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The Americans with Disabilities Act

by

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- I. **Introduction to the Americans with Disabilities Act**
 - A. **What is the ADA?**
 - 1. Bill of Rights for the disabled
 - 2. Equal opportunity for and access to all areas of life
 - 3. Change in terminology from handicapped to disabled
 - 4. Elimination of stereotypes/creation of level playing field
 - B. **How Many Individuals Affected?**
 - 1. 43 million citizens with disabilities
 - 2. 16 to 18 million of working age and unemployed or under-employed
 - 3. Highest unemployment of any minority group
 - C. **Structure of the ADA**
 - 1. Title I - protection of qualified individuals with disabilities in all areas of employment
 - 2. Title II - applies to government goods and services (including transportation)
 - 3. Title III - full and equal enjoyment of and access to goods, services, etc. of public accommodations
 - 4. Title IV - telecommunications
 - 5. Title V - remedies; ADA procedures; attorney's fees
 - D. **Effective dates**
 - 1. Signed into law on July 26, 1990
 - 2. Title I
 - a. July 26, 1992 for employers with 25 or more employees
 - b. July 26, 1994 for employers with 15 to 24 employees
 - 3. Title III
 - a. January 26, 1992 for anti-discrimination and barrier removal provisions affecting public accommodations
 - b. January 26, 1993 for new construction (first occupancy)

II. Title I

- A. Who is an employer? All companies, employment agencies, unions that employ a requisite number of employees.
- B. Who is protected by Title I?
1. The QUALIFIED disabled
 2. Those who associate with the disabled
 3. Those who make claims on behalf of the disabled
- C. Who is a qualified individual with a disability? Someone who meets all legitimate job prerequisites and who, with or without a reasonable accommodation can perform the essential functions of a position held or sought.
- D. What is a disability?
1. A physical or mental impairment that substantially limits one or more major life activities, such as:
 - a. A physiological disorder
 - b. A disfigurement
 - c. An anatomical loss (internal or external)
 - d. A mental or psychological condition
 - e. A learning disability
 - f. A disease or infection (HIV, cancer)

Note: Major life activities = movement, learning, sensory ability, stamina, working (broad range of jobs)

2. A record of impairment
3. A misperception of impairment

E. What is not a disability?

1. Physical characteristics
2. Poverty
3. Prison record
4. Homosexuality/bi-sexuality
5. Sexual behavior disorders
6. Compulsive gambling, kleptomania, pyromania, etc
7. Direct
8. Temporary conditions (e.g. pregnancy)

F. Drug and alcohol related disorders

1. No protection of illegal drug users or alcoholics with performance problems
2. Drug users protected if:
 - a. They are misperceived
 - b. They have successfully completed a supervised rehabilitation program
 - c. They are rehabilitated and no longer use drugs
 - d. They are currently in a rehab program and no longer use drugs
3. *Note: Alcoholism is a disability*

G. What are essential job functions?

1. Qualitative and quantitative aspects (How often is function performed? What are consequences of non-performance?)
2. Must be done, non-marginal

3. Employer judgment relevant

4. Specific, pre-existing job descriptions critical

H. Affirmative obligations of Title I

1. Equal treatment to and equality of opportunity for qualified individuals with disabilities in all aspects of employment, *but no quotas*

2. Reasonable accommodations for *known* limitations of qualified individuals with disabilities, except where accommodations would create an undue hardship

I. What is a reasonable accommodation? A modification to a job, the work environment, or the manner of doing a job that enables a qualified individual with a disability to enjoy an equal employment opportunity (case by case analysis).

1. Physical or structural changes to the workplace

2. Acquiring different equipment

3. Modifying existing equipment

4. Job restructuring

5. Modifying work schedules

6. Modifying training

7. Providing "helpers."

J. How do you determine reasonable accommodations?

1. Identify a barrier

2. Identify accommodation options

3. Assess reasonableness

4. The employer chooses among reasonable alternatives

K. What is an undue hardship?

1. An action requiring significant difficulty or expense, considering:

a. The nature and cost of the action involved

b. The resources of a particular facility

c. The overall resources of an employer organization

d. The number of employees who may benefit

e. Outside funding sources

L. Prohibited discrimination under Title I

1. No limiting, segregating or classifying qualified individuals with disabilities in an adverse fashion

a. No presumptions or stereotypes

b. No glass ceilings or walls

c. Must make individual assessments based on ability to perform essential job functions

2. Cannot participate in contractual relationships that effectuate discrimination (for example, employment agency contracts, collective bargaining agreements, training contracts, fringe benefit contracts)

Note: Pre-existing condition limitations in insurance policies are permissible.

3. Cannot use standards, criteria or methods of administration that perpetuate discrimination

a. Cannot ban seeing-eye dogs

- b. Cannot have non-essential requirements that screen out the disabled (e.g. no deaf cashiers)
- 4. No discrimination by association
- 5. Cannot fail to reasonably accommodate
- 6. All employment tests must be:
 - a. Job related
 - b. Job related and consistent with business necessity
 - c. Administered in the most effective manner to judge the ability to perform essential job functions
- 7. No pre-offer medical exams; post-offer exams permissible if:
 - a. Given to all employees in a given classification
 - b. The results are kept confidential
 - c. The tests are consistent with the act
 - d. For existing employees, all tests must be job related and consistent with business necessity *or* wholly voluntary.
 - e. Rule inapplicable to tests for illegal drugs
- 8. No questions about disabilities or history of disability
- 9. No retaliation for filing claims or enforcing rights

M. Penalties for violation of Title I

- 1. Reinstatement/backpay/front pay
- 2. Compensatory/punitive damages (\$50,000 - \$300,000)

3. Attorney's fees (expert witness fees)

4. Injunctive relief

N. Employer defenses

- 1. For policies/practices challenged - must show that they are job-related and consistent with business necessity. For example, warehousemen must be able to lift 50 pounds; cashier must be able to count money.
- 2. Undue hardship - a proposed accommodation would bankrupt or put a severe strain on the employer
- 3. Direct threat - an employee's condition creates a direct threat to himself/herself or others in the workplace. However, the risk must be *specific, current, and of substantial* harm. The employer's assessment must be based on objective medical data and not subject to accommodation.
 - a. Epileptic with a history of seizures could be a direct threat as a meat cutter.
 - b. On the other hand, an epileptic with no history of uncontrolled seizures could be eligible for a meat cutter position.
 - c. For food handlers, individuals who have a disease that cannot be handled through a reasonable accommodation that may present a risk of food contamination can be denied a position handling food. However, current employees falling into this category must be considered for vacant positions. The list of conditions which would support an exclusion of an individual from a food handling position is extremely narrow. For example, hepatitis, Norwalk virus, etc.

Note: Affliction with the HIV virus will not support exclusion.

O. Title I action steps

1. Create ADA task force
2. Perform ADA diagnostic
 - a. Personnel policies
 - b. Physical facilities
 - c. Landlord/tenant relations
 - d. Services/accommodations
3. Prepare detailed, specific job descriptions that identify essential job functions
4. Modify employment applications
 - a. Remove disability related questions
 - b. Add specific job related questions
 - c. Modify EEO language
5. Review all employment tests (job related/consistent with business necessity/most effective administration)
6. Review evaluation system
 - a. Consistency
 - b. Objectivity
 - c. Targeting of essential job functions
7. Review drug testing
 - a. Test for illegal drugs always permissible
 - b. No pre-offer test for prescription drugs

c. Caution against receipt of unreliable test results

8. Review medical examination procedures
9. Review reasonable accommodation options
10. Review all key personnel policies
 - a. Attendance
 - b. Leave of absence
 - c. Work schedules
 - d. Safety
 - e. Light duty
 - f. Disability/EEO policies
11. Review outside resources
12. Review all vendor contracts that impact on employees
13. Evaluate work force and customers
14. Modify/update training programs

III. Title III - Public accommodations

- A. What is the basic premise behind Title III?
1. Prohibits denial of access to or enjoyment of services offered by public accommodations
 2. Imposes affirmative obligations on public accommodations, such as installing auxiliary aides for individuals with disabilities or removing barriers
 3. Covers private entities that have public accommodations, commercial facilities or transportation services

4. Also impacts on new construction or major alterations to existing facilities
- B. Who is covered by Title III? Private entities who are owners, operators or lessees of public accommodations, commercial facilities or transportation systems.
- C. How are food industry entities covered?
1. As public accommodations, for example, with supermarkets, restaurants, etc.
 2. As landlords
 3. As tenants
 4. As operators of commercial facilities
- D. Who is protected by Title III?
1. Employees, customers, clients, vendors with disabilities
 2. Those who associate with the disabled
 3. Those who advocate on behalf of the disabled
- E. What are public accommodations? (Main focus of Title III)
1. Every place to which the public is granted access or where the public seeks services (auditoriums to zoos)
 2. All retail service establishments
 3. Educational institutions
- F. What is a commercial facility?
1. Important for new construction/alteration rules only
 2. Any place with a non-residential use whose operation affects commerce
3. Examples: Administrative offices, processing facilities, warehouses
- G. Key to Title III obligations: What is readily achievable?
1. Readily achievable is that which can be easily accomplished and able to be carried out without much difficulty or expense.
 2. Key factors:
 - a. Nature and cost of needed action
 - b. Overall financial resources of a facility
 - c. Impact on the facility's operations
 - d. Number, type and location of facilities
 - e. Size of any parent or related facility
 - f. Number of persons who would benefit
 - g. Outside funding resources
 3. Similar to undue hardship standard in Title I, but lesser in terms of burden on the business. Senate Report indicates the obligations under Title III are not meant to:
 - a. Bankrupt businesses
 - b. Close facilities
 4. Examples of readily achievable modifications for individuals with disabilities:
 - a. Grab bars
 - b. Simple ramping of steps
 - c. Lowering of telephones

- d. Braille lettering
 - e. Audio alarms
 - f. Carpet change
 - g. Changes in signage
- H. Presumed readily achievable and mandatory - no discrimination
1. No discrimination on the basis of disability in full use and enjoyment of public accommodations
 - a. Key obligation here is to offer equal opportunities as the non-disabled to goods, services and facilities.
 2. No separate provision of benefits, unless the separate provision is necessary to convey the benefit in an equivalent manner
 - a. Key goal - *integrated setting*
 - b. Essential services cannot be offered only in remote areas
 3. If separate provisions offered, cannot limit choice of the disabled
 4. No unequal provision of benefits, facilities, etc.
 5. Cannot employ administrative methods that have the effect of discriminating or perpetuating discrimination
 - a. For example, cannot ban helper animals
 6. Cannot discriminate by association
 7. No use of eligibility criteria that screen out or tend to screen out the disabled from full enjoyment of the benefits, services, etc. of public accommodations
 - a. *Exception* - the criteria necessary for the provision of services which may impact on individuals with disabilities can be used.
 - b. Examples of potentially impermissible eligibility criteria:
 - (1) Credit limits on individuals with certain diseases
 - (2) A ban on blind persons
 - (3) Additional requirements on the disabled to get services
- I. Affirmative obligations under Title III
1. Basic concept: Take all steps that are readily achievable to ensure equal access to and enjoyment of public accommodations and their services.
 2. Provide integrated settings for individuals with disabilities.
 - a. Avoid segregation.
 - b. Separate is presumptively not equal
 - c. Intersperse service areas for the disabled in normal customer service areas.
 3. Institute reasonable policy modifications
 - a. Allow helper dogs in facilities
 - b. Provide for oral giving of instructions or requirements
 4. Provide auxiliary aids and services for the disabled
 - a. Readers
 - b. Audio messages
 - c. Braille or large print materials

- d. Helpers
- 5. Remove barriers
 - a. Add grab bars
 - b. Ramp steps
 - c. Lower shelves
 - d. Widen doorways

J. What is required for new construction and major alterations?

Note: This affects both public accommodations and commercial facilities.

- 1. For new construction:
 - a. Newly constructed facilities (occupancy after January 26, 1993) must be readily accessible to and usable by individuals with disabilities, including those in wheelchairs.
 - b. Ultimate goal - "convenient accessibility"
 - c. Key areas to review:
 - (1) Parking areas
 - (2) Ingress to and egress from parking areas
 - (3) Bathrooms
 - (4) Water fountains
 - (5) Customer service
 - (6) Elevators (not necessary in buildings less than 2 stories or less than 3,000 square feet per floor, unless the building houses a health care provider, a mall or a publicly important building.)

- 2. Narrow exception for new construction standards - structurally impractical situations, for example, buildings on stilts
- 3. For alterations (*none required*)
 - a. For alterations that affect the usability of the facility, alterations must be made to the maximum extent feasible so that the altered portions of the building are accessible to and useable by the disabled, including those in wheelchairs.
 - b. If a primary function area is involved, to the maximum extent feasible, the path of travel to the altered area and to bathrooms, telephones and drinking fountains must be readily accessible to and useable by the disabled.

(1) Except - 80/20 rule

K. Enforcement/penalties

- 1. Enforcement mechanisms
 - a. Private action
 - b. U.S. Attorney
- 2. Penalties
 - a. Injunctions
 - b. Monetary damages
 - c. Civil penalties (\$50,000 for a first violation; \$100,000 for subsequent violations)
 - d. Attorney's fees

L. Title III action steps

- 1. Refer back to Title I: Form committees; ADA diagnostic; review contracts and policies, etc.

2. Existing facilities

- a. Parking areas
- b. Entry areas
- c. Walkways
- d. Curbs
- e. Ramps
- f. Doors
- g. Interior floors/carpets
- h. Telephones
- i. Drinking fountains/facilities
- j. Elevators
- k. Identification marking/warning signals
- l. Auxiliary aides

3. Landlord/tenant issues

4. Construction and alterations

- a. Architectural/engineering plans

5. Food industry

- a. Check entry to supermarkets.
- b. Ensure that at least one regular and one express aisle in larger markets are wide enough for wheelchairs.
- c. Check shelving/provide for helpers.
- d. Check on seating arrangements in restaurants.
- e. Check on ingress to and egress from restaurants and the carpeting on floors within restaurants.
- f. Check all customer service functions.
- g. Review credit procedures.