I. General Overview of the Americans with Disabilities Act ("ADA")

   A. Enacted on July 26, 1990, the intent of the legislation is to eliminate
discrimination against individuals with disabilities and to bring these persons
into the economic mainstream.

   B. Scope of the Act - The ADA consists of five titles, each with different
effective dates and enforcement provisions. This outline will focus on Title
I, but contains some miscellaneous provisions in Title V as well.

   1. Title I deals with employment discrimination and prohibits employers,
agents of employers, labor organizations, employment agencies and
joint labor-management committees from discriminating against any
qualified individual with a disability in regard to any term, condition
or privilege of employment.

   2. Title II applies to state and local governments and prohibits
discrimination on the basis of disability to all programs, activities and
services provided or made available by the state or local government.

   3. Title III extends the prohibition against discrimination to privately
operated public accommodations and public transportation services
provided by private entities.

   4. Title IV deals with telecommunications and more specifically with the
 provision of telephone services to hearing and speech impaired
individuals.

   5. Title V contains the Act's miscellaneous provisions.
C. Title I is designed to remove barriers which prevent qualified individuals with disabilities from enjoying the same employment opportunities that are available to persons without disabilities and to ensure that individuals with disabilities have access to equal employment opportunities based on merit. Therefore, an individual who is qualified for an employment opportunity cannot be denied that opportunity because of the fact that the individual is disabled.

D. The ADA applies to all qualified individuals with disabilities, regardless of their citizenship status or nationality.

E. Final Rules and Regulations Implementing Title I


2. The regulations were modeled after the regulations that implemented Section 504 of the Rehabilitation Act of 1973 and after the case law interpreting these regulations, with a few additions.

3. The EEOC has also announced that it will publish a Compliance Manual which is currently under development and will be issued prior to the effective date of the ADA. Among the issues to be addressed in depth are the theories of discrimination; definitions of disability and a qualified individual with a disability; reasonable accommodation and undue hardship, including such matters as the scope of reassignment; and pre-employment inquiries.

4. In addition to the regulations, the EEOC has published an Appendix entitled "Interpretive Guidance on Title I of the Americans with Disabilities Act" which represents the EEOC's interpretation of the Act in order that qualified individuals with disabilities understand their rights under Title I. The EEOC will use this interpretive guidance in resolving charges of employment discrimination.

F. Other Legislation


   a. Prohibits discrimination against an otherwise qualified handicapped individual on the basis of his/her handicap by
federal contractors, federal agencies, federal programs and activities and employers receiving federal financial assistance.

b. The ADA's use of the term "disability" is equivalent to the Rehabilitation Act's use of the term "handicap."

2. Effect on Other Laws

a. The ADA does not preempt any law that affords disabled individuals greater protection than that provided by the ADA. Likewise, the existence of a lesser standard of protection to disabled individuals under a state law or regulation will not provide a defense to meeting a higher standard under the ADA.

b. An action brought under the ADA is not an exclusive remedy, and individuals with disabilities are free to pursue state discrimination or tort claims in addition to charges brought under the ADA.

c. The ADA does not automatically preempt federal medical standards or safety requirements nor does it preempt state, county or local laws, ordinances or regulations that are consistent with the ADA and that are designed to protect the public health from individuals who pose a direct threat, which cannot be eliminated or reduced by reasonable accommodation, to the health or safety of others.

G. Effective Dates

1. Title I will take effect on July 26, 1992.

2. From July 26, 1992 to July 26, 1994, the ADA will only apply to employers with 25 or more employees.

3. After July 26, 1994, the ADA will apply to employers with 15 or more employees.

H. The EEOC has announced that it will further study and assess the economic costs and benefits of this legislation and issue a Final Regulatory Impact Analysis prior to January 1, 1992.
II. Title I - Employment Discrimination

A. Title I's framework tracks Section 504 of the Rehabilitation Act of 1973.

B. "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment." § 102(a).

1. The final regulations elaborate on this to prohibit discrimination in regard to the following: (29 C.F.R. § 1630.4)

   a. Recruitment, advertising, and job application procedures;

   b. Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

   c. Rates of pay or any other form of compensation and changes in compensation;

   d. Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

   e. Leaves of absence, sick leave, or any other leave;

   f. Fringe benefits available by virtue of employment, whether or not administered by the covered entity;

   g. Selection and financial support for training, including apprenticeships, professional meetings, conferences and other related activities, and selection for leaves of absence to pursue training;

   h. Activities sponsored by a covered entity including social and recreational programs; and

   i. Any other term, condition, or privilege of employment.
C. Definitions

1. "Covered Entity" - employment agencies, labor organizations, or joint labor-management committees, and employers with 15 or more employees for each working day in each of 20 or more calendar weeks.

2. "Qualified Individual with a Disability" - an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position held or desired. §101(8). The regulations further define this term as "an individual with a disability who satisfies the requisite skill, education and experience and other job related requirements of the employment position, which the individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of that position." 29 C.F.R. § 1630.2(m)

a. qualified - An employer can hire the most qualified candidate unless a non-essential function or lack of reasonable accommodation impairs the candidate from being the most qualified; no affirmative action required; must assume accommodation in hiring decisions.

b. disability - An individual must satisfy one of these three (3) conditions:

(i) a physical or mental impairment that substantially limits one or more of the major life activities of the individual;

"physical or mental impairment": any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of several body systems, or any mental or psychological disorder; the existence of an impairment is to be determined without regard to mitigating measures such as medicines or prosthetic devices; the definition does not include: physical characteristics; predisposition to illness or disease; pregnancy; personality traits that are not symptoms of a mental or psychological disorder; environmental, cultural or economic disadvantages; and advanced age.

"substantially limits": an employer must look at the effect of the impairment on the life of the individual;
temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities; multiple impairments in combination may constitute a disability; an individual is substantially limited in working if the individual is significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes when compared with the ability of the average person with comparable qualifications.

- "major life activity": those activities which the average person can perform with little or no difficulty such as caring for oneself, performing manual tasks, breathing, walking, talking, seeing, hearing, learning, working, sitting, standing, lifting and reaching. 29 C.F.R. § 1630.2(i).

(ii) a record of such impairment; and

(iii) being regarded as having such an impairment, which means:

- The individual may have an impairment which is not substantially limiting, but is perceived by the employer as constituting a substantially limiting impairment;

- The individual may have an impairment which is only substantially limiting because of the attitudes of other toward the impairment; or

- The individual may have no impairment at all, but is regarded by the employer as having a substantially limiting impairment.

(iv) Persons infected with the HIV virus are specifically protected under the ADA, even if they are asymptomatic because of the substantial limitation to procreation and intimate sexual relationships. § 3(2)(A).

(v) Certain disorders are specifically excluded from the definition of "disability," such as compulsive gambling, kleptomania, pyromania, exhibitionism, and voyeurism. § 511.
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c. **essential functions** - fundamental, non-marginal job tasks; those functions that the individual who holds the position must be able to perform unaided or with the assistance of a reasonable accommodation; the requirement focuses on the desired result rather than on the means of accomplishment.

(i) A job function may be considered essential for some of the following reasons:

- the function may be essential because the reason the position exists is to perform that function;

- the function may be essential because of the limited number of employees available among whom the performance of that job can be distributed; and/or

- the function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(ii) Evidence of whether a particular function is essential includes:

- the employer's judgment as to which functions are essential;

- written job descriptions prepared before advertising or interviewing applicants for the job;

- the amount of time spent on the job performing the function;

- the consequences of not requiring the incumbent to perform the function;

- the terms of a collective bargaining agreement;

- the work experience of past incumbents in the job; and/or

- the current work experience of incumbents in similar jobs.
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d. reasonable accommodation - An employer must make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business. § 102(b)(5).

(i) The term includes:

- modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

- modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

- modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

(ii) "Reasonable accommodation" may include but is not limited to:

- making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

- job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations. §101(9).

(iii) An employer, however, does not have to alter the essential functions of the job.
e. undue hardship - An employer is not required to provide a reasonable accommodation if it would result in an undue hardship on its business. The term "undue hardship" means significant difficulty or expense in, or resulting from, the provisions of the accommodation.

(i) This would include any accommodation that is unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business. 29 C.F.R. § 1630.2(p).

(ii) Factors when determining if an undue hardship exists include the nature and cost of the needed action; the overall financial resources of the facility and the entity as a whole, including the number of employees and the effect on expenses and impact upon the operation of the facility; and the relation of the facility to the business as a whole. § 101(10).

D. Other Specific Prohibitions

1. Job Segregation - An employer cannot limit, segregate, or classify a job applicant or employee in a way that adversely affects the opportunities or status of the applicant or employee.

2. Health Insurance - Employers may not deny health insurance coverage to an individual based on a person's diagnosis or disability; however, it is permissible for an employer to offer insurance policies limiting coverage for certain procedures if it is uniformly applied to all employees; pre-existing condition clauses are not affected as long as there is no intent to evade the ADA requirements.

3. Discriminatory Contracts - An employer may not participate in a contractual or other arrangement that has the effect of subjecting a qualified applicant or employee with a disability to discrimination.

4. Unfair Standards, Criteria or Administrative Methods - Employing standards, criteria or methods of administration that have the effect of discrimination on the basis of disability or that perpetuate the discrimination of others who are subject to common administrative control are prohibited.

5. Associations with the Disabled - The ADA protects individuals who
are associated with disabled persons and who are discriminated against because of this association; the employer is not required to make an accommodation because of this association, however.

6. **Lack of Reasonable Accommodation** - An employer is required to make reasonable accommodations to the known physical or mental limitations of a qualified individual with a disability unless it would impose an undue hardship on the employer.

7. **Qualification Standards and Employment Tests** - The ADA prohibits the use of qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standards, test, or criteria is shown to be job-related for the position in question and consistent with business necessity.

   a. **Medical Examinations** - can only be given after an offer is made; employers may ask questions relating to the ability to perform job-related functions, but may not ask questions in terms of disability; offers may be conditioned upon the results of the medical exam; rejection of an applicant tends to isolate the disability; must be given to all entering employees within the same job category; drug testing and dexterity or productivity tests are not considered medical examinations.

8. **Retaliation** - Title V prohibits retaliation against anyone who opposes discriminatory actions or who files a charge or otherwise takes part in the enforcement of the Act. The regulations also prohibit anyone from coercing, intimidating, threatening, harassing or interfering with any individual in the exercise or enjoyment of any right granted or protected under Title I.

E. **Illegal Drugs and Alcohol**

1. The definition of a "qualified individual with a disability" does not include an employee who is a current user of illegal drugs; likewise, alcoholics whose current use of alcohol prevents them from performing job duties and makes their employment a direct threat to the safety of others are not protected.

2. However, the following classes of persons are protected:
   a. persons who have successfully completed a drug rehabilitation program;
b. persons who are participating in a supervised rehabilitation program or a professionally recognized self-help program; or

c. persons who are erroneously regarded as being illegal users of drugs.

3. ADA neither encourages, authorizes nor prohibits drug testing.

F. Enforcement

1. Same as Title VII.

2. Damages: back pay, reinstatement, and other equitable relief.

3. Civil Rights Act of 1992 - remedies would be expanded to include compensatory and punitive damages, trial by jury, and a two-year statute of limitations.

4. The EEOC's regulations on Recordkeeping and Reporting under Title VII have been amended to add the recordkeeping requirements under the ADA. The amendment increases the records retention period from six months to one year. 29 C.F.R. Parts 1602 and 1627. Also, the reporting requirements are extended to include temporary or seasonal employees.

G. Defenses

1. Disparate Treatment Defense - The individual was not treated differently because of his/her disability but for a legitimate nondiscriminatory reason unrelated to the individual's disability.

2. Disparate Impact Defense - The selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities are job-related and consistent with business necessity and cannot be met with a reasonable accommodation.

3. Undue Hardships - The provision of a reasonable accommodation will cause the employer an undue hardship.

4. Conflicting Federal Law and Regulations - If the alleged discriminatory action was taken in compliance with another Federal law or regulation, the employer may offer its obligation to comply with the conflicting standard as a defense.
5. Health or Safety - The selection criteria is necessary to prevent a direct threat or significant risk to the health or safety of other employees.

6. Religion - A religious organization may assert that they gave an employment preference to individuals of a particular religion. However, the religious organization may not discriminate against an individual who satisfies the permitted religious criteria because that individual is disabled.

H. Prior Worker's Compensation Claims

1. The EEOC in its Notice of Proposed Rulermaking issued on February 28, 1991 asked for comments on specific questions concerning the application of Title I of the ADA. Of interest, the EEOC sought information regarding:

   a. whether submission of medical information to worker's compensation offices is a permissible use of information obtained as a result of a medical examination or inquiry;

   b. whether an inquiry into the history of an individual's worker's compensation claims is a prohibited pre-employment inquiry and whether such an inquiry is ever permissible as an inquiry that is job related and consistent with business necessity.

2. The EEOC amended its interpretive guidance in response to comments received so as to permit submission of medical information to workers' compensation offices in accordance with state workers' compensation laws. Further, the regulations now prohibit employers from inquiring at the pre-offer stage about an applicant's workers' compensation history. The EEOC has stated, however, that it will clarify its position on other workers' compensation issues in future guidances.
III. Selection of an Applicant in Light of the ADA and Its Proposed Regulations

A. Determine the essential functions of the job.

B. Advertise for the position accordingly.

C. Ask in your interview specific questions regarding the applicant's ability to perform the essential functions of the job.

1. An employer must assume the existence of a reasonable accommodation if necessary; if such reasonable accommodation is necessary, the employer must determine whether providing such accommodation would impose an undue hardship.

2. An employer should examine the injury experience of this particular job in formulating his/her interview questions.

D. Determine whether the person is otherwise qualified.

1. Does the individual satisfy the prerequisites for the job, such as possessing the appropriate educational background, employment experience, skills, licenses, etc.?

E. Determine whether the person can perform the essential functions of the job with or without reasonable accommodation.

F. Offer the position to the applicant if truly qualified; no preferential hiring is required.

G. Perform a medical examination if one is done for all candidates for this job class. If an employer performs examinations across the board, the risk of this practice being challenged is reduced.

1. Ideally, the medical examination should confirm that information which should have already been established in the interview. If an employer discovers something new, the employer must determine if the applicant can nevertheless accomplish and perform the essential functions of the job with reasonable accommodation. An employer should proceed with caution and make sure that it is related to the performance of an essential function, otherwise the withdrawal of the offer tends to isolate the disability as the reason for the withdrawal, thus creating a potential plaintiff's case.