court.\textsuperscript{635} It is not necessary that administrative remedies be exhausted prior to filing such an action.\textsuperscript{636}

The remedies, procedures and rights set forth in section 505 of the Rehabilitation Act\textsuperscript{637} apply under title II.\textsuperscript{638} Thus, the full scope of relief available under the Rehabilitation Act, including the damages available for employment discrimination under the Civil Rights Act of 1991,\textsuperscript{639} is available under title II. Further, reasonable attorneys’ fees—including litigation expenses and costs—may be awarded to the prevailing party (other than the United States) in a court or administrative proceeding under title II.\textsuperscript{640}

\section*{VIII. MISCELLANEOUS}

Title V of the ADA contains numerous miscellaneous provisions. The following are some of the most significant of those provisions:

\subsection{A. Eleventh Amendment Immunity}

States shall not be immune from actions under the ADA pursuant to the eleventh amendment.\textsuperscript{641}

\subsection{B. Attorneys’ Fees and Costs}

Courts and agencies have discretion to award attorneys’ fees and litigation expenses (including the cost of expert witnesses) to prevailing parties (other than the United States) in actions under the Act.\textsuperscript{642}

\begin{flushleft}
632. \textit{Id.} § 35.172(a). Note that a public entity is not excused from compliance with the ADA due to the unavailability of technical assistance. \textit{Id.} § 35.177.


634. \textit{Id.} § 35.174.


636. \textit{Id.}


639. See \textit{supra} notes 180-88 and accompanying text.


641. 42 U.S.C.A. § 12202. This section further provides:

In any action against a State for a violation of the requirements of this [Act], remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

642. \textit{Id.} § 12205; see \textit{H.R. Rep. No. 485}, pt. 3, \textit{supra} note 72, at 73. This provision would
C. Insurance and Benefit Plans

Insurers are not prohibited in their ability to underwrite, classify, or administer risks that are consistent with state law, nor are entities restricted in their ability to establish or observe the terms of *bona fide* benefit plans that are consistent with state law, as long as such insurance programs or benefit plans are not utilized to circumvent the intent of the Act.643

As previously noted, title I of the Act prohibits an employer from discriminating in the employment context against a person with a disability because the employer’s insurance does not cover accidents or injuries to people with disabilities or because of increased costs of insurance to the employer.644 Similarly, under title III of the Act, an insurer “may not refuse to insure, or refuse to continue to insure, or limit the amount, extent, or kind of coverage available to an individual, or charge a different rate for the same coverage solely because of [an individual’s] physical or mental impairment . . . .”645 Under title V of the Act, however, an insurer may limit “certain kinds of coverage based on classification of risk” or refuse to insure, limit insurance, or charge a rate differential based on an individual’s disability, when such practice “is based on sound actuarial principles or is related to actual or reasonably anticipated experience.”646 To clarify this point, the House Report from the Committee on Education and Labor explains:

For example, a blind person may not be denied coverage based on blindness independent of actuarial risk classification. Likewise, with respect to group health insurance coverage, an individual with a pre-existing condition may be denied coverage for that condition for the period specified in the policy but cannot be denied coverage for illnesses or injuries unrelated to the pre-existing condition.647

In summary therefore, the ADA prohibits denial to people with disabilities, because of their disability, of the same insurance (or benefit) coverage received by others. An insurer may, however, limit certain coverage to everyone based on sound underwriting principles or actuarial data—as opposed to mere speculation.

D. Retaliation and Coercion

Retaliation and coercion against an individual seeking to enforce his or her rights under the ADA is prohibited and subject to the same penalties imposed for other violations of the Act.648
E. Rights Under Other Laws

The Act shall not be construed to invalidate or limit the remedies, rights, and procedures of any federal, state, or local law that provides protection for individuals with disabilities that is greater than or equal to that provided under the ADA.649

F. Relationship to the Rehabilitation Act

Except as otherwise provided, the Act shall not be construed “to apply a lesser standard” than the standards applied under the Rehabilitation Act of 1973 (Sections 501, 503, 504 and 505) or the regulations issued thereunder.650

G. Smoking

The Act shall not be construed to “preclude the prohibition of, or the imposition of restrictions on, smoking” in places of employment, public accommodation, or transportation covered by the Act.651

649. Id. § 12201(b). Moreover, the Act does not preempt a state “disease control law, or any other public health law, which places certain requirements on certain employees, employers or businesses, but which does not discriminate against people with disabilities . . . .” Committee of Conference Report, supra note 84, at 80. By way of example, the Committee of Conference Report states that if “a state disease control law requires certain hygienic procedures to be followed by all employees in certain job categories,” that would not be preempted by the ADA. Id. Further, the Committee of Conference Report explains that, because the ADA does not protect persons who pose a direct threat to the health or safety of others:

. . . if a state has a law which required people with certain contagious diseases, such as tuberculosis, to take certain precautions . . . that law would also not be preempted by the ADA as long as the requirements of that state or local law were designed to protect against individuals who pose a direct threat to the health or safety of others. . . .

Id.

650. 42 U.S.C.A. § 12201(a). One commentator has argued that this proviso is ambiguous, in that it is unclear whether it is intended to apply when the ADA is enforced against all persons or entities covered by the Act or only when the ADA is enforced against persons or entities also covered by the Rehabilitation Act. Crespi, Efficiency Rejected: Evaluating ‘Undue Hardship’ Claims Under the Americans With Disabilities Act, 26 TULSA L.J. 1 (Fall 1990). This author strongly disagrees that any ambiguity exists. First, the proviso itself does not limit its applicability to situations in which the Rehabilitation Act also applies. Second, that the proviso was intended to apply in all cases under the ADA (unless the Act provides otherwise) is made clear by the presence of the previously addressed proviso (§ 501(b)) stating that the Act shall not be construed to limit the remedies or rights of any other federal law protecting disabled people—which would include the Rehabilitation Act. Clearly there would be no need for a proviso stating that the standards set forth under the Rehabilitation Act shall apply under the Rehabilitation Act. Third, the legislative history of the ADA evidences that Rehabilitation Act standards apply to all entities covered under the ADA “except as otherwise provided.” Id. In clarifying the meaning of section 501, the House Judiciary Committee Report explained that “the standards of title V of the Rehabilitation Act shall apply for purposes of the ADA to the extent that the ADA has not explicitly adopted a different standard than section 504 of the Rehabilitation Act,” except that “[i]n those instances where the ADA explicitly provides a different standard from section 504 of the Rehabilitation Act, the ADA standard applies to the ADA, but not to section 504.” H.R. REP. No. 485, pt. 3, supra note 72, at 69.

651. 42 U.S.C.A. § 12201(b).
H. Architectural and Transportation Barriers Compliance Board Guidelines

The Architectural and Transportation Barriers Compliance Board ("Compliance Board") was required to issue minimum guidelines for the purposes of titles II and III of the Act. Such guidelines were to "establish additional requirements, consistent with this [Act], to ensure that buildings, facilities, rail passenger cars, and vehicles are accessible, in terms of architecture and design, transportation, and communication, to individuals with disabilities." On July 26, 1991, the Compliance Board issued voluminous and complex guidelines pursuant to this requirement. The following is a summary of some of the most significant portions of those guidelines:

The American National Standard Institute's A117.1 standards are utilized as the basis for technical specifications relating to making facilities accessible (to determine, for example, how many, when, and where accessible elements and spaces must be provided in a facility). The guidelines basically utilize the Uniform Federal Accessibility Standards ("UFAS") as their model, and are consistent with the existing Minimum Guidelines and Requirements for Accessible Design ("MGRAD"), except to the extent that the ADA establishes requirements that differ from the UFAS or MGRAD.

Very detailed specifications are set forth with respect to the requirements that all newly constructed or altered places of public accommodation or commercial facilities must be accessible. These detailed technical specifications are beyond the scope of this article. Generally, there must be one accessible route to the facility, one accessible route to connect accessible facilities, and a specified number of accessible parking spaces (if parking spaces are provided for employees or visitors).

In newly constructed buildings, approximately fifty percent of drinking fountains or water coolers on each floor must be accessible. All elevators must be accessible. If the facility is not required to have an elevator, and toilet or bathing facilities are provided on a level not served by an

652. Id. § 12204(a).
653. Id. § 12204(b).
654. 36 C.F.R. § 1191 (1992). These guidelines are over 130 pages long. Id.
656. The UFAS are published at 49 Fed. Reg. 31,528 (1984), and as an appendix to 41 C.F.R. part 101 and 24 C.F.R. § 40.
657. See 36 C.F.R. § 1190.
659. See generally id. at 35,463-69 (to be codified as guidelines 4.1.1-.6).
660. Id. at 35,466 (to be codified as guideline 4.1.3(10)).
661. Id. at 35,465 (to be codified as guideline 4.1.3(5)). One accessible passenger elevator must serve each level in multi-story buildings and facilities, including mezzanines, unless the facility is not required to have an elevator. See supra at note 527 and accompanying text for a discussion of section 303(b) of the ADA. Where additional elevators are provided in facilities in which elevators are required, or where an elevator is installed in a facility that is not required to have an elevator under the ADA, such elevators must be accessible. Moreover, if an elevator is provided where not required, the proposed guidelines mandate that the elevator must serve each floor in the building.
662. See supra at note 527 and accompanying text for a discussion of section 303(b) of the ADA.
elevator, toilet or bathing facilities must also be provided on an accessible
ground floor.663 At least one door at each accessible entrance to a facility,
one door at each accessible space within a facility, and each door that
is an element of an accessible route must be accessible.664 All public and
common use toilet and bathing facilities must be accessible and be on
an accessible route.665 If emergency warning systems are provided, they
must include both audible and visual alarms.666 Signs that provide per-
manent identifications of rooms, room numbers, exits, and spaces such
as toilet facilities, as well as signs that provide direction or information
about functional spaces, must be marked with brailled characters and
pictorial symbol signs.667 If fixed or built-in seating or tables are provided
at accessible public or common use areas within a facility, at least five
percent, but always at least one, of such seating spaces or facilities must
be accessible.668

A chart is provided specifying the number of accessible telephones
required when public telephones are provided.669 All telephones required
to be accessible must be equipped with a volume control for use by
hard-of-hearing persons, and "25 percent, but never less than one, of
all other public telephones provided shall be equipped with a volume
control and shall be dispersed among all types of public tele-
phones . . . "670 A facility that has a total of four or more public pay
phones, at least one of which is in an interior location, must provide
at least one interior public pay telephone equipped with a TDD.671 More-
over, if an interior public pay telephone is provided in a stadium, arena,
convention center, hotel with a convention center, or a covered mall, or
if a public pay telephone is located in or adjacent to a hospital emergency
room, recovery room or waiting room, a TDD must also be available
at that location.672

A chart is also provided specifying the number of wheelchair seating
spaces required to be provided in places of assembly.673 In addition, the
guidelines provide that "one percent, but not less than one, of all fixed
seats shall be aisle seats with no armrests on the aisle side, or removable
or folding armrests on the aisle side," and must be identified at the seat
location and included in a sign notifying patrons at the ticket office.674

663. 56 Fed. Reg. 35,465 (to be codified as guideline 4.1.3(5)).
664. Id. at 35,465-66 (to be codified as guideline 4.1.3(7)).
665. Id. at 35,466 (to be codified as guideline 4.1.3(11)). Other toilet rooms, such as a private
restroom in an executive's office, must be capable of being altered to be accessible. Id.
666. Id. at 35,467 (to be codified as guideline 4.1.3(14)).
667. Id. (to be codified as guideline 4.1.3(16)). Signs providing temporary information, such as
the name of a room's current occupant, need not comply with these regulations. Id.
668. Id. at 35,468 (to be codified as guideline 4.1.3(18)).
669. Id. at 35,467 (to be codified as guideline 4.1.3(17)(a)).
670. Id. (to be codified as guideline 4.1.3(17)(b)).
671. Id. (to be codified as guideline 4.1.3(17)(c)(i)).
672. Id. at 35,467-68 (to be codified as guidelines 4.1.3(17)(c)(ii), (iii)).
673. Id. at 35,468 (to be codified as guideline 4.1.3(19)(a)). By way of example, if the assembly
area seats 51 to 300 people, four wheelchair locations must be available; if the assembly area seats
301 to 500 people, six wheelchair locations must be available.
674. Id.
Indoor assembly areas accommodating more than fifty people—or that have audio amplification systems—in which audible communication is integral to their use (such as movie theaters, meeting rooms, concert, and lecture halls) must have permanently installed assistive listening systems for people who are hearing impaired seated in fixed seating.\textsuperscript{675} Other assembly areas must have either a permanently installed assistive listening system or sufficient electronic outlets or other supplementary wiring to support portable assistive listening systems.\textsuperscript{676} In both cases individual receivers capable of receiving the sound transmitted via the assistive listening system must be available in a number equal to four percent of the total number of seats, but in no case less than two seating spaces.\textsuperscript{677} Where automated teller machines ("ATMs") are provided (with the exception of drive-up-only ATMs) one ATM at each location must be accessible to persons who use wheelchairs, and instructions for use must be made accessible and independently usable by persons with vision impairments.\textsuperscript{678}

With respect to newly altered buildings, the regulations provide, generally, that each addition to an existing facility must comply with the provisions relating to new construction,\textsuperscript{679} and that no alteration may be undertaken which has the effect of decreasing the accessibility or usability of the facility below the requirements for new construction at the time of the alteration.\textsuperscript{680} Compliance with this provision is only required, however, to the extent that it is technically feasible.\textsuperscript{681} The term "technically infeasible" means unlikely to be accomplished "because existing structural conditions would require removing or altering a load-bearing member which is an essential part of the structural frame; or because other existing physical or site constraints prohibit modification or addition of elements . . .".\textsuperscript{682}

As with the provisions relating to newly constructed facilities, very detailed criteria are set forth with respect to making altered portions of facilities accessible. The overall goal of these detailed criteria is to ensure that, to the maximum extent feasible, every altered portion of a facility will meet the full accessibility requirements set forth in the previous section dealing with newly constructed facilities.\textsuperscript{683}

\textsuperscript{675} Id. (to be codified as guideline § 4.1.3(19)(b)).
\textsuperscript{676} Id.
\textsuperscript{677} Id.
\textsuperscript{678} Id. at 35,468 (to be codified as guideline 4.1.3(20)).
\textsuperscript{679} Id. (to be codified as guideline 4.1.5).
\textsuperscript{680} Id. at 35,469 (to be codified as guideline 4.1.6(1)(a)).
\textsuperscript{681} Id. (to be codified as guideline 4.1.6(1)(a)).
\textsuperscript{682} Id.
\textsuperscript{683} Id.

It should be noted that a taxpayer who incurs expenses to make "any facility or public transportation vehicle owned or leased by the taxpayer for use in connection with his trade or business more accessible to, and usable by, handicapped and elderly individuals" may deduct up to $15,000 per year on his or her income tax returns. See 26 U.S.C.A. § 190 (1988), modified by the Revenue Reconciliation Act of 1990 (see supra note 200 and accompanying text). When barriers are removed from existing facilities, this tax exemption may become applicable. In addition, the Revenue Reconciliation Act of 1990 (I.R.C. § 44) provides tax credits to eligible small business
The guidelines also address the alteration of historic buildings. The guidelines provide that the accessibility provision pertaining to the construction and alteration of non-historic buildings shall apply with respect to alterations to "qualified" historic buildings or facilities unless such alterations would "threaten or destroy the historic significance of the building or facility . . . ." The Advisory Council on Historic Preservation must be consulted before alterations may be made to an historic building. Where compliance with the requirements for accessible routes, ramps, entrances, or toilets would threaten or destroy the historic significance of the building or facility, less stringent, alternative requirements are provided.

The remaining sections of the guidelines describe detailed technical specifications for making facilities accessible as required. Specific criteria are set forth to be followed by restaurants and cafeterias, medical care facilities, business and mercantile facilities, libraries, and transient lodging. The salient factors of these provisions are as follows:

(a) Newly constructed or altered portions of restaurants and cafeterias must make at least five percent of their fixed tables (including booths) accessible, dispersed throughout the dining area (in both smoking and non-smoking areas), and must have accessible aisles to those tables. Self-service food lines, including fifty percent of each type of self-service shelf, must be accessible; a portion of countertop service areas must be accessible or service must be accessible at accessible tables within the same areas; self-service shelves and dispensing devices for tableware, dishware, condiments, food, and beverages must be installed to be accessible; and vending machines must be accessible and placed on accessible routes.

(b) Newly constructed or altered portions of medical care facilities—defined as facilities where the period of stay may exceed twenty-four owners who incur expenses to modify their businesses to make them accessible to individuals with disabilities. See supra note 200 and accompanying text. Note, however, that neither I.R.C. section 190 nor section 44 applies to expenditures incurred in connection with new construction. Moreover, a taxpayer may not claim double benefits for the same expenditures. See, e.g., I.R.C. § 44(d)(7).

684. 56 Fed. Reg. 35,471 (to be codified as guideline 4.1.7(1)(a)). "Qualified" buildings or facilities are those eligible for listing in the National Register of Historic Places, or those designated as historic under a state or local government statute. Id. § 4.1.7(1)(b)).

685. Id.
687. 56 Fed. Reg. 35,471 (to be codified as guideline 4.1.7(2)(a)(i)).
688. Id. (to be codified as guidelines 4.1.7(1)(a) and (3)).
689. Id. at 35,517-18 (to be codified as section 5 of the guidelines).
690. Id. at 35,518-19 (to be codified as section 6 of the guidelines).
691. Id. at 35,519-20 (to be codified as section 7 of the guidelines).
692. Id. at 35,520 (to be codified as section 8 of the guidelines).
693. Id. at 35,521-25 (to be codified as section 9 of the guidelines).
694. Id. at 35,517 (to be codified as guideline 5.1).
695. Id. (to be codified as guideline 5.3).
696. Id. (to be codified as guideline 5.5).
697. Id. (to be codified as guideline 5.2).
698. Id. (to be codified as guideline 5.6).
699. Id. at 35,518 (to be codified as guideline 5.8).
hours—must ensure that specified percentages of their patient bedrooms and toilets are accessible. General purpose hospitals, for example, must ensure that at least ten percent of patient bedrooms and toilets, and all public, employee, and common use areas are accessible. Long term care facilities and nursing homes must ensure that at least fifty percent of patient bedrooms and toilets, and all public, employee, and common use areas are accessible.

(c) Newly constructed or altered portions of business and mercantile establishments must ensure that a portion of counters that have cash registers and are provided for sale or distribution of goods to the public are accessible; where check-out aisles are provided, a portion of such aisles must be accessible, based on a sliding scale and depending upon the design or type of lane (such as express lanes or lanes with a belt). By way of example, if there are between one and four check-out aisles in a new store, at least one aisle of each design must be accessible; if there are between five and eight check-out aisles in a new store, two aisles of each design must be accessible. Newly constructed or altered stores having less than 5,000 square feet of selling space, however, must have only one accessible aisle.

(d) Newly constructed or altered portions of libraries must have at least five percent (or a minimum of one) of each element of fixed seating, tables, or study carrels accessible; at least one lane in each check-out area must be accessible; card catalogues and magazine displays must be accessible in themselves and on an accessible route; and aisles between stacks must be wide enough to accommodate a wheelchair, although shelf height in stack areas is unrestricted.

(e) Newly constructed or altered portions of transient lodging (i.e., hotels, motels, inns, boarding houses, dormitories, and resorts), with the exception of those having less than five rooms for rent or hire that are occupied by the proprietor as a residence, must provide accessible sleeping rooms or suites in conformance with a detailed chart. The chart requires that four percent of the first 100 rooms be accessible, "decreasing to 20 accessible rooms in a facility with 1000 rooms, plus [one percent] for each 100 over that 1000." Further, in facilities with over fifty rooms, one percent of the rooms must have roll-in showers.

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700. Id. (to be codified as guideline 6.1).
701. Id. (to be codified as guideline 6.1(1)).
702. Id. (to be codified as guideline 6.1(3)).
703. Id. at 35,519 (to be codified as guideline 7.2).
704. Id. at 35,520 (to be codified as guideline 7.3).
705. Id.
706. Id.
707. Id. (to be codified as guideline 8.2).
708. Id. (to be codified as guideline 8.3).
709. Id. (to be codified as guideline 8.4).
710. Id. (to be codified as guideline 8.5).
711. Id. at 35,521-22 (to be codified as guideline 9.1.2).
712. Id. at 35,448 (section-by-section analysis of guideline 9.1.2).
713. Id.
facilities for homeless persons, all public use and common use areas must be accessible\textsuperscript{714} and accessible sleeping rooms must be provided in accord with the previously discussed chart.\textsuperscript{715}

On September 6, 1991, the Compliance Board published additional guidelines addressing the issue of accessibility standards for transportation facilities covered under \textit{both} titles II and III of the ADA.\textsuperscript{716} While the DOT is responsible for issuing regulations that define accessibility standards for publicly operated transportation facilities covered by title II of the Act, the DOT's standards are required to be consistent with guidelines set by the Compliance Board.\textsuperscript{717} The Compliance Board's accessibility standards for transportation facilities contain detailed scoping provisions and technical specifications with respect to new construction of bus stops and terminals,\textsuperscript{718} new construction of fixed facilities and stations,\textsuperscript{719} existing facilities and key stations,\textsuperscript{720} and new construction of airports.\textsuperscript{721}

\section{Technical Assistance Plans}

The Attorney General, in consultation with the chairs of the EEOC, the Compliance Board, the FCC, and the Secretary of Transportation, is required to develop and publish a plan to assist entities covered under the ADA, and federal agencies, in understanding the responsibility of such entities and agencies under the Act.\textsuperscript{722} On December 5, 1990, the DOJ published a proposed technical assistance plan for public comment in accord with this requirement.\textsuperscript{723} The plan was prepared in consultation with the EEOC, the DOT, the Compliance Board, the FCC, the National Council on Disability ("NCD"), the President's Committee on Employment of People with Disabilities ("President's Committee"), the Small Business Administration, the Department of Commerce, and the National Institute on Disability and Rehabilitation Research.\textsuperscript{724} The salient provisions of the proposed plan, which is intended to cover fiscal year 1991 through fiscal year 1994,\textsuperscript{725} are as follows:

\textsuperscript{714} Id. at 35,524 (to be codified as guideline 9.5.1).
\textsuperscript{715} Id. (to be codified as guideline 9.5.3).
\textsuperscript{716} 36 C.F.R. \S 1191 (1992).
\textsuperscript{717} Id.
\textsuperscript{718} Id. at 45,521 (to be codified as guideline 10.2).
\textsuperscript{719} Id. at 45,522 (to be codified as guideline 10.3).
\textsuperscript{720} Id. at 45,524 (to be codified as guideline 10.3.2).
\textsuperscript{721} Id. at 45,525 (to be codified as guideline 10.4).
\textsuperscript{722} 42 U.S.C.A. \S 12206(a). In addition, each federal agency that is determined to have responsibility for implementing the ADA is required to develop and disseminate technical assistance manuals (for use by persons and entities covered by the Act) within six months after applicable regulations are published under titles I through IV of the Act. \textit{Id.} \S 12206(c)(3). The four agencies with primary responsibility for implementing the ADA are the DOJ, EEOC, DOT, and the FCC. \textit{Id.} \S 12216(c)(2).
\textsuperscript{724} Id.
\textsuperscript{725} Id. at 50,238. It is noted, however, that "certain technical assistance activities, such as those carried out under grants and contracts that may be awarded during FY 1994, can be expected to continue into FY 1995 and FY 1996." \textit{Id.}
Section I of the proposed plan constitutes an introductory section; part A of section I summarizes the purposes of the ADA and explains the statutory requirements for the plan; part B of section I defines and describes the term "technical assistance." As used in the plan, that term "refers to the provision of expert advice, and both general and specific information and assistance, to the public and to entities covered by the ADA."\footnote{726} The purposes of such assistance are "to inform the public (including individuals with rights protected under the Act) and covered entities about their rights and duties; and to provide information about cost-effective methods and procedures to achieve compliance."\footnote{727} The types of technical assistance to be employed include "virtually all aspects of communications, including the use of publications, exhibits, videotapes and audiotapes, public service announcements, and electronic bulletin boards."\footnote{728} It is anticipated that assistance will be provided via "presentations at interactive group events such as conferences, workshops, and training programs"; "advice to individuals"; and "a variety of clearinghouse functions . . . ."\footnote{729} Such technical assistance will be provided by the staff of the four agencies charged with primary responsibility for implementing the ADA (i.e., DOJ, DOT, FCC and EEOC), as well as by the staff of other federal agencies (under agreement with the implementing agencies), individual experts or consultants retained by the implementing agencies, and assistance groups or organizations under grant or contract to the implementing agencies.\footnote{730}

Part C of section I addresses the need to coordinate the activities of the federal agencies providing technical assistance to avoid overlap or duplication of efforts, and to facilitate the sharing of information. To serve this purpose it is proposed that the Attorney General establish an ADA Technical Assistance Working Group. This group will be chaired by the Attorney General, and composed of representatives of the Departments of Justice, Transportation, and Commerce, the FCC, the NCD, the Compliance Board, the President's Committee, the EEOC, and the Small Business Administration, as well as other representatives the Attorney General invites to participate.\footnote{731} The group will meet at least twice a year, and will "assess the adequacy and effectiveness of technical assistance that is being provided, and [will] make recommendations to the Attorney General for improved coordination in the planning and delivery of technical assistance. . . ."\footnote{732}

Sections II through VI of the proposed technical assistance plan describe the suggested technical assistance programs of each of the federal agencies involved. By way of example, section II of the proposed plan describes

\footnotesize{726} Id. at 50,239.  
\footnotesize{727} Id.  
\footnotesize{728} Id.  
\footnotesize{729} Id.  
\footnotesize{730} Id. at 50,239-40.  
\footnotesize{731} Id. at 50,239-40.  
\footnotesize{732} Id. at 50,240.
the EEOC's proposed technical assistance program. The EEOC is primarily responsible for enforcement of the ADA’s provisions relating to non-discrimination in employment settings. Thus, the EEOC’s proposed technical assistance program will focus on ensuring that “employers, individuals, and the public learn about the ADA's requirements with respect to employment and develop the ability to identify and solve employment compliance problems.”

To this end, the EEOC proposes, *inter alia,* to: (a) develop liaisons with organizations and associations representing employers and people with disabilities to establish means by which those organizations and entities may provide information on the employment requirements of the ADA and the specific needs of their constituencies; (b) encourage employers to “seek information and assistance to maximize voluntary compliance”; and (c) develop informational materials and training for employers, individuals with disabilities, and the public, while placing primary emphasis on allocating resources to assist those who have the most need for such services, such as small employers who have not had previous experience in meeting nondiscrimination requirements of other federal laws like the Rehabilitation Act.

The EEOC intends to focus its efforts on providing information and assistance with respect to the employment provisions of the Act prior to July 26, 1992, when those provisions became effective. Prior to the issuance of specific regulations, the EEOC proposed to publish a basic brochure and more detailed pamphlets discussing the requirements of title I of the ADA; to have EEOC staff participate in workshops and conferences throughout the country; and to establish a toll-free telephone number to allow response to individual inquiries. Following issuance of its July, 1991 regulations, the EEOC proposes to conduct “an expanded information and outreach program,” and to publish and disseminate a “comprehensive technical assistance manual” by January, 1992 (six months before the effective date of the Act’s employment provisions). The EEOC intends to conduct training seminars—and to produce videos of such seminars—for employers and individuals with disabilities, and to provide materials, speakers and other assistance to organizations conducting their own training seminars. In addition, the Commission will air public service announcements on radio and television, provide information to a broad range of media, and provide speakers at various

733. *Id.*
734. *Id.*
735. *Id.* Because the EEOC's technical assistance program “will be separate and distinct from its enforcement responsibilities,” “employers . . . who request information or assistance in regard to a particular aspect of compliance, or who participate in training conducted by the Commission, will not be subject to investigation or other enforcement action on the basis of such inquiries or participation.” *Id.*
736. *Id.* at 50,240-41.
737. *Id.*
738. *Id.* at 50,241.
739. *Id.*
740. *Id.*
forums throughout the country.\textsuperscript{741} After the law becomes effective, the EEOC will continue to provide technical assistance on the ADA through the provision of additional information materials, training activities, and development of a central information library of technical assistance resources.\textsuperscript{742}

The proposed technical assistance plans of the remaining federal agencies who have primary or secondary responsibility for implementing the ADA are similar to the EEOC’s proposed plan. The DOJ’s proposed plan, set forth in section III, discusses the means by which the DOJ proposes to provide assistance relating to the provisions of titles II and III of the ADA prohibiting discrimination against people with disabilities by non-federal public entities and in public accommodations.\textsuperscript{743} The DOT’s proposed plan, set forth in section IV, discusses the means by which the DOT proposes to provide assistance relating to the provisions of title II of the Act with respect to nondiscrimination in public mass transportation systems.\textsuperscript{744} The FCC’s proposed plan, set forth in section V, discusses the means by which the FCC proposes to provide technical assistance relating to title IV of the Act, which requires common carriers to provide intrastate and interstate telecommunication relay services for people who are hearing impaired and requires close-captioning of federally produced or funded television public service announcements.\textsuperscript{745}

Finally, section VI of the proposed technical assistance plan addresses the means by which the Compliance Board, the Department of Commerce, the NCD, the National Institute on Disability and Rehabilitation Research, the President’s Committee, and the Small Business Administration will provide technical assistance relating to implementation of the ADA.\textsuperscript{746} As a general matter, the means of technical assistance proposed by these agencies are similar to those proposed in the EEOC’s plan, although in a few cases the proposed means of providing technical assistance are more specifically defined. Thus, for example, the Compliance Board proposes “to conduct research on mobility aids and maneuvering space in vehicles as well as on transit facility design for persons with hearing and visual impairments,” and to disseminate the results via brochures and pamphlets.\textsuperscript{747} The National Institute on Disability and Rehabilitation Research proposes to “establish technical assistance centers in 8 to 12 communities throughout the country,” whose emphasis “will be on assisting employers to comply with the ADA, for example, by providing engineering information relevant to making reasonable accommodations.”\textsuperscript{748} The President’s Committee will expand its Job Accommodations

\textsuperscript{741} Id.
\textsuperscript{742} Id.
\textsuperscript{743} Id. at 50,242-43.
\textsuperscript{744} Id. at 50,243-44.
\textsuperscript{745} Id. at 50,244-45.
\textsuperscript{746} Id. at 50,245-49.
\textsuperscript{747} Id. at 50,246.
\textsuperscript{748} Id. at 50,247.
Network (a service that provides free information about how to make reasonable accommodations, including information about available technological devices).\(^{749}\)

A significant caveat applies to this entire proposed technical assistance plan, however. Section I of the proposed plan notes that:

> It is important to remember that the scope and amount of technical assistance actually provided under the ADA will depend upon the result of the Federal Government’s budget preparation and approval process, and subsequent appropriations by Congress. Specific additional appropriations will be required to carry out the assistance and outreach initiatives described in this plan. In the absence of additional appropriations, the technical assistance grants and contracts described in this plan cannot be implemented, and the overall provision of technical assistance necessarily will be limited to minimum levels of dissemination of basic information regarding the ADA’s requirements and compliance techniques.\(^{750}\)

The extent to which this proposed plan (even if accepted in its entirety) is actually implemented, therefore, will depend on the availability of necessary funds.

\(J. \text{ Wilderness Preservation}\)

Within one year of the Act’s enactment, the National Wilderness Council on Disability must submit a report to Congress regarding “the effect that wilderness designations and wilderness land management practices have on the ability of individuals with disabilities to use and enjoy the National Wilderness Preservation System . . . .”\(^{751}\)

\(K. \text{ Applicability to Congress, Presidential Appointees, and Previously Exempt State Employees}\)

The rights and protections of the ADA apply with respect to employment by the United States Senate and House of Representatives, and to the conduct of the Senate and the House of Representatives with respect to “matters other than employment.”\(^{752}\) The ADA provides that, with respect to matters other than employment, “the architect of the Capital shall establish rules and procedures to be utilized,” which shall be subject to the approval of the Senate Committee on Rules and Administration or the House Office Building Commission, whichever is applicable.\(^{753}\) Once such rules are approved, they shall apply exclusively with regard to conduct of the Senate and House with respect to matters other than employment.\(^{754}\)

\(^{749}\) Id. at 50,248.  
\(^{750}\) Id. at 50,238-39.  
\(^{751}\) 42 U.S.C.A. § 12207.  
\(^{752}\) See generally id. § 2209.  
\(^{753}\) See id. §§ 2209(a)(6)(A)-(C), 2209(b)(3)(A)-(C).  
\(^{754}\) Id.
With respect to employment matters, the Civil Rights Act of 1991 provides as follows: (1) All personnel actions affecting employees of the Senate shall be free from discrimination based on handicap or disability within the meaning of the ADA and section 501 of the Rehabilitation Act (as well as based on race, color, religion, sex, national origin or age). The Senate will establish an office of Senate Fair Employment Practices to administer the anti-discrimination mandate. Procedures to be followed during consideration of alleged violations include, in the following order: counseling, mediation, formal complaint and hearing by a hearing board, and review of the hearing board's decision by the Select Committee on Ethics.

The hearing board may award all remedies appropriate under the Civil Rights Act, including compensatory damages, but may not award punitive damages. Any order requiring the payment of money, however, "must be approved by a Senate resolution reported by the Committee on Rules and Administration." The final decision of the Select Committee on Ethics "shall be made public if the decision is in favor of the complaining Senate employee or if the decision reverses a decision of the hearing board which had been in favor of the employee." The Select Committee has discretion to release any other decision. A non-prevailing employee—or a senator who would be required to reimburse a federal account—may petition for review of the final decision by the United States Court of Appeals for the Federal Circuit. That court shall set aside a final decision that is:

1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law;
2) not made consistent with required procedures; or
3) unsupported by substantial evidence.

If the employee is the prevailing party, attorneys' fees may be awarded. Moreover, regardless of whether the employee is the prevailing party, the employee may be reimbursed for "actual and reasonable costs" of attending the hearing and related proceedings, "consistent with Senate travel regulations." While a senator will be required to reimburse the

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758. Id. § 303(a).
760. Id. § 307(h). For a discussion of the remedies available under the Civil Rights Act, see supra notes 180-91 and accompanying text.
761. Id.
763. Id.
764. Id. § 309(a).
765. Id. § 309(c).
766. Id. § 309(d).
767. Id. § 311. This section further provides that "Senate Resolution 259, agreed to August 5, 1987 (100th Cong., 1st Sess.), shall apply to witnesses appearing in proceedings before a hearing board." Id.
appropriate federal account for any damages paid due to his or her actions, the Select Committee on Ethics retains full power to discipline a "[m]ember, officer, or employee of the Senate" for a violation of Rule XLII of the Standing Rules of the Senate, which prohibits employment discrimination on the basis of "race, color, religion, sex, national origin, age or state of physical handicap."

(2) Presidential appointees have the same rights as employees of the Senate. A presidential appointee may file a complaint with the EEOC or other entity designated by the President. If the EEOC or other entity determines that a violation has occurred, the party aggrieved by the final order may petition for review by the United States Court of Appeals for the Federal Circuit. That court shall follow the same standards with respect to overturning a decision involving a presidential appointee as it shall when overturning a decision involving a Senate employee. Again, attorneys’ fees may be awarded if the presidential appointee is the prevailing party. And again, the President will be required to reimburse the appropriate federal account for any payment made on his or her behalf for an unfair employment practice.

(3) Similar rights and remedies apply with respect to the employment of any individual chosen or appointed by a person elected to public office in any state or political subdivision of any state by the qualified voters thereof: 1) to be a member of the elected official’s personal staff; 2) to serve the elected official on the policy-making level; or 3) to serve the elected official as an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.

(4) The same rules do not apply with respect to employment matters in the United States House of Representatives, however. With respect to the House, the mandates against employment discrimination set forth in the ADA and the Civil Rights Act of 1991 will be enforced pursuant to the Fair Employment Practices Resolution enacted by the House in 1988. Employees of the House (or applicants to the House) with

768. Id. §§ 309(a), 323.
770. The term "presidential appointee" is defined as any officer or employee, or an applicant seeking to become an officer or employee, in any unit of the Executive Branch, including the Executive Office of the President, but not including any individual:
   1) whose appointment is made by and with the advice and consent of the Senate;
   2) who is appointed to an advisory committee, as defined in section 3(2) of the Federal Advisory Committee Act (5 U.S.C. App.); or
   3) who is a member of the uniformed services.
771. Id. § 320(a)(1).
772. Id. § 320(a)(2).
773. Id. § 320(a)(3)(A).
774. Id. § 320(a)(3)(C).
775. Id. § 320(a)(3)(D).
776. Id. § 323.
777. Id. § 321. Such individuals may file their initial complaint with the EEOC. Id. § 321(b).
disabilities may not seek redress for employment discrimination via the EEOC or in the courts. The Senate evidenced its objection to the House exemption from judicial enforcement by noting that “[i]t is the sense of the Senate that legislation should be enacted to provide the same or comparable rights and remedies as are provided under this title to employees of instrumentalities of the Congress not provided with such rights and remedies.”

L. Alternate Dispute Resolution

Where appropriate, and to the extent authorized by law, the use of alternate means of dispute resolution “is encouraged to resolve disputes arising under” the Act. The use of such alternative dispute resolution, however, is “completely voluntary.” The Committee of Conference Report notes that “[u]nder no condition would an arbitration clause in a collective bargaining agreement or employment contract prevent an individual from pursuing their [sic] rights under the ADA.”

IX. CONCLUSION

The ADA is a far-reaching civil rights law that is intended to provide people with disabilities with the same rights provided members of other minority groups in this country. The ultimate effects of the Act remain to be seen. At a national conference on writing national policy on work disability sponsored by the National Disability Policy Center in November 1990, numerous experts opined that, at least in the employment area, the ADA will not prove to be the panacea that some disability advocates had hoped. As stated by one commentator, the ADA will not “equalize employment opportunities between people with and without disabilities, [n]or . . . eliminate the economic disadvantages faced by most people with disabilities.” As another commentator opined, “it is hard to see how . . . the ADA will increase employment among people with work disabilities and thus improve their economic well-being . . . .” While a variety of reasons were offered for these conclusions—expressed by speaker after speaker—the general consensus was that many people with disabilities lack the same educational opportunities and job skills as people without disabilities. Because the ADA provides no remedy to equalize

780. 42 U.S.C.A. § 12212. Suggested means of alternate dispute resolution include “settlement negotiations, conciliation, facilitation, mediation, fact finding, mini-trials, and arbitration. . . .” Id. For a more thorough discussion of Alternate Dispute Resolution and the ADR, see Blanck On Integrating Persons with Mental Retardation: The ADA and ADR, 22 N.M.L. Rev. 259 (1992) (this issue).
781. Committee of Conference Report, supra note 84, at 85.
782. Id.
educational or job training opportunities, merely prohibiting discrimination in the work place will not eliminate the employment problems faced by people with disabilities.

Although many will agree that the ADA will not prove to be a panacea, few among us will dispute that it is a significant beginning. If the ADA is effectively implemented and enforced it will provide some long-awaited relief for vast numbers of Americans with disabilities. Most importantly, the Act will begin the lengthy process of humanizing and de-stigmatizing people with disabilities. Ultimately, achievement of the latter goal will prove the most fruitful in eradicating the societally imposed barriers confronting people with disabilities.