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## The Impact of Title I of the Americans with Disabilities Act of 1990 on Workers' Compensation Law

Ranko Shiraki Oliver

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THE IMPACT OF TITLE I OF THE AMERICANS WITH  
DISABILITIES ACT OF 1990 ON WORKERS'  
COMPENSATION LAW

*By Ranko Shiraki Oliver\**

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### I. INTRODUCTION

The Americans with Disabilities Act of 1990 ("ADA")<sup>1</sup> protects individuals with disabilities from discrimination in almost every aspect of their lives. The intent of the ADA is to prevent day-to-day discrimination against these individuals<sup>2</sup> by legislating a comprehensive social policy that prohibits discrimination because of the presence or record of a disability, society's attitudes about disabilities, or physical barriers. Thus, to the degree that is reasonably possible,

1. Pub. L. No. 101-336, 104 Stat. 327 (1990), 42 U.S.C. §§ 12101-12213 (Supp. IV 1992).

2. 42 U.S.C. § 12101(b)(4) (Supp. IV 1992).

the ADA attempts to provide equal opportunity and equal treatment to individuals with disabilities. In an effort to achieve this equality, the ADA imposes on entities subject to its provisions not only an obligation not to discriminate because of a disability, but also an obligation to provide reasonable accommodation for the individual's disability, unless providing such accommodation would impose undue hardship.

The ADA substantially adopts the provisions of the Rehabilitation Act of 1973,<sup>3</sup> which has protected individuals with disabilities from discrimination for the past twenty-one years, but the ADA goes further in terms of who is subject to its provisions and who is protected by it. Specifically, under Sections 501 and 503 of the Rehabilitation Act, federal government agencies and federal contractors, respectively, are prohibited from discriminating against job applicants and employees with disabilities. Additionally, under Section 504, agencies or entities receiving federal funding are prohibited from discriminating against individuals with disabilities not only in employment, but also in participation in those agencies' or entities' programs or activities. Under the ADA, a much broader group of entities, public *and* private, are prohibited from discriminating on the basis of a disability. Thus, while the Rehabilitation Act of 1973 and other preexisting federal and state laws protecting individuals with disabilities are still in effect, the ADA will have substantially greater impact. At the state level, the Arkansas Civil Rights Act of 1993 also recognizes the right of "an otherwise qualified person to be free from discrimination because of . . . the presence of any sensory, mental, or physical disability . . ." in various settings, including employment.<sup>4</sup>

The stated purposes of the ADA are to provide a national mandate for the elimination of discrimination against individuals with disabilities; to provide clear, strong, consistent, and enforceable standards; to ensure a central role for the federal government in enforcing the act; and to use the regulation of commerce to protect persons with disabilities from discrimination.<sup>5</sup>

To achieve these purposes, the ADA covers employment;<sup>6</sup> services and programs of state and local governments and their instrumentalities;<sup>7</sup> services by most public transportation providers;<sup>8</sup>

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3. 29 U.S.C. §§ 701-797 (1988 & Supp. IV 1992).

4. ARK. CODE ANN. § 16-123-105 (Michie Supp. 1993).

5. S. 933, 101st Cong., 1st Sess. (1989), Sec. 1(b)(1); ADA § 2(b), 42 U.S.C. § 12101 (Supp. IV 1992).

6. ADA, Title I, §§ 101-08, 42 U.S.C. §§ 12111-12117 (Supp. IV 1992); 29 C.F.R. § 1630.2 (1993).

7. ADA, Title II, §§ 201-46, 42 U.S.C. §§ 12131-12165 (Supp. IV 1992). Under

commercial facilities, public accommodations, and services;<sup>9</sup> and telecommunications.<sup>10</sup>

The ADA is unquestionably the most sweeping piece of civil rights legislation since the Civil Rights Act of 1964 because, for the first time, federal law protects individuals with disabilities against discrimination on the basis of their disability. This protection is comparable to that extended to minority groups since 1964. In fact, it has been suggested that the ADA has created a new "suspect class" for purposes of claims under the Equal Protection Clause of the Fifth and Fourteenth Amendments of the United States Constitution.<sup>11</sup> Whether or not these individuals represent a "suspect class," it is clear that they do represent a significant and important segment of this country's society. This new class is estimated to be comprised of 43,000,000 individuals with one or more physical or mental disabilities, or roughly twenty percent of the population of the United States.<sup>12</sup>

All the provisions of the ADA are important. However, the requirements in Title I, which prohibit discrimination in employment, are probably the most significant because of their impact on both of the groups affected: individuals with disabilities and employers.

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Title II, a qualified individual with a disability is protected from exclusion from the benefits of services, programs, or activities provided by public entities. Public transportation systems operated by state and local governments and associated public transportation authorities are also required to make vehicles and other facilities accessible to persons with disabilities.

8. ADA, Title II, Subtitle B, §§ 221-46, 42 U.S.C. §§ 12141-12165 (Supp. IV 1992), applies to publicly operated transportation; ADA, Title III, 42 U.S.C. §§ 12181-12189 (Supp. IV 1992) applies to private carriers.

9. ADA, Title III, §§ 301-310, 42 U.S.C. §§ 12181-12189 (Supp. IV 1992). "Public accommodations" such as public lodgings, public transportation stations, restaurants and bars, stores, service establishments, shelters and care centers, and places of amusement, public gathering, and recreation are prohibited from discriminating against individuals with disabilities. Any public transportation provided by private entities must also be in compliance with this title, and those entities must make their facilities accessible to individuals with disabilities or make equivalent services available to them.

10. ADA, Title IV, §§ 401-402. Section 401 adds language to Title II of the Communications Act of 1934, 47 U.S.C. § 201 *et seq.* (Supp. IV 1992), and directs telecommunications providers to offer relay services to enable individuals who are hearing or speech-impaired to communicate by telephone by means of "TDDs" (telecommunications device for the deaf).

11. John Parry, *Overview [of the Americans with Disabilities Act]* in THE AMERICANS WITH DISABILITIES ACT MANUAL 1992, at 4 (A.B.A. Commission on Mental and Physical Disability Law). Courts, however, have thus far been reluctant to consider individuals with disabilities as a "suspect class." *See, e.g., More v. Farrier*, 984 F.2d 269 (8th Cir. 1993) (rejecting argument that inmates who used wheelchairs were a suspect class).

12. S. 933, 101st Cong., 2d Sess. (1989), Sec. 2(a)(1). *See also* John T. Shannon, *Americans with Disabilities Act: A New Era in Employment Practices*, ARK. LAW., Apr. 1991, at 35.

For individuals with disabilities, Title I is the most significant because it is through employment that their self-confidence, self-esteem, and independence might be enhanced by realizing that they, too, are contributing to society. For employers, Title I is also significant because it will cover an estimated 666,000 employers.<sup>13</sup> In addition, Title I creates major changes in employer and employee relations generally, and particularly in hiring practices, which will require employers to educate themselves on the intricacies of the law. Finally, Title I imposes an obligation on employers to provide reasonable accommodations for job applicants and employees with disabilities. While all of these accommodations will require some administrative and operational adjustments, not all of them will result in financial outlays. For those that will, however, the cost could be significant.

The impact of Title I is evidenced by the high number of recent employment discrimination charges received by the Equal Employment Opportunity Commission ("EEOC"), the federal agency enforcing Title I. As of July 1993, one year after the effective date of Title I, the EEOC reported that it had received 12,000 complaints from individuals with disabilities alleging violations of Title I. Some commentators have estimated that this figure surpasses the number of complaints filed by women and minorities in the first year after Title VII of the Civil Rights Act of 1964 became effective.<sup>14</sup>

Title I of the ADA unquestionably affects workers' compensation law, but the extent of its impact is not entirely clear. Four specific areas of concern can be identified: first, whether the restrictions imposed on employers by Title I on investigating a job applicant's physical and mental condition and qualifications prevent employers from determining whether an applicant may be a potential "Second Injury Fund" claimant; second, whether, in view of these same restrictions, employers can still investigate a job applicant's condition in sufficient depth to preserve the defense of "misrepresentation;" third, whether an "injured worker" or a "worker with a disability"

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13. R. Lee Creaseman, Jr. & Patricia Greene Butler, *Will the Americans with Disabilities Act Disable Employers?*, 42 LAB. L.J. 52, 52 n.4 (1991) (citing N.Y. TIMES, Sept. 17, 1989, at E5).

14. The most common types of charges alleged in the complaints were as follows: Discharged from work because of disability (48%); employer failed to provide reasonable accommodations (22%); disability prevented worker from getting job (13%); harassed because of disability (10%); unfairly disciplined because of disability (7.2%); and denied benefits because of disability (3.6%).

The most common types of disabilities found in these charges were as follows: Back impairment (18%); mental illness (9.8%); heart impairment (4.3%); neurological impairment (3.7%); and diabetes (3.6%). Liz Spayd, *The Disabilities Act, One Year Later*, WASH. POST, July 29, 1993, at A23.

under workers' compensation is also "a qualified individual with a disability" for purposes of Title I of the ADA and, thus, entitled to protection from discrimination on the basis of that disability; and, fourth, whether the ADA preempts the "exclusive remedy" provision of workers' compensation laws.

This article attempts to address these four areas by analyzing the effect of the hiring practices mandated by Title I on "Second Injury Fund" cases and the misrepresentation defense; by examining employers' obligations to provide reasonable accommodations to employees injured on the job and returning injured workers; and by interpreting the interplay of exclusivity clauses of workers' compensation laws and Title I.

Section II of this article discusses the definitions of key terms in Title I. Section III will discuss the impact of Title I on hiring practices, specifically the two-step job application process mandated by the ADA. Section IV will analyze the importance of this two-step application process and address the terms "disability," "qualified individual with a disability," and "reasonable accommodations" in the context of workers' compensation. Finally, Section V will evaluate the advantages and disadvantages of Title I.

## II. KEY TERMS IN TITLE I OF THE AMERICANS WITH DISABILITIES ACT OF 1990 (ADA)

Title I prohibits *employers* from *discriminating* against a *qualified individual with a disability* on the basis of that *disability*. Furthermore, employers are required to provide equal opportunities to otherwise qualified individuals with disabilities by making *reasonable accommodation* for an individual's disability, unless these accommodations would create an *undue hardship* on the employer. One must study these terms carefully to fully understand the breadth of the law.

### A. Employers

Title I covers employers, employment agencies, labor organizations, and joint labor-management committees.<sup>15</sup> The ADA defines an employer as a person engaged in an industry affecting interstate commerce and who employs fifteen<sup>16</sup> or more people for

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15. ADA § 101(2), 42 U.S.C. § 12111(2) (Supp. IV 1992); 29 C.F.R. § 1630.2(b) (1993).

16. For employers of 25 or more employees, the ADA became effective on July 26, 1992. For employers of 15 or more employees, the ADA became effective on July 26, 1994. ADA § 101(5)(A), 42 U.S.C. § 12111 (Supp. IV 1992), 29 C.F.R. § 1630.2(e) (1993).

each working day in each of twenty or more calendar weeks in the current or preceding calendar year. The term "employer" also includes agents of employers;<sup>17</sup> this not only imposes individual liability upon officers and supervisors for their own discriminatory acts as agents of the corporate employer, but also creates corporate liability for the employer. Furthermore, employment agencies are considered to be "third-party contractors" under a provision that prohibits discrimination by "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."<sup>18</sup>

Title I does not apply to the federal government as an employer (which is covered under Section 501 of the Rehabilitation Act of 1973<sup>19</sup>), tax exempt private clubs, or Indian Tribes.<sup>20</sup>

## B. Discrimination

Title I of the ADA prohibits an employer from *discriminating* against a qualified individual with a disability in any term or condition of employment, solely on the basis of that disability. "Term or condition of employment" includes application, recruitment, hiring, promotions, layoffs, compensation, leaves of absence, job assignments, selection and financial aid for training programs, advancement, discharge, employer-sponsored social and recreational activities, and other terms, conditions, and privileges of that person's employment.<sup>21</sup> As examples of these terms and conditions, Title I includes the following seven actions by employers<sup>22</sup> that would constitute discrimination under the above general prohibition:

1. Limiting, segregating, or classifying job applicants or employees in a way that adversely affects applicants' or employees' opportunities or status;<sup>23</sup>

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17. ADA § 101(5)(A), 42 U.S.C. § 12111 (Supp. IV 1992); 29 C.F.R. § 1630.2(e) (1993).

18. ADA § 102(a)-(b)(2), 42 U.S.C. § 12112(a)-(b)(1) (Supp. IV 1992). Regulations promulgated by the Equal Employment Opportunity Commission (EEOC) state that the ADA prohibits discrimination in recruitment, advertising, and job application procedures. 29 C.F.R. § 1630.4(a) (1993).

19. 29 U.S.C. § 701-797 (1988 & Supp. IV 1992).

20. ADA § 101(5)(b), 42 U.S.C. § 12111(5)(b) (Supp. IV 1992); 29 C.F.R. § 1630.2(e)(2) (1993).

21. ADA § 102(a), 42 U.S.C. § 12112(a) (Supp. IV 1992); 29 C.F.R. § 1630.4 (1993).

22. ADA § 102(b)(1)-(7), 42 U.S.C. § 12112(b) (Supp. IV 1992); 29 C.F.R. § 1630.4 to .11 (1993).

23. ADA § 102(b)(1), 42 U.S.C. § 12112(b)(1) (Supp. IV 1992).



2. participating in a contractual or other arrangement or relationship that subjects a covered employee or applicant to discrimination prohibited by the ADA;<sup>24</sup>

3. utilizing standards, criteria, or methods of administration that have the effect of, or perpetuate, discrimination;<sup>25</sup>

4. denying equal jobs or benefits to a qualified individual because that individual associates with someone who has a known disability;<sup>26</sup>

5. failing to make reasonable accommodations to known limitations of an otherwise qualified individual, unless the accommodation would impose an undue hardship on the operation of the business of the entity;<sup>27</sup>

6. using selection criteria that screen out an individual with a disability or a class of individuals with disabilities unless the criteria are job-related and are consistent with business necessity;<sup>28</sup> and

7. failing to select and administer employment tests in the most effective manner to ensure that the test results accurately reflect whatever factors the tests purport to measure, rather than reflecting the individual's disability.<sup>29</sup>

The fundamental requirement of Title I is only that employers not discriminate; they are not required to prefer an individual with a disability over an equally qualified or better qualified individual without a disability.<sup>30</sup> Because Title I prohibits discrimination against only individuals with disabilities, however, an employer could theoretically hire only disabled individuals to the exclusion of other qualified individuals without disabilities.<sup>31</sup>

### C. Qualified Individual with a Disability

Title I of the ADA states that a "qualified individual with a disability" may not be discriminated against on the basis of that

24. ADA § 102(b)(2), 42 U.S.C. § 12112(b)(2) (Supp. IV 1992).

25. ADA § 102(b)(3)(A)-(B), 42 U.S.C. § 12112(b)(3) (Supp. IV 1992).

26. ADA § 102(b)(4), 42 U.S.C. § 12112(b)(4) (Supp. IV 1992).

27. ADA § 102(b)(5)(A), 42 U.S.C. § 12112(b)(5)(A) (Supp. IV 1992).

28. ADA § 102(b)(6), 42 U.S.C. § 12112(b)(6) (Supp. IV 1992).

29. ADA § 102(b)(7), 42 U.S.C. § 12112(b)(7) (Supp. IV 1992); *see also* 3A ARTHUR LARSON & LEX K. LARSON, EMPLOYMENT DISCRIMINATION, § 108A.41 (1993); Parry, *supra* note 11, at 5.

30. 3A LARSON & LARSON, *supra* note 29, § 108A.41.

31. 3A LARSON & LARSON, *supra* note 29, § 108A.41. In contrast to Title VII of the Civil Rights Act of 1964, the ADA does not have "reverse discrimination" protection. 3A LARSON & LARSON, *supra* note 29, § 108A.41; *see* ADA § 102(a); 42 U.S.C. § 12112(a) (Supp. IV 1992).

disability.<sup>32</sup> A “qualified individual with a disability” is an individual with a disability who has the requisite skill, experience, education, and other job-related requirements of the position he is seeking, and who, with or without reasonable accommodation, can perform the essential functions of the position that the individual seeks.<sup>33</sup> “Essential functions” are those job duties that are fundamental to the position as opposed to those responsibilities that are marginal.<sup>34</sup> The ADA does not specifically define the meaning of “essential functions,” but the regulations promulgated by the EEOC provide some guidance.<sup>35</sup> The regulations state that the employer must demonstrate that the function is essential to the job.<sup>36</sup> However, courts give consideration to employers’ judgment regarding the essential functions of the job.<sup>37</sup> Although a court determines what is essential on a case-by-case basis, the regulations specifically mention three indicators:

1. Does the position exist to perform one job function and is that particular function the one which is being evaluated?<sup>38</sup>
2. Are there only a limited number of employees available who can perform the function?<sup>39</sup>
3. Does the function require special expertise?<sup>40</sup>

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32. ADA § 102(a), 42 U.S.C. § 12112(a) (Supp. IV 1992).

33. ADA § 101(8), 42 U.S.C. § 12111(8) (Supp. IV 1992); *see also* 29 C.F.R. 1630.2(M) (1993).

One commentator has proposed that notwithstanding the protection given to individuals with disabilities by the Rehabilitation Act of 1973 and the ADA, the law continues to resist assimilation of those individuals into employment positions with a level of economic equality because of the requirement, under both laws, that the individual be able to perform the essential functions of the job involved. *See W. Robert Gray, The Essential Functions Limitation on the Civil Rights of People with Disabilities and John Rawls, Concept of Social Justice*, 22 N.M. L. REV. 295, 296-97 (1992). According to the commentator, under Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, national origin, sex, or age, the main obstacles to the full enjoyment of rights are irrational stigmas and social stereotypes. *Id.* at 296. Once these social barriers are removed, the individuals to be protected presumably become like any other persons in the workforce and are evaluated and accepted without further obstacles. *Id.* By contrast, for individuals with a disability, even after social stereotypes or other artificial barriers are removed, an individual still must be able to perform the essential functions of the job. *Id.* at 296-97. These essential job functions involve the “nonstereotypical, natural, and thus physical requirements that a person with a disability must be able to meet or perform to attain equality.” *Id.* at 297.

34. 29 C.F.R. § 1630.2(n)(1) (1993).

35. *Id.*

36. *Id.*

37. 29 C.F.R. § 1630.2(n)(3)(i) (1993); *see also* ADA § 1081(8), 42 U.S.C. § 12111(8) (Supp. IV 1992).

38. 29 C.F.R. § 1630.2(n)(2)(i) (1993).

39. 29 C.F.R. § 1630.2(n)(2)(ii) (1993).

40. 29 C.F.R. § 1630.2(n)(2)(iii) (1993).

If the answer to any of these questions is yes, the function is likely to be considered essential.<sup>41</sup> In addition, a court may consider other relevant factors in determining whether a function is "essential." Among these elements are the employer's judgment, the amount of time an employee must spend performing that function, the consequences of not requiring the person who previously held the job to perform the function, the terms of any applicable collective bargaining agreement, the work experience of persons who have previously held that job, and the work experience of persons holding similar jobs.<sup>42</sup> Finally, written job descriptions prepared before advertising for or interviewing job applicants are considered evidence of the essential functions of the job.<sup>43</sup>

#### D. Disability

The ADA uses the term "disability" rather than "handicap," which had been used in prior federal legislation such as the Rehabilitation Act of 1973, to describe individuals with disabilities. Both terms have basically the same definition, but the drafters of the ADA chose the term "disability" due to the possible negative connotations attached to the word "handicap."<sup>44</sup>

The ADA defines "disability" as:

- 1) A physical or mental impairment that substantially limits one or more of the major life activities of an individual; or
- 2) a record of a physical or mental impairment; or
- 3) being regarded as having a physical or mental impairment.<sup>45</sup>

Thus, Congress has effectively given the term "disability" three separate definitions. To seek protection under the ADA, an individual must only show that one of the three components applies to him or her.<sup>46</sup>

The following is an explanation of what each of the three definitions is meant to cover.

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41. Parry, *supra* note 11, at 25.

42. 29 C.F.R. § 1630.2(n)(3)(i), (iii)-(vii) (1993); *see generally* Parry, *supra* note 11, at 24-25.

43. ADA § 101(8), 42 U.S.C. § 12111(8) (Supp. IV 1992); 29 C.F.R. § 1630.2(n)(3)(ii) (1993). *See also* Peter M. Panken, *The Disabled and Work*, ALI-ABA COURSE OF STUDY ADVANCED EMPLOYMENT LAW AND LITIGATION, n.3 (1992).

44. 3A LARSON & LARSON, *supra* note 29, § 108A.31(b).

45. ADA § 3(2)(A)-(C), 42 U.S.C. § 12102(2)(A)-(C) (Supp. IV 1992).

46. 3A LARSON & LARSON, *supra* note 29, § 108A.31(b). *See also* Mary E. Ingley & Barbara L. Kornblau, *Workers' Compensation and the Americans with Disabilities Act*, 66 FLA. B.J. 77, 77 (June 1992).

1. *“A Physical or Mental Impairment that Substantially Limits One or More of the Major Life Activities of an Individual.”*

- a. Physical or Mental Impairment

This phrase encompasses:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.<sup>47</sup>

Because these terms are identical to those contained in the Rehabilitation Act, precedent under that act should be helpful in determining whether a court will consider a particular condition to fall within this definition.<sup>48</sup>

- b. “Substantially Limits”

This term qualifies “impairment” to ensure that individuals covered by the ADA will be only those individuals whose impairment has affected their lives to the extent that it is disabling, without regard to whether the impairment is corrected or reduced through medication or prosthetic devices.<sup>49</sup> According to ADA regulations, an impairment substantially limits an individual when it renders that person:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) significantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.<sup>50</sup>

Factors to be used in determining whether an impairment is substantially limiting include:

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47. 29 C.F.R. § 1630.2(h)(1)-(2) (1993).

48. 3A LARSON & LARSON, *supra* note 29, § 108A.31(c)(i).

49. *See* 29 C.F.R. § 1630.2(j) (1993).

50. 29 C.F.R. § 1630.2(j)(1)(i)-(ii) (1993).

- (i) The nature and severity of the impairment;
- (ii) the duration or expected duration of the impairment;
- (iii) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.<sup>51</sup>

A disability that "substantially limits" one's ability to work significantly restricts the person's ability to perform a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities.<sup>52</sup> The inability to perform a single, particular job does not constitute a substantial limitation in working under the ADA.<sup>53</sup>

### c. "Major Life Activities"

This term includes functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.<sup>54</sup>

### 2. "A Record of Such Impairment"

This second meaning in the definition of "disability" applies to an individual who "has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities."<sup>55</sup> This probably means that having a history of a disability will constitute a disability under the ADA.<sup>56</sup>

### 3. "Being Regarded as Having Such Impairment"

An individual can satisfy this third definition by showing that his employer's action was based on a perception of disability grounded in myth, fear, or stereotype. Therefore, this definition "applies to decisions based upon unsubstantiated concerns about productivity, safety, insurance, liability, attendance, costs of accommodation, accessibility, *workers' compensation costs* or acceptance by co-workers and customers."<sup>57</sup>

51. *Id.* § 1630.2(j)(2)(i)-(iii).

52. *Id.* § 1630.2(j)(3)(i).

53. *Id.*

54. *Id.* § 1630.2(i).

55. *Id.* § 1630.2(k).

56. Ingley & Kornblau, *supra* note 46, at 77.

57. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT, at II-11 (January 1992) (emphasis added) [hereinafter TAM].

In addition to those individuals who qualify under one of the three definitions of "disability," the ADA extends protection to the following individuals:

4. *Individuals Who Associate with Individuals with Disabilities*

Significantly, Title I of the ADA protects individuals from associational discrimination. This means that it is illegal to deny equal treatment or opportunities or both to qualified individuals because of a known relationship or association with an individual with a known disability.<sup>58</sup> For example, an employee who is otherwise qualified and performs his job satisfactorily may not be discharged because his wife has tuberculosis.

5. *Users of Illegal Drugs and Alcohol*

The ADA also protects individuals suffering from drug addiction and alcoholism;<sup>59</sup> however, it allows employers to institute internal policies that seek to ensure a workplace that is free from the illegal use of drugs and the use of alcohol. In addition, the act allows employers to promulgate policies that are required for compliance with other applicable federal laws and regulations.<sup>60</sup>

With regard to the illegal use of drugs, it is not unlawful for an employer to discharge or deny employment to *current* users of illegal drugs on the basis of such drug use, because current users of illegal drugs are not "qualified individuals with disabilities" under the ADA.<sup>61</sup> "Illegal use" means the use, possession, or distribution of drugs that is unlawful under the Controlled Substances Act.<sup>62</sup> It also means the use of illegal drugs and illegal prescription drugs that are "controlled substances." The term "illegal use" does not include the use of drugs taken under supervision of a licensed health care professional, including experimental drugs for individuals with AIDS, epilepsy, or mental illness.<sup>63</sup> An individual qualifies as a current user when that individual undergoes a drug test and tests positive for the illegal use of drugs and controlled substances.<sup>64</sup> By

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58. ADA § 102(b)(4), 42 U.S.C. § 12112(b)(4) (Supp. IV 1992).

59. ADA § 104(b), 42 U.S.C. § 12114(b) (Supp. IV 1992).

60. ADA § 104(c)(1)-(5), 42 U.S.C. § 12114(c)(1)-(5) (Supp. IV 1992).

61. ADA § 104(a), 42 U.S.C. § 12114(a) (Supp. IV 1992).

62. ADA § 101(6)(A), 42 U.S.C. § 12111(6)(A) (Supp. IV 1992).

63. *Id.*

64. See generally TAM, *supra* note 57, *Drug and Alcohol Abuse*, at VIII-2 to VIII-3.

contrast, *former* drug users or addicts, who are receiving treatment for drug addiction or who have been successfully rehabilitated, are protected by the ADA from discrimination on the basis of past drug addiction.<sup>65</sup>

With regard to alcoholism, the fact that a person currently uses alcohol does not mean that he is automatically denied protection because of this use. Alcoholism is a disability under the ADA; therefore, a person with alcoholism is an individual with a disability. Consequently, that individual may not be discriminated against on the basis of the alcoholism, and the individual may be entitled to a reasonable accommodation if the individual is qualified to perform the essential functions of the job. The employer may, however, discipline, discharge, or deny employment to a person who is an alcoholic and whose use of alcohol adversely affects his job performance or conduct to the extent that the person is no longer "qualified."<sup>66</sup>

The ADA excludes from protection homosexuals, bisexuals, transsexuals, transvestites, other individuals with conditions related to sexual behavior, compulsive gamblers, kleptomaniacs, pyromaniacs, and individuals with mental disorders resulting from illegal drug use.<sup>67</sup>

#### E. Reasonable Accommodations

An employer is required to make "reasonable accommodations" for the known disabilities of otherwise qualified individuals.<sup>68</sup> While this requirement imposes significant burdens on employers, the ADA allows employers to assert a defense to this obligation. The employer may demonstrate that the required accommodation will cause "undue hardship" on him.<sup>69</sup> The reasonableness of the accommodations depends, in part, on the employer's ability to pay for the installment and implementation of those accommodations.<sup>70</sup>

The obligation to provide reasonable accommodations applies in two settings: 1) reasonable accommodations in facilities and 2) reasonable accommodations in the operations of the business.<sup>71</sup>

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65. TAM, *supra* note 57, at VIII-3; ADA § 104(b)(1)-(2), 42 U.S.C. § 12114(b)(1)-(2) (Supp. IV 1992).

66. TAM, *supra* note 57, *Drug and Alcohol Abuse*, at VIII-3.

67. ADA § 511 (a)-(b), 42 U.S.C. § 12211(a)-(b) (Supp. IV 1992). For a discussion of these exclusions, see 3A LARSON & LARSON, *supra* note 29, § 108A.32.

68. ADA § 102(b)(5)(A), 42 U.S.C. § 12112(b)(5)(A) (Supp. IV 1992).

69. *Id.*

70. Shannon, *supra* note 12, at 55.

71. ADA § 101(9)(A)-(B), 42 U.S.C. § 12111(9)(A)-(B) (Supp. IV 1992).

Reasonable accommodations in facilities means removal of barriers in order to make those facilities easily accessible to individuals with disabilities.<sup>72</sup> This provision refers to architectural or structural changes, and it covers both the employee's immediate work area and public areas such as lunch rooms, restrooms, and conference rooms.<sup>73</sup> Depending upon the nature of the accommodations, large businesses may be expected to make them in situations in which small businesses would not be expected to make them due to the financial burden the changes create.

Reasonable accommodations in operations of the business include:

[J]ob restructuring, part-time or modified work schedules, reassignment [of an otherwise qualified employee] to a vacant position, acquisition or modification of equipment or devices, or appropriate . . . modifications of examinations, training materials, or policies . . . and other similar accommodations for individuals with disabilities.<sup>74</sup>

Three general classes of reasonable accommodations are required throughout the evolution of an employer/employee relationship. In the job application process, reasonable accommodations are modifications or adjustments that enable a qualified applicant with a disability to be considered for the position that is currently available.<sup>75</sup> In the workplace or in an individual's performance of his job, reasonable accommodations are modifications or adjustments that enable the qualified individual with a disability to perform the essential functions of that position.<sup>76</sup> Finally, reasonable accommodations also include modifications or adjustments that allow an employee with a disability to enjoy equal benefits and privileges

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72. ADA § 101(9)(A), 42 U.S.C. § 12111(9)(A) (Supp. IV 1992); 29 C.F.R. § 1630.2(o)(2)(i) (1993).

73. Parry, *supra* note 11, at 25.

74. ADA § 101(9)(B), 42 U.S.C. § 12111(9)(B) (Supp. IV 1992); 29 C.F.R. § 1630.2(o)(2)(ii) (1993).

75. See generally 29 C.F.R. § 1630.2(o)(1)(i) (1993). For example, an employer allowing a job applicant with dyslexia to take an oral examination, if a written test is not essential to the job application process, would constitute a reasonable accommodation. See Parry, *supra* note 11, at 26 (citing *Stutts v. Freeman*, 694 F.2d 666 (11th Cir. 1983) (case decided under § 504 of the Rehabilitation Act of 1973)).

76. 29 C.F.R. § 1630.2(o)(1)(iii) (1993). Some examples are modifying or adjusting when and how the essential functions of the job are performed, reassigning nonessential functions of the job, modifying a disabled individual's work schedule to allow him to receive treatment during regular work hours, or allowing a full-time employee to return to work part-time while the individual recovers from an injury. See Parry, *supra* note 11, at 26.



of employment as those enjoyed by similarly situated employees without disabilities.<sup>77</sup>

#### F. Undue Hardship

An accommodation will not be required if it imposes an "undue hardship" on the employer.<sup>78</sup> "Undue hardship" is "an action requiring significant difficulty or expense" when considered in light of several factors such as the employer's financial resources or the number of employees.<sup>79</sup>

The legislative history of the ADA indicates that the regulations promulgated under the Rehabilitation Act were almost fully incorporated into the ADA, and the case law that developed under the Rehabilitation Act thus provides guidance for cases arising under the ADA.<sup>80</sup> Therefore, to determine more specifically what constitutes "reasonable accommodations" and "undue hardship," the regulations implementing Section 504 of the Rehabilitation Act of 1973 and case law interpreting those regulations should be consulted.

### III. HIRING AND EMPLOYMENT PRACTICES UNDER TITLE I OF THE ADA

Since the enactment of Title I of the ADA, significant changes have occurred in employer hiring practices.<sup>81</sup> The ADA seeks to preclude employers from using selection criteria, methods of testing, results of medical examinations, or answers to medical questions to justify hiring and employment practices that may discriminate against individuals with disabilities. The ADA has substantially curtailed discriminatory practices followed before the ADA became effective. The restrictions imposed in the hiring process are necessary to ensure that qualified applicants and employees are not screened out or dismissed, due to their disability, before their actual ability to perform

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77. 29 C.F.R. § 1630.2(o)(1)(iii) (1993). The regulation specifically uses the term "equal" instead of "the same" to emphasize that although individuals with disabilities must have equal access to benefits and privileges, this does not mean that they will enjoy "the same" results from those benefits and privileges or be given "the same" benefits and privileges. See Parry, *supra* note 11, at 25 (citing 56 Fed. Reg. 35,729 (1991)).

78. ADA § 102(b)(5)(A), 42 U.S.C. § 12112(b)(5)(A) (Supp. IV 1992).

79. See ADA § 101(10)(A)-(B), 42 U.S.C. § 12111(10)(A)-(B) (Supp. IV 1992); 29 C.F.R. § 1630.2(p)(1)-(2) (1993). For an explanation of the factors considered in determining whether an accommodation is an "undue hardship," see Parry, *supra* note 11, at 27; 3A LARSON & LARSON, *supra* note 29, § 108A.42(b).

80. Jules L. Smith, *An Employer Compliance Checklist: The Employment Provisions of the ADA*, 39 FED. B. NEWS & J. 81 (Jan. 1992).

81. See generally ADA § 102(b), 42 U.S.C. § 12112(b) (Supp. IV 1992).

a job is evaluated. Therefore, the ADA contains specific provisions concerning the use of qualification standards, methods of testing, and other selection criteria. The ADA also contains specific provisions concerning the use of medical examinations and medical inquiries in the hiring process and in employment settings.

#### A. Qualification Standards

Employers must not use qualification standards, employment tests, or other criteria that screen out or tend to screen out individuals with disabilities on the basis of their disabilities.<sup>82</sup> This ADA provision ensures that there is correlation between the job criteria and the applicant or employee's actual ability to do the job. Therefore, it is unlawful to use job criteria that, even unintentionally, screen out, or tend to screen out, individuals with disabilities because of their disabilities, unless the criteria are job-related and consistent with business necessity.<sup>83</sup> This provision applies to all types of selection criteria, including safety, vision, hearing, walking, or lifting requirements, as well as employment tests.<sup>84</sup>

#### B. Administration of Tests

Employers must select and administer employment tests in the most effective manner to ensure that, when the test is administered to an applicant or employee with a disability which impairs his sensory, manual, or speaking skills, the test results accurately reflect the individual's skills, aptitude, or any other qualifications that the test purports to measure.<sup>85</sup> Naturally, when sensory, manual, or speaking skills are the factors that the test seeks to measure, this provision is inapplicable.<sup>86</sup> This provision emphasizes the unlawfulness of excluding individuals with disabilities from jobs that they can

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82. ADA § 102(b)(6), 42 U.S.C. § 12112(b)(6) (Supp. IV 1992); 29 C.F.R. § 1630.10 (1993).

83. See 29 C.F.R. § 1630 app. (1993) for EEOC Interpretive Guidance. The Interpretive Guidance contains an explanation of this provision and its relation to "essential functions" and production standards. The concept of "business necessity" has the same meaning it has under § 504 of the Rehabilitation Act of 1973. Thus, selection criteria that exclude, or tend to exclude, individuals with disabilities because of their disabilities and do not relate to an essential function of the job would be inconsistent with business necessity. See 29 C.F.R. § 1630.10 (1993).

84. See 29 C.F.R. § 1630.10 (1993).

85. ADA § 102 (b)(7), 42 U.S.C. § 12112(b)(7) (Supp. IV 1992); 29 C.F.R. § 1630.11 (1993).

86. *Id.*

actually perform merely because their disabilities prevent them from taking an employment test or negatively influences the results of the employment test. Thus, the provision requires that when employment tests are taken by individuals with impaired sensory, manual, or speaking skills, the tests must be administered in formats that do not necessitate the use of the impaired skill.<sup>87</sup>

The employer's obligation to comply with this provision arises at the time he becomes aware that the applicant or employee will require special modifications. Thus, when neither the individual with the disability nor the employer knows before the testing is to take place that the individual will need to take an alternative test or otherwise have reasonable accommodations, the employer's obligation arises when the individual realizes that, due to his disability, he will need to take a modified test and advises the employer of such need.<sup>88</sup> However, this provision does not require employers to offer applicants or employees their choice of test formats. This provision only requires employers to provide alternative, accessible tests to individuals whose disabilities impair the sensory, manual, or speaking skills needed to take the test, unless, of course, the tests are intended to measure precisely those skills. For example, in the case of an applicant with dyslexia, the employer may legally require the applicant to take a written test if: 1) the ability to read is a skill the test is designed to measure; 2) an essential function of that particular job is the ability to read; or 3) no reasonable accommodations are available to enable the individual to perform that essential function, or the necessary accommodations would not be reasonable because they would impose an undue hardship on the employer.<sup>89</sup>

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87. See 29 C.F.R. § 1630 app. (1993) for EEOC Interpretive Guidance. The Interpretive Guidance contains an explanation of the application of this provision. Examples of a reasonable accommodation in this regard would be administering an oral test to an individual with dyslexia, instead of requiring him to take a written employment test. Conversely, if the applicant or employee suffers from a disability that impairs his speaking skills or processing of auditory information, a written test must be given to him instead of an oral employment test. See 29 C.F.R. § 1630 app. (1993). With regard to alternative test modes or formats, it is suggested that employers might utilize large print or braille on tests or that the tests could be administered through a reader or sign interpreter. If it is not possible to administer tests in any of these alternative formats as a reasonable accommodation, the employer may be required to evaluate the skill to be tested through an interview or through evaluation of the applicant's education, license, or work experience. *Id.*

88. See 29 C.F.R. § 1630 app. (1993) for examples of the application of this provision.

89. 29 C.F.R. § 1630 app. (1993).

### C. Medical Examinations and Inquiries

Title I of the ADA severely limits the employer's ability to subject job applicants to medical examinations and ask medical questions during the initial application process.<sup>90</sup> These limitations force employers to modify traditional methods used to evaluate the physical or mental ability of applicants, such as preemployment physicals, diagnostic tests, and strength tests. The goal of these limitations is to discourage employers from using those traditional methods to discriminate against individuals with disabilities. Specifically, by prohibiting medical examinations and inquiries in the preemployment stage, Congress sought to preclude an employer from refusing to hire an otherwise qualified applicant deemed to be a high risk based on the results of medical examinations, answers to medical inquiries, and the employer's assessment (objective and subjective). Employers must consider whether an applicant is reasonably well suited for the position before they can request the applicant to undergo medical examinations or answer medical questions. Therefore, employers must review their hiring practices, including a review of all application processes and questionnaires.

Title I establishes a two-step job application process. The first step occurs when the individual applies and interviews for a job. The second step occurs after the employer makes a conditional employment offer to the applicant following the initial interview. The employment offer is conditioned on the results of medical examinations and answers to medical questions. In each of these two steps, Title I specifically establishes when and how medical examinations and inquiries can become part of the hiring process.

#### 1. *Medical Examinations and Inquiries Before a Conditional Offer of Employment*

Title I of the ADA prohibits employers from asking an applicant to submit to medical examinations, inquiring about whether the applicant has a disability, or inquiring about the nature or severity of a disability.<sup>91</sup> This prohibition applies to any type of inquiry, whether in an application form, personal or telephone interview, or any other selection process. Similarly, employers cannot inquire about the applicant's workers' compensation history. Employers can, however, ask questions relating to the applicant's ability to perform essential and marginal job-related functions, so long as the queries are not worded in terms of a disability.<sup>92</sup> If the applicant's disability

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90. ADA § 102(c)(2)(A), 42 U.S.C. § 12112(d)(2)(A) (Supp. IV 1992); 29 C.F.R. § 1630.13(a).

91. *Id.*

92. 29 C.F.R. § 1630.13(a) (1993). For example, the employer may ask whether

prevents him from performing an essential job-related function and it is not possible to provide a reasonable accommodation that would allow the applicant to perform that essential function, the employer may refuse to hire the applicant. On the other hand, if the applicant's disability prevents him from performing only a marginal job-related function, the employer may not refuse to hire the applicant.<sup>93</sup>

Employers may also ask an applicant to demonstrate, with or without reasonable accommodations, how he would perform job-related functions.<sup>94</sup> If the applicant's obvious or known disability may interfere with or prevent his ability to perform a job function, an employer may ask the applicant to demonstrate or describe how he would perform the job-function, whether or not the employer routinely makes similar requests to other job applicants. On the other hand, if the applicant's obvious or known disability will not interfere with or prevent him from performing a job-related function, the employer may ask the applicant to demonstrate or describe how he would perform the job function only if the employer routinely asks all applicants in the same job category to demonstrate or describe how they would perform the job function.<sup>95</sup>

Physical agility tests are not considered medical examinations, and, thus, they may be given at any stage in the application or employment process. Those tests, however, must be given to all similarly situated applicants or employees whether or not they have

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the applicant has a driver's license, if driving is a job function, but may not ask whether the applicant has a visual disability or impairment. *Id.*

A class action lawsuit was filed in an Alabama federal district court in 1993 against Morrison, Inc., alleging that the employer asked applicants questions that are prohibited by the ADA. The job application form utilized by Morrison, Inc., asked whether the applicant was an individual with a disability and also inquired into the nature and severity of the disability. The complaint alleged that these questions, during the preemployment stage, were impermissible under the ADA. *ADA Lawsuit Alleges Illegal Preemployment Inquiries, Accommodating Disabilities* (CCH) No. 18, at 2 (May 1993) (citing *Johnston v. Morrison, Inc.*, No. CV-93-N-0517-M (D.C. Ala. filed Mar. 17, 1993)).

93. See generally 29 C.F.R. § 1630.14(a) (1993). Questions must be carefully asked. Employers may not ask whether the applicant has a disability that prevents him from performing job-related functions. This type of question, essentially, would be asking whether the applicant had a disability, and Title I prohibits these questions. Instead, employers must first determine the types of essential job-functions and then ask the applicant whether he can perform those functions. Chai Feldblum, *Medical Examinations and Inquiries Under the Americans with Disabilities Act: A View from the Inside*, 64 *TEMPLE L. REV.* 521, 537 n.98 (1991). This excellent article discusses the legislative history of the ADA, and, specifically, the process that culminated with the passage of the provisions concerning medical examinations and inquiries.

94. 29 C.F.R. § 1630.14(a) (1993).

95. ADA § 102, 42 U.S.C. § 12112 (Supp. IV 1992); 29 C.F.R. § 1630.14(a) (1993).

a disability. If it is determined that the tests screen out or tend to screen out individuals with disabilities, the employer must establish that the test is job-related, consistent with business necessity, and that satisfactory performance cannot be achieved with reasonable accommodations.<sup>96</sup>

## 2. *Medical Examinations and Inquiries After a Conditional Offer of Employment*

Under Title I, employers can require postoffer medical examinations and answers to medical questions before the employee actually starts working, provided that all entering employees in the same job category are subjected to the same examinations and questions whether or not they have a disability. Employers may condition their offers of employment on the results of the medical examinations and answers to the medical questions.<sup>97</sup> However, employers cannot withdraw conditional offers of employment based on the results of medical examinations or answers to medical inquiries, unless the results or answers suggest that the applicant is not qualified to perform the essential job functions. Legislative history indicates that Congress wanted to prevent the use of medical examinations and medical inquiries to discriminate against an individual with a disability if he is qualified for the job notwithstanding his disability.<sup>98</sup>

Although the medical examinations permitted under this provision do not have to be job-related and consistent with the business necessity, employers may not use the results to withdraw offers of employment to otherwise qualified applicants. Specifically, if the employer withdraws an offer of employment because the medical examination reveals that the employee does not satisfy certain employment criteria, the exclusionary criteria, at that point, must

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96. *Id.* It is unclear whether this provision permitting agility tests also permits an employer to ask an applicant to lift 100-pound sacks of flour, which would be a strength test. See generally Matthew B. Schiff & David L. Miller, *The Americans with Disabilities Act: A New Challenge for Employers*, 27 TORT AND INS. L.J. 44 (1991).

For suggestions on how to conduct preemployment job interviews consistent with the requirements of the ADA, see *Checklist Forms Strategy for Job Interviews*, Accommodating Disabilities (CCH), at 1 (May 1992); *Interviewing Applicants with Disabilities: Script for a Training Session*, Accommodating Disabilities (CCH), at 6-7 (March 1992); *Job Interviews: What Will Employers be Able to Ask After July 26?*, Accommodating Disabilities (CCH), at 6-7 (June 1992). See also Philip L. Gordon, *Job Application Process After the Americans with Disabilities Act*, 18-2 EMPLOYEE REL. L.J. 185 (1992-93).

97. 29 C.F.R. § 1630.14(b) (1993).

98. Feldblum, *supra* note 93, at 537 n.100.

be job-related and consistent with business necessity. To justify the exclusionary criteria as job-related and consistent with business necessity, the employer must show that no reasonable accommodations will enable the applicant to perform the essential functions of the job.<sup>99</sup>

The results of medical examinations and the answers to medical questions must be kept confidential during the hiring stage and may be used only as specified in the ADA. The information collected must be maintained on separate forms, be arranged in separate medical files, and be treated as a confidential medical record.<sup>100</sup> This information may be disclosed only to three persons: 1) a supervisor or manager may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations; 2) first aid and safety personnel may be informed if the disability might require emergency treatment; and 3) a government official investigating compliance of this provision may be provided any relevant information upon request.<sup>101</sup> Under the ADA, an applicant may bring a cause of action against the employer for breach of confidentiality of medical records obtained by the employer during the job application stage.<sup>102</sup>

### 3. *Medical Examinations or Medical Inquiries of Employees*

With the exception of voluntary medical examinations and voluntary medical histories, administered as part of a health program available to employees, employers cannot require an employee to submit to a medical examination, answer medical questions, or answer

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99. ADA § 102(d)(2)(B), 42 U.S.C. § 12112(d)(2)(B) (Supp. IV 1992); 29 C.F.R. § 1630.14(b) (1993).

100. 29 C.F.R. § 1630.14(b)(1) (1993).

101. ADA § 102(c)(3)(B)(i)-(iii), 42 U.S.C. § 12112(d)(3)(B)(i)-(iii) (Supp. IV 1992). This requirement of confidentiality creates a potential problem for employers, since providing reasonable accommodations without being able to explain the reasons for these accommodations may result in creating an appearance of discrimination to other workers in the same job category who are not given the accommodations that the individual with a disability gets (e.g., flexible hours or relief from lifting). See James G. Frierson, *An Employer's Dilemma: The ADA's Provisions on Reasonable Accommodation and Confidentiality*, 43 LAB. L.J. 308 (1992).

102. 42 U.S.C. § 12112(d)(3)(B) (Supp. IV 1992). Due to the potential exposure to liability and the limited authorized use of medical examination results and answers to medical questions, it has been argued that employers will be uncertain as to how much they can or should ask. Therefore, they will probably opt for rather narrowly defined medical examinations and inquiries. Employers will possibly focus on gathering information that is either directly relevant to the applicant's ability to perform the essential functions of the job or information necessary to obtain some basic information for future possible workers' compensation claims. See Feldblum, *supra* note 93, at 538.

questions regarding the existence, nature, or severity of an employee's disability.<sup>103</sup> This provision seeks to prevent employers from subjecting disabled employees to medical tests or inquiries that do not serve a legitimate business purpose.<sup>104</sup> An employer may, however, make inquiries to determine the ability of an employee to perform job-related functions.<sup>105</sup> The results of any medical examinations or medical histories of on-the-job employees must also be kept confidential.

#### IV. EFFECT OF TITLE I OF THE ADA ON EMPLOYER/EMPLOYEE RELATIONS IN THE WORKERS' COMPENSATION CONTEXT

Although the ADA does not preempt state workers' compensation laws, except to the extent that they are inconsistent with it, the relationship between the ADA and state workers' compensation law presents difficult issues. For example, employers have traditionally evaluated the physical and mental condition and ability of applicants by preemployment questions and physicals. Based upon the results of these screening techniques, the employer could simply choose not to hire an applicant when he thought that the applicant was a high risk. This practice is now illegal under the ADA. Thus, the most significant impacts of the ADA in the workers' compensation context are most likely the prohibition on screening applicants through preemployment medical examinations or questions, the restrictions on the use of medical examinations generally, and the limited authorized use and dissemination of the results of such examinations. Another major impact of the ADA on workers' compensation is the requirement that employers retain workers injured on the job, even when the worker may no longer be able to perform all the duties of that job. In this connection, one of the principal concerns to employers is the ADA's requirement that the employer make *reasonable accommodations* so that any *qualified individual with a*

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103. ADA § 102(c)(4)(A), 42 U.S.C. § 12112(d)(4)(A) (Supp. IV 1992); 29 C.F.R. § 1630.13(b) (1993).

104. The example given in the EEOC regulations is a situation in which the employer notices increased absenteeism and signs of sickness in an employee; the employer cannot require the employee to be tested for AIDS, HIV, or cancer unless the employer can justify such action as job-related and consistent with business necessity. 29 C.F.R. § 1630.14(c) (1993). It is difficult to argue, however, that an employee's frequent absences and likely low productivity because of an illness is of no concern to the employer. It appears to be an issue covered under the umbrella of legitimate "job-relatedness and business necessity."

105. ADA § 102(c)(4)(B), 42 U.S.C. § 12112(d)(4)(B) (Supp. IV 1992); 29 C.F.R. § 1630.14(d) (1993).



*disability* can perform the *essential functions* of a job.<sup>106</sup> Finally, the ADA also affects the exclusivity clauses in workers' compensation statutes.

## A. Preemployment Inquiries

### 1. *Limitations on Determining the Physical and Mental Condition of Applicants*

The principal focus of the ADA's protection of individuals with disabilities is the prohibition against any question by an employer to an applicant concerning either the existence of a disability, the nature of a disability or phrased in terms of a disability.<sup>107</sup> This means that an employer may not ask any preemployment question, in a written application or orally, concerning any physical or mental condition, any prior injuries, or prior workers' compensation claims before making a conditional offer of employment.<sup>108</sup> An employer

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106. 42 U.S.C. § 12112(b)(5)(A) (Supp. IV 1992).

107. ADA § 102(c)(2)(A), 42 U.S.C. § 12112(d)(2)(A) (Supp. IV 1992); 29 C.F.R. § 1630.13(b) (1993).

108. 29 C.F.R. § 1630.13(a) (1993). Some questions related to the applicant's use of drugs and alcohol can possibly be asked during the pre-offer stage, but they have to be carefully worded. For example, an employer can ask if an applicant drinks alcohol, *but* the employer cannot ask if the applicant is an alcoholic. The employer can ask if the applicant is using drugs illegally at the time of the interview, *but* the employer cannot ask if the applicant has *ever* used drugs illegally. Finally, an employer can ask how many days the applicant missed work the previous year, *but* he cannot ask how many days the applicant missed due to problems related to substance abuse. *Interviews—Preoffer Drug and Alcohol Inquiries You Can Ask, Accommodating Disabilities* (CCH), at 2 (May 1993) (citing remarks made by Mark Graves, labor and employment attorney with Alley and Alley, Tampa, Florida, in *The Changing Tide: Navigating Through Employment Laws under the New Administration*, a seminar sponsored by Alley and Alley, April 30, 1993).

These examples reflect the protection given by the ADA to those who abuse illegal drugs and alcohol. A person who currently uses illegal drugs is not protected by the ADA. However, former drug addicts who have been successfully rehabilitated are protected by the ADA. ADA § 102(a)-(b); 42 U.S.C. § 12114(a)-(b) (Supp. IV 1992). Alcoholism is a "disability" under the ADA. Therefore, persons who are alcoholics may not be discriminated against if they are satisfactorily performing their jobs. TAM, *supra* note 57, *Drug and Alcohol Abuse*, at VIII-3.

The ADA's protection of alcoholics and former drug users is important under the new Arkansas Workers' Compensation Act, which significantly changed the definition of "compensable injury." Under the new act, compensable injuries do not include injuries substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders. ARK. CODE ANN. § 11-9-105(5)(B)(iv) (Michie Supp. 1993). Moreover, if an alcoholic is injured on the job, the law creates a rebuttable presumption that the injury was caused by the use of alcohol, and, therefore, his injury is not compensable. However, because under the ADA alcoholism is a disability, if the employer refuses to provide

may not base his decision to bypass the applicant simply on speculation that the applicant may cause increased workers' compensation costs in the future. An employer can, however, discharge or refuse to hire an individual who is incapable of performing a job without posing a significant risk of substantial harm to the health or safety of the individual or others if that risk cannot be eliminated or reduced by reasonable accommodations.<sup>109</sup>

During this initial stage of the hiring process, an employer may ask questions about the applicant's ability to perform job-related functions with or without reasonable accommodations.<sup>110</sup> An employer may also ask an applicant to describe or demonstrate how, with or without reasonable accommodation, he will perform job-related functions.<sup>111</sup> For example, an employer may ask an applicant with only one arm to describe how he will perform the duties of the mail clerk position he is seeking. If the applicant requires some accommodation to perform the job-related duties, the employer must either provide the accommodation the applicant needs or permit the applicant to explain how he will perform the duties.

During this pre-offer stage an employer may also lawfully require the applicant to submit to drug tests, because testing for illegal drugs is not considered to be a "medical examination" under the ADA. The ADA does not prohibit, encourage, or authorize an employer to conduct drug tests of job applicants or employees to determine the illegal use of drugs or to make employment decisions based on such test results.<sup>112</sup> This provision is particularly important in the workers' compensation context because employers generally use preemployment drug testing as a means to control costs of workers' compensation benefits,<sup>113</sup> because studies show that employees with a problem of drug abuse have more accidents. Therefore, testing can be an effective tool to screen out high risk employees.<sup>114</sup>

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compensation for the alcoholic employee's injury, the injured worker may very likely be in a position to bring a charge of discrimination on the basis of his disability. This scenario would present a situation in which the state workers' compensation law is inconsistent with the ADA and is, therefore, probably preempted by the ADA.

109. TAM, *supra* note 57, *Workers' Compensation and Work-Related Injuries*, at IX-1 [hereinafter *Workers' Compensation*].

110. ADA § 102(c)(2)(B), 42 U.S.C. § 12112(c)(2)(B) (Supp. IV 1992); 29 C.F.R. § 1630.4 (1993).

111. ADA § 102(d)(2)(B), 42 U.S.C. § 12112(d)(2)(B) (Supp. IV 1992); 29 C.F.R. § 1630.14(a) (1993).

112. ADA § 104(c)(1), 42 U.S.C. § 12114(d)(1) (Supp. IV 1992); 29 C.F.R. § 1630.16(c) (1993).

113. Schiff & Miller, *supra* note 96, at 63.

114. Schiff & Miller, *supra* note 96, at 63 (citing Zwerling et al., *The Efficacy*

After making a conditional employment offer, an employer may ask the applicant about his workers' compensation history, ask him to undergo a medical examination, or request the applicant to answer medical questions as long as that is also required of all applicants in the same job category.<sup>115</sup> However, an employer may not require an applicant to have a medical examination because a response to a medical question (as opposed to results from a medical examination) discloses a previous injury sustained on the job, unless all applicants in the same job category are required to have the examination.<sup>116</sup> An employer may also ask an applicant questions, or may use the medical examination, to determine the need for reasonable accommodations.<sup>117</sup> Any information obtained through these preplacement medical examinations and questions must be kept separately from the personnel file and treated as confidential medical records.<sup>118</sup> Employers cannot use this information to discriminate against individuals with disabilities.<sup>119</sup> Finally, an employer may, without violating the ADA's confidentiality requirement and in accordance with state workers' compensation laws, submit to state workers' compensation offices and "second injury funds" the medical information and records concerning applicants and employees that were obtained after a conditional employment offer.<sup>120</sup>

The ADA also permits an employer to inform supervisors of necessary restrictions on work or duties and necessary accommodations. If the disability may require emergency treatment, the employer may additionally notify first aid and safety personnel. Government officials investigating compliance with the ADA may

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*of Pre-employment Drug Screening for Marijuana and Cocaine in Predicting Employment Outcome*, 264 JAMA 20 (1990)).

This provision of the ADA is consistent with the Arkansas Workers' Compensation Act, which states that employees are deemed by their performance of services to have impliedly consented to reasonable and necessary testing for illegal drugs. ARK. CODE ANN. § 11-9-102(5)(B)(iv) (Michie Supp. 1993).

115. 29 C.F.R. § 1630.14(b) (1993); TAM, *supra* note 57, at IX-3.

116. TAM, *supra* note 57, at IX-3.

117. ADA § 102(c), 42 U.S.C. § 12112(d) (Supp. IV 1992); 29 C.F.R. § 1630.14(c) (1993).

118. ADA § 102(d)(3)(B), 42 U.S.C. § 12112(d)(3)(B) (Supp. IV 1992); 29 C.F.R. § 1630.14(b)(1) (1993).

119. 29 C.F.R. § 1630.14(b) (1993). It has been suggested that it would not be inconsistent with the ADA to use these tests in defending workers' compensation cases. Specifically, it is argued that employers could use baseline audiometric tests to rebut claims of work-induced hearing loss, or findings that the applicant is restricted from raising his leg to rebut a later claim of back injury. Schiff & Miller, *supra* note 96, at 61.

120. 29 C.F.R. § 1630.14(c) (1993).

also be informed.<sup>121</sup> Employers may also use information from medical inquiries and examinations to verify employment history; to screen out applicants with a history of fraudulent workers' compensation claims; and to screen out individuals who would pose a "direct threat" to the health or safety of themselves or others, that could not be reduced to an acceptable level or eliminated by a reasonable accommodation.<sup>122</sup>

2. *Limitations on Gathering Information Required to Establish the Possible Existence of a "Second Injury Fund" Case*

Like the ADA, the concept of a Second Injury Fund (SIF) statute seeks to promote the employment of individuals with disabilities. It does so by providing reimbursement for those workers' compensation claims that are either caused or exacerbated by a preexisting condition.<sup>123</sup> Where an employee's preexisting condition combines with a recent workplace injury to create more disability than would have resulted from the injury on the job done, the SIF pays benefits. SIF payments benefit both the employer and the worker. In an SIF case, the employer pays only for the additional disability resulting from the injury sustained by the worker at his workplace—the compensable injury. The injured worker is fully compensated because he receives benefit payments based on all the disability resulting from the preexisting condition combined with the compensable injury. The goal of this system of compensation is to ease employers' anxiety about hiring individuals with disabilities who might represent increased exposure to liability for workers' compensation benefits.<sup>124</sup>

The ADA affects SIF statutes because of its restrictions on preemployment examinations and interviews. In effect, the ADA bars all questions about the existence, nature, and severity of past or present disabilities, medical conditions or history, workers' compensation history, or any preexisting injury. This prohibition directly clashes with the SIF statutes of many states, which protect

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121. 29 C.F.R. § 1630(b)(1)(i)-(iii) (1993). Employers should be aware that the risk of tort actions brought against them for defamation, intentional infliction of emotional distress, or invasion of privacy is substantial when sensitive medical information is disseminated. Schiff & Miller, *supra* note 96, at 62.

122. TAM, *supra* note 57, at IX-3 to -4.

123. H. Michael Bagley et al., *Workers' Compensation*, 44 MERCER L. REV. 457, 509 (1992).

124. ZAN DAVIS & WILLIAM M. GRIFFIN, III, *WORKERS' COMPENSATION IN ARKANSAS: ISSUES AND ANSWERS* 59-60 (1991).

employers only if they know about the employee's preexisting impairments. Arkansas is one such state.<sup>125</sup> Thus, the ADA's prohibition against preemployment inquiries concerning any physical or mental impairment significantly changes the manner in which an employer may prove the elements of employer knowledge that are essential to preserve a SIF case. If, as they have always done at the pre-offer stage, employers ask questions necessary to discover the facts that the SIF statute requires them to have, they will be violating Title I of the ADA. However, some provisions of Title I may allow employers to discover some of the required information.

One such provision allows employers to make preemployment inquiries into the ability of the applicant to perform job-related functions.<sup>126</sup> For example, although an employer could not ask the applicant directly whether he had a weak back, he could ask an applicant for a position as a construction worker whether he could operate heavy construction equipment and climb scaffolding.<sup>127</sup>

The other provision that aids employers in discovering information about the applicant's medical history and possible disabilities allows the employer, after making a conditional employment offer, to require the applicant to undergo a medical examination,<sup>128</sup> provided that all prospective employees undergo a medical examination.<sup>129</sup>

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125. ARK. CODE ANN. § 11-9-525 (Michie 1987) reads as follows in pertinent part:

(a)(1) The Second Injury Trust Fund established in this chapter is a special fund designed to insure that an employer employing a handicapped worker will not, in the event the worker suffers an injury on the job, be held liable for a greater disability or impairment than actually occurred while the worker was in his employment.

(2) The employee is to be fully protected in that the Second Injury Fund pays the worker the difference between the employer's liability and the balance of his disability or impairment which results from all disabilities or impairments combined.

(3) It is intended that latent conditions which are *not known* to the employee or *employer* not be considered previous disabilities or impairments which would give rise to a claim against the Second Injury Fund.

(emphasis added).

126. ADA § 102(d)(2)(b), 42 U.S.C. § 12112(d)(2)(B) (Supp. IV 1992); 29 C.F.R. § 1630.14(a) (1993).

127. 2 ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION § 59.33(g), at 10-525 (1992) (citing 136 CONG. REC. H2632 (daily ed. May 22, 1990) (remarks of Rep. Owens)).

128. ADA § 102(c), 42 U.S.C. § 12112(d)(3)(A) (Supp. IV 1992); 29 C.F.R. § 1630.14(b) (1993).

129. It has been suggested that the impact of the ADA on potential SIF claims is not as dramatic as it seems because such claims have never been dependent upon the employer's knowledge of the preexisting condition at the *preoffer* stage. Although employers have generally determined the existence of a preexisting condition in the

In promulgating its Final Rules, the EEOC recognized the concern of employers about whether they would be able to obtain medical information from applicants without violating the ADA, and, as a consequence, it issued regulations allowing inquiries as well as medical examinations.<sup>130</sup> The regulations provide that the medical examinations need not be job-related or consistent with business necessity, unless the employer intends to use the information gained through those examinations and inquiries to screen out applicants or employees with disabilities.<sup>131</sup> Finally, the regulations explain that the statutory language requiring that the medical examinations be given to "all employees" means "all employees in the same job category."<sup>132</sup>

The EEOC has stated that the information obtained from a lawful entrance examination or inquiry is to be treated as a confidential medical record and may be used only in accordance with the regulations. This confidentiality requirement, however, does not mean that state workers' compensation laws are preempted by the ADA. Specifically, the EEOC has stated that employers may submit the information obtained through medical examinations or inquiries to the state workers' compensation offices or SIFs in accordance with state workers' compensation laws.<sup>133</sup>

Although the regulations seem to resolve the conflict between the requirement of the SIF to get information from the applicant and the ADA's prohibition on asking any questions concerning the applicant's past medical history, Professor Arthur Larson, the leading authority on workers' compensation law, questioned the extent to which the federal regulations actually control.<sup>134</sup> He anticipated that two questions may arise: (1) whether courts will consider the EEOC to be the final arbiter on the interpretation of the statute, and (2) whether the EEOC's statement that the ADA does not preempt workers' compensation laws means that the employer, consistent with the ADA, can obtain information necessary for the SIF through other means if the medical examination does not reveal it.<sup>135</sup>

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preoffer stage, that is simply because the employer has obtained such information from medical inquiries and employment applications. Bagley, *supra* note 123, at 471. It has further been suggested that complying with the requirements of the ADA will actually make it easier for employers to prove knowledge of SIF cases, because the medical examinations and questions will be more specifically directed at potential SIF claims. Bagley, *supra* note 123, at 471.

130. 29 C.F.R. § 1630.14(b) (1993).

131. *Id.* § 1630.14(b)(3).

132. *Id.* § 1630.14(b).

133. 2 LARSON, *supra* note 127, at 10-527 (citing 29 C.F.R. pt. 1630, Interpretive Guidance on Title I of the Americans with Disabilities Act, § 1630.14(b)).

134. *See* 2 LARSON, *supra* note 127, at 10-527.

135. *See* 2 LARSON, *supra* note 127, at 10-527.

The first question reflects concerns by employers that courts might find the EEOC's regulations inconsistent with the plain language of the statute. It is unknown whether courts will interpret "all entering employees" literally, or, in accord with the regulations, as "all entering employees in the same job category." It is equally unclear whether courts will interpret the regulatory provision allowing medical examinations once the employer has extended a conditional employment offer to include medical inquiries as well.

The second question posed by Professor Larson turns on an interpretation of the regulations. Although the regulations are clear that the SIF provisions of state workers' compensation law are not preempted by the ADA, they do not resolve the issue of whether the employer is permitted to go beyond the medical examination in seeking information relevant to the SIF.<sup>136</sup>

While these concerns about courts' possible interpretation of the statutory language may be valid, the EEOC regulations are the best guidance presently available. They state that once the employer has extended a conditional offer of employment to the applicant, it can make inquiries to obtain the information required in connection for a SIF case.<sup>137</sup> The regulations do not provide for any limitation on the scope of sources from which the required information may be obtained. Therefore, it is probably reasonable to assume that the employer may go beyond the medical examination to obtain the necessary information.

### 3. *Limitations on Gathering Information to Preserve a "Misrepresentation" Defense*

In addition to affecting how employers may assess whether an applicant will represent a potentially high risk, the ADA's restrictions on the questions that can be asked during the preemployment stage raise issues concerning a misrepresentation defense to a workers' compensation claim—generally termed in Arkansas the "*Shippers Defense*." In *Shippers Transport of Georgia v. Stepp*,<sup>138</sup> the Arkansas Supreme Court established a defense to workers' compensation claims. Under this defense, a false representation as to physical condition in procuring employment can preclude workers' compensation benefits for an otherwise compensable injury. To prevail on the defense, the employer must show that: (1) the employee knowingly and willfully made false representations as to his physical condition; (2) the employer relied on that false representation and that reliance was

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136. See 2 LARSON, *supra* note 127, at 10-527.

137. See TAM, *supra* note 57, at IX-6.

138. 265 Ark. 365, 578 S.W.2d 232 (1979); See also ARK. CODE ANN. § 11-9-106 (Michie 1987).

a substantial factor in the employment; and (3) there was a causal connection between the false representation and the injury.<sup>139</sup> This defense is designed to preclude claims that result from fraud in the hiring process.<sup>140</sup>

Before the enactment of the ADA, an employer could preserve this defense by asking job applicants questions about their medical history either during the job interview or on the job application form. If an employer did not elicit this information, the defense would be lost because the employee would have made no misrepresentation.

Because the ADA now prohibits specific questions in employment applications regarding past conditions, many employers fear that the *Shippers* defense is dead. This fear is probably unfounded. The Technical Assistance Manual issued by the EEOC specifically states that the ADA does not prevent the use of the misrepresentation defense to a workers' compensation claim,<sup>141</sup> but an employer must wait to ask the necessary questions until *after* it has made a conditional employment offer. If the misrepresentation defense requires that the applicant misrepresent his condition to the employer during the hiring process before he starts to work, the employer can still raise the defense when the applicant makes false representations after the employer has made a conditional employment offer. Analysis of the facts in *Shippers* supports this argument.

The employer's defense in *Shippers* was based on the employee's false representation on his written employment application that he had not previously been injured on a job. "In fact, he had suffered three prior injuries, . . . resulting in a collective forty percent permanent partial disability rating to the body as a whole."<sup>142</sup> The rationale of the Arkansas Supreme Court in reaching its decision was that public policy required imposing an obligation on the employee to answer truthfully any questions the employer may ask about preemployment health conditions. The court was influenced by the principle in workers' compensation law that requires the employer to take an employee as it finds him, with all the risks associated with hiring an employee who is already disabled. Consequently, the

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139. *Shippers*, 265 Ark. at 369, 578 S.W.2d at 234.

140. Other jurisdictions also recognize this defense. See, e.g., *Blanton v. Workmen's Comp. Bd.*, 531 S.W.2d 518 (Ky. Ct. App. 1976); *Martinez v. Driver Mechenbier, Inc.*, 562 P.2d 843 (N.M. Ct. App. 1977); *Givens v. Steel Structures, Inc.*, 301 S.E.2d 545 (S.C. 1983); *Federal Copper and Aluminum Co. v. Dickey*, 493 S.W.2d 463 (Tenn. Ct. App. 1973). See also 1B A. LARSON, *supra* note 127 § 47.53; DAVIS & GRIFFIN, *supra* note 124, at 37.

141. TAM, *supra* note 57, at IX-7.

142. *Shippers*, 265 Ark. at 367, 578 S.W.2d at 232-33.



court reasoned that it was only fair that the employer have a right to determine the health history of the employee before employment to avoid the possible liability for an accidental injury causally related to a preexisting condition or disability.<sup>143</sup>

The court did not require that the questions be asked in the pre-offer stage. Instead, the court's opinion reflects a public policy concern to protect employers from fraud. The holding of the court is based on the principle that fraud at the inception of a contract makes the contract voidable.

Even if it is assumed that the employee in *Shippers* had made false representations about his condition in a post-conditional employment interview or medical examination rather than in a preemployment written application, the result should be the same. In view of the court's rationale, an employer's reliance on information given by the employee in a post-conditional employment offer interview or medical examination should have the same effect as if it had been obtained at the pre-offer stage.

Additionally, it should be noted that the ADA permits the employer to ask, at the pre-offer stage, whether the applicant can perform the essential functions of the job, with or without reasonable accommodation. The employer must, however, word the questions carefully to avoid violating the ADA and, at the same time, preserve the misrepresentation defense. A question that seeks detailed information about disabilities may violate the ADA; moreover, some authority suggests that the answer to such a question would not support a misrepresentation defense.<sup>144</sup> On the other hand, a very general question probably will not preserve the defense. The Arkansas Court of Appeals has ruled that the question, "Do you have any physical condition which may limit your ability to perform the job applied for?" called for an opinion rather than factual information. Therefore, the court concluded that it was too broad and general to support the misrepresentation defense.<sup>145</sup>

Employers should ask specific, factual questions about specific essential functions of the job. For example, asking an applicant for

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143. *Id.* at 369, 578 S.W.2d at 234.

144. In *Huisenga v. Opus Corp.*, 494 N.W.2d 469 (Minn. 1993), the Supreme Court of Minnesota, relying on the Minnesota Human Rights Act, not the ADA, held that the employer's questions on the job application regarding the physical and mental condition of the applicant went beyond those essential job-related functions. Therefore, the employer could not rely on the employee's false answers to those questions as a defense in subsequent workers' compensation proceedings. *Id.* at 474.

145. *Sawyer v. Mtarri*, 33 Ark. App. 125, 806 S.W.2d 7 (1991).

a job driving a truck whether he had ever passed out or had a seizure while driving would probably not be prohibited, but asking the same question of an applicant for a desk job would probably be impermissible. The question would be sufficiently precise and factual so that a false answer would, presumably, allow the employer to successfully assert the misrepresentation defense if the employee subsequently had a seizure while driving a truck and sustained an otherwise compensable injury.

It is unclear what effect the ADA will have on SIF cases and the misrepresentation defense. Only as courts provide guidance resulting from litigation will its effects be more certain.

#### B. Protected Status of Employees Injured on the Job and Returning Injured Workers

The first step in determining whether Title I applies is to determine whether the employee has a "disability" as defined by the ADA.<sup>146</sup> This determination is important because an employee may be "disabled" under workers' compensation law yet still fail to qualify under the ADA definition.<sup>147</sup> The definition of disability under state workers' compensation laws differs from that under the ADA because of the different goal that each act seeks to achieve. Workers' compensation laws are designed to compensate and to provide needed assistance to workers who are injured on the job; the ADA is designed to protect from discrimination against disabled individuals who are otherwise qualified to work.<sup>148</sup> Generally speaking, medical problems are not covered by the ADA. Thus, nonchronic, nonpermanent, easily healing injuries in most circumstances would not be considered a "disability" under the ADA. However, given the ADA's broad definition of "disability," it is quite possible that an employee "disabled" under the workers' compensation statute would also be an "individual with a disability" under the ADA. Nonetheless, to be protected, the employee must be "a qualified

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146. A "disability" under the ADA means suffering from any physical or mental impairment that substantially limits one or more major life activities, having a record of such impairment, or being regarded as having such an impairment. ADA § 101(2), 42 U.S.C. § 12101(2) (Supp. IV 1992). For an explanation of the meaning of each of these definitions, see *supra* text accompanying notes 45-67.

147. "Disability" for purposes of workers' compensation in Arkansas means "incapacity because of injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the injury." ARK. CODE ANN. § 11-9-102(5) (Michie 1987).

148. TAM, *supra* note 57, at IX-2.

individual with a disability." This means that he must be able to perform the essential functions of the job with or without accommodations.<sup>149</sup>

Certainly, not every employee injured on the job will be protected by the ADA, because work-related injuries do not always cause physical or mental impairments that are severe enough to "substantially limit" a major life activity such as work. Thus, an employer must consider work-related injuries on a case-by-case basis to decide whether an employee is protected by the ADA, because even if an employee is awarded workers' compensation benefits or is assigned a high workers' compensation disability rating, that employee is not automatically protected by the ADA.

The terms "substantially limiting," "record of," and "regarded as" must, therefore, be understood in the context of workers' compensation to determine whether an injured worker may be protected by the ADA. If a worker sustained an injury that normally heals within a few weeks or months, he would not be considered to be a person with a disability under the ADA even if he received workers' compensation benefits for his injury. This is so because the impairment he suffered from the injury did not "substantially limit" a major life activity, in view of the fact that the injury healed within a short period of time and had little or no long-term impact.

On the other hand, if the worker was substantially impaired during a healing period that was significantly longer than would normally be expected for the type of injury he sustained, or if the injury resulted in a permanent limp, he might be protected by the ADA if his condition substantially limited one or more major life activities as compared to the average person in the general population.<sup>150</sup> It should be noted that, for a condition to be a disability that substantially limits one's ability to work, the condition must restrict the applicant or employee from "either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working."<sup>151</sup>

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149. ADA § 1021(8), 42 U.S.C. § 12111(8) (Supp. IV 1992); 29 C.F.R. § 1630.2(m) (1993).

150. TAM, *supra* note 57, at IX-2.

151. 29 C.F.R. § 1630.2(j)(3)(i) (1993). This section also lists the factors to be considered in determining whether an individual is substantially limited in the major life activity of "working" as follows: (1) The nature and severity of the impairment; (2) the duration or expected duration of the impairment; (3) the permanent or

Once the individual is deemed to have a "disability" under the ADA, he cannot, even after full recovery, be subjected to discrimination based on the record of this past disability. Such discrimination is barred regardless of whether the employee was working for the discriminating employer or a prior employer at the time of the injury and resulting disability.

Finally, if an impairment or condition caused by an injury on the job does not substantially limit a worker's ability to work, but the employer regards the individual as having an impairment that makes him unable to perform a class of jobs, that individual would be considered to be "regarded" by the employer as having a disability. Therefore, if the employer discriminated against the employee because of this perception, the employer would be violating the ADA.<sup>152</sup>

It should be noted, however, that in each of these hypotheticals the employer would be liable for discrimination only if the employee was a "qualified individual with a disability"<sup>153</sup> and if causation was established.

### C. Employer Obligations Toward Employees Injured on the Job and Returning Injured Workers

Although one of the underlying purposes of workers' compensation statutes is to return injured workers to active employment,<sup>154</sup> before the ADA was enacted some employers enjoyed another option. An employer might have opted instead to pay an injured worker disability benefits or assist him in finding a job with

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long-term impact or the expected permanent or long-term impact of or resulting from the impairment; (4) the geographical area to which the individual has reasonable access; (5) the job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills, or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or (6) the job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills, or abilities within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes). *Id.* § 1630.2(j)(2)(i), (ii), (iii), (3)(ii)(A), (B), and (C). Examples demonstrating the application of each of these factors are provided in the Interpretive Guidance for each of these sections. *See also* Lawrence P. Postol and David D. Kadue, *An Employer's Guide to the Americans with Disabilities Act*, 42 LAB. L.J. 323, 324-25 (1991).

152. TAM, *supra* note 57, at IX-3.

153. TAM, *supra* note 57, at IX-3.

154. *See, e.g.*, Arkansas Workers' Compensation Act, ARK. CODE ANN. § 11-9-505 (Michie Supp. 1993), which increases rehabilitation benefits and requires employers to return injured employees to work or be liable for additional benefits, including rehabilitation and vocational assistance. *See also* Philip Pesek, *The New Workers' Compensation Law: What Happens Now?*, 27 ARK. LAW. 20, 22-23 (Summer 1993).

another employer rather than modify the job description so the employee could come back to work.<sup>155</sup> After the enactment of the ADA, however, employers do not have this option because the ADA requires employers to allow a qualified individual with a disability to return to work and, if needed, to provide reasonable accommodations for the employee. Therefore, when an employee is injured on the job or when an injured employee wishes to return to work, employers must first determine what the ADA permits as far as medical examinations and inquiries and what reasonable accommodations the ADA requires the employer to provide to allow the injured employee to either continue or return to work.<sup>156</sup>

### 1. *Medical Examinations and Questions of Current Employees*

The ADA affects the methods employers used before the enactment of the ADA to determine the physical and mental fitness of employees seeking a transfer or a promotion and of employees who are returning to work after an injury sustained on the job.<sup>157</sup> Title I requires employers to use the same two-step inquiry they are required to use with applicants.<sup>158</sup> Specifically, the employer may

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155. Bagley et al., *supra* note 123, at 471.

156. The EEOC has indicated that 80% of the ADA charges filed as of August 1993 came from incumbent employees rather than applicants, and that the issue most frequently alleged was unlawful discharge because of a disability. This information suggests that employers would be well advised to review their policies applicable to employees returning to work, particularly the coordination of those policies with workers' compensation claims. Employers should uniformly enforce rules concerning authorization to return to work for all employees, whether disabled or not. If an employee with a disability is involved, employers must be aware of the additional obligations imposed by the ADA. *Return-to-Work Policies May Require Review*, Accommodating Disabilities (CCH) No. 21, at 10 (August 1993).

A recent Florida case exemplifies the potential problem. The issue was whether it was Walt Disney World's return-to-work policies or the employee's disabilities that were the reason for her termination. According to her complaint, even though the employee suffered from two different disabling conditions, she was able to perform the essential functions of the job well enough that she had won an award a few months before her termination. Her disabilities, however, did impair her ability to care for herself and her muscular control when she did not have access to proper medication. Her supervisors suggested that she take a three-week medical leave even though she did not have authorization from a doctor, and assured her that there would be no problem upon her return. When she attempted to return to work, she was told that Disney's return-to-work policy required her to have a doctor's release before she could return. Ten days later, she was terminated for not submitting the medical release. *Id.* (citing *Dauzat v. Walt Disney World Co.*, Fla. No. 93-516-CIV-ORL-19, June 28, 1993).

157. Schiff & Miller, *supra* note 96, at 45.

158. See *supra* text accompanying notes 92-103.

require the employee to submit to medical examinations and answer medical questions only after the employer believes that the employee is qualified.<sup>159</sup> At that point, the employer could test the employee for physical and mental fitness to determine whether he is able to return to work.<sup>160</sup> If the employee is unable to perform the essential functions of the job, the next question is whether the employee is

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159. See *supra* text accompanying notes 92-103.

160. One authority lists the following as examples of questions that could be asked:

1. Does the employee's medical condition preclude travel to and from work? If so, what is the medical reason?
2. Does the employee's medical condition preclude being at work? If so, what is the medical reason?
3. Has the medical condition adversely affected the employee's life activities such as driving, shopping, self-care and recreation? If so, how?
4. Does the employee's medical condition preclude assignment of the tasks and duties of the job? If so, which tasks and duties and what is the medical reason?
5. Is there a medical reason to believe that the employee is likely to experience injury, harm or aggravation of the medical condition by performing or attempting to perform the described tasks and duties? If so, what is the degree of injury, harm or aggravation that should be expected and what is the likelihood that it will occur?
6. If restrictions on the activity of the employee are warranted because of a significant risk of harm to the employee or others, what kinds of measures should be considered in identifying possible accommodations to eliminate the reason for the restrictions?
7. Is there any reason to believe that the reasonable accommodation measures described are not medically feasible and appropriate?
8. Is the employee likely to recover sufficiently to have the capacity to perform the essential functions of the job, with or without reasonable accommodation? If so, what is the time frame? If not, what is the medical reason?

*Questions to Ask when Making Return-to-Work Determinations, Accommodating Disabilities* (CCH) No. 25, at 9 (December 1993) (citing *The Workers' Compensation-ADA Connection: Supervisory Tools for Workers Compensation Containment that Reduce ADA Liability*). The relevance of the third question, which seems to examine matters unrelated to the job, is open to debate.

To reduce the costs of workers' compensation, some employers are analyzing and assessing the merits of a concept known as "flexiplace program." The United States Department of Defense is one such employer. The goal of the concept is to get employees off the workers' compensation roll and have them work at home if they cannot go back into the workplace. Specifically, if the job previously held by the injured worker required him to spend significant time working in front of a computer screen, the application of the "flexiplace program" would result in providing a computer, fax machine, and any adaptive equipment necessary to the injured worker at home. Commerce Clearing House, *Accommodating Disabilities*, January 1994, *Cost Containment—Flexiplace Program Reduces Workers' Comp Costs*, at 7.

disabled. If the employee's condition prevents him from performing only the duties associated with his old position or only a few positions, he is not "disabled," and the employer could lawfully deny the employee the position without any further investigation into what, if any, reasonable accommodations the employee may need. On the other hand, if the employee's condition restricts him from performing "either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities,"<sup>161</sup> he is "disabled" within the meaning of the ADA, and the employer's obligation to provide reasonable accommodations applies.<sup>162</sup>

If the employee is found to be "disabled," further restrictions apply concerning the use of medical examinations and questions. An employer may require an employee to take a medical examination or to answer medical questions regarding a disability only if the examination or questions are job-related and consistent with business necessity. If a worker sustains an injury on the job that appears to affect his ability to perform the essential functions of the job, the employer is allowed to require the employee to undergo a job-related medical examination (not a full physical) and answer job-related questions. Under these circumstances, the examination and inquiry will be deemed to be job-related and consistent with business necessity, and may be required as a condition of returning to work. A medical examination or inquiry is also allowed to determine what reasonable accommodations may be required.<sup>163</sup>

## 2. *Reasonable Accommodations*

It is unlawful under the ADA to discriminate against an employee with a disability who is otherwise qualified for the job he holds or seeks. Therefore, the employer cannot refuse to allow an employee

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161. 29 C.F.R. § 1630.2(j)(3)(i) (1993).

162. *Id.*

163. TAM, *supra* note 57, at IX-4. It has been argued that the requirements of Title I of the ADA suggest that, to determine whether a worker with a disability can perform a certain job, the employer must work with a physician who has experience and training in rehabilitation and ergonomics, because most company doctors will not have the necessary expertise. It is further argued that for a physician to be able to make a legally sufficient determination as to whether a worker can or cannot perform the job, it is essential that the physician know exactly what the job entails. The physician, therefore, should visit the worksite or view a tape of someone performing the job so that the doctor will have more facts on which to base his decision. *New Era for "Company Doctors,"* Accommodating Disabilities (CCH) No. 14, at 4 (January 1993).

with a disability to keep his job or to return to work because the employee is not fully recovered from his injury, unless: (1) the employee cannot perform the essential functions of the job he holds or seeks with or without reasonable accommodation; or (2) allowing the employee to return to work would pose a significant risk of substantial harm that could not be reduced to an acceptable level with reasonable accommodation.<sup>164</sup> To lawfully deny employment on the latter basis, an employer must be prepared to prove that the individual's medical condition creates a significant risk of substantial harm. Decisions to deny employment must be based on a case-by-case basis and must not represent a policy of excluding all those who have specific disabilities. The EEOC regulations require that decisions be made based on the individual's ability to safely perform the job at the time he is being considered for employment as a returning injured worker. The regulations also require that accommodations to reduce or eliminate the risk must be considered before denying employment to an individual with a disability.<sup>165</sup>

a. Determination of Whether the Employee Can Perform the Essential Functions of the Job

"Essential functions" means the fundamental job duties of the job the employee with a disability holds or seeks. The term does not include marginal functions of the job. As stated earlier, the EEOC regulations list the following as factors that may make a job function essential: (1) whether the position exists to perform that function; (2) whether only a limited number of employees are available among whom the performance of that function can be distributed; or (3) whether the function is highly specialized so that the employee in that position is hired for his expertise or ability to perform that particular function.<sup>166</sup> Evidence establishing that the particular function is essential includes, but is not limited to: (1) the employer's judgment

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164. TAM, *supra* note 57, at IX-4; 29 C.F.R. § 1630.2(r) (1993).

165. James G. Frierson, *An Analysis of ADA Provisions on Denying Employment Because of a Risk of Future Injury*, 17 EMPLOYEE REL. L.J. 603, 603 (1991-92). The author predicted that the single largest category of charges to be brought under the ADA is likely to be cases in which individuals with disabilities are denied employment, or are not allowed to return to work because of a risk of future injury. This is because employers often believe that employing individuals with disabilities will increase the chance of accidents on the job and job-related sickness. Because of this perception, employers fear that hiring individuals with disabilities will, therefore, mean increased health insurance and workers' compensation premiums, lawsuits, and general disruption in the workforce. *Id.* Back problems and injuries constitute the largest category of cases presenting a risk of future occupation injury and of workers' compensation claims. *Id.* at 611.

166. ADA § 101, 42 U.S.C. § 12111 (Supp. IV 1992); 29 C.F.R. § 1630.2(n)(1), (2)(i)-(iii) (1993).



as to which function is essential; (2) written job descriptions prepared before advertising or interviewing applicants for the job; (3) the amount of time spent on the job performing the function; (4) the consequences of not requiring the incumbent to perform the function; (5) the terms of a collective bargaining agreement; (6) the work experience of past incumbents in the job; or (7) the current work experience of incumbents in similar jobs.<sup>167</sup>

The ADA's focus on the ability of an employee with a disability to perform *essential* functions of a job with or without accommodations suggests that employers may be required to eliminate *nonessential* functions as a reasonable accommodation to an employee returning from disability leave. Employers may need to engage the services of safety and health professionals to assess correctly the physical and mental abilities of individuals with disabilities in relation to job requirements. It has been suggested that the proper way to accomplish the desired goal is to try to fit the job to the worker, rather than vice versa. This concept is known as "ergonomics."<sup>168</sup> Preparing job descriptions to comply with the ADA is a good way to help employers look at jobs from that perspective.<sup>169</sup> Even if input from safety and health professionals is not available, employers will need to determine how disabilities might relate to essential job functions.<sup>170</sup>

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167. 29 C.F.R. § 1630.2(n)(3)(i)-(vii).

168. *Writing ADA Job Descriptions Can Result in Better Job Design*, Accommodating Disabilities (CCH) No. 13, at 1 (December 1992) (citing remarks made by Harold R. Imbus, M.D., of Greensboro, North Carolina, a physician who has worked with many companies to help them return their injured employees to work).

169. *Id.* See also *Workplaces that Fit Employees*, Accommodating Disabilities (CCH) No. 19, at 6 (June 1993) for an explanation of how the concept of ergonomics seeks to prevent situations which exceed employees' capabilities, because injuries occur when employees' capabilities and limitations are exceeded.

Specifically, it is argued that injuries known as cumulative trauma disorders (CTDs) result from repetitive motion over an extended period of time, and they are thus also known as repetitive strain injuries or RSIs. Because it is scientifically unknown how many motions and over what period of time these injuries are caused, ergonomics tries to discover the predictability factors. Examples of CTDs include carpal tunnel syndrome, thoracic outlet syndrome, tendonitis, tenosynovitis, and sprain/strains. *Id.*

170. For a list of broad definitions of disabilities more likely to afflict employees in the workplace, and the limitations that those disabilities create, see *id.*, *Limitations Associated with Specific Disabilities*, Accommodating Disabilities (CCH) No. 23, at 5 (October 1993) (citing Army & Air Force Exchange Service as its source).

For a self-test exercise to determine the essential functions of a taxi driver, see Accommodating Disabilities (CCH) No. 16, at 3, 6 (March 1993). The analysis of the "elements" and "qualifications/performance" of that job could be applied to many other jobs.

In preparing these job descriptions, some degree of detail is helpful in determining whether there is a portion of a job that will require a reasonable accommodation. It has been suggested, however, that preparing a very detailed job description outlining the physical requirements in a job function assessment is advisable only when there is documentation from another source to support the decision. This other source could be, for example, safety standards required by the Occupational Safety and Health Administration (OSHA) because many positions are already governed by OSHA standards. Employers should be cautious, however, not to include too much detail in job descriptions because of potential exposure to charges of discrimination on the grounds that a particular detail would be desirable or helpful, but not an essential function of the job. It is, therefore, suggested that, in the absence of such other sources of support, employers should prepare basic job descriptions explaining the essential elements of the position.<sup>171</sup>

Job descriptions have, in fact, become more significant since the enactment of Title I because they are an important tool to determine essential job functions. Job descriptions must, therefore, be constantly updated and must be comprehensive, including all performance standards and listing physical, sensory, and cognitive requirements.<sup>172</sup>

#### b. Determination of What Reasonable Accommodations Are Needed

As stated earlier, the EEOC regulations define reasonable accommodation to mean:

1) Modifications or adjustments to a job application process that would enable a qualified applicant with a disability to be considered for the position he is seeking;

2) modifications or adjustments to the work environment, or to the manner or circumstances under which the position the employee holds or seeks is customarily performed, that would enable a qualified individual with a disability to perform the essential functions of the job; and

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171. *Should Job Descriptions Include Detailed Physical Requirements?*, Accommodating Disabilities (CCH) No. 2, at 5 (February 1992).

172. Accommodating Disabilities (CCH) No. 16, at 9 (March 1993) (citing David Alexander, President of Auburn Engineers, Inc., Auburn, Alabama).

3) modifications or adjustments that enable an employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by other similarly situated employees without disabilities.<sup>173</sup>

Reasonable accommodations may include, but are not limited to:

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

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition and modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.<sup>174</sup>

Title I prohibits employers from refusing to allow an employee with a disability to return to work simply because he is not fully recovered, unless he cannot perform the essential functions of the job with or without accommodations. If necessary to accommodate medical restrictions and limitations of returning injured workers, employers may be required to eliminate nonessential job functions as a reasonable accommodation and create "light-duty" positions. Even though employers are not theoretically obligated to create separate "light-duty" positions, many already do so.

Many employers, in fact, have adopted the concept of "light-duty" positions in an effort to reduce workers' compensation liability. These positions generally place few physical demands on an employee, requiring him to perform tasks such as answering the telephone and administrative work. Assignment to these positions is usually for a limited period of time.<sup>175</sup> In these "light-duty" positions, employees with disabilities do not perform the essential functions of their job.<sup>176</sup>

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173. ADA § 101(9), 42 U.S.C. § 12111(9) (Supp. IV 1992); 29 C.F.R. § 1630.2(o)(1)(i)-(iii) (1993).

174. 42 U.S.C. § 12111(9) (Supp. IV 1992).

175. TAM, *supra* note 57, at IX-4 to -5.

176. *Should Light-Duty Job Policies Be Revamped?*, Accommodating Disabilities (CCH) No. 4, at 5 (April 1992). It is suggested that placing returning injured workers in "light-duty" jobs to avoid workers' compensation costs sets a precedent for other workers not protected by the ADA to request the same accommodation. Therefore, employers are encouraged to change their current return-to-duty work or "light-duty" policies by reorganizing some of their essential and nonessential functions. Specifically, it is suggested that if a "light-duty" position can be rewritten or redesigned as a viable permanent job, it should not be considered "light-duty." After redefining the position, it would become a job having essential functions

A noteworthy reasonable accommodation that employers are required to provide under Title I is that of reassigning the injured worker to a vacant position if one is available that the injured worker is qualified to perform. It has been said that this obligation will have the greatest impact upon workers' compensation because, by requiring placement in a vacant position as a reasonable accommodation, the ADA obligates employers to review reinstatement and alternative employment, which is a more extensive requirement than any state workers' compensation law.<sup>177</sup> Assigning an injured worker to a vacant position as a reasonable accommodation will require employers to engage in a two-step process. First, employers must look at the injured employee's job description as of the date he seeks to return to work and see whether, in light of his disability, he can reoccupy that position with or without accommodations. If he cannot, employers must then review alternate job descriptions of the same or lower level positions that are currently vacant to determine whether the injured employee could be reassigned to it.<sup>178</sup> This requirement to reassign injured workers to vacant positions will also require employers to coordinate more closely with rehabilitation specialists to determine whether injured workers protected by the ADA are able to perform the functions of vacant positions that already exist or that are expected to exist within a reasonable period of time.<sup>179</sup>

The focus on the employer's obligation to provide reasonable accommodations seems to be on accommodating individuals with physical disabilities. While this focus is understandable, employers must also be sensitive to their obligation to provide reasonable accommodations to individuals with mental and developmental disabilities. As in the case of physical disabilities, depending upon the nature and severity of the disability, it may not be possible to provide reasonable accommodations for these employees.<sup>180</sup> Employers

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within a person's physical capability. *Id.*

In a recent case, Donelson Hospital in Nashville, Tennessee was found liable for the discriminatory discharge of a nurse with a back injury, even though she was able to perform light-duty nursing duties. *Tuck v. HCA Health Servs. of Tenn., Inc.*, 7 F.3d 465 (6th Cir. 1993).

177. *ADA Employment Regs Hit Workers' Comp*, Accommodating Disabilities (CCH) No. 2, at 3 (February 1992).

178. *Id.*

179. *Id.* See also Renee L. Cyr, Note, *The Americans With Disabilities Act: Implications for Job Reassignment and the Treatment of Hypersusceptible Employees*, 57 BROOK. L. REV. 1237 (1991-92).

180. For suggestions of possible accommodations for employees with mental illness and employees with hearing impairments, see *Accommodating Disabilities*,

must be aware, however, that their obligation under the ADA applies equally to the large number of persons suffering from mental or developmental disabilities.

#### D. Impact of the ADA on "Exclusivity" Clauses

Title I provides that filing a workers' compensation claim does not prevent an injured worker from filing a charge of discrimination under the ADA. Therefore, "exclusivity" clauses in state workers' compensation laws barring all other civil remedies related to an injury that has been compensated by a workers' compensation system<sup>181</sup> do not preclude a qualified individual with a disability from filing a charge of discrimination with the EEOC or filing a suit in federal court under the ADA.<sup>182</sup> This interplay between the two statutes results from a situation in which an employee receives workers' compensation benefits for a work-related injury or disease and then charges the employer with discrimination on the basis of his disability under the ADA because of the employer's refusal to reemploy him or to make reasonable accommodations.<sup>183</sup> This seeming conflict between the two statutes can, however, be reconciled. Exclusive remedy provisions in state workers' compensation apply only to civil actions against the employer for employment-related injuries. Therefore, a charge of disability discrimination would not be inconsistent because it would not be seeking additional recovery for

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*supra* note 70, *Mental Illness in the Workplace*, July 1992, at 4-5. See also *Id. Accommodations for the Hearing-Impaired Employee*, *Accommodating Disabilities (CCH)* No. 6, at 7 (April 1992); Peter David Blanck, *Empirical Study of the Employment Provisions of the Americans with Disabilities Act: Methods, Preliminary Findings, and Implications*, 22 N.M. L. REV. 119 (1992).

A network, called Job Accommodation Network (JAN), operated by the President's Committee on Employment of Individuals with Disabilities, provides assistance to employers in accommodating disabilities. *Accommodating Disabilities, supra* note 92, *Viewpoint—Need Accommodation Ideas? Don't Overlook JAN*, Dec. 1992, at 1.

181. See ARK. CODE ANN. § 11-9-105(a) (Michie Supp. 1993) (reinforcing the doctrine of exclusive remedy by prohibiting employees from filing a civil action against their employer for employment-related injuries).

182. TAM, *supra* note 57, at IX-7.

183. HENRY H. PERRITT, JR., AMERICANS WITH DISABILITIES ACT HANDBOOK § 5.12 Workers' Compensation Preemption, at 22-23 (1993 Cumulative Supplement No. 1) (citing *Hartman v. Mathis & Bolinger Furniture Co.*, 282 Cal. Repr. 35 (Cal. Ct. App. 1991) (finding that exclusive remedy provision of state workers' compensation did not bar claim of discrimination on the basis of disability under state law)).

an injury. Rather, it would be seeking recovery for an employer's alleged failure to comply with the requirements of Title I. An injured worker not allowed to return to work because of discrimination based on race or sex could similarly receive damages for such discrimination in addition to workers' compensation.

## V. CONCLUSION

It is unquestionable that the ADA significantly changes employment law. It also affects workers' compensation law in several ways. First, the ADA requires employers to make a conditional employment offer to a job applicant before investigating the applicant's physical and mental condition and obtaining any other relevant information necessary to preserve the misrepresentation defense or to determine the existence of an SIF case. Thus, the change brought about by the ADA in these two settings is that employers can no longer determine the condition of the applicant through employment applications or pre-offer medical examinations and inquiries as was customary before the enactment of the ADA. Second, the ADA protects employees injured on the job and returning injured workers if their injury constitutes a "disability" under the ADA. This means that employers must now first determine whether the injured worker would be protected by the ADA. If so, employers must then determine the resulting obligations that the ADA imposes on them. Third, the ADA imposes an obligation on employers to provide reasonable accommodations for employees injured on the job or returning injured workers who are "disabled" within the meaning of the ADA. These accommodations could range from slightly modifying work schedules or the duties of the job to installing mechanical or technological equipment, or making structural and architectural modifications of the facilities to allow these employees to return to the workplace. Fourth, the ADA provides that filing a workers' compensation claim does not prevent an injured worker from filing a charge of discrimination on the basis of a disability under the ADA. Consequently, the "exclusivity" clause in workers' compensation laws barring all other civil remedies related to an injury that has been compensated by a workers' compensation system does not apply when recovery is sought to redress discrimination on the basis of disability.

Title I of the ADA has created anxiety among employers because it is, indeed, sweeping civil rights legislation that requires significant changes in the hiring and employment practices that were customary before its enactment. Although some of these required changes will be financially burdensome for employers, most will be principally

administratively and operationally burdensome during the implementation period. When assessing the need for and nature of these changes, employers must remember the goal of the ADA: to prohibit discrimination against individuals with disabilities solely because of their disability. Understanding this basic goal should aid employers in their efforts to comply with the intricate provisions of Title I.

In prohibiting discrimination, the ADA creates opportunities for both employees and employers. Individuals with disabilities can now enjoy full and equal employment opportunities generally available only to nondisabled individuals before the enactment of the ADA. Employers will face the economic and noneconomic costs of "reasonable accommodations" as well as possible liability. But employers, too, will benefit from the ADA in that injured employees who might never have been able to return to work will now have a much better chance of doing so because of accommodations for their disability. More specifically, by forcing employers to develop disability management policies, the ADA may become a vehicle for reducing workers' compensation costs. Although some employers are concerned that the ADA will increase workers' compensation costs because workers with a disability may be more likely to sustain an injury or aggravate a preexisting disability, careful evaluation of the physical and mental abilities of the employee relative to the requirements of the job should provide considerable protection. The benefits to be derived in the workplace from jobs that are better designed not only for employees with disabilities but also, perhaps indirectly, for nondisabled employees should outweigh the perceived negative effects of the ADA.

If the ADA has the effect it was intended to have, society as a whole should also benefit because millions of individuals with disabilities can now become independent and productive members of society. From the perspective of society as a whole, the economic advantages from increased national productivity and reduced welfare costs may well exceed the costs imposed on employers by the ADA. The principal societal benefit, however, may not be economic. By bringing individuals with disabilities into the mainstream of American life, society may find itself enriched in ways that most of us had never envisioned: by new business and social relationships with these individuals.

It is still too early to assess the impact of the ADA. It may prove to be a breeding ground for litigation, resulting in ill will and unnecessary costs, as some fear. But, in years to come, it may appear as an important milestone toward a society that is more productive, kinder, and gentler.