

*Continuation of Senate Proceedings of September 7, 1989, Issue
No. 112; and Proceedings of September 8, 1989, Issue No. 113.*

Vol. 135

WASHINGTON, FRIDAY, SEPTEMBER 8, 1989

No. 113

Congressional Record



United States
of America

PROCEEDINGS AND DEBATES OF THE 101st CONGRESS, FIRST SESSION

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Vol. 136

WASHINGTON, TUESDAY, JUNE 26, 1990

No. 83

Congressional Record



United States
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PROCEEDINGS AND DEBATES OF THE 101st CONGRESS, SECOND SESSION

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June 26, 1990

CONGRESSIONAL RECORD — HOUSE

H 4171

(3) **DIRECT THREAT.**—The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) **EMPLOYEE.**—The term "employee" means an individual employed by an employer.

(5) **EMPLOYER.**—

(A) **IN GENERAL.**—The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this title, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) **EXCEPTIONS.**—The term "employer" does not include—

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.

(6) **Illegal use of drugs.**—

(A) **IN GENERAL.**—The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 812). Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(B) **DRUGS.**—The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act.

(7) **PERSON, ETC.**—The terms "person", "labor organization", "employment agency", "commerce", and "industry affecting commerce", shall have the same meaning given such terms in section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e).

(8) **QUALIFIED INDIVIDUAL WITH A DISABILITY.**—The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this title, 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.

(9) **REASONABLE ACCOMMODATION.**—The term "reasonable accommodation" may include—

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) **UNDUE HARDSHIP.**—

(A) **IN GENERAL.**—The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) **FACTORS TO BE CONSIDERED.**—In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—

(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.

SEC. 102. **DISCRIMINATION.**

(a) **GENERAL RULE.**—No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) **CONSTRUCTION.**—As used in subsection (a), the term "discriminate" includes—

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this title (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration—

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) 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;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the

covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) **MEDICAL EXAMINATIONS AND INQUIRIES.**—

(1) **IN GENERAL.**—The prohibition against discrimination as referred to in subsection (a) shall include medical examinations and inquiries.

(2) **PREEMPLOYMENT.**—

(A) **PROHIBITED EXAMINATION OR INQUIRY.**—Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) **ACCEPTABLE INQUIRY.**—A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) **EMPLOYMENT ENTRANCE EXAMINATION.**—A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if—

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that—

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

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this Act shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this title.

(4) **EXAMINATION AND INQUIRY.**—

(A) **PROHIBITED EXAMINATIONS AND INQUIRIES.**—A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) **ACCEPTABLE EXAMINATIONS AND INQUIRIES.**—A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) **Requirement.**—Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

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6. Discrimination

The Senate bill and House amendment use the same terms but in a different order. The Senate recedes.

7. Contract liability

The Senate bill specifies that covered entities cannot discriminate directly or indirectly through contracts with other parties.

The House amendment clarifies that a covered entity is only liable in contractual arrangements for discrimination against its own applicants or employees.

The Senate recedes.

8. Reasonable accommodation

The Senate bill specifies that it is discriminatory for a covered entity to deny an employment opportunity to a qualified job applicant or employee with a disability if such denial is based on the need of the covered entity to make reasonable accommodations. In a separate section, the Senate bill specifies that reasonable accommodations need not be provided if they would result in an undue hardship.

The House amendment clarifies the relationship between the obligation not to deny a job to an individual with a disability who needs a reasonable accommodation and the undue hardship limitation governing the covered entity's obligation to provide the reasonable accommodation by including these provisions under the same paragraph.

The Senate recedes.

9. Employment tests

The House amendment adds the term "qualification standards" to the phrase "employment tests or other selection criteria."

10. Preemployment inquiries

The House amendment deletes the word "employee" from the preemployment inquiry provision.

The Senate recedes. The conferees note that in certain industries, such as air transportation, applicants for security and safety related positions are normally chosen on the basis of many competitive factors, some of which are identified as a result of post-offer pre-employment medical examinations. Thus, after the employer receives the results of the post-offer medical examination for applicants for safety or security sensitive positions, only those applicants who meet the employer's criteria for the job must receive confirmed offers of employment, so long as the employer does not use those results of the exam to screen out qualified individuals with disabilities on the basis of disability. The conferees do not intend for this Act to override any legitimate medical standards or requirements established by Federal, state or local law, or by employers for applicants for safety or security sensitive positions, if the medical standards are consistent with the Act.

11. Postemployment medical examinations

The Senate bill specifies that an employer shall not conduct or require a medical examination of an employee unless such examination or inquiry is shown to be job-related and consistent with business necessity.

The House amendment deletes the term "conduct" and adds that a covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site so long as the information obtained regarding the medical condition or history of any employee are kept confidential and are not used to discriminate against qualified individuals with disabilities.

The Senate recedes.

12. Defenses, in general

The Senate amendment includes a reference to "reasonable accommodations." The House adds the following phrase "as required under this title."

The Senate recedes.

13. Health and safety

The Senate bill includes as a defense that a covered entity may fire or refuse to hire a person with a contagious disease if the individual poses a direct threat to the health and safety of other individuals in the workplace.

The House amendment makes this specific defense applicable to all applicants and employees, not just to those with contagious diseases.

The Senate recedes. The conferees intend that the term "qualification standard" as used in section 103(b) permits a requirement that an individual with a disability not pose a direct threat to the health or safety of other individuals in the workplace if reasonable accommodation will not eliminate the direct threat. In addition, the conferees concur with the House provision that defines "direct threat" to mean "significant risk" (section 101(3)). The qualification standard in section 103(b) and the definition in section 101(3) clearly spell out the right of the employer to take action to protect the rights of its employees and other individuals in the workplace. Such employer action would include not assigning an individual to a job if such an assignment would pose a direct threat to individuals in the workplace and such a threat could not be eliminated by reasonable accommodation. The conferees incorporate by reference the explanations of the term "direct threat" set out in Senate Report No. 101-116. Consistent with this explanation, in determining what constitutes a significant risk, the conferees intend that the employer may take into consideration such factors as the magnitude, severity, or likelihood of risk to other individuals in the workplace and that the burden would be on the employer to show the relevance of such factors in relying on the qualification standard.

14. Religious tenet exemption

The Senate bill specifies that a religious organization may require, as a qualification standard to employment, that all applicants and employees conform to the religious tenets of such organization.

The House amendment deletes the phrase "as a qualification standard to employment."

The Senate recedes.

15. Food handlers

The House amendment, but not the Senate bill, specifies that it shall not be a violation of this Act for an employer to refuse to assign or continue to assign any employee with an infectious or communicable disease of public health significance to a job involving food handling, provided that the employer shall make reasonable accommodation that would offer an alternative employment opportunity for which the employee is qualified and for which the employee would sustain no economic damage.

The House recedes. Consistent with section 103(b), the conferees note that nothing in the Americans with Disabilities Act shall require an employer to assign, or to continue to assign to a job any employee with a communicable or infectious disease who by reason of such disease poses a significant risk to the health or safety of others which cannot be eliminated by reasonable accommodation. The conferees acknowledge that such reasonable accommodation is not required if it imposes an undue hardship (as

defined in section 101(10)) on the operation of the business.

Different types of contagious diseases pose different kinds of risks; some contagious diseases may pose a significant risk which cannot be eliminated by reasonable accommodation in certain job categories, such as food handling. The conferees do not intend to imply that a person with an infectious disease necessarily poses a health threat to others. Rather, the conferees intend for this policy to meet the legitimate concerns of employers that are based on health and safety concerns. The determination whether a particular individual poses a significant risk of transmitting an infection to others must be based on the facts applicable to that individual and be based on current and objective public health standards.

16. Illegal use of drugs and use of alcohol

(a) The Senate bill specifies that the term "qualified individual with a disability" does not include employees or applicants who are current users of illegal drugs, except that an individual who is otherwise handicapped shall not be excluded from the protections of the Act if such individual also uses or is addicted to drugs.

The House amendment specifies that "qualified person with a disability" does not include any applicant or employee who is currently engaging in the illegal use of drugs when the covered entity acts on the basis of such use.

The Senate recedes. The provision excluding an individual who engages in the illegal use of drugs from protection is intended to ensure that employers may discharge or deny employment to persons who illegally use drugs on that basis, without fear of being held liable for discrimination. The provision is not intended to be limited to persons who use drugs on the day of, or within a matter of days or weeks before, the employment action in question. Rather, the provision is intended to apply to a person whose illegal use of drugs occurred recently enough to justify a reasonable belief that a person's drug use is current.

(b) The House amendment specifies that the following individuals are not excluded from the definition of the term "qualified individual with a disability": (1) an individual who has successfully completed a supervised 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) an individual who is participating in a supervised rehabilitation program and is no longer engaging in such use; or (3) an individual who is erroneously regarded as engaging in such use but is not engaging in such use.

The Senate recedes. Section 104(b)(2) provides that a person cannot be excluded as a qualified individual with a disability if that individual is participating in a supervised rehabilitation program and is no longer engaging in the illegal use of drugs. This provision does not permit persons to invoke the Act's protection simply by showing that they are participating in a drug treatment program. Rather, refraining from illegal use of drugs also is essential. Employers are entitled to seek reasonable assurances that no illegal use of drugs is occurring or has occurred recently enough so that continuing use is a real and ongoing problem. On the other hand, this provision recognizes that many people continue to participate in drug treatment programs long after they have stopped using drugs illegally, and that such persons should be protected under the Act. The conferees intend that the phrase "otherwise been rehabilitated successfully" be

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WASHINGTON, TUESDAY, JULY 10, 1990

No. 86

Congressional Record



United States
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PROCEEDINGS AND DEBATES OF THE *101st* CONGRESS, SECOND SESSION

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