

101ST CONGRESS
2D SESSION

H. R. 4807

To establish a clear and comprehensive prohibition of discrimination on the basis of disability.

IN THE HOUSE OF REPRESENTATIVES

MAY 14, 1990

Mr. HOYER (for himself, Mr. MINETA, Mr. ANDERSON, Mr. BROOKS, Mr. DINGELL, Mr. HAWKINS, Mr. BARTLETT, Mr. EDWARDS of California, Mr. FISH, Mr. GEPHARDT, Mr. GINGRICH, Mr. GRAY, Mr. GUNDERSON, Mr. HAMMERSCHMIDT, Mr. THOMAS A. LUKEN, Mr. MARKEY, Mr. MARTINEZ, Mr. OWENS of New York, Mr. RINALDO, and Mr. SENSENBRENNER) introduced the following bill; which was referred jointly to the Committees on Education and Labor, Energy and Commerce, Public Works and Transportation, the Judiciary, House Administration, and Rules

A BILL

To establish a clear and comprehensive prohibition of discrimination on the basis of disability.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4 (a) **SHORT TITLE.**—This Act may be cited as the
5 “Americans with Disabilities Act of 1990”.

6 (b) **TABLE OF CONTENTS.**—The table of contents is as
7 follows:

Sec. 1. Short title; table of contents.

United States Senate

WASHINGTON, D.C. 20510

May 5, 1989

The Honorable Bob Dole
Senate Minority Leader
United States Senate
Washington, D.C. 20510

Dear Bob:

As you know, I favor comprehensive civil rights legislation for persons with disabilities. I have had conversations with Senator Harkin about such legislation. I am unable to cosponsor his bill because I have several concerns about it. In general, I believe the bill exceeds parallel protections available under existing civil rights statutes. I believe that the 1964 Civil Rights Act and Section 504 of the Rehabilitation Act of 1973 are appropriate, basic models for civil rights legislation for persons with disabilities.

For example, the bill's public accommodations section covers too much of the private sector. It defines "public accommodations" to include any private entity used by a customer, client, or visitor, and any potential place of employment, which affects commerce. This coverage goes well beyond the scope of Title II of the 1964 Civil Rights Act which bans discrimination on the bases of race, color, national origin, and religion in public accommodations. For example, this section covers retail businesses, private schools, and much more in the private sector not covered by Title II, and even though they do not receive federal aid or federal contracts.

I also believe Senator Harkin's bill is excessive in its remedies. For example, today, under Title II of the 1964 Civil Rights Act, a black person discriminated against by a bar or restaurant can get an injunction and attorneys' fees, and the Attorney General can get injunctive relief in a federal enforcement action. Senator Harkin's bill lets a private plaintiff obtain actual and punitive damages, plus attorney fees, and the Attorney General can obtain monetary damages plus sizable civil penalties. In employment, in addition to using the usual Title VII remedies, Senator Harkin's bill adds additional penalties.

The Honorable Bob Dole
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I believe that the bill I have enclosed is a more reasonable and realistic measure to protect the civil rights of disabled persons. It extends the substantive protections of Section 504 to many areas of the public and private sectors and goes much farther than the coverage of current law. I cover: public and private employment; public accommodations as defined in current law (Title II of 1964 Act -- entities like eating places and places of entertainment, hotels); state and local governments; transportation by state and local governments; and I require television stations to close caption their videotapes. My remedies, outside of employment where I utilize the Title VII remedies, are injunctive relief and attorney's fees.

I would like to discuss with you whether we could cosponsor this proposal, which I believe is a tough but reasonable measure.

Sincerely,

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Orrin G. Hatch
United States Senator

OGH:jwd
enclosure

SECTION-BY SECTION ANALYSIS

DRAFT

Section 1. This section provides that the Act may be referred to as the Equal Opportunity Act of 1989.

Section 2. Congressional Findings and Purpose. This section sets forth findings concerning discrimination against individuals with handicaps and the purpose of eliminating such discrimination in certain activities.

Section 3. General Definitions. This section defines terms generally applicable throughout the Act. Subsection (1) defines the term "individual with handicaps" in a manner similar to the definition applicable to section 504 of the Rehabilitation Act of 1973. 29 U.S.C. 706(8)(B). One difference between the two definitions is that in this Act's definition, the exclusion of alcoholics and persons who are addicted to, or dependent on, lawfully prescribed drugs is applicable not only to employment, as under Section 504, when such persons' current use of alcohol or drugs prevents them from performing the job in question or constitutes a direct threat to the property or safety of others, but also to participation in programs. There is no sound reason for excluding from coverage a person unable to

perform a job or who threatens the property or safety of others as an employee because of alcoholism or drug dependency, and not to exclude the same person who is unable to perform the requirements necessary to participate in a program or whose participation threatens the property and safety of others, for the same reason. This makes explicit in the Act itself the way the Act would likely operate in these latter situations through agency and judicial interpretation of the term "qualified individual with handicaps," i.e. a person who is unable to participate in a program or who threatens the property or safety of others due to alcoholism or drug dependency is not "otherwise qualified" to participate. The definition also takes into account how the term is used in the Civil Rights Restoration Act of 1988 (CRRA), Pub. L. No. 100-259, and the Fair Housing Amendments Act of 1988 (FHA), Pub. L. No. 100-430.

Subsection (2)(A) provides that "qualified individual with handicaps" means, with respect to employment, a person who is able to perform the essential functions of the job in question in spite of his or her handicap, or who could do so if reasonable accommodation were made for the handicap. Subsection (2)(B) provides that, with respect to all other activities covered by this Act, a "qualified individual with handicaps" means a person who can meet the essential eligibility requirements for participation in, or receipt of benefits from, such activities, or who could do so if reasonable accommodation

were made for the handicap. Many such activities have no eligibility criteria that requires performance or have merely nominal criteria and subsection (2)(B) refers to them as well. For example, many places of public accommodation have no criteria for entry, or impose nominal ones such as a cover charge or a dress requirement. An individual with a handicap who can afford the cover charge or meets the dress requirement, and who can gain access to the facility with or without reasonable accommodation, is otherwise qualified to patronize that place of public accommodation.

In short, both of these terms are generally used in the same manner as current Section 504 regulations such as the definitions contained in the Department of Justice's regulation applicable to its own activities, 39 CFR 103, with the broadened exclusion of alcoholics and drug dependents and the additional exclusions based on the CRRA and the FHA.

"Reasonable accommodation" is used in the same way it is used in interpretations of Section 504 of the Rehabilitation Act of 1973. An employer must undertake a reasonable accommodation to the known physical or mental limitations of a person with handicaps if doing so is necessary to permit the person to perform the essential functions of the job, but need not make fundamental alterations in the nature of the program or undertake undue financial and administrative burdens, or, in

other words used in regulations with respect to employment, incur an undue hardship. Similarly, an entity operating any other activity covered by this Act must make reasonable accommodation to the handicapping condition of a person if doing so enables the person to participate in the covered program, subject to the limitation that the entity need not fundamentally alter its program or undertake an undue financial and administrative burden. Southeastern Community College v. Davis, 442 U.S. 397 (1979); see Alexander v. Choate, 469 U.S. 287, 300 (1985); Dopico v. Goldschmidt, 687 F.2d 644 (2d Cir. 1982); American Public Transit Association v. Lewis, 655 F.2d 1272(D.C. Cir. 1981); Rhode Island Handicapped Action Committee v. Rhode Island Public Transit Authority, 718 F.2d 490 (1st Cir. 1983); Nelson v. Thornburgh, 567 F. Supp. 369 (E.D. Pa. 1983).

The inclusion of the reasonable accommodation concept is to ensure that the substantive standard applicable under the Act, i.e. the standard for determining liability, is that which exists under Section 504, as generally construed under recent federal agency regulatory provisions and Section 504 caselaw. In effect, this Act extends the protections of Section 504 to the activities to which it applies. In applying Davis, courts have recognized that the determination that an accommodation is "reasonable" must be based on the specific circumstances of each case, but that the entity operating the covered activity may be required to incur more than minimal expense as long as

the requested accommodation does not constitute an undue burden. The reasonable accommodation requirement under this Act, therefore, requires more on the part of an employer than the reasonable accommodation requirement with respect to religion in Title VII of the Civil Rights Act of 1964. The latter provision has been construed to require that an employer undertake no more than de minimis cost. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977). In the employment context, the Equal Employment Opportunity Commission's definition provides guidance, 29 CFR 1613.704. In the other contexts covered by this Act, regulations such as the Department of Justice's regulation covering its own activities, e.g. 39 CFR 39.150; *id.* .151; *id.* .160, provide general guidance. Each agency which must promulgate regulations to implement this Act may adapt the general guidance provided by these regulations and relevant caselaw to the specific type of activity covered.

Section 4. Construction. Subsection (a) makes clear that this Act does not disturb the enforcement of the nondiscrimination provisions of title V of the Rehabilitation Act of 1973 or the rights, remedies, and substantive standards thereunder.

Subsection (b) makes clear that nothing in this Act bars conduct against a person either (1) because the person has been

convicted of the illegal manufacture or distribution of drugs or (2) because of the person's sexual orientation.

Subsection (c) provides that this Act shall not apply to programs or activities covered by Sections 503 or 504 of the Rehabilitation Act of 1973 or to any air carrier subject to the Air Carrier Access Act of 1986.

Subsection (d) provides that the Act does not apply to any entity merely because that entity is licensed or regulated by a state or local government agency or department or because it receives any assistance from such agency or department. If a state or subdivision of a state passes along federal financial assistance, as part of a federal aid program, to any entity, of course, the entity is subject to Section 504 according to Section 504's terms.

Subsection (e) provides that this Act does not invalidate or limit any other federal, state, or local law providing greater protection than this Act.

Section 5. Exclusion from coverage. This provision creates a blanket exclusion from coverage under the Act of any otherwise covered entity if it does not employ at least 25 employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.

Section 6. Prohibition against retaliation. This section bars those entities covered by the Act from retaliating against any person for opposing any act or practice made illegal under the Act, or because such person made a charge, testified, assisted, or participated in an investigation, proceeding, or hearing under this Act.

Section 7. Prohibition of discrimination in employment.

Subsection (a)(1) defines Commission to mean the Equal Employment Opportunity Commission.

Subsection (a)(2) defines the term "employer" to include any person engaged in a business affecting interstate commerce who employs 25 or more persons. The definition excludes the United States Government, bona fide private clubs, and Indian tribes. These exclusions conform to those in Section 701 of the Civil Rights Act of 1964, except that, consistent with section 5 of this Act, it excludes employers with 25 or more, rather than 15 or more, employees. Employees of the District of Columbia, who are not included within the scope of Section 701, are included within subsection (a) of this bill.

Subsection (a)(3) establishes that the terms "labor organization," "employment agency," "employee," "commerce," "industry affecting commerce," and "State" shall have the same

meaning as they have in title VII of the Civil Rights Act of 1964.

Subsection (b) provides that employers and other entities covered by this section shall not discriminate against otherwise qualified individuals with handicaps solely because of such handicap in any aspect of employment. The bill uses the word "solely" as it is used in Section 504 of the Rehabilitation Act of 1973.

Subsection (c). Enforcement. This subsection provides that the same procedures that are used to enforce title VII of the Civil Rights Act of 1964 will be used to enforce this section.

Subsection (d). Regulations. This section provides that the EEOC shall issue final regulations, no later than 10 months after enactment of the Act, that it deems necessary and appropriate to carry out its responsibilities under this Section and the anti-retaliation section of the Act.

Subsection (e) Posting notices. This subsection provides that entities covered by this section post appropriate notices of the requirements of this Section, as prepared or approved by the EEOC and for a penalty for willful violation of the subsection.

Subsection (f) this subsection provides that an entity whose principal purpose is assisting a particular class of individuals with handicaps will not violate the provisions of this bill if it has a publicly announced policy of extending a hiring preference to members of the class or persons whom the entity assists. Since the exemption is only for hiring, the discrimination prohibitions in the bill would continue to apply to all other aspects of employment, such as compensation.

Subsection (g) provides that the Section does not apply to an employer with respect to the employment of aliens outside of any state.

Section 8. Prohibition against discrimination in public accommodations.

Subsection (a)(1) provides that the operations of an establishment "affect commerce" if the establishment meets the criteria in Section 201(c) of the Civil Rights Act of 1964, 42 U.S.C. Section 2000a(c).

Subsection (a)(2) defines "a place of public accommodation" to include those listed in Sections 201(b)(1)-(4), and excluding those listed in Section 201(e) of the Civil Rights Act of 1964 (42 U.S.C. Section 2000a(b)(1)-(4) and (e).

Subsection (b) bans discrimination against an otherwise qualified individual with handicaps, solely on the basis of handicap, in any place of public accommodations whose operations affect commerce.

Subsection (c)(1) gives the Attorney General the same enforcement authority, and right of intervention, he or she has under Sections 206 and 204(a) of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000a-5 and 2000a-3(a).

Subsection (c)(2) establishes a private right of action by providing that the remedies and procedures of Section 204 of the Civil Rights Act of 1964, 42 U.S.C. 2000a-3, shall be available to a person aggrieved under this section.

Subsection (c)(3) provides that the District Courts of the United States shall have jurisdiction over proceedings under this section and that aggrieved parties need not exhaust any administrative or other remedies.

Subsection (d) authorizes the Attorney General to issue final regulations, no later than 10 months after enactment of this Act, he or she deems necessary to implement his or her responsibilities under this section and the bill's anti-retaliation provision.

Section 9. Prohibitions against discrimination in state and local government. Subsection (a) prohibits discrimination against otherwise qualified individuals with handicaps, solely on the basis of his or her handicap, by any agency or department of a state or subdivision of a state.

Subsection (b)(1) requires the President, consistent with other provisions of the Act, to designate federal agencies to promulgate regulations to cover state and local government agencies and departments. The purpose of this section is to be sure that a federal agency is responsible for regulating each type of covered state and local agency and department, such as the Department of Health and Human Services for state and local health departments, the Environmental Protection Agency for state and local environmental agencies, and similar designations, and for processing complaints about violations of this section committed by such state and local agencies. These agencies may refer unresolved complaints to the Department of Justice. It is intended that overlap and duplication will be avoided by centralizing the designation process with the President. No agency may be designated if it does not have a Section 504 regulation in place. It is likely, given the purpose of this Act to apply generally the principles and standards of Section 504 to the areas covered by this Act, that designated agencies will be able to use their existing

regulations as a model for any regulatory activity under this section or even to extend their current regulations to newly covered activities under this Act.

Subsection (b)(2) requires that final regulations described in the preceding paragraph be issued no later than 10 months after the date of enactment.

Subsection (b)(3) authorizes the Attorney General to seek injunctive and other equitable relief in a civil action, upon referral of an unresolved complaint from a federal agency.

Subsection (b)(4) establishes a private right of action, pursuant to the procedures and remedies available under Sections 204(a) and (b) of the Civil Rights Act of 1964, 42 U.S.C. 2000a-3(a) and (b). These sections authorize a court to grant preventive relief and attorneys' fees. A private party need not, as under Sections 204(c) and (d) of the Civil Rights Act of 1964, provide notice to any state or local government agency before initiating suit, nor await the referral of the complaint to the Department of Justice's Community Relations Service.

Subsection (b)(5) provides that the District Courts shall have jurisdiction over proceedings under this section.

Section 10. Prohibition against discrimination in transportation services.

Subsection (a) provides that no otherwise qualified individual with handicaps shall be discriminated against in any services offered to the public for the transportation of persons by any state or local government agency. Accessibility under this provision can be provided in one of three ways without incurring an undue financial and administrative burden: (1) taking steps to make accessible the mainline bus on subway systems; (2) providing paratransit services which are similar in route, time of service, and fare as the mainline system; or (3) a combination of mainline accessibility on some routes and paratransit services on others.

Subsection (b)(1) provides that the Department of Transportation shall investigate and seek to conciliate complaints of violations of this section, and may refer unresolved complaints to the Department of Justice.

Subsection (b)(2) authorizes the Attorney General to seek injunctive and other equitable relief in a civil action, upon referral of an unresolved complaint from the the Department of Transportation.

Subsection (b)(3) provides for a private right of action identical to that established in Section 9 (b)(3).

Subsection (b)(4) provides that the District Courts of the United States shall have jurisdiction over proceedings under this section.

Subsection (c) authorizes the Secretary of Transportation to issue final regulations, no later than 10 months after enactment, he or she deems necessary to implement this section and section 6 as it applies to entities covered by this section.

Section 11. Television broadcasters.

Subsection (a) provides that television stations which broadcast videotape programming or advertising shall do so with closed captions, provided that no television station need undertake an undue financial and administrative burden. This subsection is intended to impose the substantive requirements of Section 504 to a television station's broadcast of videotapes even when it does not receive federal financial assistance.

Subsection (b) creates enforcement machinery parallel to that created in Section 10(b).

Subsection (c) authorizes the Department of Commerce to issue regulations to implement this section and the anti-retaliation provision, Section 6, as it relates to entities covered by this section. Like other agencies promulgating regulations under this Act, such regulations must reflect the undue financial and administrative burden limitation on the requirement to accommodate qualified individuals with handicaps. Particular factors that must be considered in determining whether undue financial and administrative burden in a specific case exists under this section, include the need for a television broadcaster to broadcast a videotape at a particular time, the cost of closed captioning, and the marketplace's capacity to close caption the volume of videotapes that are likely to fall within the requirements of this section. It is expected, however, that every television station will make significant and steady progress in close captioning the videotapes it uses over the shortest time feasible under the terms of this section.

Section 12. Authorization of appropriations. This section authorizes appropriations to carry out the Act.

Section 13. Effective date. This section provides that, except where otherwise specifically designated, the Act shall become effective one year after the date of its enactment.

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TO ESTABLISH A CLEAR AND COMPREHENSIVE PROHIBITION
OF DISCRIMINATION ON THE BASIS OF HANDICAP

DRAFT
- Sen. Hatch

Section 1. Short Title

This Act may be cited as the "Equal Opportunity Act of 1989."

Section 2. Findings and Purposes

(a) Findings. -- Congress finds that --

(1) some 36,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) the Nation's proper goal regarding persons with disabilities is to assure equality of opportunity; and

(3) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis, to pursue those opportunities available to others in our free society, and imposes significant costs on the United States in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose. -

It is the purpose of this Act to provide a prohibition of discrimination against persons with disabilities in employment, public accommodations, state and local

government agencies, certain transportation services; and the broadcast of television videotapes.

Section 3. Definitions.

As used in this Act. -

(1) "Individual with handicaps." -

(A) In General. - The term "individual with handicaps" includes any individual who -

(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities;

(ii) has a record of such an impairment;

or

(iii) is regarded as having such an impairment.

(B) The term "individual with handicaps" does not include-

(i) an individual who currently, illegally uses or is addicted to a controlled substance as defined in section 102 of the Controlled Substances Act, 21 U.S.C. Section 802.

(ii) an individual who is an alcoholic or who is addicted to or dependent upon lawfully prescribed drugs if such individual's current use of alcohol or drugs prevents such individual from performing the duties of the job in question or

performing the requirements of the program or activity in question, or whose employment or participation in the program or activity, by reason of such current alcohol or drug use, would constitute a direct threat to the property or the safety of others.

(iii) an individual who has a currently contagious disease or infection, and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job or perform the requirements of the program or activity; and

(iv) an individual solely because that individual is a transvestite.

(2) "Qualified individual with handicaps." - The term "qualified individual with handicaps" means -

(A) with respect to employment, individuals with handicaps who, with or without reasonable accommodation, can perform the essential functions of the particular job in question; and

(B) with respect to any other program or activity, an individual with handicaps who, with or without reasonable accommodation, meets the essential eligibility

requirements for participation in, or receipt of benefits from, that program or activity.

Section 4. Construction

(a) Nondiscrimination Provisions. - Nothing in this Act shall be construed to affect or change the nondiscrimination provisions contained in title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.), and any right, remedy, obligation, or responsibility under such Act, or to affect or change regulations issued by Federal agencies pursuant to title V of such Act.

(b) Controlled Substances. - Nothing in this Act prohibits any conduct against an individual because -

(1) such individual has been convicted by any court of competent jurisdiction for the illegal manufacture or distribution of a controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802); or

(2) of the sexual orientation of such individual.

(c) Rehabilitation Act or Air Carriers. - Nothing in this Act shall be construed to apply to -

(1) any program or activity that is subject to sections 503 or 504 of the Rehabilitation Act of 1973 (29 U.S.C. 793 and 794); or

(2) to any air carrier that is subject to the Air Carrier Access Act of 1986 (49 U.S.C. 1374(c)).

(d) Government Limitation. - Nothing in this Act shall be construed to apply to any entity solely because it is licensed

or regulated by, or receives assistance from, any agency or department of any State or subdivision of any State.

(e) Coexistence With Other Laws. - Nothing in this Act shall be construed to invalidate or limit any other Federal Law or any law of a State or political subdivision of a State or jurisdiction that provides greater protection of rights for individuals with handicaps:

Section 5. Exclusion From Coverage

The provisions of this Act shall not apply to any public or private entity otherwise covered by this Act that does not employ 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.

Section 6. Prohibition Against Retaliation

No employer, employment agency, labor organization, joint labor-management committee, place of public accommodation, state or local government agency, entity engaged in providing transportation services, or broadcaster of videotapes covered by this Act shall discriminate against any individual because--

- (1) such individual has opposed any act or practice made unlawful by this Act; or
- (2) such individual has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act.

Section 7. Prohibition of Discrimination in Employment.

- (a) Definitions. - As used in this section -

(1) Commission. - The term "commission" means the Equal Employment Opportunity Commission established by section 705 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4).

(2) Employer. -

(A) In General. - The term "employer" means a individual 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 calendar year, and any agent of such an individual.

(B) Limitation. - Such term does not include -

(i) the United States, or a corporation wholly owned by the Government of the United States;

(ii) an Indian tribe; or

(iii) 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.

(3) Labor Organization. - The terms "labor organization," "employment agency," "employee," "commerce," "industry affecting commerce," and "State" shall have the same meaning as they have in section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e).

(b) Prohibition Against Discrimination. - No employer, labor organization, employment agency or joint labor-management

committee shall discriminate against any otherwise qualified individual with handicaps, solely because of his or her handicap, with respect to -

- (1) hiring,
- (2) discharge,
- (3) compensation, or
- (4) the terms, conditions, or privileges of

employment.

(c) Enforcement. -

(1) Aggrieved individual. - The remedies and procedures set forth in sections 706, 709, and 710 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5, 2000e-8, and 2000e-9) shall be available to any individual aggrieved for any violation of this Act.

(2) Enforcement of Act. - The remedies and procedures of sections 706 and 707 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5 and 2000e-6) shall be available to the Attorney General or to the Commission as prescribed by law to enforce the provisions of this Act.

(d) Regulations. -

(1) Issuance of Regulations. - The Commission shall issue such rules, regulations, orders, and instructions as the Commission considers necessary and appropriate to carry out its responsibilities under this section, and section 6 as it applies to entities covered by this section.

(2) Issuance Date. - Final regulations described under paragraph (1) shall be issued no later than 10 months after the date of enactment of this Act.

H(e) Posting Notices. -

(1) Posting Requirement. - Every employer, employment agency, and labor organization shall post and keep posted, in conspicuous places upon its premises where notices to employees, applicants for employment, and members are customarily posted, a notice to be prepared or approved by the Commission setting forth excerpts from, or summaries of, the pertinent provisions of this section and information pertinent to the filing of a complaint.

(2) Fine. - A willful violation of this section shall be punishable by a fine of not more than \$100 for each separate offense.

(f) Exemption. - Nothing in this Act shall be construed to prohibit an entity, with a principal purpose of assisting a particular class of individuals with handicaps from establishing a publicly announced policy of giving preference in hiring to individuals who are members of that class.

(g) Aliens outside of State. - This section shall not apply to any employer with respect to the employment of aliens outside of any State.

Section 8. Prohibition Against Discrimination in Public Accommodations.

(a) Definitions. - As used in this Section -

(1) Affect Commerce. - The operations of an establishment "affect commerce" if the establishment meets the criteria in section 201(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000a(c)).

(2) Place of Public Accommodation. - The term "place of public accommodation" means those establishments listed in sections 201(b)(1)-(4) and excludes those listed in section 201(e) of the Civil Rights Act of 1964 (42 U.S.C. 2000a(b)(1)-(4) and (e)).

(b) Prohibition on Discrimination. - No otherwise qualified individual with handicaps shall be subject to discrimination, solely on the basis of his or her handicaps, in any place of public accommodation whose operations affect commerce.

(c) Enforcement. -

(1) Attorney General. - The remedies and procedures of sections 206 and 204(a) of the Civil Rights Act of 1964, (42 U.S.C. 2000a-5 and 2000a-3(a)), shall be available to the Attorney General to enforce the provisions of this section.

(2) Aggrieved Individual. - The remedies and procedures of section 204 of the Civil Rights Act of 1964, (42 U.S.C. 2000a-3), shall be available to a individual aggrieved under this section.

(3) District Courts. - The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without

regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law.

(d) Regulations. -

(1) Issuance of Regulations. - The Attorney General shall issue such regulations as the Attorney General considers necessary to effectuate this section, and section 6 as it applies to entities covered by this section.

(2) Issuance Date. - Final regulations described in paragraph (1) shall be issued no later than 10 months after the date of enactment of this Act.

Section 9. Prohibition Against Discrimination in State and Local Government.

(a) In General. - No otherwise qualified individual with handicaps shall be subject to discrimination, solely on the basis of his or her handicap, by any agency or department of any State or subdivision of any State.

(b) Regulations and Enforcement. -

(1) Designation of Agencies. - Consistent with this Act, the President shall designate Federal agencies, that have a regulation issued under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), to issue regulations applicable to State and local government agencies or departments to effectuate this section, including procedures for the receipt of complaints of violations of this section, and section 6 as it applies to entities covered by this section, the

conciliation of such complaints, and the referral of these complaints in which conciliation fails to the Attorney General.

(2) Issuance Date. - The final regulations described in paragraph (1) shall be issued no later than 10 months after the date of enactment of this Act.

(3) Equitable Relief. - The Attorney General may, on referral of a complaint from a Federal agency, initiate a civil action for injunctive and other appropriate equitable relief.

(4) Enforcement Provisions. - The remedies and procedures of section 204(a) and (b) of the Civil Rights Act of 1964 (42 U.S.C. 2000a-3(a) and (b)), shall be available to -

(A) a individual aggrieved under this section;
and,

(B) to the Attorney General with respect to intervention in a civil action initiated under this subsection.

(5) Jurisdiction. - The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section, and shall exercise such jurisdiction without regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law.

Section 10. Prohibition Against Discrimination in
Transportation Services.

(a) In General. - No otherwise qualified individual with handicaps shall be subject to discrimination, solely on the basis of his or her handicap, in any services offered to the

public for the transportation of individuals by any agency or department of any State or subdivision of any State.

(b) Enforcement. -

(1) Secretary of Transportation. - The Secretary of transportation -

(A) shall investigate complaints of violations of this section;

(B) shall seek conciliation of such complaints;
and

(C) may refer complaints in which such conciliation fails to the Attorney General.

(2) Attorney General. - The Attorney General may, on referral of complaint from the Secretary of Transportation, initiate a civil action for injunctive and other appropriate equitable relief.

(3) Remedies and Procedures. - The remedies and procedures of section 204(a) and (b) of the Civil Rights Act of 1964, (42 U.S.C. 2000a-3 (a) and (b)), shall be available to -

(A) an individual aggrieved under this section;
and

(B) the Attorney General with respect to his or her intervention in a civil action initiated under this subsection.

(4) District Court. - The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise such authority

without regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law.

(c) Regulations. -

(1) Issuance of Regulations. - The Secretary of Transportation shall issue such regulations as the Secretary considers necessary to effectuate this section, and section 6 as it applies to entities covered by this section.

(2) Issuance Date. - The final regulations described under paragraph (1) shall be issued no later than 10 months after the date of enactment of this Act.

Section 11. Television Broadcasters.

(a) Closed Captions. - Television stations that broadcast videotape programming or advertising shall do so with closed captions, provided that no television station need undertake an undue financial and administrative burden to do so.

(b) Enforcement. -

(1) Secretary of Commerce. - The Secretary of Commerce shall -

(A) investigate complaints of violations of this section;

(B) shall seek conciliation of such complaints;

and

(C) may refer complaints in which conciliation fails to the Attorney General.

(2) Attorney General. - The Attorney General may, on referral of a complaint, initiate a civil action for injunctive and other appropriate equitable relief.

(3) Remedies and Procedures. - The remedies and procedures of section 204(a) and (b) of the Civil Rights Act of 1964 (42 U.S.C. 2000a-3(a) and (b)), shall be available to -

(A) an individual aggrieved under this section;
and

(B) the Attorney General with respect to intervention in a civil action initiated under this subsection.

(4) District Courts. - The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section, and shall exercise such jurisdiction without regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law.

(c) Regulations. -

(1) Issuance of Regulations. - The Secretary of Commerce shall issue regulations to effectuate this section, and section 6 as it applies to entities covered by this section.

(2) Issuance Date. - The final regulations described under paragraph (1) shall be issued no later than 10 months after the date of enactment of this Act.

Section 12. Authorization of Appropriations.

There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

Section 13. Effective Date.

Except as otherwise specified, this Act shall become effective 1 year after the date of its enactment.

CRS Report for Congress

Americans With Disabilities Act: Analysis of the Remedies and Enforcement Provisions of S.933, as Passed by the Senate

Charles V. Dale
Legislative Attorney
American Law Division

February 22, 1990



Congressional Research Service • The Library of Congress

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HLC

[DISCUSSION DRAFT]
MAY 22, 1989

101ST CONGRESS
1ST SESSION

H. R. _____

IN THE HOUSE OF REPRESENTATIVES

Mr. McCOLLUM introduced the following bill; which was referred to
the Committee on _____

A BILL

To amend title VII of the Civil Rights Act of 1964 to make
discrimination against handicapped individuals an unlawful
employment practice; and to amend the Rehabilitation Act of
1973 with respect to the abuse of alcohol and drugs.

1 *Be it enacted by the Senate and House of Representatives*
2 *of the United States of America in Congress assembled,*

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1 SECTION 1. SHORT TITLE.

2 This Act may be cited as the `` _____ Act of 1989``.

3 TITLE I--AMENDMENTS TO TITLE VII OF THE CIVIL

4 RIGHTS ACT OF 1964

5 SEC. 101. REFERENCES.

6 A reference in section 2, 3, 4, 5, or 6 of this title to
7 a section or other provision is a reference to a section or
8 other provision of the Civil Rights Act of 1964.

9 SEC. 102. DEFINITIONS.

10 Section 701 is amended by adding at the end the
11 following:

12 `` (1) The term `handicap` means an impairment of a kind
13 described in section 7(8)(B) of the Rehabilitation Act of
14 1973 (29 U.S.C. 706(8)(B)), except that such term excludes
15 the impairments described in the second and third sentences
16 of such section.``.

17 SEC. 103. UNLAWFUL EMPLOYMENT DISCRIMINATION.

18 (a) UNLAWFUL EMPLOYMENT PRACTICES.--Sections 703(a)(1),
19 703(a)(2), 703(b), 703(c)(1), 703(c)(2), 703(d), and
20 703(e)(1) are each amended by striking ``or national origin``
21 each place it appears and inserting ``national origin, or
22 handicap``.

23 (b) EXCLUSION.--The first sentence of section 703(h) is
24 amended--

25 (1) by striking ``or national origin`` the first

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1 place it appears and inserting ``national origin, or
2 handicap``; and

3 (2) by striking ``sex or national origin`` and
4 inserting ``sex, national origin, or handicap``.

5 (c) RULE OF INTERPRETATION.--Section 703(j) is amended--

6 (1) by striking ``or national origin`` the first
7 place it appears and inserting ``national origin, or
8 handicap``;

9 (2) by inserting `` , or persons with any handicap,``
10 after ``national origin`` the second place it appears;
11 and

12 (3) by inserting `` , or persons with such handicap,``
13 after ``national origin`` the third place it appears.

14 (d) The heading of section 703 is amended by striking
15 ``OR NATIONAL ORIGIN`` and inserting ``NATIONAL ORIGIN, OR
16 HANDICAP``.

17 **SEC. 104. OTHER UNLAWFUL EMPLOYMENT PRACTICES.**

18 Section 704(b) is amended by striking out ``or national
19 origin`` each place it appears and inserting ``national
20 origin, or handicap``.

21 **SEC. 105. PREVENTION OF UNLAWFUL EMPLOYMENT PRACTICES.**

22 The last sentence of section 706(g) is amended by
23 striking ``or national origin`` and inserting ``national
24 origin, or handicap``.

25 **SEC. 106. NONDISCRIMINATION IN FEDERAL GOVERNMENT EMPLOYMENT.**

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1 (a) PERSONNEL ACTIONS.--Section 717(a) is amended by
2 striking out ``or national origin`` and inserting ``national
3 origin, or handicap``.

4 (b) APPEAL OF AGENCY ACTION.--Section 717(c) is amended
5 by striking ``sex or national origin`` and inserting ``sex,
6 national origin, or handicap``.

7 SEC. 107. RULE OF STATUTORY CONSTRUCTION.

8 The amendments made by this title do not affect any
9 right, remedy, obligation, or responsibility under the
10 Rehabilitation Act of 1973.

11 TITLE 201--AMENDMENTS TO REHABILITATION ACT OF 1973

12 SEC. 201. EXCLUSION OF ILLEGAL DRUG ABUSER FROM DEFINITION OF
13 INDIVIDUAL WITH HANDICAPS.

14 (a) IN GENERAL.--Section 7(8)(B) of the Rehabilitation
15 Act of 1973 (29 U.S.C. 706(8)(B)) is amended--

16 (1) by inserting after the first sentence the
17 following new sentence: ``For purposes of title IV and V
18 of this Act, such term does not include any individual
19 whose sole physical or mental impairment is a current
20 psychological or physical dependence on any controlled
21 substance, as defined in section 102 of the Controlled
22 Substances Act.`` , and

23 (2) in the first sentence by striking ``Subject to``
24 and all that follows through ``the term`` and inserting
25 ``The term``.

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5

1 (b) TECHNICAL AND CONFORMING AMENDMENTS WITH RESPECT TO
2 LEGAL DRUGS.--Section 7(8) of the Rehabilitation Act of 1973
3 (29 U.S.C. 706(8)), as amended by subsection (a), is
4 amended--

5 (1) in subparagraph (B) by amending the last sentence
6 to read as follows: ``For purposes of sections 503 and
7 504 as such sections relate to employment, such term
8 further does not include any individual who is an
9 alcoholic, or an abuser of any drug not a controlled
10 substance under such section 102, whose current use of
11 alcohol or such a drug prevents such individual from
12 performing the duties of the job in question or whose
13 employment, by reason of such current alcohol or drug
14 abuse, would constitute a direct threat to property or
15 the safety of others.'', and

16 (2) in subparagraph (C) by inserting ``further``
17 after ``such term``.

November 8, 1989

TO: MEMBERS OF THE EDUCATION AND LABOR COMMITTEE
FROM: PAT MORRISSEY, PROFESSIONAL STAFF
RANDEL JOHNSON, LABOR COUNSEL
SUBJECT: OVERVIEW OF THE BIPARTISAN AGREEMENT ON ADA

AGREEMENTS

1. Drugs

Substantive amendments to section 512 of S.933, that would amend section 7(7) [Definition of a "handicapped individual"] of the Rehabilitation Act

"(a) does not include an individual who is a current user of illegal drugs when a recipient acts on the basis of such use."

Purpose and effect: It clarifies the original understanding of the Helms'amendment. It would allow a recipient of Federal funds under the Rehabilitation Act to not hire or to fire an individual with a disability, if the basis of such action was the use of illegal drugs by such individual.

Report Language: Would include the principle that a positive drug test is conclusive evidence of current use.

"(b) nothing in subsection (a) shall be construed to exclude as an individual with a disability an individual who (i) has successfully completed a supervised drug rehabilitation program and is no longer using drugs, or has otherwise been rehabilitated successfully and is no longer using illegal drugs, or (ii) is participating in a supervised rehabilitation program and is no longer using illegal drugs, or (iii) is erroneously regarded as being a drug user but is not using illegal drugs. Provided 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 defined in this paragraph is no longer using illegal drugs."

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1. Drugs continued:

Substantive amendments to section 512 of S.933, that would amend the Rehabilitation Act continued

Purpose and effect: Need insurance from liability of discrimination charges for recipients of Federal funds from users of illegal drugs who are using a rehabilitation program to obtain protection under the Act, but also to protect those individuals who are "regarded as" being a user of illegal drugs.

In addition, need to clarify that the policies related to and administration of drug testing and related activity, such as direct observation of illegal drug use, will not be construed as a violation of the protection of an individual's rights against discrimination.

Report language being developed.

Other amendments to the Rehabilitation Act.

Principles reflected in amendments:

(1) Illegal drug users would not be excluded from the benefit of health services and services provided under titles I, II, and III of the Rehabilitation Act [new language in this concept to clarify floor amendment in the Senate], if entitled to such services;

(2) education agencies may take disciplinary actions against a student with a handicap who currently uses illegal drugs or alcohol, to the same extent such disciplinary action is taken against a student without a handicap; and the due process procedures at 34 C.F.R. 104.36 [P.L.94-142] shall not apply to such disciplinary actions;

(3) for the purposes of sections 503 and 504, relating to employment, the "term individual with a handicap" does not include an individual who is an alcoholic who current use of alcohol prevents the individual from performing his/her job duties or whose employment, by reason of such alcohol abuse, would constitute a direct threat to the property or safety of others; and

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1. Drugs continued:

Other amendments to the Rehabilitation Act continued
Principles reflected in amendments:

(4) inclusion of a definition of "illegal drugs" to mean controlled substances, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812), the possession or distribution of which is unlawful under such Act; the term "illegal drugs" does not mean the use of a controlled substance taken pursuant to the supervision of a licensed health care professional [was "pursuant to a valid prescription] or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

2. Substantive amendments to section 510 of S.933, that clarify protections for individuals with disabilities and the effects of illegal drug use under the ADA, in a manner consistent with proposed amendments to the Rehabilitation Act.

"(a) For the purposes of this Act, an individual with a disability does not include an individual who is a current user of illegal drugs when the covered entity acts on the basis of such use."

Purpose and effect: It clarifies the original understanding of the Helms'amendment. It would allow a covered entity to not hire or to fire an individual with a disability, if the basis of such action was the use of illegal drugs by such individual.

Report Language: Would include the principle that a positive drug test is conclusive evidence of current use.

"(b) nothing in subsection (a) shall be construed to exclude as an individual with a disability an individual who (i) has successfully completed a supervised drug rehabilitation program and is no longer using drugs, or has otherwise been rehabilitated successfully and is no longer using illegal drugs, or (ii) is participating in a supervised rehabilitation program and is no longer using illegal drugs, or (iii) is erroneously regarded as being a drug user but is not using illegal drugs. Provided 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 defined in this paragraph is no longer using illegal drugs."

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Purpose and effect: Need insurance from liability of discrimination charges for recipients of Federal funds from users of illegal drugs who are using a rehabilitation program to obtain protection under the Act, but also to protect those individuals who are "regarded as" being a user of illegal drugs.

In addition, need to clarify that the policies related to and administration of drug testing and related activity, such as direct observation of illegal drug use, will not be construed as a violation of the protection of an individual's rights against discrimination.

"(c) Notwithstanding subsection (a) and section 511(d), an individual shall not be denied health or social services on the basis of his or her current use of illegal drugs if he or she is otherwise entitled to such services."

Substantive amendments to section 104 of S.933, that clarify protections for individuals with disabilities and the effects of illegal drug use under employment, title I of the ADA, in a manner consistent with amendments to the Rehabilitation Act.

"Sec. 104(a) QUALIFIED INDIVIDUAL WITH A DISABILITY.--For the purposes of this Title the term "qualified individual with a disability does not include an employee or applicant who is a current user of illegal drugs when the covered entity acts on the basis of such use."

Purpose and effect: It clarifies the original understanding of the Helms'amendment. It would allow a covered entity to not hire or to fire an individual with a disability, if the basis of such action was the use of illegal drugs by such individual.

Report Language: Would include the principle that a positive drug test is conclusive evidence of current use.

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"[Sec.104] (b) Nothing in subsection (a) shall be construed to exclude as an individual with a disability an individual who (i) has successfully completed a supervised drug rehabilitation program and is no longer using drugs or has otherwise been rehabilitation successfully and is no longer using illegal drugs, or (ii) is participating in a supervised rehabilitation program and is no longer using illegal frugs, or (iii) is erroneously regarded as being a drug user but is not using illegal drugs. Provided 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 defined in this paragraph is no longer using illegal drugs."

Substantive amendments to section 104 of S.933, that clarify protections for individuals with disabilities and the effects of illegal drug use under employment, title I of the ADA, in a manner consistent with amendments to the Rehabilitation Act.

[Sec. 104(c) DRUG TESTING. --] " (1) IN GENERAL. -- For purposes of this title, a test to determine the use of illegal drugs shall not be considered a medical examination.

(2) CONSTRUCTION. -- Nothing in this title shall be construed to encourage, prohibit, or authorize the conducting of drug testing for illegal drugs of job applicants or employees or making employment decisions based on such results."

Purpose and effect: There are special restrictions in title I on the use of medical exams, thus the clarification in (a), which would make such restrictions inapplicable in regard to testing for illegal drugs. Also, (2) makes the employment title neutral on drug testing.

Substantive amendment to section 101 of S.933, that defines "illegal drugs" for the purposes of the ADA, in a manner consistent with proposed amendments to the Rehabilitation Act.

[Sec. 101] "(5) ILLEGAL DRUG. -- The term "illegal drugs" means controlled substances, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812), the possession or distribution of which is unlawful under such Act. The term "illegal drugs" does not mean the use of a controlled substance taken pursuant to the supervision of a licensed health care professional or other uses authorized by the Controlled Substances Act or provisions of other Federal law.

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1. Drugs continued

Purpose and effect: Clarify the universe of illegal drugs affected by ADA drug provisions and protect with coverage those individuals taking illegal drugs for medical and/or medical research reasons.

Clarify in section 511 the specific categories of individuals that would be excluded from protection under the ADA

[Sec. 511 DEFINITIONS] "Under this Act the term "disability" does not include:
(a) homosexuality or bisexuality;
(b) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, or other sexual behavior disorders;
(c) compulsive gambling, kleptomania, or pyromania or
(d) psychoactive substance use disorders resulting from the current use of illegal drugs.
[Gender identity disorders will be added to this.]

Purpose and effect: To correct the scope of coverage in the original Armstrong amendment, that would have included extensive groups not intended to be excluded/or covered, e.g. those addicted to nicotine.

2. Contractual Liability:

Substantive amendment to title I, Employment, and title III, Public Accommodations, to clarify liability in contractual and other arrangements

[Sec. 102. Discrimination] "(a) GENERAL RULE. -- No covered entity shall discriminate against a qualified individual with a disability...

(b) CONSTRUCTION. -- As used in subsection (a), the term "discriminates" includes -- ...

(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."

and

[Sec. 302(b) (1) (A) (iv)] "For purposes of sec. 302(b) (1) (A) (i)-(iii), the term 'individual or class of individuals' refers to the clients or customers of the public accommodation that enters into the contractual, licensing, or other arrangement."

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Purpose and effect: To clarify that the obligation not to discriminate by a covered entity extends only to the entity's applicants, employees, clients etc., not to those individuals with which the entity has no involvement, such as the employees of a second entity.

Agreement on statutory language. Working on report language in five areas:

(1) Basic civil rights, not involving reasonable accommodation to disability should not have defenses attached to them: The General Prohibitions [denial of participation, provision of separate benefit, or unequal benefit] in title three have no defenses because they are to be construed as general civil rights principles that parallel those from the Civil Right Acts.

(2) Sole source: In sole source contract situations a covered entity may have legitimate reason to discriminate in an employment situation, but only if reasonable accommodation would constitute an undue hardship.

(3) Duty to investigate: Clarify how much effort a covered entity must make to ensure that his/her employee or applicant is not discriminated against through a contract with a second entity. Report language will emphasize the important of clear and specific contracts to establish extent of potential liability on the second entity.

(4) Impact of policies and actions of a second entity on the first entity: [the mall example] Delineate that an entity is not liable for the impact of the policies and actions of a second party [the mall owner], as long as the first entity does not participate in the implementation of such policies and actions that result in discrimination on the basis of disability.

(5) Clarification of the relationship between the general and specific prohibitions against discrimination [is related to # 1 above]: Clarify that when there is applicability of a specific prohibition and a general prohibition, the defense for the specific prohibition is to be applied; and when there is apparent conflict between a general and specific prohibition, the conditions of the specific prohibition would apply.

3. Undue Hardship:

In the employment title clarify the link between reasonable accommodation and undue hardship

The link between reasonable accommodation and undue hardship will be clarified in 3 ways:

(1) Report language in the definition section for section 101(8): "The definition of "reasonable accommodation" sets forth examples of types of accommodation that could ensure that an individual with a disability will be able to perform the essential functions of a job. As set forth in the substantive section of the Act, of course, the legal obligation of an entity to provide reasonable accommodation will be dependent on whether the accommodation would impose an undue hardship on the entity's business. "undue hardship" is defined in section 101(9)."

(2) Under section 102 DISCRIMINATION, (b) (5) and (b) (6) would be combined in (b) (5); (5) addresses reasonably accommodating known physical or mental limitations of an applicant or employee [unless such constitutes an undue hardship]; and (b) (6) is denying a job opportunity on the basis of a need for reasonable accommodation. [Report language, drafted would accompany this provision.]

(3) Under section 103 DEFENSES, (a) IN GENERAL. -- ... "and such performance cannot be accomplished by reasonable accommodation, as required by this title." [Report language, drafted, would accompany this provision.]

DETERMINATION. --

factors to be considered include --

(i) the overall size of the business of the covered entity with respect to the number of employees, number, type, and location of facilities, the overall financial resources of the entity and the financial resources of its facility (or: facilities involved in the provision of the reasonable accommodation or: involved in the provision of the auxiliary aid or the removal of the barrier -- for Title III);

(ii) the type of operation or operations maintained by a covered entity, including the composition and structure of the workforce, in terms of such factors as functions of the workforce, geographic separateness, and administrative relationship to the extent that such factors contribute to a reasonable determination of undue hardship; and

(iii) the nature and cost of the accommodation needed under this Act.

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4. Threshold on alterations:

Statutory changes to clarify, when making alterations to existing facilities, the obligation to make the facility accessible/usable by individuals with disabilities

[Sec. 302(b) (A) (vi)] Strike language referencing "major structural alteration" [page 38, line 20 through line 25] and insert -- "where the entity is undertaking an alteration that affects or could affect the usability of or access to an area of the facility containing a primary function" ["(as defined by criteria established by the Attorney General)" was dropped, is that o.k.?] the entity shall make the alterations in such a manner that..."

[Page 39, line 3] Delete "remodeled" and insert "altered"

[Page 39, line 5] Insert before "except" the following -- "where such alterations to the path of travel to 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 by the Attorney General),"

Report Language: Has been drafted to address these principles: definition of "areas of primary function" (e.g., service to customers); effect of decorating (e.g., wallpapering, floor resurfacing); clarification of "disproportion to the overall cost and scope of an alteration."

4. Potential Places Of Employment:

Clarify the obligation to make new construction accessible/usable by individuals with disabilities in anticipation of it being a site for potential employment

Change "Potential Places of Employment" to "Other Commercial Facilities", and clarify concept in report language.

Purpose and effect: Need to clarify what is required in terms of accessibility/usability in new construction.

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6. Monetary Damages:

Clarify damages in title III of the Public Accommodation title of the ADA

At section 308(b) (2), add the following --

"(D) Punitive damages. -- "Monetary damages and other forms of appropriate relief" do not mean punitive damages."

Report language: "Monetary damages" includes out of pocket expenses, including consequential damages, and compensatory damages, such as pain and suffering. The Attorney General has the discretion to ask for the type of damages."

7., 14., 18. Pattern and practice:

Clarification of how violations will be determined for the purpose of establishing levels of civil penalties [first violation versus subsequent violations]

Proposed language may be a new "(C)" on page 49, after line 17 or report language. The decision left to Legislative Counsel.

In counting the number of previous determinations of violations for purposes of determining which level of penalty applies, determinations of more than one violation in the course of a single proceeding or adjudication are counted as a single violation."

Purpose and effect: The objective is to limit instances of violation to one proceeding, i.e., one pattern and practice case equal one violations for the purpose of determining the appropriate civil penalty. The same instances could not be considered for the purpose of establishing a subsequent violation, if considered in a previous [initial] one.

Clarification of the obligation of the AG to do compliance reviews. (#14)

Applies to sec.308(b) (1) (A) --

"The Attorney General shall investigate alleged violations of this title, which shall include undertaking periodic reviews of compliance of covered entities under this title." (Senate Report is silent.)

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Purpose and effect: The Attorney General has established procedures and precedents for conducting investigations, therefore, no clarification is needed.

Pattern and practice continued (#'s7, 14, 18):

Clarification of the standards to be applied when judging good faith efforts prior to setting the level of civil penalties (#18):

Options:

In section 308(b) (3), on page 50, line 18, insert after "entity." the following --

"In evaluating good faith, the court shall consider, among other factors, it deems appropriate, whether the entity could have reasonably anticipated the need for an appropriate type of auxiliary aid needed to accommodate the unique needs of particular individual with a disability."

8. Preemption

Clarification of the obligations of Federal agencies with enforcement authority to coordinate

Include statutory language that requires agencies with enforcement authority under this title [employment in the ADA] and the Rehabilitation Act 1973 shall develop procedures to ensure that administrative complaints filed under this title and under the Rehabilitation Act of 1973 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards. Such agencies would also be required to establish coordinating mechanisms for issuing regulations.

Purpose and effect: Encourage/require a maximum level of coordination across agencies to control/reduce potential burdens on those involved in administrative or court proceeding.

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11. Basis of discrimination:

Clarify that all factors should be considered in an employment decision that have bearing on the decision

On page 45 of the Senate Committee Report, strike the third full paragraph --

"If the plaintiff is qualified for the position in question, a rejection which considered disability as a factor [the problematic language] would not be justified. The existence of non-disability related factors in the rejection decision does not immunize employers. The entire selection procedure must be reviewed to determine if disability was improperly considered."

And insert in lieu thereof --

"In sum, the existence of both disability-related and non-disability-related factors in a discriminatory rejection of a qualified individual does not immunize employers. The entire selection procedure must be reviewed to determine if disability was improperly considered."

12. Technical assistance manuals:

Mandate the provision of technical assistance manuals to assist covered entities comply with the requirements of the ADA

Insert after section 506(c) (2) the following --

"(3) TECHNICAL ASSISTANCE MANUALS. --
Each department or agency as part of its implementation responsibilities, shall ensure the availability and provision of appropriate technical assistance manuals to entities covered under this Act, no later than six months after applicable final regulations are published for titles I, II, III, and IV of this Act."

Delete the period, "." at the end of section 506(e), and insert the following --

", including any failure to develop or disseminate any technical assistance manual authorized by this section."

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15. Essential functions:

Clarification of covered entity's role in establishing essential functions of a job

Deletion of the underlined from page 26, second full paragraph, last sentence of the Senate Report.

In determining what constitutes the essential functions of the job, consideration should be given to the employer's judgement regarding what function are essential [, as a matter of business necessity --- would be deleted].

16. Anticipatory discrimination:

1. Clarification that charges based on anticipatory discrimination must have reasonable grounds.

A. Add "reasonable grounds" to sec. 308(a) (1), page 48, line 15.

"The remedies and procedures set forth in section 204 of the Civil Rights Act ... shall be available to any individual who is being or is about to be subjected to discrimination on the basis of disability in violation of this title [assume the language will be added here -- "if such individual has reasonable grounds."]."

DISAGREEMENTS

1. Drugs

Establish categories and/or conditions under which a covered entity can deny a position, on the basis of safety, to an individual covered under this Act, who has a record of illegal drug use or alcoholism

New Sec. 104(b) (5) :

"may require employees in sensitive positions, as defined by the Department of Transportation regulations regarding alcohol and drug use, the Department of Defense drug-free work regulations, and the Nuclear Regulatory Commission regulations regarding alcohol and drug use to comply with the standards established by such regulations."

Purpose and effect: These regulations cover an array of jobs including those in railroads, commercial motor carriers (including employees responsible for hiring, supervising, training, assigning, and dispatching drivers and employees concerned with the installation, inspection or maintenance of motor vehicle equipment and/or accessories), mass public transit, airlines (including flight crews, aircraft -- dispatchers, maintenance personnel, and security personnel), commercial marine vessel operators, industries dealing with natural gas and hazardous liquids, defense jobs, and nuclear jobs.

5. Contagious Disease:

1. Reflect a clear understanding that the Supreme Court standard set in *Arline* is the same standard to be understood and applied in the case of the ADA provision pertaining to contagious disease.

In the statute [Sec. 103 Defenses] on page 15, line 16, strike "direct threat" and insert "significant risk." The provision would then read:

"(b) Qualification Standards. -- The term 'qualified standards' may include that an individual with a currently contagious disease or infection shall not pose a significant risk [instead of "direct threat"] to the health an safety of other individuals in the work place.

-2-

7., 14., and 18. Pattern and Practice

Establish that civil penalties will be assessed only in pattern and practice cases where the defendant has acted in willful and egregious manner to discriminate. (The Justice Department says that they will do this anyway.)

9. Business necessity:

Make the standards for screening applicants consistent with the Wards Cove decision by the Supreme Court

Option:

Delete "business necessity" test in screening of applicants and as part of the general defenses under the employment title, and replace it with "business justification" and "legitimate employment goal." Such a change would be consistent with the Supreme Court's decision in Wards Cove.

Background: The Senate passed bill would prohibit the use of employment tests or other selection criteria that screen out or tend to screen out individuals and classes of individuals with disabilities, unless a covered entity shows that such tests and criteria are job related and consistent with business necessity. The phrase "...consistent with business necessity" is also included with "job-relatedness" as a general defense.

On June 5, 1989, the Supreme Court, in Wards Cove (a title VII adverse impact on minorities case), held that "business necessity" need not be shown to justify an adverse impact, only a "legitimate employment goal" or "business justification." The ADA is inconsistent with this holding.

10. Burden of proof:

Clarify the burden of proof in adverse impact cases be placed in a manner consistent with or not in conflict with the Wards Cove decision.

Option:

Strike language in Senate report.

-3-

Background: In the Wards Cove decision the Court held that the plaintiff always has the burden of proof. The Senate passed bill appears to be unclear on this issue in the employment title, but on page 38 of the Senate Report, the intent to over turn the Court's decision on burden of proof is implied. The Senate Report states that the burden of proof under certain impact sections shall be construed "in the same manner in which similar agency provisions are construed under Section 504 ...as of June 4, 1989." The Wards Cove decision was handed down on June 5, 1989.

13. Association:

Limit the association provision [section 102(b) (4), page 11, lines 13-16] in the employment title to individuals who have a legal relationship with an individual with a disability

Option:

Limit protection under this provision in the employment title, to an individual who is related by blood, marriage, or legal adoption to an individual with a disability or to an individual who provides significant assistance or services to an individual with a disability.

Background: In section 102(b) (4) of the employment title in the Senate passed bill, it would be discriminatory to exclude or deny "equal jobs or benefits to a qualified individual because of a known disability of an individual with whom the qualified individual has a known relationship or an association." The proposed modification would reduce the likelihood of this provision being used to pursue inappropriate or frivolous suits, yet retain protection in those instances in which most logically it would be needed.

ADAPET6M
adapet6k

"I'm going to do whatever it takes to make sure the disabled are included in the mainstream...They're not going to be left out anymore." President George Bush

A MESSAGE TO CONGRESS FROM REPRESENTATIVES OF 43 MILLION AMERICANS WITH DISABILITIES

ADA YES! LEGALIZED DISCRIMINATION NO!

WE CONGRATULATE President Bush, Attorney General Thornburgh, Senators Harkin, Dole, Kennedy, McCain, Simon, Durenberger, Hatch and all who supported the overwhelming 76-8 vote by the US Senate on September 7 to pass THE AMERICANS WITH DISABILITIES ACT (ADA).

WE URGE THE PROMPT APPROVAL by the US House of Representatives of this landmark legislation to provide to people with disabilities the "clear and comprehensive mandate for the elimination of discrimination" which other minorities attained more than two decades ago.

WE URGE THE REJECTION OF WEAKENING AMENDMENTS that would legalize current discrimination in areas such as public accommodations, transportation, employment and telecommunications. These amendments would condemn millions of 21st century Americans to the same barriers which have made people with disabilities this nation's most isolated, unemployed, impoverished and welfare dependent minority.

REGRETTABLY, OPPONENTS of a strong and effective ADA are claiming that it will impose backbreaking costs and lawsuits on business. THESE CLAIMS ARE GROUNDLESS. They reflect the same obsolete attitudes, unfounded fears and doomsday predictions that have greeted all previous extensions of basic civil rights protections.

ADA, AS PASSED BY THE SENATE and endorsed by President Bush, strikes a careful balance between the elimination of discrimination and the interests of business. It provides for a gradual transition to an opportunity society, requiring that only new facilities be fully accessible. It specifies that no "significant difficulty or expense" be imposed on businesses. Virtually all of its requirements have been tested for many years under existing federal and local statutes - with no excessive costs or litigation.

IT IS THE PROPOSED WEAKENING AMENDMENTS that are unaffordable. President Bush has estimated that excluding 2/3 of working age people with disabilities from the workforce costs America \$300 billion per year.

ADA WILL FREE MILLIONS OF AMERICANS from the bondage of welfare

dependency, enabling them to become employees, taxpayers and customers. It will be remembered with the Emancipation Proclamation and the Civil Rights Act of 1964 as an historic progress toward the fulfillment of the American dream.

ADA MUST BE PASSED PROMPTLY. THERE MUST BE NO WEAKENING AMENDMENTS. An ADA which legalizes discrimination in any area of society would be intolerable to Americans with disabilities and to every American who believes in liberty and justice for all.

WE WILL REMEMBER THE PATRIOTS WHO VOTE FOR JUSTICE NOW.

Following is a partial list of the 5,046 Democrats, Republicans and just plain Americans with disabilities and their advocates, who pledged their scarce dollars to sponsor this petition for justice.

Alabama: -----; Alaska: -----

"ADA is about unleashing the talents, skills, enthusiasms and commitment of 43 million Americans who want to contribute but cannot." Senator Tom Harkin

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- ✓Bill Grant, Florida, Tallahassee

#1. DRUGS

Original Requests:

1. Fix bad Helms/Harkin language
2. Delete section that explicitly protects individuals who have been rehabilitated or are in treatment, or modify it in some way to remove the implication that such individuals are automatically protected.
3. Clarify that drug tests can be given, at will, to rehabilitated applicants or employees.
4. Make some allowance for taking past drug and alcohol use into account in "safety-sensitive" jobs.

Current State of the Negotiations

1. Agreement on new Helms/Harkin statutory language.
2. Offer from us for a modified statutory section regarding those in rehabilitation and treatment .
3. Agreement on statutory language regarding right to drug test rehabilitated or in treatment folks. (Clarification of current policy)
4. Agreement on report language, not statutory language. that actions may be taken on the basis of a positive drug test that accurately detects illegal drugs. (Clarifies current policy -- adds something for us.)
5. Agreement to add titles I-III of the Rehabilitation Act in the Helms provision. (Our request--done to conform to Helms' statement on the floor.)
6. Agreement to add the phrase "for illegal drugs" in the drug testing provision. (Our request--to conform to rest of title.)
7. Agreement to substitute "taken pursuant to medical supervision under a licensed health care professional," for "taken pursuant to a valid prescription." (Our request)
8. Agreement to clarify the Armstrong amendment to conform to the Senate understanding. (Our request)
9. NO AGREEMENT YET on safety-sensitive jobs. Our offer is currently on the table which follows Senate approach, says that folks in various industries can be subject to

monitoring and placement out of safety-sensitive jobs It
doesn't cover enough jobs for the Bartlett staff.

2. CONTRACTUAL LIABILITY

Original Requests:

1. Place knowledge requirement in provision
2. Place undue hardship/undue burden limitation in provision.

Current State of the Negotiations

1. Agreement on two statutory changes, in employment section and in public accommodation section, to clarify that only the entity's own employees or own customers are covered by the contractual liability provision. No policy change.
2. Agreement in principle on the answers to three hypotheticals, which will be placed in the report language.
3. Agreement in principle on report language explaining the interaction between the specific and general prohibitions in the public accommodation section. Same as in Senate report.
4. Agreement that request for knowledge requirement and undue hardship/burden limitation will be dropped in return for agreements reached in 1-3.

#3. UNDUE HARDSHIP

Original Requests:

1. Establish linkage between reasonable accommodation and undue hardship each time the term reasonable accommodation appears.
2. Substitute solely "site-specific" factors in the undue hardship/undue burden definitions.
3. Link cost of a reasonable accommodation to the value of a job being held by the disabled person.

Current State of the Negotiations:

1. Agreement on our proposed approach for establishing linkage. (Report language in the definitions section; statutory renumbering and report language in the substantive section; statutory addition and report language in defenses section.)
2. NO AGREEMENT YET on site-specific factors.
3. No agreement yet on cost/value issue. Their latest offer on the table is to have no statutory language and one short report language sentence.
4. NOTE: Tim Cook and Bob Burgdorf would like to get a change in the first part of the definition to include the string cite of words from the Senate report. Unclear whether we can swing this -- but maybe we can try if there will be a statutory change in this section already.

#4. MAJOR STRUCTURAL ALTERATIONS

Original Request:

1. Add a specific threshold for "alterations" and "major structural alterations."

Current State of the Negotiations:

1. Apparent agreement on the statutory language worked out between disability folks and AIA.

2. Randy is waiting for AIA's comments on our accompanying explanatory language (probably will be report language).

#4A. POTENTIAL PLACES OF EMPLOYMENT

Original Request:

1. Statutory Language to define what potential places of employment do not have to do in the area of new construction.

Current State of the Negotiations:

1. Complete rejection by us of their statutory suggestion.
2. We've submitted report language spelling out the requirements of new construction, simply expanding on the Senate report.
3. Under consideration: their request that we use a term such as "commercial facilities" instead of the term "potential places of employment" -- but keep the definition the same.
4. Apparent agreement that if we reach consensus on a new statutory term and report language, they will not pursue further statutory language.

#5. CONTAGIOUS DISEASES

Original Request:

Substitute Arline standard for the term "direct threat."

Current State of the Negotiations:

1. We agree that direct threat means the Arline standard. We would agree to report language and colloquy to that effect.
2. No agreement to make the change in the statute.

#6. MONETARY DAMAGES

Original Request:

Limit monetary damages to out-of-pocket expenses.

Current State of the Negotiations:

1. Agreement on statutory language that clarifies that punitive damages may not be awarded.
2. Agreement that report language will state that damages for pain and suffering may be awarded.

No policy change.

#7. PATTERN OR PRACTICE

Original Requests:

1. AG must consider entity subdivisions separately in bringing a pattern or practice suit.
2. Multiple violations in one pattern or practice suit count as only one violation for purposes of assessing the civil penalty.

Current State of the Negotiations:

1. Randy has dropped the entity subdivision request. Needs to be ratified by Bartlett.
2. Agreement that multiple violations in one pattern or practice suit count as only one violation for purposes of civil penalty. We proposed report language; leg counsel to decide whether we need it to be statutory language.

#8. PREEMPTION

Original request:

1. Preempt sections 503 and 504.
2. Deem compliance with 503/504 compliance with ADA or vice-versa.

Current State of the Negotiations:

1. Agreement that we will not pursue a preemption approach. (Contingent, I assume, on otherwise reaching an agreement in this area.)
2. Their statutory offer on the table that would not allow "two bites at the apple" and that would mandate agency coordinating mechanisms.
3. Under consideration: is statutory or report language that would reflect current civil procedure law with regard to filing of suits.

#9-10. BUSINESS NECESSITY/BURDEN OF PROOF

Original Request:

Made ADA conform with the decision in Wards Cove.

Current State of the Negotiations:

No movement possible on substance.

#11. BASIS OF DISCRIMINATION

Original Request:

Modify sentence in Senate Report which could have been read as going beyond standard established in the Price Waterhouse case regarding extent to which consideration of a prohibited characteristic played role in employment decision.

Current State of the Negotiations:

Agreement to repeat everything in Senate Report, pp. 44-45, with the exception of the one offending sentence.

#12. TIMING OF COMPLIANCE AND REGULATIONS

Original Request:

1. Extend effective date by having education period.
2. Tie effective date to regs or T.A. manual.

Current State of the Negotiations:

1. Agreement to place requirement to do T.A. manual in the statute.

#13. ASSOCIATION PROVISION

Original Request:

1. Limit protection to those associated by blood, marriage, or adoption.
2. Latest semi-offer on table -- also extend to caregivers.

Current State of the Negotiations:

No Agreement on any limitation.

#14. DUTY TO INVESTIGATE

Original Request:

1. Limit AG's authorization to investigate only alleged violations; no compliance review.

Current State of the Negotiations:

1. Agreement on silence for silence. Compliance review stays in statute; we don't spend two pages hyping it up in the report.

#15. ESSENTIAL FUNCTIONS

Original Request:

1. Require that plaintiffs prove a function is not essential by compelling evidence.

Current State of the Negotiations:

1. Rejection of compelling evidence standard.

1. Agreement to repeat second sentence of second paragraph on p. 26 of Senate report, minus phrase "as a matter of business necessity."

#16. ANTICIPATORY DISCRIMINATION

Original Requests:

1. Delete anticipatory discrimination except in area of new construction.
2. Put "reasonable grounds" requirement in the statute.

Current State of the Negotiations:

1. Agreement to keep anticipatory discrimination in; examples to go in the report language.
2. Agreement to put "reasonable grounds" requirement in the statute. Tracks existing Title II language.

#18. PATTERN OR PRACTICE

Original Request:

1. Require that violations be wilful or egregious to have a pattern or practice suit.
2. Establish standards for "good faith": reasonable anticipation of disabilities and wilful/intentional standard.

Current State of the Negotiations:

1. Agreement that we will not place a wilful/egregious requirement as a prerequisite for the AG being able to bring a pattern or practice suit.

Everything else: refers just to assessment of civil penalties:

2. Agreement in principle that we should clarify the "good faith" standard.
3. Agreement in principle that good faith already includes assessment of anticipation of unique, unusual needs. Unclear whether this will be statutory language. Randy seemed possibly open to just report language, but Bartlett may be a stickler.
4. Agreement in principle that intentional/wilful requirement should not be the standard for good faith, but need to say something about entities making an honest effort to comply. We have submitted some report language on this.

Sec. 512. AMENDMENTS TO THE REHABILITATION ACT.

HANDICAPPED INDIVIDUAL -- Section 7(7) (B) of the Rehabilitation Act of 1973 (29 U.S.C. 706 (8) (B)) is amended --

(1) in the first sentence, by striking out "Subject to the second sentence of this subparagraph" and inserting instead Subject to subparagraph (C) of this paragraph; and

(2) by striking the second sentence and inserting in lieu thereof the following:

"(C) (1) For purposes of Subchapter V of this Act the term "individual with a handicap -

(a) does not include an individual who is a current user of illegal drugs when a recipient acts on the basis of such use [fixes objectionable Helms language];

(b) nothing in subsection (a) shall be construed to exclude as an individual with a disability an individual who (i) has successfully completed a supervised drug rehabilitation program and is no longer using illegal drugs, or has otherwise been rehabilitated successfully and is no longer using illegal drugs, or (ii) is participating in a supervised rehabilitation program and is no longer using illegal drugs or (iii) is erroneously regarded as being a drug user but is not using illegal drugs. Provided that it shall not be a violation of this Act for a recipient to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual defined in this paragraph is no longer using illegal drugs.

[Uses construction approach suggested by John T., plus one specific language change recommended by John; uses John's sentence re drug testing.]

(2) Notwithstanding subsection 1(a), for purposes of programs and activities providing health services and services provided under title I, II and III of the Rehabilitation Act of 1973, an individual shall not be excluded from the benefits of such programs or activities on the basis of his or her current use of illegal drugs if he or she is otherwise entitled to such services.

(3) For purposes of programs and activities providing educational services, local educational agencies may take disciplinary actions pertaining to the use or possession of illegal drugs or alcohol against any handicapped student who

currently uses illegal drugs or alcohol to the same extent that such disciplinary actions is taken against nonhandicapped students. Futhermore, the due process procedures at 34 C.F.R. 104.36 shall not apply to such disciplinary actions.

(4) For purposes of sections 503 and 504 of this Act as such sections relate to employment, the term "individual with a handicap" does not include an individual who is an alcoholic whose current use of alcohol prevents such individual from performing the duties of the job in questions or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or the safety of others.

(5) Section 7 of the Rehabilitation Act is further amended by adding at the end thereof the following new paragraph:

(22) The term "illegal drugs" means controlled substances, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812), the possession or distribution of which is unlawful under the Act. The term "illegal drugs" does not mean the use of a controlled substance taken pursuant to medical supervision under a licensed health care professional or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

Title I, Section 104(c). Drug Testing.

(1) IN GENERAL -- For purposes of this title, a test to determine the use of illegal drugs shall not be considered a medical examination.

(2) CONSTRUCTION -- Nothing in this title shall be construed to encourage, prohibit, or authorize the conducting of drug testing for illegal drugs of job applicants or employees or making employment decisions based on such test results.

Sec. 101 DEFINITIONS

(5) ILLEGAL DRUG--The term "illegal drugs" means controlled substances, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812), the possession or distribution of which is unlawful under the Act. The term "illegal drugs" does not mean the use of a controlled substance taken pursuant to medical supervision under a licensed health care professional or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(Underlined language is different. Current language:
"pursuant to a valid prescription.")

Sec. 510. ILLEGAL DRUG USE

(a) For purposes of this Act, an individual with a disability does not include an individual who is a current user of illegal drugs, when the covered entity acts on the basis of such use.

(b) nothing in subsection (a) shall be construed to exclude as an individual with a disability an individual who (i) has successfully completed a supervised drug rehabilitation program and is no longer using illegal drugs, or has otherwise been rehabilitated successfully and is no longer using illegal drugs, or (ii) is participating in a supervised rehabilitation program and is no longer using illegal drugs or (iii) is erroneously regarded as being a drug user but is not using illegal drugs. Provided 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 defined in this paragraph is no longer using illegal drugs.

(c) Notwithstanding subsection (a) and section 511(d), an individual shall not be denied health or social services on the basis of his or her current use of illegal drugs if he or she is otherwise entitled to such services.

Sec. 104. (a) QUALIFIED INDIVIDUAL WITH A DISABILITY.--For purposes of this title, the term "qualified individual with a disability" shall not include any employee or applicant who is a current user of illegal drugs, when the covered entity acts on the basis of such use.

(b) nothing in subsection (a) shall be construed to exclude as an individual with a disability an individual who (i) has successfully completed a supervised drug rehabilitation program and is no longer using illegal drugs, or has otherwise been rehabilitated successfully and is no longer using illegal drugs, or (ii) is participating in a supervised rehabilitation program and is no longer using illegal drugs or (iii) is erroneously regarded as being a drug user but is not using illegal drugs. Provided 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 defined in this paragraph is no longer using illegal drugs.

Drugs: Drug Testing

Instead of business community's statutory language, add report language to p. 41:

"Section 104(a) provides that a qualified individual with a disability does not include a person who is currently using illegal drugs. Section 104(c) provides that employers may, if they wish, conduct drug testing for illegal drugs of applicants and employees and may make employment decisions based on such tests. Thus, nothing in this Act prohibits an employer from giving a test to any applicant or employee to determine the presence of illegal drugs and from refusing to hire the applicant or taking action against the employee if the test accurately detects the presence of illegal drugs. This is the case even if the applicant or employee states that he or she recently stopped being a current user. The provision regarding drug testing for illegal drugs stands as an independent provision from the provision removing protection from individuals who are current users of illegal drugs."

Offer re Safety-sensitive jobs:

P. 16, 24-p. 17, l. 1-2: Delete (re transportation employees).

Instead, insert, p. 17, line 9:

Sec. 104(b)(5):

"may require employees in sensitive positions, as defined by the Department of Transportation regulations regarding alcohol and drug use, the Department of Defense drug-free workplace regulations, and the Nuclear Regulatory Commission regulations regarding alcohol and drug use, to comply with the standards established by such regulations."

NOTE: These regulations cover an array of jobs including those in railroads, commercial motor carriers (including employees responsible for hiring, supervising, training, assigning, or dispatching of drivers and employees concerned with the installation, inspection, or maintenance of motor vehicle equipment and/or accessories), mass public transit, airlines (including flight crew members, aircraft dispatchers, aircraft maintenance, aircraft security), commercial marine vessel operators, industries dealing with natural gas and hazardous liquids, defense jobs, and nuclear jobs.

Sec. 511. Definitions.

Under this Act, the term "disability" does not include:

- (a) homosexuality or bisexuality;
- (b) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments or other sexual behavior disorders;
- (c) compulsive gambling, kleptomania, or pyromania; or
- (d) psychoactive substance use disorders resulting from current use of illegal drugs.

(Refinements of the Armstrong amendment)

Contractual Liability: Employment

Statutory Change #1:

Sec. 102. DISCRIMINATION.

(a) GENERAL RULE.--No covered entity shall discriminate against a qualified individual with a disability

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

...

(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

Accompanying Report Language:

"Section 102(b)(2) provides that a covered entity may not participate in a contractual relationship that has the effect of subjecting the covered entity's qualified applicants or employees to discrimination. The phrase "the covered entity's" qualified applicants or employees was added in order to avoid any possible misunderstanding regarding this provision. This provision is intended to apply to a situation in which a covered entity enters into a contractual relationship with another entity, which has the effect of subjecting the first entity's own employees or applicants to discrimination. It does not apply to a situation in which a covered entity enters into a contractual relationship with another entity, and that other entity is engaging in some form of discrimination against its own employees or applicants. The first entity carries no liability in such a situation for the discrimination of the second entity. (Of course, the second entity may be separately liable to suit under this Act.)

Section 102(b)(2) further provides that a covered entity may not participate in a contractual relationship that has the effect of subjecting the covered entity's qualified applicants or employees "to the discrimination prohibited by this title." The basic intent of this provision is that an entity may not do through a contractual provision what it may not do directly. The type of discrimination prohibited is that "prohibited by this title"--i.e., that set forth in the substantive provisions of the bill. Thus, if the contractual relationship having the effect of discrimination occurs in any of the areas covered by the Act, for

example, in hiring, training or promotion of employees, to the extent that the requirement of reasonable accommodation, and the limitation of "undue hardship," applies if the entity is acting directly, these requirements and limitations would apply as well when the entity is acting in a contractual relationship. The contractual relationship adds no new obligations in and of itself beyond the obligations imposed by the Act, nor does it reduce the obligations imposed by the Act.

For example, assume that an employer is seeking to contract with a company to provide training for the first entity's employees. Whatever responsibilities and limitations of reasonable accommodation that would apply to the employer if it provided the training itself would apply as well in the contractual situation. Thus, if the training company were planning to hold its program in a physically inaccessible location, thus making it impossible for an employee who used a wheelchair to attend the program, the employer would have a duty to consider various reasonable accommodations. These would include, for example, (1) asking the training company to identify other sites for the training that are accessible; (2) identifying other training companies that use accessible sites; (3) paying to have the training company train the disabled employee (either one-on-one or with other employees who may have missed the training for other reasons), or any other accommodation that might result in making the training available to the employee.

If no accommodations were available that would have made the training program accessible, or if the only options that were available would have imposed an undue hardship on the employer, the employer would have then met its requirements under the Act. The Committee anticipates, however, that certainly some form of accommodation could be made such that the disabled employee would not be completely precluded from receiving training that the employer may consider necessary.

As a further example, assume that an employer contracts with a hotel for a conference held for the employer's employees and the hotel turns out to be inaccessible. Assume further that the hotel management informs the employer that the hotel is accessible, but that information turns out to be false. What is the employer's liability?

Under the Act, the employer has an affirmative duty to investigate the accessibility of locations that it plans to use for its own employees. An unfortunate problem in today's society is that hotel personnel often state that hotels are accessible when, in fact, they are not. This is due not to any malicious intent on the part of such individuals, but rather can be traced simply to a lack of awareness on the part of such individuals as to what accessibility means in specific situations. An employer who has engaged in a faulty or insufficient investigation, and has

relied solely on the statements of hotel personnel, is not relieved of responsibility under the Act. A better approach to determining accessibility for the employer would either be to check out the hotel first-hand, if possible, or to ask a local disability group to check out the hotel.

In any event, however, the employer can protect itself in such situations by simply ensuring that the contract with the hotel specifies that all rooms to be used for the conference, including the exhibit and meeting rooms, be accessible in accordance with applicable standards. If the hotel breaches this accessibility provision, the hotel will be liable to the employer for the cost of any accommodation needed to provide access to the disabled individual during the conference, as well as for any other costs accrued by the employer. Placing a strict duty on the employer to ensure accessibility of places that it contracts for will, in all likelihood, be the impetus for ensuring that these types of contractual provisions become commonplace in our society.

Contractual Liability: Public accommodations

Statutory Change #2

P. 33-35: Sec. 302(b)(1)(A)(iv):

"For purposes of sec. 302(b)(1)(A)(i)-(iii), the term 'individual or class of individuals' refers to the clients or customers of the public accommodation that enters into the contractual, licensing or other arrangement."

Accompanying Report Language:

Sec. 302(b)(1) provides that it is discriminatory for a public accommodation to subject an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, "directly, or through contractual, licensing, or other arrangements," to a denial of an opportunity to benefit from goods or services, to unequal goods or services, or to different or separate goods or services.

The intent of this contractual prohibition is to prohibit a public accommodation from doing indirectly, through a contractual relationship, what it may not do directly. Thus, the "individual or class of individuals" referenced by sec. 302(b)(1) has always been intended to refer to the clients and customers of the public accommodation that enters into the contractual arrangement. Such individuals have never been intended to encompass the clients or customers of other entities. Thus, a public accommodation is not liable, under this provision, for discrimination that may be practiced by those with whom it has a contractual relationships, when that discrimination is not directed against its own clients or customers.

In order that the scope of the contractual prohibition be made clear, sec. 302(b)(1)(A)(iv) has been added to the statute, which provides that: "For purposes of sec. 302(b)(1)(A)(i)-(iii), the term 'individual or class of individuals' refers to the clients or customers of the public accommodation that enters into the contractual, licensing or other arrangement." This addition tracks a similar clarification in the statute which was made in Title I of the Act. See sec. 102(a)(2).

Sec. 302(b)(1) includes general prohibitions restricting a public accommodation from discriminating against people with disabilities by denying them the opportunity to benefit from goods or services, by giving them unequal goods or services, or

by giving them different or separate goods or services. These general prohibitions are patterned after the prohibitions that exist in other civil rights laws that prohibit discrimination on the basis of race, sex, religion, or national origin. These basic prohibitions in civil rights laws refer to the denial of, or the provision of unequal or separate, goods, services, employment or housing. With regard to such prohibitions, other civil rights laws place no limitations based on cost or administrative difficulty--and thus no such limitations are included in the general prohibitions incorporated in this Title, or in the Section 504 regulations on which this Title is patterned.

In order not to discriminate against people with disabilities, however, certain positive steps must often be taken as well. Thus, section 302(b)(2) includes specific prohibitions against discrimination, which refers to such requirements as providing auxiliary aids, modifying policies, or making various types of physical access changes. Because these requirements require positive actions, certain limitations have been incorporated into the obligation: for example, a public accommodation need not provide an auxiliary aid if doing so would impose an undue burden, and physical access changes to existing facilities need be made only if they are readily achievable.

It should be noted that the specific provisions, including the limitations in these provisions, control over the general provisions to the extent that there is any apparent conflict. This interaction between the specific and general prohibitions operates with regard to the contractual prohibition as well. Thus, in situations in which there is no limiting factor (cost or otherwise) when the entity acts directly, there is similarly no limiting factor when the entity acts indirectly through a contract. Similarly, when there is a limiting factor when the entity acts directly (e.g., the limitation of "undue burden" in providing auxiliary aids and services or the limitation of "readily achievable" for physical access changes in existing facilities), that same limitation applies if the entity is acting indirectly through a contractual relationship.

As noted, the reference to contractual arrangements is to make clear that an entity may not do indirectly through contractual arrangements what it is prohibited from doing directly under this Act. However, it should also be emphasized that this limitation creates no substantive requirements in and of itself. Thus, for example, a store located in an inaccessible mall or other building, which is operated by another entity, is not liable for the failure of that other entity to comply with this Act, simply by virtue of having a lease or other contract with that entity. This is because, as noted, the store's legal obligations extends only to individuals in their status as its own clients or customers, not in their status as the clients or

customers of other public accommodations. Likewise, of course, a covered entity may not use a contractual provision to reduce any of its obligations under this Act. A public accommodation's obligations are not extended or changed in any manner by virtue of its lease with the other entity. The Committee intends that implementing regulations be issued by the Attorney General that will specifically address this area.

Further Possible Report Language on: Contractual Liability:
Public accommodations

Landlord-Tenant Responsibility

A person or business violates section 302 by discriminating against an individual on the basis of disability regarding "goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation." Where a place of public accommodation is operated in premises that are rented or leased, either the landlord or the tenant may have legal control over the making of alterations, depending upon the terms of the lease or rental agreement they have entered into and state and local legal requirements regarding such contracts. Under some rental agreements, the tenant may be permitted to make certain alterations upon the premises, which may or may not be subject to a requirement of prior approval from the landlord. In other circumstances, the contractual agreement between the parties may prohibit the tenant from making any alterations. In most cases, the landlord will have full control over public and common areas of facilities.

Legal responsibility for making alterations under the ADA will depend upon who has the legal authority to make such alterations, generally determined by the contractual agreement between the landlord and tenant. The obligation to remove architectural and communication barriers in existing buildings where such barrier removal is readily achievable (sec. 302(b)(2)(A)(iv) and to include accessibility when making alterations (sec. 302(b)(2)(A)(vi) are both stated in terms that make a "failure" to take such actions unlawful discrimination. The responsibility under ADA for such a "failure" rests with the party -- either the landlord or the tenant, depending upon their arrangement -- who had the legal authority to make the changes required under the Act.

For example, if readily achievable modifications are needed on the premises of a place of public accommodation, and the lease gives the tenant the right to make such changes, then the tenant is responsible under the ADA to make such modifications. On the other hand, if a lease reserves all authority for making alterations to a landlord of premises in which a public accommodation is located, then the landlord is responsible for making the accessibility modifications called for in the ADA.

In regard to the obligation in the cases of alterations that trigger the requirements that the altered area be accessible and, in some case, that a path of travel and facilities be made accessible, this obligation is stated in terms requiring an

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In regard to the obligation in the cases of alterations that trigger the requirements that the altered area be accessible and, in some case, that a path of travel and facilities be made accessible, this obligation is stated in terms requiring an

entity to "make the alterations in such a manner that" accessibility requirements are met (sec. 302(b)(2)(A)(vi). Obviously, this language applies only to the entity that is making the alterations -- the entity that had responsibility for otherwise undertaking the renovations or alteration. Consequently, if a tenant is making alterations upon its premises pursuant to terms of a lease that grant it the authority to do so (even if they constitute alterations that trigger the path of travel requirement), and the landlord is not doing alterations to other parts of the facility, then the alterations by the tenant on its own premises does not trigger a pathway of travel or bathrooms etc. obligation upon the landlord in areas of the facility under its authority and not otherwise being altered.

BB

Linkage

Report language to 101(8) (Definitions):

The definition of "reasonable accommodation" in section 101(8) sets forth examples of types of accommodations that could ensure that a person with a disability will be able to perform the essential functions of a job. As set forth in the substantive section of the Act, of course, the legal obligation of an entity to provide such an accommodation will be dependent on whether the accommodation would impose an undue hardship on the entity's business. See section 102(5)(A). "Undue hardship" is defined in section 101(9).

Statutory Renumbering to sections 102(b)(5)-(6)

P. 11, lines 17-25:

(5) REASONABLE ACCOMMODATION

(a) not making reasonable accommodations to the known physical or mental limitations ... unless such covered entity can demonstrate that the accommodation would impose an undue hardship; or

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

Accompanying Report Language:

Section 102(b)(5)(b) of the legislation specifies that discrimination includes the denial of employment opportunities to a job applicant or employee who is a qualified individual with a disability, if the basis for such denial is the need of the applicant or employee for a reasonable accommodation. This provision is derived directly from the Section 504 regulation, 42 C.F.R. 84.12(d).

The Section 504 regulation, and this provision, do not include the phrase "when such reasonable accommodation would not impose an undue hardship on such covered entity." However, it has always been understood under Section 504, and the Committee wishes to emphasize that this is its understanding under this Act, that the obligation on the part of the covered entity to make a reasonable accommodation applies only when such accommodation would not impose an undue hardship (see section 102(b)(5)(a)). Because concerns have been raised that this provision could be misinterpreted to mean that there might be circumstances in which a covered entity would be required to provide a reasonable accommodation that would impose an undue hardship, the Committee wishes to emphasize that this has never been the case under Section 504 and is not the case under this Act. In addition, to eliminate any possible misunderstanding, the Committee has renumbered these provisions to read as subsets of the same provision, so that it is clear that the undue hardship limitation of 102(b)(5)(a) applies to 102(b)(5)(b) when the covered entity is expected to make the reasonable accommodation.

This provision, therefore, should be applied just as it is applied under Section 504. That is, an employer cannot reject an applicant with a disability who requires a reasonable accommodation in favor of one who does not, if the reason for the rejection is the need for a reasonable accommodation which, if provided by the covered entity, would not have imposed an undue hardship. In addition, even where an entity is not required under the law to pay for a reasonable accommodation, because it would have imposed an undue hardship on the entity, the entity cannot refuse to hire a qualified applicant where the applicant is willing to make his or her own arrangements for the provision of such an accommodation, if the reason for the rejection is the need or the presence of the accommodation.

Statutory Addition in Defenses Section

P. 15, line 11:

Sec. 103. DEFENSES

...

"and such performance cannot be accomplished by reasonable accommodation, as required under this title."

Accompanying report language: This means a reasonable accommodation that would not impose an undue hardship on the covered entity, if the covered entity provides the accommodation, or a reasonable accommodation that the applicant or employee provides on his or her own, if the provision of such an accommodation would have imposed an undue hardship on the covered entity.

Site Specific

New Statutory Language: (for back pocket)

P. 9-10.

Sec. 101

(9) UNDUE HARDSHIP.--

(A) IN GENERAL.--The term "undue hardship" means an action that is unduly costly, extensive, substantial, disruptive, or that will fundamentally alter the nature of the program.

(B) DETERMINATION.--

...

factors to be considered include --

(i) the overall size of the business of the covered entity with respect to the number of employees, number and type of facilities, and the size of the budget;

(ii) the type of operation or operations maintained by a covered entity, including the composition and structure of the workforce of such entity; and

(iii) the nature and cost of the accommodation needed under this Act.

(C) MULTI-FACILITY OPERATIONS.-- In the case of entities operating at multiple facilities, the factors set forth in subsection (B) shall be considered in light of the interrelationship between the covered facility and the covered entity.

Accompanying Report Language on Site Specific:

In determining whether a reasonable accommodation would impose an undue hardship, section 101(9)(B) lists several factors that should be considered by a court, including the size of the budget of the covered entity, the type of operation maintained by the covered entity, including the composition and structure of the entity's workforce, and the nature and cost of the accommodation needed. Section 101(9)(C) further provides that, in the case of covered entities operating at multiple facilities, the factors set forth in subsection (B) shall be considered in light of the interrelationship between the covered facility and the covered entity.

Section 101(9)(C) was added to address concerns raised regarding those covered entities that operate local facilities across the country, in which the financial resources of the local facilities may vary. The Committee intends that courts should consider both the financial resources and operations of the local facility, as well as the financial resources available to the local covered facility from the larger covered entity. As a general matter, while the practical realities of the financial resources of a local facility should not be ignored, a facility of a larger entity can certainly be expected to do more than a local "mom and pop" store.

As section 101(9)(C) makes clear, various factors such as the financial resources or composition of a workforce should be considered in light of the interrelationship between the covered facility and the covered entity. For example, in making the determination as to what resources, if any, are available to the facility from the covered entity in order to provide a reasonable accommodation, a court should consider what other services and resources the covered entity customarily provides to the local facility. Examples would include whether the covered entity pays the employer's contributions to employee pension accounts, provides legal and accounting services, provides employee training, provides construction and renovation guidance and resources, and similar actions.

Cost/Value of Accommodation/Salary

Their offer:

No change in statutory language in 102(9)(B)(iii).)+(I.e., keep it: "nature and cost of the accommodation needed under this Act."

Following sentence in report language, with nothing more: "The Committee intends that the factors to be considered under (iii) include the nature and cost of the accommodation generally and in relation to the nature of the job in question."

Major Structural Alterations

New Statutory Language

* On p. 38, strike line 20-23 (where ADA says: and where the entity is undertaking major structural alterations...").
Insert in lieu:

"and where the entity is undertaking an alteration that affects or could affect usability of or access to an area of the facility containing a primary function"

(pick up rest of sentence: "the entity shall make the alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area and the bathrooms, telephones, and drinking fountains serving the remodeled area, are readily accessible to and usable by individuals with disabilities")

and then add:

"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."

ALTERATIONS AND AREAS OF PRIMARY FUNCTIONS

Under the language of the proposed amendment to section 302(b)(2)(A)(vi), an "alteration that affects or could affect usability of or access to an area of the facility containing a primary function" triggers an obligation to provide an accessible path of travel to the altered area, and to make bathrooms, telephones, and drinking fountains serving the altered area accessible. That such alterations must or could affect usability means that minor changes such as painting or papering walls, replacing ceiling tiles, and similar alterations that do not affect usability or access do not trigger the path of travel and accessible bathrooms, etc. requirements.

Changes to floors may or may not affect accessibility or usability, depending upon the nature of the change involved. Routine maintenance, repairing and sanding floors, and other minor changes to floor surfaces would generally not affect usability and accessibility. Likewise, laying carpets or linoleum would ordinarily not affect usability and access. Such changes to floor surfaces would affect accessibility, however, if they were done in such a manner or made use of such materials as to result in a surface that is too slippery, spongy, uneven, not securely fastened down, having too-deep or too-wide channels, or otherwise creates a hazard or barrier to access by persons who use wheelchairs, or have other mobility or visual impairments. Laying of carpets and other floor coverings may not be done in such a manner as to make an otherwise accessible area inaccessible.

Other changes to floors, such as totally replacing a floor or installing a brick or stone floor, may be so substantial an undertaking and so connected to usability and accessibility as to trigger the path of travel and accessible bathrooms, etc. requirements, if they occur in "an area of the facility containing a primary function." Under the amended statutory language, the latter obligations will occur only to the extent that they are not disproportionate to the overall alterations in terms of cost and scope.

Areas containing primary functions refer to those portions of a place of public accommodation where significant goods, services, facilities, privileges, advantages, or accommodations are provided. It is analogous to the concept in existing UFAS standards of "the rooms or spaces in a building or facility that house the major activities" (UFAS 3.5). A mechanical room, boiler room, supply storage room, or janitorial closet is clearly not an area containing a primary function; the customer service lobby of a bank, the dining area of a cafeteria, and the viewing galleries of a museum are areas containing a primary function.

Potential Place of Employment

New Statutory Language (under consideration)

P. 30, line 14:

Sec. 301(2). COMMERCIAL FACILITIES.-- The term "commercial facilities" means facilities--

- (A) that are intended for nonresidential use; and
- (B) whose operations will affect commerce.

(Change: The term "commercial facilities" has been substituted for the term "potential places of employment." The definition of the term and its substantive coverage remain the same.)

Accompanying Report Language

Recipients of federal financial assistance currently must ensure that all newly constructed facilities are readily accessible to and usable by people with disabilities. The Section 504 regulations, which govern these recipients, use the Uniform Federal Accessibility Standards (UFAS), which are based on model guidelines developed by the ATBCB.

Under UFAS, the areas of a new building which must be accessible are those "for which the intended use will require public access or which may result in the employment of physically handicapped persons." Those, both areas that will be used by patrons and areas that will be used by employees are covered under these standards.

The intent of the ADA is to extend this obligation to all newly constructed commercial establishments. In many situations, the new construction will be covered as a "public accommodation," because in many situations it will already be known for what business the facility will be used for. The Act also includes the phrase "commercial facilities," however, to ensure that all newly constructed commercial facilities will be constructed in an accessible manner. That is, the use of the term "commercial facilities" is designed to cover those structures that are not included within the specific definition of "public accommodation." In either case, however, the standard governing the construction is that the facility must be "readily accessible to and usable by" people with disabilities.

The phrase "commercial facilities" has been substituted for the phrase "potential places of employment" in order to eliminate any possible confusion between coverage of Title III, concerning new construction, and coverage of Title I, concerning employment practices. Obviously, there is an intended conceptual connection between the two titles. To the extent that new facilities are built in a manner that make them accessible to all individuals, including to potential employees, there will be less of a need for individual employers to engage in reasonable accommodations for particular employees in the future. The legal requirements of the two titles, however, are separate and independent. The use of the term "commercial facilities," which retains the same definition as that given to "potential places of employment" in the Senate bill, is designed simply to eliminate any unnecessary confusion.

As noted, the standard of "readily accessible to and usable by," as applied in UFAS and MGRAD, applies not only to areas that will be used by patrons, but also to areas that may be used by disabled employees. The parameters of the standard as it applies to patrons has been set forth in the Senate report, pp. 69-70 [can repeat for House report]. The same basic approach applies in employment areas. Thus, access into and out of the building is required, and access into and out of the rooms is required. In addition, there must be an accessible path of travel in and around the employment area. The basic objective is that a person with a disability must be able to get to the employment area. These design standards do not cover unusual spaces that are not duty stations, such as catwalks and fan rooms.

The standard does not require, however, that individual workstations be outfitted with fixtures that make it accessible to a person with a disability. Such modifications will come into play in the form of reasonable accommodations when a person with a disability applies for a specific job and is governed by the undue hardship standard. Thus, for example, in building a restaurant, the builder could not build two steps up to the bar, because he or she thought that steps looked sophisticated, because that would completely eliminate the possibility for a disabled individual to get to an employment area. However, if the builder is building fixtures and equipment to service the bar (e.g., racks, shelves), all of the fixtures and shelves do not have to be made accessible. If an otherwise qualified disabled person applies, whether such fixtures and equipment can be modified to allow the person to do the job would be an issue of reasonable accommodation.

Two items regarding the placement of fixtures and equipment should be noted. As have often been pointed out, it is always less expensive to build something new in an accessible matter than it is to retrofit an existing facility to make it accessible. That concept applies as well in the building and

placement of fixtures and equipment. Thus, if it would not affect usability or enjoyment by members of the general public, consideration should be given in new construction to placing fixtures and equipment at a convenient height for accessibility. In addition, if they are commercially available, and it would not affect usability or enjoyment by the general public, an effort should be made to purchase new fixtures and equipment that are adjustable so that reasonable accommodations in the future may not pose undue hardships.

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Monetary Damages

Statutory Language:

P. 50, line 14

Sec. 308(b)(3):

(3) PUNITIVE DAMAGES.--For purposes of subsection (b)(2)(B), the term "monetary damages" and "other relief" does not include punitive damages.

Report Language

The term "monetary damages" in section 308(b)(2)(B) does not include punitive damages. It does include, however, damages for out-of-pocket expenses, including consequential expenses, and damages for pain and suffering. The Attorney General has discretion regarding the type of damages he or she chooses to seek on behalf of aggrieved persons.

Multiple Violations

Add report or statutory language for sec. 308(b)(2)(C) (p. 50, 1. 7):

"In counting the number of previous determinations of violations for purposes of determining whether a "first" or subsequent" violation has occurred, determinations of more than one violation in the course of a single proceeding or adjudication are to be counted as a single violation."

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Sec. 107. Enforcement.

Designate existing language as (a) and add the following new subsections:

(b) Where an ^(civil) action which alleges employment discrimination is pending under this Title, no action which alleges employment discrimination based upon the same facts may be brought pursuant to the Rehabilitation Act of 1973. Similarly, where an ^(civil) action which alleges employment discrimination is pending under the Rehabilitation Act of 1973, no action which alleges ^{in a separate} employment discrimination may be brought under this Title.

(c) A final ^{resolution} ~~determination~~ ^{on the merits} in any ^(separate later) action which alleges employment discrimination brought under this Title based upon the facts which were offered or could have been offered shall preclude any action or claim under the Rehabilitation Act of 1973 based upon the same facts. Similarly, a final ~~determination~~ ^{resolution on the merits} in any ^{subsequent} action which alleges employment discrimination under the Rehabilitation Act of 1973 shall preclude any action or claim under this Title based upon the same facts.

(d) The agencies with enforcement authority for actions which allege employment discrimination under this Title and the Rehabilitation Act of 1973 shall develop procedures to implement the requirements of paragraphs (b) and (c) in a way designed to avoid duplication of effort and prevent imposition of inconsistent or conflicting standards.

can't be used to preempt a civil authority.

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the Rehabilitation Act of 1973 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same terms and requirements under this Title and the Rehabilitation Act of 1973. Such agencies shall also establish coordinating mechanisms for the issuance of regulations implementing this Title and the Rehabilitation Act of 1973.

NOTE: Report language would explain how this provision is expected to work. It would also explain that subsection (d)'s phrase: "because of a lack of coverage under section 101(4) of this Title" means the defendant was found not to be an "employer" for purposes of the ADA, and the phrase "because of a finding that a defendant is not covered under such Act" in subsection (e) meant the defendant was found not to be a recipient of federal financial assistance, or a contractor, or the federal government. Jurisdictional defects would refer to defects in jurisdiction of the court.

Report language would also make the following clear with regard to the relationship between administrative and judicial claims:

"Under Section 504, a claimant is not required to exhaust administrative remedies before filing in court. However, a claimant may choose to file an administrative complaint before pursuing court action. The remedies for employment under Title I of this Act require adherence to the procedures of Title VII of the Civil Rights Act of 1964, which include the filing of a complaint with the EEOC. Sections 503 and 501 of the Rehabilitation Act of 1973 also require a claimant to file an administrative complaint. Even where exhaustion is required, (either by a final agency decision or by receipt of a right to sue letter), the plaintiff retains a private right of action in court. Nothing in this section affects the right of a plaintiff to de novo review in a court of competent jurisdiction."

November 1, 1989

12. Mandate for technical assistance manuals

Insert after section 506(c)(2) the following --

"(3) TECHNICAL ASSISTANCE MANUALS. --
Each department or agency as part of its implementation responsibilities, shall ensure the availability and provision of appropriate technical assistance manuals to entities covered under this Act, no later than six months after applicable final regulations are published for titles I, II, III, and IV of this Act."

Delete the period, "." at the end of section 506(e), and insert the following

failure or delay relative to the development or *dissemination* ~~failure~~ in
", including any ~~failure~~ to receive any technical assistance manual authorized by this section."

48a

Good Faith

Report Language:

"Sec. 308(b)(2)(C) provides that, "to vindicate the public interest," a court may assess a civil penalty against an entity that has been found to be in violation of the Act in suits brought by the Attorney General. In addition, the Act further provides that, in considering what amount of civil penalty, if any, is appropriate, the court should give consideration to "any good faith effort or attempt to comply with this Act."

The "good faith" standard referred to in the Act is not intended to be a wilful or intentional standard--that is, an entity cannot demonstrate good faith simply by showing that it did not wilfully, intentionally or recklessly disregard the law. At the same time, the absence of such a course of conduct would be a factor a court should weigh in determining the presence of good faith. (Second sentence is Randy's contribution.)

The "good faith" standard is a standard that should be seriously applied to protect from the assessment of civil penalties, as well as from the higher levels of civil penalties, those entities that have honestly and reasonably attempted to comply with the law. For example, a public accommodation is not required to anticipate all of the auxiliary aids that might be necessary to accommodate an individual with a unique disability. While, of course, a public accommodation is expected to anticipate such disabilities as visual, speech, hearing and mobility impairments, the Committee does not expect that civil penalties will be assessed against entities that reasonably and honestly could not anticipate the unique needs of individuals with certain types of unusual disabilities and therefore may not have had some appropriate auxiliary aid at hand.

In sum, an honest effort to comply with the law should be a basic factor taken into account by the court in assessing whether any civil penalties, or the highest levels of those penalties, should apply against an entity. As an additional example, assume that a public accommodation provided an auxiliary aid to a person with a disability, which the public accommodation reasonably believed would enable the person to effectively enjoy the goods and services provided by the accommodation. Assume further that a court ultimately determined that the auxiliary aid was not adequate for the person with a disability and therefore that the accommodation was in violation of the requirements of the Act. Assuming further that this action (or actions) somehow rose to the level of a case brought by the Attorney General, a court's assessment that the public accommodation had made a reasonable and honest effort to provide the auxiliary aid should obviously

be taken into account by the court in determining good faith for
the purposes of assessing any civil penalty.

Re statutory language:

If statutory language on the anticipation point seems inevitable, the following rewrite should probably be considered:

"In evaluating good faith, the court shall consider, among other factors it deems relevant, whether the entity could have reasonably anticipated the need for an unusual type of auxiliary aid needed to accommodate the unique needs of a particular individual with a disability."

Plus, the previous report language, making it clear that visual, speech, hearing and mobility impairments would be among those disabilities that entities are expected to anticipate.