

ADA

POSITION BACKGROUND:

Senator Dole has earned national acclaim for his leadership to enhance the rights of people with disabilities. His commitment stems back to his days as a Member of the House of Representatives when his first floor speech spoke to the issue of disability. Senator Dole evidenced his commitment to strengthen all areas of policy that will integrate people with disabilities in the mainstream of this country as a key player in passage of the Americans with Disabilities Act (ADA).

Recognizing the comprehensive nature of this landmark law, Senator Dole secured an ADA technical assistance amendment to design a government-wide information dissemination program to educate people with disabilities about their rights and the business community as to their obligations under the law. Upon passage of the ADA, Senator Dole co-authored an amendment to expand the Tax Code to include a tax credit applicable to any ADA related expenditure incurred by a private entity in fulfilling their obligations under ADA.

KEY DEBATE POINTS:

Senator Dole is convinced that the vast majority of people with disabilities don't want handouts. They want the opportunity to work, to take part in their communities, and to pursue the American dream. However, barriers still prevent them from reaching that goal -- sadly, many of these obstacles only exist in the minds of those who are not disabled.

Bipartisan support in Congress with cooperative efforts from people with disabilities, business leaders and concerned American citizens made this historic legislation possible. As a result, this new law will ban discrimination in employment, public accommodations, transportation and telecommunications. While earlier legislation, such as Section 504 of the Rehabilitation Act of 1973, the Education for Handicapped Children's Act and the Fair Housing Act provided a broad range of access to specific programs for persons with disabilities, the ADA created a broad range of access in both the public and private sectors.

To reinforce the goals of the ADA and to move disability policy into the next century, it is critical to maintain a united and solid partnership between the disability and business communities. Recognizing this, Senator Dole has consistently ensured that many private sector entities under ADA jurisdiction have the needed information to answer their questions regarding compliance and applicable tax credits when providing access accommodations under the law.

DOLE LEGISLATION:

Authored and successfully secured a technical assistance amendment to the ADA that would assist with its implementation through information dissemination by the Equal Employment Opportunity Commission (EEOC) and the Department of Justice.

For the past two years Senator Dole has requested and secured a total of \$10,000,000 to implement the ADA's Technical Assistance Program.

Authored Section 190 of the Internal Revenue Code providing a \$35,000 (now at \$15,000) deduction for disability related expenditures.

Co-authored an amendment to expand Section 190 of the Internal Revenue Code by adding a tax credit (in addition to the previous deduction) designed to assist the small business community with the cost of ADA compliance.

Sponsored in conjunction with the Small Business Administration and the Kansas Association of Centers for Independent Living -- three information seminars entitled "The ADA and Small Businesses: to provide those in the business community throughout Kansas specific information on the ADA and the needed linkages to sources of assistance for future questions.

Sponsored a two day conference -- "Employment of People with Disabilities: Issues and Opportunities" with the Kansas Division of Continuing Education on implementation of the ADA's employment provisions.

Established the Dole Foundation for Employment of People with Disabilities, solely dedicated to the economic independence of people with all types of disabilities through the provision of grants to organizations that train and place people with disabilities in competitive employment.

DISABILITY POLICY

DISABILITY POSITION BACKGROUND:

All aspects of a person's life are affected by federal policy. Federal policy should be directed toward goals which encourage integration -- independence -- and productivity. Disability policy must encourage the inclusion of people with disabilities in all parts of society and should be linked to the more general policies for society as a whole. All of the policies Senator Dole has supported empower people with disabilities to claim their rightful place in society as full participating citizens.

KEY DEBATE POINTS:

EDUCATION:

Nearly 5 million students receive federally-assisted special education services annually and approximately 200,000 students graduate from special education each year. This represents a wise decision in public policy. Further efforts and supports should focus on providing schools with the resources to provide quality services to meet the special needs of all students with disabilities. Quality education will prepare the student with a disability for a productive and independent life in the work force and the community.

EMPLOYMENT:

People with disabilities must have a variety of occupational choices to empower them to pursue productive lives. Job training programs, including vocational rehabilitation programs must focus on achieving appropriate job placements and on providing the necessary on-going supports and assistive technology that people with disabilities may need in order to succeed at work.

TRANSPORTATION:

Transportation is a key to full independence, employment, and full integration in society. For a variety of reasons, including impairment and income, many people with disabilities do not own or have access to an automobile. Lack of accessible transportation remains a major concern for persons with disabilities. As author of the Air Carriers Access Act (P.L. 99-643), airline travel is now accessible by people with disabilities -- and with passage of the ADA all public /private modes of transportation must be accessible to people with disabilities.

HOUSING:

Appropriate, affordable and accessible housing is a major concern for people with disabilities. Even if you are self

sufficient and can afford to buy a home -- finding an accessible home becomes the issue. More and more people are living in their communities and flourishing outside the institutional setting.

INCOME:

Over seven million individuals with disabilities receive Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI) payments and need these programs for basic support. The Harris Poll indicated that two thirds of all people with disabilities between the ages of 16 and 64 are unemployed, but that 66% of those people want to work. A major disincentive to work is that people with disabilities are often faced with discrimination and the possibility of losing other benefits (such as Supplemental Security Disability Income) -- yet their salary might be insufficient to meet their basic needs, especially in the area of health care. Removing the disincentives that prevent people from entering the work force has always

HEALTH CARE:

Continued effort must be made to find the means to prevent disabilities and to implement and fund prevention initiatives. Health care reform and access to health care is not just an issue for people with disabilities, with coverage for preexisting conditions.

DOLE LEGISLATION:

AUTHORED TWO PUBLIC LAWS ON DISABILITY:

P.L. 99-435, Air Carrier Access Act of 1986 which provides protections from discrimination in air travel.

P.L. 99-643, the "Employment Opportunities for Disabled Americans Act" which makes permanent the provisions of Section 1619 of the Social Security Act to enable disabled and blind individuals to continue their Medicaid (health) coverage, even after other cash SSI benefits have been terminated because of high earnings.

Authored a Senate Res. 13 -- requiring that the Senate floor proceedings be closed captioned.

SUPPORTED PASSAGE OF THE FOLLOWING DISABILITY LAWS AND COSPONSORED SUBSEQUENT REAUTHORIZATIONS:

P.L. 100-336 -- Americans with Disabilities Act -- landmark civil rights legislation outlawing discrimination against people with disabilities in employment, public accommodations, transportation and telecommunications

Rehabilitation Act of 1973 -- authorizes support for training and placing persons with mental and physical disabilities into full-time, part-time or supported employment in

the competitive labor market.

Section 504 of the Rehabilitation Act -- prohibits recipients of federal financial assistance from discriminating on the basis of disability.

Individuals with Disabilities Education Act (formerly known as the Education of Handicapped Children's Act) -- requires States to provide students with disabilities a free, appropriate public education in the least restrictive environment, with opportunities for interaction with their nondisabled peers to the maximum extent possible.

Fair Housing Act Amendments of 1988 -- expanded protections against discrimination in housing to include people with disabilities in addition to setting forth standards of accessibility for the new construction of multifamily dwellings.

Voting Accessibility for the Elderly and Handicapped Act of 1984 -- requires that polling places be accessible to people with disabilities.

COMPARISON BETWEEN ORIGINAL AND REVISED
AMERICANS WITH DISABILITIES ACT (ADA)
Prepared by Bob Silverstein (x46265)
Chief Counsel, Subcommittee on the Handicapped
April 28, 1989

Set out below is a summary of the major differences between S. 2345, the Americans With Disabilities Act of 1988 (the original ADA) and the Americans with Disabilities Act of 1989 (the revised version) that will be introduced by Senators Harkin and Kennedy and others.

Definition of Protected Class and Proving Discrimination

Under section 503 section 504 of the Rehabilitation Act of 1973 (affirmative action statute applicable to government contractors and civil rights statute applicable only to recipients of federal financial assistance, respectively), there is a two-step process for proving discrimination. First, an individual must prove that he or she is handicapped (e.g., has a physical or mental impairment that substantially limits a major life activity). Second, there must be showing that he or she is otherwise qualified.

Sections 503 and 504 also include provisions expressly stating that if someone with a contagious disease or someone who is an alcoholic or drug addict poses a direct threat to the health and safety of others, then he or she is not a qualified handicapped person.

The original ADA did not adopt the sections 503 and 504 definitions and section 503 and section 504 approach. The original bill included a broader definition (e.g. a person only had to prove he or she had a physical or mental impairment; there was no need to show that the impairment substantially limited a major life activity). The original bill did not include the provisions regarding persons with contagious diseases and alcoholics and drug addicts. The original bill did not include the definition of the term "otherwise qualified."

The revised ADA generally adopts the section 503 and section 504 definitions and approach.

Employment

Sections 503 and 504 generally require covered entities to make reasonable accommodations for handicapped applicants and employees unless it would pose an undue hardship.

The original ADA rejected this principle and substituted a so-called "bankruptcy" provision under which a recipient would have to provide the accommodation unless it would "threaten the existence of the company."

The revised ADA generally includes the section 503 and section 504 standards.

Currently, title VII of the Civil Rights Act of 1964 has a small provider exception of 15. The original ADA incorporated by reference this small provider provision. The revised ADA also includes this provision.

Public Accommodations.

The original ADA used the definition of "public accommodation" set out in title II of the Civil Rights Act of 1964 (e.g., hotels, restaurants, theaters etc) and required that all existing facilities be retrofitted within two to five years so as to make them fully accessible unless the retrofitting would threaten the existence of the business (the so-called bankruptcy provision).

The original ADA also required that all new facilities be fully accessible. NOTE: Retrofitting of existing facilities to make them fully accessible is often expensive in contrast to making new facilities accessible which usually costs less than 1 percent of the total cost of construction. Further, the original ADA required that public accommodations provide reasonable accommodations unless to do so would threaten the existence of the business (the bankruptcy provision).

The revised ADA reaches all entities that are open to the public as customers, clients, visitors, or which are potentially places of employment.

With respect to existing facilities, the revised ADA only requires structural changes that are "readily achievable" and when not readily achievable the failure to provide alternative methods of making the services available that are readily achievable. An example of "readily achievable" is expending \$100 to build a ramp that will enable a person in a wheelchair to gain access into a Safeway. Expensive modifications are not required.

With respect to the provision of reasonable accommodations, the revised bill requires that they be provided unless it would result in undue burden, which is the current standard in section 504 (the revised bill includes the phrase "auxiliary aids and services" in lieu of the phrase "reasonable accommodation").

With respect to new construction, both the original and the revised bill require that new facilities be made accessible.

Public Services.

The provisions in the original ADA applicable to public services rejected the approach of simply extending the provisions of section 504 to cover all government agencies, regardless of whether or not they receive federal aid. Instead new standards were included such as making all existing facilities fully accessible within 2-5 years.

The revised ADA simply extends section 504 (and current standards applicable thereunder) to cover all state and local government agencies and their programs and activities.

Communications

The original ADA required all those engaged in the business of broadcasting to close-caption progressively more shows each year. The original ADA also directed the FCC to issue regulations calling for the establishment of interstate and intrastate relay systems under which a deaf person using a TDD can speak to an operator who has a TDD and who can communicate by voice with a person who does not have a TDD.

The revised bill reaffirms and clarifies the provisions in the original ADA applicable to relay systems and deletes the provisions applicable to captioning.

Transportation.

The original ADA required that 50% of a public transit authority's fleet be accessible within 7 years (likelihood of significant retrofitting) and that all new buses be accessible. The revised ADA requires that new buses used in a fixed route system be accessible. No retrofitting is required.

The revised ADA also permits a transit authority to purchase used buses that are not accessible if the transit authority has demonstrated a good faith effort to purchase a used bus that is accessible.

Both the original ADA and the revised ADA require a paratransit system be made available for those disabled individuals who cannot use the mainline system. Further, both versions require that new facilities be made accessible.

The revised ADA also has a separate standard for communities that have a demand responsive system for the general public. Under this standard, all new buses need not be accessible if the transit authority can demonstrate that it can meet the needs of disabled people with current accessible buses.

With respect to rail systems, the original ADA required that 50% of existing cars be made accessible within 7 years (requiring extensive retrofitting); in contrast the revised ADA requires that at least one car be made accessible within 5 years. Further, under the original ADA all stations would have to be made accessible within 10 years; in contrast under the revised ADA only key stations must be made accessible within 20 years.

The original ADA covered airplanes; the revised ADA does not. The original ADA covered taxicabs; the revised ADA does not require that cabs be made accessible but prohibits a driver from refusing to pick up a disabled person who can use a car.

Enforcement

The original ADA included an enforcement provision that applied to the entire Act. The provision provided for injunctive and monetary damages.

The revised bill has a separate enforcement section for each title. With respect to employment, the revised bill incorporates by reference the enforcement provisions in title VII of the Civil Rights Act of 1964 and for acts of intentional discrimination, section 1981 of the Civil Rights Act of 1866.

With respect to public services, the revised bill incorporates by reference the provisions of section 505 of the Rehabilitation Act (the enforcement provisions generally applicable to section 504).

With respect to public accommodations and communications, the revised bill generally incorporates the enforcement provisions in the Fair Housing Act, as recently amended.

Attorneys fees provision are included in both versions.

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SUMMARY OF THE AMERICANS WITH DISABILITIES ACT OF 1989

FINDINGS AND PURPOSE

The purpose of the Act is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities; provide protection against discrimination comparable to that afforded to minorities and others; and provide enforceable standards addressing discrimination against individuals with disabilities.

DEFINITIONS

The term "disability" is defined to mean, with respect to an individual- a physical or mental impairment that substantially limits one or more of the major life activities of such individual, a record of such an impairment, or being regarded as having such an impairment. This is the same definition used for purposes of section 504 of the Rehabilitation Act of 1973 and the recent amendments to the Fair Housing Act.

TITLE I: GENERAL PROHIBITION AGAINST DISCRIMINATION

Title I sets out the general forms of discrimination prohibited by the Act. It is considered discriminatory to subject an individual, directly or indirectly, on the basis of disability, to any of the following:

- (1) denying the opportunity to participate in or benefit from an opportunity;
- (2) affording an opportunity that is not equal to that afforded others;
- (3) providing an opportunity that is less effective than that provided to others;
- (4) providing an individual or class of individuals with an opportunity that is different or separate, unless such action is necessary to provide the individuals with an opportunity that is as effective as that provided to others;
- (5) aiding or perpetuating discrimination by providing significant assistance to others that discriminate;
- (6) denying an opportunity to participate as a member of boards or commissions; and
- (7) otherwise limiting an individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others.

For purposes of the Act, for an aid, benefit, or service to be equally effective, an entity must afford an individual with a disability equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement in the most integrated setting appropriate to the individual's needs.

Further, an entity may not directly or indirectly use criteria or methods of administration that have the effect of subjecting an individual to discrimination on the basis of disability or perpetuate discrimination by others who are subject to common administrative control or are agencies of the same State. Nor can an entity discriminate against an individual or entity because of the association of that individual or entity with another individual with a disability.

Title I also sets out several defenses to allegations of discrimination. It is not considered discrimination to exclude or deny opportunities to an individual with a disability for reasons entirely unrelated to his or her disability. Further, it is not discrimination to exclude or deny opportunities to an individual with a disability based on the application of qualification standards or other criteria that are shown by a covered entity to be both necessary and substantially related to the ability of the individual to perform or participate or take advantage of an opportunity and such participation cannot be accomplished by applicable reasonable accommodations, modifications, or the provision of auxiliary aids or services.

Qualification standards may include requiring that the current use of alcohol or drugs by an alcohol or drug abuser not pose a direct threat to property or the safety of others in the workplace or program; and requiring that an individual with a currently contagious disease or infection not pose a direct threat to the health or safety of other individuals in the workplace or program. These defenses are comparable to the defenses currently available under section 504 of the Rehabilitation Act of 1973.

TITLE II: EMPLOYMENT

The provisions in title II of the Act use or incorporate by reference many of the definitions in title VII of the Civil Rights Act of 1964 (employee, employer, Commission, person, labor organization, employment agency, joint labor-management committee, commerce, industry affecting commerce). The scope of the bill is identical i.e., only employers who have 15 or more employees are covered.

A "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or

desires. This definition is comparable to the definition used for purposes of section 504.

Using the section 504 legal framework as the model, the bill specifies that no entity covered by the Act shall discriminate against any qualified individual with a disability because of such individual's disability in regard to application procedures, the hiring or discharge of employees and all terms, conditions and privileges of employment.

Thus, discrimination includes, for example, the failure by a covered entity to make reasonable accommodations to the known limitations of a qualified individual with a disability unless such entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business. Discrimination also includes the denial of employment opportunities because a qualified individual with a disability needs a reasonable accommodation.

The definition of the term "reasonable accommodation" included in the bill is comparable to the definition in the section 504 legal framework. The term includes: making existing facilities accessible, job restructuring, part-time or modified work schedules, reassignment, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations and training materials, adoption or modification of procedures or protocols, the provision of qualified readers and interpreters, and other similar accommodations.

Discrimination also includes the imposition or application of qualification standards and other criteria that identify or limit a qualified individual with a disability unless such standards or criteria can be shown by such entity to be necessary and substantially related to the ability of an individual to perform the essential functions of the particular employment position.

Consistent with title VII of the Civil Rights Act of 1964, every covered entity must post notices in an accessible format describing the applicable provisions of this Act. The Commission is also directed to promulgate regulations within 180 days in an accessible format.

* { The bill incorporates by reference the remedies and procedures set out in section 706, 709, and section 710 of title VII of the Civil Rights Act of 1964. The bill also incorporates the remedies and procedures available under section 1981 of the Civil Rights Act of 1866 for acts of intentional discrimination. *unlawful intentional*

TITLE III: PUBLIC SERVICES

Section 504 only applies to entities receiving Federal financial assistance. Title III of the bill makes all activities of State and local governments subject to the types of prohibitions against discrimination against a qualified individual with a disability included in section 504 (nondiscrimination) and section 505 (the enforcement procedures).

A "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies and practices, or the removal of architectural, communication, and transportation barriers or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a State or agency or political subdivision of a State or board, commission or other instrumentality of a State and political subdivision.

Title III also specifies the actions applicable to public transportation (not including air travel) provided by public entities that are considered discriminatory. The term "public transportation" means transportation by bus or rail, or by any other conveyance (other than air travel) that provides the general public with general or special service (including charter service) on a regular and continuing basis.

1. New fixed route buses of any size and rail vehicles for which a solicitation is made later than 30 days after the date of enactment of this Act must be readily accessible to and usable by individuals with disabilities. No retrofitting of existing buses is required.

2. Used vehicles purchased or leased after the date of enactment need not be accessible but a demonstrated good faith effort to locate a used accessible vehicle must be made.

3. Vehicles that are re-manufactured so as to extend their usable life for five years or more must, to the maximum extent feasible, be readily accessible to and usable by individuals with disabilities.

4. In those communities with fixed route public transportation, there must also be a paratransit system to serve those individuals with disabilities who cannot use the fixed route public transportation and to other individuals associated with such individuals in accordance with service criteria established by the Secretary of Transportation.

5. Communities that operate a demand responsive system that is used to provide public transportation for the general public (nondisabled and disabled) must purchase new buses for which a solicitation is made 30 days after the date of enactment of the Act that are accessible unless the system can demonstrate that the system, when viewed in its entirety, provides a level

of service equivalent to that provided to the general public; in which case all newly purchased vehicles need not be accessible.

6. All new facilities used to provide public transportation services must be readily accessible to and usable by individuals with disabilities.

7. When alterations are made to existing facilities one year after the date of enactment that affect or could affect the usability of the facility, the alterations, the path of travel to the altered area, the bathrooms, telephones, and drinking fountains serving the remodeled area must be, to the maximum extent feasible, readily accessible to and usable by individuals with disabilities.

8. A mass transportation program or activity, when viewed in its entirety, must be readily accessible to and usable by individuals with disabilities. All stations in intercity rail systems and key stations in rapid rail, commuter rail and light rail systems must be made readily accessible as soon as practicable but in no event later than 3 years after the date of enactment of this Act except that the time limit may be extended by the Secretary of Transportation up to 20 years for extraordinary expensive structural changes to, or replacement of, existing facilities necessary to achieve accessibility.

9. Intercity, light rail, rapid, and commuter rail systems must have at least one car per train that is accessible as soon as practicable, but in any event in no less than five years.

The bill directs the Attorney General to promulgate regulations within 180 days in an accessible format that implement the provisions generally applicable to state and local governments. These regulations must be consistent with the coordination regulations issued in 1978 that governed the regulations applicable to recipients of Federal financial assistance. The Secretary of the Department of Transportation is also directed to issue regulations in an accessible format that include standards which are consistent with minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board.

TITLE IV: PUBLIC ACCOMMODATIONS AND SERVICES OPERATED BY PRIVATE ENTITIES

Title IV specifies that no individual shall be discriminated against in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, on the basis of disability.

The term "public accommodation" means privately operated establishments that are used by the general public as customers, clients, or visitors or that

are potential places of employment and whose operations affect commerce. Examples of public accommodations include: auditoriums, theaters, restaurants, shopping centers, hotels, terminals used for public transportation, office buildings and recreation facilities.

Examples of discrimination include the following:

-The imposition or application of eligibility criteria that identify or limit an individual with a disability.

-A failure to make reasonable modifications in rules and policies and procedures when necessary to afford meaningful opportunity unless the entity can demonstrate that the modifications would fundamentally alter the nature of the program.

-A failure to provide auxiliary aids and services unless the entity can demonstrate that such services would result in undue burden. Auxiliary aids and services include: qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments; qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments; acquisition or modification of equipment or devices; and other similar services and actions.

-A failure to remove architectural and communication barriers that are structural in nature in existing facilities and transportation barriers in existing vehicles where such removal is readily achievable; and, where the entity can demonstrate that such removal is not readily achievable, a failure to provide alternative methods.

-With respect to a facility that is altered one year after the effective date of the Act, the failure to make the alterations in a manner that, to the maximum extent feasible, the altered portion, the path of travel to the altered area, and the bathrooms, telephones, and drinking fountains serving the remodeled area are readily accessible to and usable by individuals with disabilities.

-A failure to make facilities designed and constructed later than 30 months after the date of enactment readily accessible to and usable by individuals with disabilities except where an entity can demonstrate that it is structurally impracticable to do so in accordance with standards set forth or incorporated by reference in regulations.

-A failure by a public accommodation to provide a level of transportation services to individuals with disabilities equivalent to that provided for the general public and a refusal to purchase or lease vehicles

that carry in excess of 12 passengers for which solicitations are made later than 30 days after the date of enactment which are readily accessible to and usable by individuals with disabilities.

The bill also includes a specific section prohibiting discrimination in public transportation services (other than air travel) provided by private entities. In general, no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of public transportation services provided by a privately operated entity that is primarily engaged in the business of transporting people (but not in the principal business of providing air transportation) and whose operations affect commerce.

Examples of discrimination include:

-the imposition or application of eligibility criteria that identify or limit an individual with a disability;

-a failure to make reasonable modifications to criteria, provide auxiliary aids and services, and remove barriers consistent with the standards set out above;

- new vehicles (other than automobiles) purchased 30 days after the date of enactment must be made accessible. Because there is no requirement that cars be made accessible, new taxicabs are not required to be made accessible. Taxicab companies are liable, however, if their drivers refuse to pick up an individual with a disability.

The bill incorporates by reference the provisions in the Fair Housing Act, as recently amended, authorizing enforcement by private persons in court (section 813) and enforcement by the Attorney General (section 814(a)). Regulations must be issued in an accessible format by the Attorney General and by the Secretary of Transportation, consistent with the provisions applicable to public agencies under title III.

TITLE V: COMMUNICATIONS

Title V specifies that it is considered discrimination for a common carrier that offers telephone services to the general public to fail to provide, within one year after the date of enactment of this Act, interstate and intrastate telecommunication relay services so that such services provide individuals who use non-voice terminal devices because of their disabilities opportunities for communications that are equal to those provided to persons able to use voice telephone services. Nothing in this title is to be construed to discourage or impair the development of improved or future technology designed to improve access to telecommunications services for individuals with disabilities.

DISABILITY RIGHTS WORKING GROUP

Working Paper #1

Concerns with the Americans With Disabilities Act

INTRODUCTION

The Americans with Disabilities Act, introduced on May 9, 1989, is comprehensive legislation whose expressed objective is to extend the same protections against discrimination enjoyed by other protected groups to those with disabilities.

Though supportive of many of the concepts embodied in the ADA, the Disability Rights Working Group -- a coalition of businesses and trade associations -- is opposed to the ADA in its present form. Discussions have been held with representatives of the disability community, Congress and the Administration in an effort to fashion legislation we can all embrace. However, unless changes are made, particularly in the area of remedies, the Group will seek to defeat S. 933/H.R. 2273.

CONCERNS WITH LEGISLATION

Listed below are summaries highlighting some of the Group's concerns with the ADA, all of which have been communicated to the parties. There are two levels of concern with the legislation: first, the issues relating to enforcement and remedies; and second, all others. We have made it clear that resolution of the former is absolutely essential to further negotiation, without which the Group will seek defeat of the bills. That should not, however, be interpreted to mean that resolving the threshold concerns alone would be acceptable.

THRESHOLD ISSUES

Enforcement/Remedies. In addition to the remedies, administrative procedures and defenses available under Title VII of the Civil Rights Act of 1964 -- for which there is an extensive body of law and successful experience regarding cases alleging discrimination based on race, sex, religion and national origin -- the ADA, in §205, provides a second, separate track of enforcement that would permit a jury trial, and punitive and compensatory damages, *i.e.*, pain and suffering. The second track must be eliminated.

Anticipatory Discrimination. Section 205 of the ADA would also provide relief to individuals who believe they "are about to be" discriminated against. Such speculative complaints and attendant litigation are not permitted in any other civil rights in employment legislation and should be eliminated from the ADA.

GENERIC ISSUES

Enforcement Duplication/Consistency with Rehabilitation Act. A significant number of employers are currently subject to Sections 503 and/or 504 of the Rehabilitation Act of 1973, as amended, that prohibit discrimination against persons with disabilities. The ADA would impose additional, in some cases, conflicting obligations on these employers. The ADA is silent as to situations where employers are faced with inconsistent standards and duplicative enforcement by various federal agencies. Compliance with Section 503 or 504 standards should be deemed to be in compliance with the ADA.

Failure versus Refusal to Act. The lack of distinction between intentional and unintentional discrimination will penalize employers for inadvertent errors in their attempts to abide by new, affirmative obligations imposed by the ADA. Discrimination should be defined as "refusal" or "willful failure" to act.

Reasonable Accommodation and Undue Burden. As defined in §1, there is no limitation on the lengths to which one must go to provide reasonable accommodation, though it is limited in §101 (b) (Defenses) as not requiring an "undue burden," which itself is undefined. In the absence of the definition, does this connote that "undue burden" means anything that threatens a firm's existence? Further, under §202(b)(2), it would be discriminatory not to hire an individual on the basis of the need for reasonable accommodation, not limited in this context by a defense of "undue burden." Thus, an employer could not offer the defense of undue burden in response to an allegation of refusal of hire because on the need for reasonable accommodation. In order

that employers and others understand the bounds of their obligations, reasonable accommodation should be defined not to require fundamental alterations or result in undue financial or administrative burdens and include a definition of "undue burden." Codification of relevant Section 504 regulations and additional information regarding obligations would provide needed guidance.

Incentives. While it is argued that, as a civil rights law, the costs attendant to compliance with the ADA are irrelevant, no other civil rights statute requires a private employer, who is not a federal contractor or grantee, to expend substantial resources on affirmatively accommodating a protected class. In some instances, the costs will be significant and burdensome, particularly on smaller businesses. As introduced, the ADA contains no incentive to encourage and assist employers to make expenditures to increase opportunities for individuals with disabilities. The tax deduction of \$35,000/year permitted under §190 of the Internal Revenue Code for removal of architectural barriers should be increased and expanded to defray the costs incurred in providing reasonable accommodation or auxiliary aids and services that would be required by the ADA.

TITLE I – GENERAL PROHIBITIONS

Drug/Alcohol Abuse. The bill, in §101(b)(2)(A), appears to limit an employer's ability to adopt and implement a drug-free workplace policy by protecting current abusers of alcohol/illegal substances except where it can be demonstrated that such use constitutes a direct threat to property and/or safety. In view of federal and Congressional policy on drug-free workplaces, this provision should be revised to eliminate current contradictions, to clarify that nothing in the ADA is intended to protect current abusers, and to protect the right of employers to implement "zero-tolerance" policies concerning substance abuse.

Overlap Between Titles I and II. It is unclear what additional burdens are imposed on employers in Title I which are not included in Title II which governs the employment relationship. As currently constructed, drafters of the ADA have lifted regulations implementing Section 504 (which are targeted to federal grant recipients) and simply added the term "job" so that they now would apply to employment. In doing so, new, broad and ambiguous terms are used that have no historical interpretation. When, for example, is one job considered "as effective as" another? The term "job" should be deleted wherever it appears in Title I and it should be made clear that employment discrimination is controlled exclusively by Title II.

Discrimination by Assistance. The ADA would hold an employer or other entity liable if the recipient of its charity or assistance discriminates on the basis of disability, whether or not there is knowledge of such discrimination. Section 101(a)(1)(E) should be amended to reflect that such act is illegal only where the provider knows of the discrimination.

Discrimination Based on Association. The ADA would make it illegal to discriminate against an individual because of the "relationship to, or association of, that individual or entity with another individual with a disability." This is unparalleled in civil rights law and will invite frivolous lawsuits requiring employers to prove a negative, *i.e.*, that they weren't aware of the association. Section 101(a)(5) should be deleted.

Discrimination in Benefits. As drafted, Title I creates incredible new liabilities for employers if they provide disabled persons with a benefit which is "less effective than" or "is different or separate" from that provided to others (*e.g.*, §101(a)(1)(C) & (D)). Group health insurance benefits, which are offered under the same terms and conditions to all employees, may still be "less effective" or "separate or different" for a person with disabilities. Employers should only be obligated to offer the same benefits package to all employees, whether or not they are disabled. To require otherwise, *e.g.*, provide specific medical coverage or purchase medical insurance with pre-existing condition waivers, would be prohibitively expensive and result in insurance companies being unable to provide and/or underwrite group health policies.

Good Faith Efforts. Despite their good faith efforts, employers will be placed in a "Catch 22" position by the conflicting requirements of §101(a)(1)(d) -- provide "different or separate" programs/activities that are "as effective as [those] provided to others" -- and §101(a)(3) -- a disabled person "shall not be denied the opportunity to participate in such programs or activities that are not separate or different." There should be recognition in the ADA of employer good faith efforts to make accommodations to those with disabilities. It is a well recognized concept under current civil rights law and should be incorporated in the ADA.

Consistency with Existing Law. Section 101(a)(4) seems to adopt the adverse impact theory for proving discrimination against persons with disabilities. It is not clear whether the authors intend to follow or overturn *Alexander v. Choate* as it relates to application of the adverse impact theory of discrimination. The Committee Report should indicate the intent of authors to follow *Choate*, in which Supreme Court Justice Marshall discussed the appropriate application of adverse impact theory.

Defenses. The inclusion in Title I of defenses would seem to limit the defenses that would otherwise be available under the Act. There is an adequate body of law under the Civil Rights and Rehabilitation Acts concerning the defenses available to an employer in cases of discrimination and §101(b)(1) should be deleted. Title II should be amended to provide that the defenses, as well as the procedures and remedies, of the Civil Rights Act of 1964 apply in actions brought under the ADA.

TITLE II -- EMPLOYMENT

Coverage. The ADA imposes substantial new burdens on employers, particularly for smaller employers. Coverage under Title II should be phased-in, as it was with the Civil Rights Act of 1964, over a five-year period with the threshold starting at 100 employees the first year and dropping each year. This same approach should be employed with regard to Title IV to provide a reasonable time to make changes to physical and procedural barriers.

Discrimination. The definition of discrimination in §202(a) is inconsistent with that in Section 504. To conform the ADA, an employment action is not discriminatory against an "otherwise" qualified individual unless it is "solely" based on an individual's disability. The term "solely" appears in Section 504 itself. Its absence in the ADA will be interpreted by the courts as a deliberate change in the law.

Job Applications. Section 202(a) uses a new term, "job application procedures," which differs from the language found in regulations issued under Section 504 concerning the application process, "processing applications for employment." Absent some specific reason for changing the language of Section 504 regulations, this raises questions about whether it will require something other than the Rehabilitation Act. This is particularly important because under Section 503, employers are required to follow certain procedures that permit an applicant with a disability to identify themselves to the employer and to discuss the possible need for an accommodation. The new wording suggests that the ADA might prohibit or limit these same procedures.

Selection Criteria. Section 202(b) goes beyond Section 504 regulations by limiting an employer's use of qualification standards, tests, etc., that "identify" individuals with disabilities, such as physicals, even if the identification doesn't lead to an adverse employment decision. The word "identify" must be deleted. Use existing Section 504 language to permit use of selection criteria but insure that the criteria don't discriminate against individuals solely on the basis of their disability unless the criteria are job-related.

Notice. Section 203 requires notices to be "posted." This is somewhat problematic, for example, for a vision impaired person. The requirement that notice be provided in accessible formats would allow flexibility to use the best means available.

TITLE IV -- PUBLIC ACCOMMODATIONS AND SERVICES OPERATED BY PRIVATE ENTERPRISES

Public Accommodations. As defined in §401(1)(A)(II), a public accommodation includes "potential places of employment." Since there is no limitation based on employment size in Title IV, the definition would extend almost universal coverage to the requirement of accessibility. As with Title II, the scope should be phased-in consistent with the scope of the Civil Rights Act and the ADA as introduced in the 100th Congress.

Readily Achievable. Section 402(b)(4)(A) & (B) introduces a new and undefined term not found in existing law, "readily achievable." A definition of readily achievable should be added to §401.

Retrofitting Existing Structures. Under §402(b)(5), there is no threshold as to when an existing structure must be retrofitted, a process -- limited only by structural impracticability -- that is prohibitively expensive

and for which existing tax code provisions (§190) only allow a deduction of \$35,000 per year. Further, there is no indication to whom the liability for retrofitting accrues, *i.e.*, the lessee or lessor, and the time-frame of one year for changes is unrealistic. It is unreasonable to require the retrofit of structures that were originally built to code unless the requirement is limited to instances where renovations of a certain magnitude, *e.g.*, 50% of building value, are contemplated. Section 190 of the Internal Revenue Code should be revised, not only in terms of the dollar maximum but also expanded to include all expenditures associated with accommodating those with disabilities. Finally, a realistic phase-in period must be established together with placing responsibility for retrofitting on the building owner.

Transportation. The requirement that all new vehicles with capacity in excess of 12 passengers be fully accessible ignores reality and fails to provide for paratransit. In most instances, the situations addressed are services such as hotel to airport limos which can readily accommodate the needs of the disabled through on-demand paratransit. Section 402(b)(7)(B) should be eliminated.

Public Transportation. The requirements of §403 to make all intercity transportation fully accessible are not based on any demonstrated need and are unwarranted. Rather than preordain the demise of this sector of the transportation industry, the Department of Transportation or some other agency of the executive or legislative branch of government should be directed to first determine if there is a need that is not currently being met.

Standards. Section 404(c) requires the Architectural and Transportation Barriers Compliance Board to establish minimum guidelines and requirements for accessibility standards. In the spirit of building on experience under Section 504, the standards should not impose greater obligations than those contained in standards issued by the American National Standards Institute (ANSI A117.1) and be consistent with Section 504 requirements at 45 CFR 84.23.

Enforcement. As with the enforcement mechanism under Title II, the remedies available under Title IV, §405, should be limited to those available to other protected classes, *i.e.*, Civil Rights Act of 1964 and Rehabilitation Act of 1973.

TITLE VI -- MISCELLANEOUS PROVISIONS

Effective Date. As set forth in §606 of the ADA, the Act would become effective on date of enactment and provide no time for employers and other entities to familiarize themselves with its provisions. The Act should have a delay in the effective date of one year and provide for education and technical assistance programs.

Insurance Underwriting. In its present form, the ADA does not directly address insurance and questions or ambiguity may arise regarding its application to the insurance industry, particularly as it concerns employee benefit plans. Section 601 should be amended to make clear that the intent of Congress is not to disrupt the current nature of insurance underwriting. Specifically, the new subsection would (1) clarify that insurers could continue to sell to and underwrite individuals applying for life/health insurance on an individual basis, and (2) reflect, as does the Age Discrimination in Employment Act, the need for employers to establish and observe the terms of employee benefit plans so long as the plans are not a subterfuge to evade the terms of the ADA.

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DISABILITY RIGHTS WORKING GROUP

Issue Paper #2

THE ADA ENFORCEMENT PROCESS

The enforcement provision in the proposed ADA has been the subject of much criticism because of the manner in which claims of discrimination would be resolved. The focus of the criticism has been the fact that the ADA would incorporate, by reference, the "procedures and remedies" of Section 1981, a post-civil war act aimed at prohibiting and punishing race discrimination.

Unlike the equal employment opportunity laws passed during the past 25 years, Section 1981 was not specifically designed to deal with issues of employment discrimination. Incorporating the procedures and remedies of that statute into the enforcement section of the ADA would create a law which differs in three significant ways from modern EEO laws.

First, Section 1981 provides for litigation as the initial step in resolving a dispute. This is different from modern EEO laws which generally require a litigant to first proceed through an administrative process in an effort to promote voluntary resolution of the matter, with lawsuit being the avenue of last resort.

Second, Section 1981 provides for an award of damages which goes well beyond the back pay damages common to employment discrimination cases under modern laws such as Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, sex, national origin, and religion. This potential for *windfall damages* tends to discourage litigants from accepting reasonable settlement offers, and it encourages lawyers and their clients to take their chance at trial in the hope of winning a million dollar verdict.

Finally, once in court, Section 1981 provides the option for a *jury trial*, unlike Title VII, which provides for trial before a judge in cases alleging employment discrimination.

THE COURT HOUSE IS THE FIRST STOP

By including section 1981 procedures in the ADA, the drafters provide individuals with a means of circumventing the administrative process which has been critical to the success of Title VII of the Civil Rights Act of 1964, believed by many to be the most effective employment discrimination law on the books. The "procedures" under Section 1981 are simple: A person needs only to walk into the court house and file a lawsuit. This approach is in sharp contrast to Title VII which requires litigants to at least give the administrative process a chance to resolve the dispute before it becomes a lawsuit. The Title VII procedures are built upon the practical notion that the primary intent of an EEO law is the creation of employment opportunities. Thus, under Title VII it is considered preferable to resolve disputes through a prompt, fair conciliation which leads to a job opportunity than to resolve matters through a lawsuit which, years after the incident, provides a windfall monetary verdict as a way of punishing the employer.

THE TRIAL AS A LOTTERY

Recent news reports have highlighted the fact that in certain states plaintiffs are now selling shares to those who wish to "invest" in the lawsuit in the hope of sharing in the plaintiff's verdict or settlement award. The ADA, by including Section 1981 procedures and remedies, would promote a similar "lottery" or "windfall" attitude with respect to litigation of disability discrimination claims.

The Section 1981 remedies would allow a litigant to win a full range of compensatory damages -- such as an award of money for pain and suffering -- as well as punitive damages, designed solely for the purpose of punishing the employer.

Typically, in awarding such damages, the attorney seeking a large damage award asks the jury to envision the injury the plaintiff has had to endure and to then try to calculate a sum that will adequately compensate

the individual for that injury. The jury may then be asked to award punitive damages, based upon the defendant's overall net worth. The results can be staggering. In a well-publicized case several years ago in Colorado, a jury returned a \$17 million verdict against a large retailer in an age discrimination case. That decision was subsequently overturned on appeal. But, nonetheless, it demonstrates the "sky is the limit" attitude which compensatory and punitive damages can bring to employment discrimination lawsuits.

The simple availability of such damages, and the mere possibility of such a windfall award, is a significant factor long before the case reaches the trial stage. The potential for a windfall encourages the litigant and his or her attorney to reject reasonable settlement offers in favor of "taking a shot" at the brass ring and winning millions of dollars. This is in contrast to the Title VII approach which focuses on creating employment opportunities and providing back pay for an individual who was the victim of illegal discrimination.

SYMPATHY/PREJUDICE IN THE COURTROOM

Under Section 1981 procedures, the case may be decided, and the damages may be awarded by a jury, rather than a judge. While our society recognizes the value which a jury can bring to the process of deciding lawsuits, it is also recognized that in certain situations the facts before a jury can have an emotional impact so strong that it is likely to interfere with the jury's deliberations and prejudice one of the litigants. Clearly, in the area of disability cases, the potential for such prejudice is high. In this area of the law, plaintiffs obviously will be individuals with disabilities. Is it realistic to think that jurors will be able to decide the case without being affected one way or the other by the fact? The only sensible approach is the approach followed by Title VII. In those cases where the parties are unable to work out their differences through the administrative process and end up in court, such decisions are best left to judges who can better view the facts without any cloud of sympathy for or prejudice against the litigants.

July 1989

OVERVIEW OF THE AMERICANS WITH DISABILITIES ACT OF 1989

Purpose

The purpose of the Americans with Disabilities Act of 1989 (ADA) is to "establish a clear and comprehensive prohibition of discrimination on the basis of disability." Currently such a prohibition applies to the Executive Branch, Federal contractors and recipients of Federal financial assistance through title V of the Rehabilitation Act and to matters related to the sale and rental of housing through the Fair Housing Amendments of 1988. **The ADA (H.R. 2273 and S. 933) would extend the prohibition against discrimination on the basis of disability to the private sector and to state and local governments in such areas as -- employment, public services provided by state and local governments, public accommodations and services provided by private entities, and telecommunications relay services.** It is viewed as an extension of civil rights similar to those now available on the basis of race, national origin, and religion through the Civil Rights Act of 1964.

Definitions

The definition for disability is the same as that contained in section 504 of the Rehabilitation Act and in the Fair Housing Amendments of 1988. With respect to an individual, the term disability means -- a physical or mental impairment that substantially limits one or more of the major life activities; a record of such an impairment; or **being regarded as having such an impairment.**

The term "qualified individual with a disability" is defined further in title II pertaining to employment to *mean an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position the individual holds or desires.* A similar clarification for "qualified individual with a disability" is contained in title III pertaining to public services provided by state and local governments and is defined to mean --

an individual who with or without reasonable modifications to rules, policies, and practices, the removal of architectural, communication, and transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements...for services....

Discrimination

Discrimination is construed differently in titles I through V of the ADA to accommodate the different foci in each. For example, in title I which addresses general prohibitions against discrimination, discrimination is viewed as denying opportunities, providing an opportunity that is not equal to or as effective as that provided to others, or helping others to perpetuate the same forms of discrimination.

Under title II which relates to employment, discrimination includes the failure to provide reasonable accommodation; to hire someone because he/she needs such accommodation; or the application of qualification standards, tests, or eligibility criteria that identify or limit individuals on the basis of disability.

Title III, Public Services, addresses principally transportation systems and facilities associated with such systems, and thus construes discrimination as the failure to make such systems and facilities accessible to individuals with disabilities, including those in wheelchairs.

Title IV, Public Accommodations and Services Operated by Private Entities covers privately operated establishments -- auditoriums, convention centers, stadiums, theaters, restaurants, shopping centers, inns, hotels and motels. Discrimination is construed in terms similar to those found in titles I and III.

Title V applies to telecommunications relay services offered by private companies, and includes services regulated by states. Discrimination is viewed as the failure to provide access to nonvoice terminal devices to those who cannot use the conventional telephone system.

Standards of Compliance

The ADA provides exemptions and conditions for compliance that vary across titles. For example, title I allows for qualification standards that require the current use of alcohol or drugs, by an abuser of such substances, not pose a direct threat to the property and safety of others; or that an individual with a contagious disease or infection, not pose a direct threat to the health or safety of others.

Elected officials and their staff, nonprofit entities, and entities that employ less than 15 individuals are exempt from coverage under title II. In addition, an employer is not required to make reasonable accommodation for an individual on the basis of disability, if such an employer can demonstrate that it would constitute an undue hardship on the operation of the business. Finally, special standards and criteria that may discriminate against an individual on the basis of disability may be used if an employer can demonstrate that they are necessary and substantially related to the ability of an individual to perform the essential functions of the position.

Under title III no retrofitting of buses is required, but all new vehicles and remanufactured vehicles with a life of more than five years must be accessible. In the purchase of used vehicles only a good faith effort must be demonstrated. All new facilities and those subject to alterations must be made accessible. Intercity, rapid, light, and commuter rail systems must be accessible within five years. Key stations must be made accessible within 3 years, but the Secretary of Transportation may give waivers for up to 20 years for extraordinarily expensive structural alterations.

Under title IV, private entities may be exempted if they can demonstrate that making reasonable accommodation would fundamentally alter the nature of privileges, advantages, and accommodations; that providing auxiliary aids constitutes an undue burden; or that removing a barrier and providing an alternative are not readily achievable. Facilities that are altered, to the maximum extent feasible, must be accessible and new facilities that would be occupied 30 months after enactment must be accessible. New vehicles that carry more than 12 individuals must be accessible.

Under title V dealing with telecommunications relays, compliance by covered entities is required within one year of enactment of the ADA.

Remedies and Procedures

Remedies and procedures vary both within and across titles, encompassing the full range from injunctive relief and attorney's fees to compensatory and punitive damages. In addition, title V alone allows for administrative actions as well as individual suits. Finally, the ADA calls for the development of regulations by varying Federal entities, including the EEOC, the Departments of Transportation and Justice, and the Federal Communications Commission. The variety in remedies and procedures throughout the ADA may cause multiple interpretations in the area of enforcement.

Further, the ADA would not preempt other disability laws that may be applicable to the same extent as the ADA. Thus, an employer could possibly be subject to different suits in different forums under different standards of compliance although the underlying facts giving rise to the disability discrimination claim were the same.

May 23, 1989

AMERICANS WITH DISABILITIES ACT OF 1989 MAJOR PROBLEMS

1. Definition of disability -- The ADA includes a provision which would allow an individual, "regarded as having an impairment," to be considered an individual with a disability. Although such a provision is contained in other legislation that prohibits discrimination on the basis of disability, it would appear to allow very expansive coverage of individuals and classes of individuals, such as those suspected of having AIDS.

2. Equal treatment standard -- The ADA requires that equal and as effective means be offered to an individual with a disability so that such an individual may achieve the same result or outcome as other individuals. This appears to be a very rigorous standard that would not allow for a covered entity to offer a comparable treatment/service/opportunity for an individual to achieve a comparable, rather than the same, outcome. It is unclear how this standard would affect, and possibly restrict, efforts to provide reasonable accommodation.

3. Coverage of individuals who are alcohol and drug abusers and those with contagious diseases or infections -- The ADA would prohibit discrimination against such individuals unless they posed a direct threat to the property and safety or health and safety, respectively, of others in the workplace. (This provision is contained only in title I which addresses general prohibitions.) The alcohol and drug provision would seem to potentially conflict with legislation requiring a drug free workplace. The provision pertaining to contagious disease or infection would extend coverage to individuals with AIDS or regarded as having AIDS.

4. Anticipated discrimination -- The ADA would allow an individual to sue if he/she was discriminated against on the basis of disability or *believes he/she is about to be discriminated against on such a basis*. It is unclear how a case of *anticipated discrimination would be proved or disproved*.

5. Access to varied and multiple penalties -- The ADA would allow an individual who successfully sues because of discrimination on the basis of disability, to obtain injunctive, and possibly compensatory; relief and attorney's fees, and/or compensatory and punitive damages, in employment cases and those involving public accommodations and services operated by private entities; to obtain injunctive relief and attorney's fees in cases involving public services (likely to be transportation cases); and to seek individual cause of action (injunctive relief and attorney's fees, and/or compensatory and punitive damages) or administrative action (which would include cease and desist orders and fines), in cases involving telecommunications relay services. Having such a range of penalties may lead to severe opposition to the legislation, and, if enacted, full employment for attorneys and inconsistency in interpretation of the law.

6. Allowance of suits in cases of both intentional and unintentional discrimination -- Because of the phrase "fail to..." in the provisions which define discrimination (for example, fail to provide opportunity, access, reasonable accommodation etc.), it is likely that covered entities would be subject to suits involving either kind of discrimination. "Fail to" does not require conscious intent, it just requires that an action or the failure to act has the effect of discrimination. Other language in the ADA also appears to prohibit practices with an adverse impact, regardless of intent, on individuals with disabilities. It would seem appropriate to limit the right to sue in cases of unintentional discrimination to specific circumstances where covered entities have experience, knowledge, and resources that would allow them to avoid such discrimination.

7. Inclusion of section 504 references in ADA -- Section 504 of the Rehabilitation Act prohibits discrimination on the basis of handicap by recipients of Federal financial assistance. The ADA includes references to section 504 in its provisions pertaining to transportation. The reason for such references is unclear. Do the references to section 504 in the ADA change standards related to transportation that now apply to recipients of Federal financial assistance covered by section 504?

8. Burden of proof -- The ADA appears unclear on where the burden of proof lies in most titles. Such lack of clarity needs to be resolved, especially in cases of unanticipated discrimination.

SUMMARY OF THE AMERICANS WITH DISABILITIES ACT OF 1989

FINDINGS AND PURPOSE

The purpose of the Act is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities; provide protection against discrimination comparable to that afforded to minorities and others; and provide enforceable standards addressing discrimination against individuals with disabilities.

DEFINITIONS

The term "disability" is defined to mean, with respect to an individual- a physical or mental impairment that substantially limits one or more of the major life activities of such individual, a record of such an impairment, or being regarded as having such an impairment. This is the same definition used for purposes of section 504 of the Rehabilitation Act of 1973 and the recent amendments to the Fair Housing Act.

TITLE I: GENERAL PROHIBITION AGAINST DISCRIMINATION

Title I sets out the general forms of discrimination prohibited by the Act. It is considered discriminatory to subject an individual, directly or indirectly, on the basis of disability, to any of the following:

- (1) denying the opportunity to participate in or benefit from an opportunity;
- (2) affording an opportunity that is not equal to that afforded others;
- (3) providing an opportunity that is less effective than that provided to others;
- (4) providing an individual or class of individuals with an opportunity that is different or separate, unless such action is necessary to provide the individuals with an opportunity that is as effective as that provided to others;
- (5) aiding or perpetuating discrimination by providing significant assistance to others that discriminate;
- (6) denying an opportunity to participate as a member of boards or commissions; and
- (7) otherwise limiting an individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others.

For purposes of the Act, for an aid, benefit, or service to be equally effective, an entity must afford an individual with a disability equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement in the most integrated setting appropriate to the individual's needs.

Further, an entity may not directly or indirectly use criteria or methods of administration that have the effect of subjecting an individual to discrimination on the basis of disability or perpetuate discrimination by others who are subject to common administrative control or are agencies of the same State. Nor can an entity discriminate against an individual or entity because of the association of that individual or entity with another individual with a disability.

Title I also sets out several defenses to allegations of discrimination. It is not considered discrimination to exclude or deny opportunities to an individual with a disability for reasons entirely unrelated to his or her disability. Further, it is not discrimination to exclude or deny opportunities to an individual with a disability based on the application of qualification standards or other criteria that are shown by a covered entity to be both necessary and substantially related to the ability of the individual to perform or participate or take advantage of an opportunity and such participation cannot be accomplished by applicable reasonable accommodations, modifications, or the provision of auxiliary aids or services.

Qualification standards may include requiring that the current use of alcohol or drugs by an alcohol or drug abuser not pose a direct threat to property or the safety of others in the workplace or program; and requiring that an individual with a currently contagious disease or infection not pose a direct threat to the health or safety of other individuals in the workplace or program. These defenses are comparable to the defenses currently available under section 504 of the Rehabilitation Act of 1973.

TITLE II: EMPLOYMENT

The provisions in title II of the Act use or incorporate by reference many of the definitions in title VII of the Civil Rights Act of 1964 (employee, employer, Commission, person, labor organization, employment agency, joint labor-management committee, commerce, industry affecting commerce). The scope of the bill is identical i.e., only employers who have 15 or more employees are covered.

A "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or

desires. This definition is comparable to the definition used for purposes of section 504.

Using the section 504 legal framework as the model, the bill specifies that no entity covered by the Act shall discriminate against any qualified individual with a disability because of such individual's disability in regard to application procedures, the hiring or discharge of employees and all terms, conditions and privileges of employment.

Thus, discrimination includes, for example, the failure by a covered entity to make reasonable accommodations to the known limitations of a qualified individual with a disability unless such entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business. Discrimination also includes the denial of employment opportunities because a qualified individual with a disability needs a reasonable accommodation.

The definition of the term "reasonable accommodation" included in the bill is comparable to the definition in the section 504 legal framework. The term includes: making existing facilities accessible, job restructuring, part-time or modified work schedules, reassignment, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations and training materials, adoption or modification of procedures or protocols, the provision of qualified readers and interpreters, and other similar accommodations.

Discrimination also includes the imposition or application of qualification standards and other criteria that identify or limit a qualified individual with a disability unless such standards or criteria can be shown by such entity to be necessary and substantially related to the ability of an individual to perform the essential functions of the particular employment position.

Consistent with title VII of the Civil Rights Act of 1964, every covered entity must post notices in an accessible format describing the applicable provisions of this Act. The Commission is also directed to promulgate regulations within 180 days in an accessible format.

The bill incorporates by reference the remedies and procedures set out in section 706, 709, and section 710 of title VII of the Civil Rights Act of 1964. The bill also incorporates the remedies and procedures available under section 1981 of the Civil Rights Act of 1866 for acts of intentional discrimination.

TITLE III: PUBLIC SERVICES

Section 504 only applies to entities receiving Federal financial assistance. Title III of the bill makes all activities of State and local governments subject to the types of prohibitions against discrimination against a qualified individual with a disability included in section 504 (nondiscrimination) and section 505 (the enforcement procedures).

A "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies and practices, or the removal of architectural, communication, and transportation barriers or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a State or agency or political subdivision of a State or board, commission or other instrumentality of a State and political subdivision.

Title III also specifies the actions applicable to public transportation (not including air travel) provided by public entities that are considered discriminatory. The term "public transportation" means transportation by bus or rail, or by any other conveyance (other than air travel) that provides the general public with general or special service (including charter service) on a regular and continuing basis.

1. New fixed route buses of any size and rail vehicles for which a solicitation is made later than 30 days after the date of enactment of this Act must be readily accessible to and usable by individuals with disabilities. No retrofitting of existing buses is required.

2. Used vehicles purchased or leased after the date of enactment need not be accessible but a demonstrated good faith effort to locate a used accessible vehicle must be made.

3. Vehicles that are re-manufactured so as to extend their usable life for five years or more must, to the maximum extent feasible, be readily accessible to and usable by individuals with disabilities.

4. In those communities with fixed route public transportation, there must also be a paratransit system to serve those individuals with disabilities who cannot use the fixed route public transportation and to other individuals associated with such individuals in accordance with service criteria established by the Secretary of Transportation.

5. Communities that operate a demand responsive system that is used to provide public transportation for the general public (non-disabled and disabled) must purchase new buses for which a solicitation is made 30 days after the date of enactment of the Act that are accessible unless the system can demonstrate that the system, when viewed in its entirety, provides a level

of service equivalent to that provided to the general public; in which case all newly purchased vehicles need not be accessible.

6. All new facilities used to provide public transportation services must be readily accessible to and usable by individuals with disabilities.

7. When alterations are made to existing facilities one year after the date of enactment that affect or could affect the usability of the facility, the alterations, the path of travel to the altered area, the bathrooms, telephones, and drinking fountains serving the remodeled area must be, to the maximum extent feasible, readily accessible to and usable by individuals with disabilities.

8. A mass transportation program or activity, when viewed in its entirety, must be readily accessible to and usable by individuals with disabilities. All stations in intercity rail systems and key stations in rapid rail, commuter rail and light rail systems must be made readily accessible as soon as practicable but in no event later than 3 years after the date of enactment of this Act except that the time limit may be extended by the Secretary of Transportation up to 20 years for extraordinary expensive structural changes to, or replacement of, existing facilities necessary to achieve accessibility.

9. Intercity, light rail, rapid, and commuter rail systems must have at least one car per train that is accessible as soon as practicable, but in any event in no less than five years.

The bill directs the Attorney General to promulgate regulations within 180 days in an accessible format that implement the provisions generally applicable to state and local governments. These regulations must be consistent with the coordination regulations issued in 1978 that governed the regulations applicable to recipients of Federal financial assistance. The Secretary of the Department of Transportation is also directed to issue regulations in an accessible format that include standards which are consistent with minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board.

TITLE IV: PUBLIC ACCOMMODATIONS AND SERVICES OPERATED BY PRIVATE ENTITIES

Title IV specifies that no individual shall be discriminated against in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, on the basis of disability.

The term "public accommodation" means privately operated establishments that are used by the general public as customers, clients, or visitors or that

are potential places of employment and whose operations affect commerce. Examples of public accommodations include: auditoriums, theaters, restaurants, shopping centers, hotels, terminals used for public transportation, office buildings and recreation facilities.

Examples of discrimination include the following:

-The imposition or application of eligibility criteria that identify or limit an individual with a disability.

-A failure to make reasonable modifications in rules and policies and procedures when necessary to afford meaningful opportunity unless the entity can demonstrate that the modifications would fundamentally alter the nature of the program.

-A failure to provide auxiliary aids and services unless the entity can demonstrate that such services would result in undue burden. Auxiliary aids and services include: qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments; qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments; acquisition or modification of equipment or devices; and other similar services and actions.

-A failure to remove architectural and communication barriers that are structural in nature in existing facilities and transportation barriers in existing vehicles where such removal is readily achievable; and, where the entity can demonstrate that such removal is not readily achievable, a failure to provide alternative methods.

-With respect to a facility that is altered one year after the effective date of the Act, the failure to make the alterations in a manner that, to the maximum extent feasible, the altered portion, the path of travel to the altered area, and the bathrooms, telephones, and drinking fountains serving the remodeled area are readily accessible to and usable by individuals with disabilities.

-A failure to make facilities designed and constructed later than 30 months after the date of enactment readily accessible to and usable by individuals with disabilities except where an entity can demonstrate that it is structurally impracticable to do so in accordance with standards set forth or incorporated by reference in regulations.

-A failure by a public accommodation to provide a level of transportation services to individuals with disabilities equivalent to that provided for the general public and a refusal to purchase or lease vehicles

that carry in excess of 12 passengers for which solicitations are made later than 30 days after the date of enactment which are readily accessible to and usable by individuals with disabilities.

The bill also includes a specific section prohibiting discrimination in public transportation services (other than air travel) provided by private entities. In general, no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of public transportation services provided by a privately operated entity that is primarily engaged in the business of transporting people (but not in the principal business of providing air transportation) and whose operations affect commerce.

Examples of discrimination include:

- the imposition or application of eligibility criteria that identify or limit an individual with a disability;

- a failure to make reasonable modifications to criteria, provide auxiliary aids and services, and remove barriers consistent with the standards set out above;

- new vehicles (other than automobiles) purchased 30 days after the date of enactment must be made accessible. Because there is no requirement that cars be made accessible, new taxicabs are not required to be made accessible. Taxicab companies are liable, however, if their drivers refuse to pick up an individual with a disability.

The bill incorporates by reference the provisions in the Fair Housing Act, as recently amended, authorizing enforcement by private persons in court (section 813) and enforcement by the Attorney General (section 814(a)). Regulations must be issued in an accessible format by the Attorney General and by the Secretary of Transportation, consistent with the provisions applicable to public agencies under title III.

TITLE V: COMMUNICATIONS

Title V specifies that it is considered discrimination for a common carrier that offers telephone services to the general public to fail to provide, within one year after the date of enactment of this Act, interstate and intrastate telecommunication relay services so that such services provide individuals who use non-voice terminal devices because of their disabilities opportunities for communications that are equal to those provided to persons able to use voice telephone services. Nothing in this title is to be construed to discourage or impair the development of improved or future technology designed to improve access to telecommunications services for individuals with disabilities.

The Federal Communications Commission is directed to issue regulations establishing minimum standards and guidelines for telecommunications relay services. With respect to enforcement, the bill incorporates by reference the provisions in the Fair Housing Act, as recently amended, authorizing enforcement by private persons in court (section 813) and enforcement by the Attorney General (section 814(a)). Further, the Federal Communications Commission is authorized to use enforcement provisions generally applicable to it for remedying violations of the Communications Act of 1934.

TITLE VI: MISCELLANEOUS PROVISIONS

Title VI explains the relationship between section 504 and this Act; this Act and State laws that provide greater protections; and the relationship among the various titles of the Act. Title VI also includes an anti-retaliation provision; directs the Architectural and Transportation Barriers Compliance Board to issue minimum guidelines; and makes it clear that States are not immune under the 11th Amendment for violations of the Act.

With respect to attorney's fees, the bill specifies that in any action or administrative proceeding commenced under the Act, the court, or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including expert witness fees, and costs.

Association for Retarded Citizens
of the United States
1522 K Street, N.W., Suite 516
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"AMERICANS WITH DISABILITIES ACT" FACT SHEET

Background

Citizens with disabilities, including children and adults with mental retardation, are the last segment of our society not yet fully protected by our Federal Government from discriminatory practices. Section 504 of the "Rehabilitation Act of 1973", as amended, provides protection against discrimination on the basis of handicap, only if a program or entity is federally funded or operated. State and local governments and the vast private sector are not covered under Section 504. ARCs throughout the nation report incidences of discrimination based on mental retardation on a frequent basis. Persons with mental retardation and their families are forced to leave restaurants, movie theaters, stores and other public places because they look and act "inappropriately." Thousands are denied jobs, even though they are fully qualified to perform the work, due to their retardation. Others have been removed from airplanes or denied boarding.

The "Americans with Disabilities Act" would provide for a general prohibition in the private sector against discrimination based on disability. It would also cover such key areas as:

- o employment (15 or more employees);
- o public services (state and local governments);
- o public accommodations and services (e.g., hotels, restaurants, movie theaters, office buildings, recreation facilities, etc.);
- o communications; and
- o mass transportation.

Among the types of discriminatory practices prohibited under the legislation would be the:

- o denial of opportunities to participate in a program, activity, service, benefit or job;
- o provision of unequal or less effective programs, activities, services or jobs;
- o provision of assistance to an entity that discriminates;
- o limiting of a right, privilege, advantage or opportunity;
- o failure to make reasonable accommodations;
- o failure to address architectural, transportation and communication barriers;

(cont'd)

ADA (cont'd)

- o use of discriminatory qualifications, standards or eligibility criteria; and
- o denial of equal opportunity based on a relationship or association with persons with disabilities.

The legislation would contain such necessary enforcement procedures as administrative remedies, a private right of action, monetary damages, injunctive relief, attorney's fees and the cutoff of Federal funds. Specific Federal agencies would be called upon to promulgate and enforce relevant guidelines and regulations.

"Americans with Disabilities Act" legislation is expected to be introduced in late April by Congressional leaders such as Senator Tom Harkin (D-IA), Chairman of the Senate Subcommittee on the Handicapped, Senator Ted Kennedy (D-MA), Chairman of the Senate Labor and Human Resources Committee, and House Majority Whip Tony Coelho (D-CA).

Association for Retarded Citizens Recommendation

Enactment of this vital legislation will, for the first time in our nation's history, fully guarantee basic rights to our citizens with mental retardation. The ARC recommends and strongly urges each Member of Congress to co-sponsor this legislation when it is introduced. Further, Members of Congress are implored to seek prompt consideration of this legislation.

Relevant Committees

Senate Labor and Human Resources Committee
Subcommittee on the Handicapped
House Judiciary Committee
Subcommittee on Administrative Law and
Governmental Relations
House Education and Labor Committee
Subcommittee on Select Education
House Energy and Commerce Committee
Subcommittee on Telecommunications and Finance
Subcommittee on Transportation and
Hazardous Material
House Public Works and Transportation Committee
Subcommittee on Public Buildings and Grounds
Subcommittee on Surface Transportation

4/10/89

AMERICANS WITH DISABILITIES ACT of 1989 (S. 933/H.R. 2273)

Introduced by: Senators Tom Harkin (D-IA), Edward M. Kennedy (D-MA),
David Durenberger (R-MN) and Representatives Tony Coelho (D-CA),
Hamilton Fish (R-NY) Major Owens (D-NY), Silvio Conte (R-MA)

CO-SPONSORS AS OF 5/11/89

ALASKA

Sen. Ted Stevens (R)

Rep. Don Young (R)

ARIZONA

Sen. John McCain (R)

Rep. Mo Udall (D)

CALIFORNIA

Sen. Alan Cranston (D)

Rep. Anthony Beilenson (D)

Rep. Doug Bosco (D)

Rep. Barbara Boxer (D)

Rep. George Brown, Jr. (D)

Rep. Tom Campbell (R)

Rep. Tony Coelho (D)

Rep. Ronald Dellums (D)

Rep. Julian Dixon (D)

Rep. Mervyn Dymally (D)

Rep. Don Edwards (D)

Rep. Vic Fazio (D)

Rep. Augustus Hawkins (D)

Rep. Tom Lantos (D)

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Rep. Matthew Martinez (D)

Rep. Robert Matsui (D)

Rep. George Miller (D)

Rep. Norman Mineta (D)

Rep. Nancy Pelosi (D)

Rep. Henry Waxman (D)

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Sen. Timothy Wirth (D)

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Sen. Joe Lieberman (D)

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Rep. Barbara Kennelly (D)

Rep. Bruce Morrison (D)

Rep. Christopher Shays (R)

Rep. John Rowland (R)

FLORIDA

Sen. Bob Graham (D)

Rep. Charles Bennett (D)

Rep. Earl Hutto (D)

GEORGIA

Rep. John Lewis (D)

HAWAII

Sen. Daniel Inouye (D)

Sen. Spark Matsunaga (D)

Rep. Daniel Akaka (D)

Rep. Patricia Saiki (R)

ILLINOIS

Sen. Paul Simon (D)

Rep. Cardiss Collins (D)

Rep. Charles Hayes (D)

INDIANA

Rep. Andrew Jacobs (D)

Rep. Jim Jontz (D)

Rep. Frank McCloskey (D)

Rep. Peter Visclosky (D)

IOWA

Sen. Tom Harkin (D)

(over)

MAINE

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Sen. William Cohen (R)

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Sen. Paul Sarbanes (D)

Rep. Benjamin Cardin (D)
Rep. Steny Hoyer (D)
Rep. Kweisi Mfume (D)
Rep. Connie Morella (R)

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Sen. John Kerry (D)

Rep. Silvio Conte (R)
Rep. Brian Donnelly (D)
Rep. Barney Frank (D)
Rep. Edward Markey (D)
Rep. Nicholas Mavroules (D)
Rep. Joe Moakley (D)
Rep. Gerry Studds (D)
Rep. Chester Atkins (D)

MICHIGAN

Sen. Carl Levin (D)
Sen. Donald Riegle (D)

Rep. John Conyers (D)
Rep. George Crockett (D)
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Rep. Sander Levin (D)
Rep. Bob Traxler (D)
Rep. Howard Wolpe (D)

MINNESOTA

Sen. Rudy Boschwitz (R)
Sen. Dave Durenberger (R)

Rep. James Oberstar (D)
Rep. Martin Sabo (D)
Rep. Bruce Vento (D)

MISSISSIPPI

Rep. Mike Espy (D)

MISSOURI

Rep. William Clay (D)
Rep. Alan Wheat (D)
Rep. Richard Gephardt (D)

MONTANA

Rep. Pat Williams (D)

NEW JERSEY

Rep. Bernard Dwyer (D)
Rep. Jim Florio (D)
Rep. Frank Pallone (D)

NEW MEXICO

Rep. Jeff Bingaman (D)
Rep. Bill Richardson (D)

NEW YORK

Sen. Daniel Moynihan (D)

Rep. Gary Ackerman (D)
Rep. Hamilton Fish (R)
Rep. Robert Garcia (D)
Rep. Matthew McHugh (D)
Rep. Thomas Manton (D)
Rep. Major Owens (D)
Rep. Stephen Solarz (D)
Rep. Edolphus Towns (D)
Rep. Ted Weiss (D)

NORTH DAKOTA

Sen. Quentin Burdick (D)
Sen. Kent Conrad (D)

OHIO

Sen. Howard Metzenbaum (D)

Rep. Ed Feighan (D)

OREGON

Sen. Bob Packwood (R)

(over)

PENNSYLVANIA

Sen. John Heinz (R)

Rep. Robert Borski (D)

Rep. Thomas Foglietta (D)

Rep. William Gray III (D)

PUERTO RICO

Rep. Jaime Fuster (D)

RHODE ISLAND

Sen. John Chafee (R)

Sen. Claiborne Pell (D)

Rep. Claudine Schneider (R)

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Sen. Al Gore, Jr. (D)

Rep. Harold Ford (D)

Rep. Bart Gordon (D)

TEXAS

Rep. Martin Frost (D)

VERMONT

Sen. Patrick Leahy (D)

Sen. Jim Jeffords (R)

Rep. Peter Smith (R)

VIRGIN ISLANDS

Rep. Ron de Lugo (D)

WASHINGTON

Sen. Brock Adams (D)

Rep. John Miller (R)

Rep. Jim McDermott (D)

WEST VIRGINIA

Rep. Nick Joe Rahall (D)

Rep. Bob Wise (D)

WISCONSIN

Rep. Robert Kastenmeier (D)

Rep. Gerald Kleczka (D)