



A WILEY SMALL BUSINESS EDITION

Complying with the ADA

**A SMALL BUSINESS
GUIDE TO HIRING
AND EMPLOYING
THE DISABLED**



Jeffrey G. Allen, J.D., C.P.C.

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Dedicated to changing the phrase *reasonable accommodation* to real *acceptance*.

With appreciation ...

*To my wife, Bev;
to our daughter, Angela;
to an editor's editor, Mike Hamilton;
to his assistant, Elena Paperny; and
to Pat Stahl,
the most capable researcher any author could want.*

Thanks more than words can say.

Preface

Disabled, handicapped, impaired. Translation: “crippled.” Words that describe people negatively; words that are synonymous in the work world with *unqualified, incompetent, expensive*, or worse—such reflexive stereotypes automatically exclude almost *one-third* of our work force!

Yet experience teaches us that people with physical or mental weaknesses in certain areas often compensate with strengths in others. People who cannot hear generally see better. Those with poor eyesight hear better. Amputees develop greater strength in their remaining limbs. These aren’t isolated cases. They are examples of the natural adaptive process that has existed since the first life forms evolved.

Unfortunately, discrimination against the disabled can be traced back almost as far; it probably began the day the first job was created.

For all of the equal employment opportunity legislation of the past 25 years, there has been almost no affirmative action to hire the disabled. This is largely due to their “invisibility.”

Despite the fact that I spent 24 years as a recruiter, personnel consultant, human resources manager, and employment lawyer, and that I was the author of more than a dozen books about the hiring process, I never realized the obstacles that the disabled encounter until I broke my hip.

Instantly I noticed how inaccessible everything was—my car, a restaurant, an office building. Moving around was also difficult. I couldn’t even find a comfortable place to sit.

The temporary inconvenience I experienced during my convales-

cence was nothing compared with what people with permanent impairments face every day. Despite their sometimes amazing adaptations, they have been physically and psychologically blocked from the mainstream of our society.

If you doubt it, just check the disabled area in any parking lot. The chances are better than 50 percent that some unauthorized car is there. The fines are stiff, but it's so convenient. Even legally designated, strictly enforced, specially designed areas yield to expediency. Who really knows another's pain? And, too often, who really cares?

Federal law leveled the playing field for disabled job seekers and employees on July 26, 1992, when the employment provisions of the Americans with Disabilities Act (ADA) became the law of the land. The ADA is a sweeping federal mandate that authorizes administrative, civil, and criminal penalties for discriminating against the disabled with respect to "job application procedures, hiring, advancement, discharge, compensation, job training and other terms, conditions and privileges of employment."

The mandate has the potential to revolutionize the hiring and employment process permanently. It affects everything from preemployment screening (testing, evaluating qualifications, interviewing, etc.) to physical workplace alterations. Most regulations are general; and key concepts in the law such as "essential functions" and "readily achievable" are not precisely defined, leaving major ambiguities that will undoubtedly be the basis of endless administrative and judicial review.

If you have more than 25 employees in your organization, you are liable. The minimum will be reduced to 15 employees on July 26, 1994. Nobody's perfect—everyone is a potential claimant.

As a small businessperson, you are particularly vulnerable to claims by applicants and employees because you probably don't know the many technical nuances of the law. Large corporations have human resources professionals on staff, legal counsel in house, and outside consultants or trainers available to assist in this major undertaking, but many private entrepreneurs have to go it alone. Even if you have the money and time to seek outside assistance, few attorneys and human resources professionals really understand application of the mandates.

The Equal Employment Opportunity Commission (EEOC) and your state compliance authority are inadequate to assist as well. This year the number of complaints from the ADA alone should increase their work load by 25 percent. Even before the ADA, equal employment compliance agencies were inaccessible, understaffed, and inefficient. Those that functioned at all, assumed an adversarial position to employers. Once

you are targeted, the government's unlimited power to investigate and prosecute is brought to bear on your business.

This book is written to help small business owners understand their obligations under the ADA. It doesn't answer every question about the law because some issues are still being decided, but it does offer my best judgments based on my reading of the law, the accompanying regulations, and available research. It will guide you through the basics of the law and point you to the myriad other resources available on this subject. I've included sample job applications, model position descriptions, checklists, and case studies to illustrate specific applications.

The book is divided into two broad sections. Part One, *Hiring the Disabled*, covers recruitment, interviewing, testing, compensation, training, and other issues involved in hiring. Part Two, *Employing the Disabled*, offers accessibility guidelines to help you accommodate your employees and customers.

I hope the book will motivate you not only to make a good faith effort to comply with the *letter* of the law, but to respond in the *spirit* of the law by taking an "affirmative action" to work with people who are technically "disabled."

Use it well!

JEFFREY G. ALLEN, J.D., C.P.C.

Beverly Hills, California

About the Author

Jeffrey G. Allen, J.D., C.P.C., is America's leading employment attorney. For almost a decade, Mr. Allen was a human resources manager with small business employers or small divisions of major employers. This direct experience has been coupled with his employment law practice over the past 17 years. As a certified placement counselor, certified employment specialist, and professional negotiator, Mr. Allen is highly qualified to write the first book for entrepreneurs on hiring and employing the disabled.

Mr. Allen is the author of more bestselling books in the employment field than anyone else. Among them are *How to Turn an Interview into a Job*, *Finding the Right Job at Midlife*, *The Employee Termination Handbook*, *The Placement Strategy Handbook*, *Placement Management*, *The Complete Q&A Job Interview Book*, *The Perfect Job Reference*, *The Perfect Follow-Up Method to Get the Job*, and the popular three-book series *Jeff Allen's Best*. He writes a nationally syndicated column entitled "Placements and The Law," conducts seminars, and is regularly featured in television, radio, and newspaper interviews.

Mr. Allen has served as Director of the National Placement Law Center, Special Advisor to the American Employment Association, General Counsel to the California Association of Personnel Consultants, judge pro tem, and is recognized as the nation's foremost employment attorney.

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Introduction

IS THE ADA GOOD FOR BUSINESS?

On July 20, 1990, President Bush fulfilled a campaign promise by signing into law the Americans with Disabilities Act (ADA), regarded by many as the most sweeping piece of legislation since the Civil Rights Act of 1964. While many advocacy groups for the disabled hail it as the "emancipation proclamation of the disabled," many employers are understandably apprehensive about its legal and economic implications for their business: What will it cost to comply?

The new law will require changes in the way businesses and public facilities operate. Some of these changes will be physical and will cost money; others will involve adopting new attitudes toward people with disabilities. But creating equal access for the nation's disabled is not just a moral or legal obligation. It is also good business. To put the potential benefits of the law into perspective, consider these work force projections from the U.S. Department of Labor:

- White men, for decades the majority of workers, will make up only 45 percent of the total work force by the year 2000.
- Women, minorities, and immigrants will account for more than 80 percent of the U.S. labor force growth in the year 2000.
- The growth rate of the labor force in the year 2000 will be only 1.2 percent, compared with an annual growth rate of 2.6 percent in the

1970s. In 1995, the number of Americans 18 to 24 years of age will bottom out at a little under 24 million, compared with a peak of 30 million in 1980.

- One out of three people will be 50 years of age or older by the turn of the century. The largest age group of workers will be those who are 35 to 54 years old.

What do these changes mean? Because of projected labor shortages, previously underutilized segments of the labor force, such as women, minorities, elderly, and disabled workers, will be actively recruited by business and industry.

There are an estimated 43 million disabled Americans, more than 60 percent of whom are unemployed. The cost of maintaining people with disabilities who cannot find jobs has increased steadily over the past 20 years. In 1970, total disability expenditures amounted to \$19.3 billion. By 1986, they increased by 779 percent to \$169.4 billion. The federal government now spends about \$200 billion a year on direct public and private assistance for people with disabilities. This includes Social Security disability insurance, supplemental security income, worker's compensation, welfare, and private transfer payments that reflect claims of people injured on the job. Add another \$1 billion for lost taxes and lost production and you begin to see the economic wisdom of employing the disabled.

One Company's Experience

Kreonite, a manufacturer of darkroom equipment in Wichita, Kansas, with \$30 million a year in sales, hired its first disabled workers 20 years ago, and two of that first group are still there. Today, people with cerebral palsy, mental retardation, mental illness, and various sensory impairments make up 15 percent of the company's work force of 240. The company says it is motivated by business needs, not altruism, to hire disabled workers and, according to a recent article in *The New York Times* (July 27, 1992), its experience with them has been overwhelmingly positive.¹

Wichita has a low unemployment rate of around 4 percent and is home to several big aircraft makers that can pay skilled workers more

¹Peter Kilborn, "Company Invests in Human Assets: Disabled Employees in Regular Jobs." *The New York Times*, 27 July 1992, A8.

than Kreonite does, so workers are hard to find. In the 1980s, the company was losing one in every three production workers a year, at a turnover cost of about \$1,000 per worker. Partly as a result of hiring more disabled workers and accommodating them better, Kreonite's annual rate of turnover is down to one in ten—a big savings for the company.

The lesson of Kreonite is that disabled people represent a large untapped resource of qualified labor. The ADA will help businesses gain access to this labor pool while giving qualified workers greater access to business.

LEGISLATIVE HISTORY OF THE ADA

The ADA extends civil rights protection to people with disabilities that are parallel to those established by the federal government for women and minorities. It is essentially an amalgam of two major civil rights statutes: the Civil Rights Act of 1964 and the Rehabilitation Act of 1973. The ADA uses the framework of Titles II and VII of the Civil Rights Act of 1964 for coverage and enforcement, and the framework of the Rehabilitation Act of 1973 for defining disability and determining what constitutes discrimination.

But whereas the Rehabilitation Act prohibited only those doing business with the federal government or receiving federal financial assistance from discriminating against qualified individuals with handicaps (the term used under that law), the ADA reaches into the private sector as well, affecting both large and small businesses.

Another significant difference between the ADA and its predecessor laws is that the ADA does not merely prohibit discrimination, as does Title VII of the Civil Rights Act, but imposes additional affirmative obligations upon businesses to accommodate the needs of people with disabilities and to promote their economic independence.

Since enacting the Rehabilitation Act of 1973, Congress has passed several other statutes prohibiting discrimination against individuals with disabilities. In addition to the federal laws, more than 40 states have their own laws protecting individuals with disabilities. The scope of protection under these laws varies greatly on such issues as coverage of private sector employers, the number of employers covered, and the obligation to make reasonable accommodation.

In congressional hearings on the ADA, former attorney general Rich-

ard Thornburgh argued that this new law weaves together the torn patchwork of existing federal and state legislation regarding people with disabilities and closes gaps in coverage.

Certain key terms are not defined in the law itself, so Congress directed the Equal Employment Opportunity Commission to issue comprehensive regulations clarifying the employment provisions of Title I in the ADA, and the attorney general of the United States to issue comprehensive regulations interpreting the public accommodations provisions of Title III in the ADA. These regulations are extremely useful in interpreting the ADA.

OVERVIEW OF TITLES I THROUGH V

Although this book is concerned primarily with employment issues, the ADA prohibits both intentional and unintentional discrimination in five broad areas, some of which touch upon employment.

Title I: Employment. A key provision of the ADA is the prohibition of discrimination against individuals with disabilities in public-and private-sector employment. Title VII of the Civil Rights Act of 1964 opened the doors of American business to minorities and women. Title I of the ADA offers the same promise to qualified individuals with disabilities. It requires employers to take immediate action to provide "reasonable accommodations" to both employees and job applicants for a broad range of mental and physical disabilities.

Title II: State and local governments and public services. This title prohibits public entities from discriminating against qualified individuals with disabilities or excluding them from participating in their services, programs, or activities. The ADA's guarantee of full participation in the mainstream of American life is illusory if accessible transportation is not available; hence, most of Title II's provisions deal with transportation provided to the general public via bus, rail, taxis, and limousines. Aircraft are excluded.

All new public buses must be accessible to persons with disabilities. Transit authorities must provide supplementary or special services to those who cannot use fixed-route bus services. New over-the-road buses, new rail vehicles, and all new rail stations must be accessible. Existing rail systems must have one accessible car per train within the next five years.

Title III: Public accommodations and services operated by private entities. Title III prohibits discrimination against individuals with disabilities in the full and equal enjoyment of the goods, services, facilities, and privileges of any place of public accommodation. It requires that the above benefits be offered "in the most integrated setting appropriate to the needs of the individual," except when the individual poses a direct threat to the health or safety of others.

Public accommodations include a broad range of entities, from airports to zoos. They extend to sales, rental, and service establishments as well as educational institutions, recreational facilities, and social service centers. Title III requires public accommodations to modify their policies and procedures and to provide auxiliary aids to disabled people unless doing so would fundamentally alter the nature of the organization or cause an undue burden. All newly constructed and substantially renovated buildings must be readily accessible to people with disabilities. Existing facilities must be made accessible if changes are "readily achievable."

Title IV: Telecommunications. Title IV ensures that individuals with disabilities will be able to communicate electronically. It requires that, within three years, telephone companies must provide telecommunications relay services that enable hearing-and speech-impaired individuals to communicate with hearing individuals through the use of telecommunications devices for the deaf (TDD) and other nonvoice terminal devices.

Title V: Miscellaneous provisions. In general, this title delineates the ADA's relationship to other laws, outlines insurance issues, and explains how each title in the act will be implemented. Title V prohibits retaliation against individuals who try to enforce their own rights under the ADA and amends the Rehabilitation Act of 1973 to exclude current users of alcohol and drugs from its coverage. It provides that nothing in the ADA shall be construed to apply to a lesser standard than the standards set in any other federal or state law as long as the previous law provides greater or equal protection.

ADA IMPLEMENTATION SCHEDULE

Title I. Employment

Employers of 25 or more people.	July 26, 1992.
Employers of 15 to 24 people.	July 26, 1994.
Employers of fewer than 15 people.	Law does not apply.

Title II. Transportation

Public transportation.	New stations built after January 26, 1992, must be accessible; one car per train must be accessible by July 26, 1995.
Rail transportation.	By July 26, 1995, Amtrak coaches must have one accessible car per train, and coaches must have some accessible seats; by July 26, 2000, coaches must have same number of accessible seats that they would have had if they had been built accessible.

Title III. Public Accommodations

Businesses with 25 or fewer employees and revenues of \$1 million or less.	January 26, 1992.
Businesses with 10 or fewer employees and revenues of \$500,000 or less.	January 26, 1993.

Title IV. Telecommunications

Telecommunications relay services to operate 24 hours a day.	July 26, 1993.
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Title V. Miscellaneous

Effective dates of Title V.	Determined by analogous sections in Titles I through IV.
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