

# TABLE OF CONTENTS

PREFACE .....	V
FOREWORD .....	XI
ABOUT THE AUTHOR .....	XIX

## PART 1. HISTORICAL AND CONCEPTUAL FOUNDATIONS

<b>Chapter 1. Introduction .....</b>	<b>3</b>
§ 1.1     Overview.....	3
§ 1.2     American Conceptions of Discrimination on the Basis of Disability .....	4
A.     Evolution of Societal Treatment of Disability .....	6
B.     The Disability Rights Model.....	8
§ 1.3     Limits of Constitutional Protection .....	9
§ 1.4     ADA Law and Policy Precursors.....	14
A.     Vocational Rehabilitation and Benefits.....	14
B.     Early Disability Civil Rights Statutes (1968–88) .....	14
1.     Architectural Barriers Act of 1968.....	15
2.     Rehabilitation Act of 1973 .....	15
3.     Individuals with Disabilities Education Act (Education for All Handicapped Children Act of 1975) .....	15
4.     Voting Accessibility for the Elderly and Handicapped Act of 1984 .....	16
5.     Air Carrier Access Act of 1986 .....	17
6.     Fair Housing Amendments Act of 1988.....	17
C.     Interpretation of the Rehabilitation Act.....	19
<b>Chapter 2. ADA History and Philosophy.....</b>	<b>25</b>
§ 2.1     Brief Guide to the ADA .....	25
§ 2.2     ADA Background and Fundamentals.....	27
A.     Story of the Passage of the ADA .....	27
B.     Legislative Trade-Offs .....	32
C.     Constitutional Basis .....	34
D.     Role of Federal Agencies.....	34
1.     Regulations.....	34
2.     Enforcement .....	35
§ 2.3     The Accommodation Principle .....	37

## PART 2. DEFINITIONAL ISSUES

<b>Chapter 3. Disability .....</b>	<b>47</b>
§ 3.1     Overview.....	47
§ 3.2     Actual Disability .....	48
A.     Physical or Mental Impairment.....	48
B.     Substantially Limits .....	49
1.     Individualized Inquiry .....	52

2.	Mitigation .....	53
3.	Substantiality .....	53
C.	Major Life Activity .....	54
§ 3.3	Record of a Disability.....	55
§ 3.4	Regarded as Having a Disability .....	56
§ 3.5	Association .....	59
§ 3.6	Retaliation .....	60
§ 3.7	Harassment and Hostile Work Environment .....	61
<b>Chapter 4. Qualified Individuals .....</b>		<b>63</b>
§ 4.1	Prerequisites .....	63
§ 4.2	Essential Requirements .....	65
	A. Title I Essential Job Functions .....	65
	B. Note on Title II Essential Eligibility Requirements .....	66
§ 4.3	Estoppel .....	68
<b>PART 3. EMPLOYMENT DISCRIMINATION: ADA TITLE I</b>		
<b>Chapter 5. Title I .....</b>		<b>73</b>
§ 5.1	Overview.....	73
§ 5.2	Covered Entities .....	74
	A. Definition of Covered Entity/Employer .....	74
	B. Definition of Employee .....	74
	C. States as Employers.....	75
	D. Title I Covered Employers: Illustrations.....	78
	1. Temporary Employment, Staffing Firms, Independent Contractors .....	78
	2. Single and Multiple Employers .....	80
	3. Extraterritorial Application of Title I .....	81
	4. Religious Entities as Employers .....	82
	5. Employers Under Section 504 of the Rehabilitation Act .....	83
	6. Indirect Employment Relationships .....	84
	7. Supervisors and Other Employees.....	86
	8. Labor Organizations .....	87
	9. Federal Employers and Contractors .....	87
§ 5.3	Hiring, Discipline, and Benefits.....	88
	A. Hiring.....	88
	B. Discipline .....	89
	C. Benefits and Privileges of Employment .....	89
<b>Chapter 6. Examinations and Inquiries .....</b>		<b>91</b>
§ 6.1	Overview.....	91
§ 6.2	Permissible Scope of Inquiries and Examinations .....	92
	A. Pre-Employment .....	92
	1. No Known Disability or Requested Accommodation .....	92
	2. Known Disability or Requested Accommodation .....	94

B.	Post-Conditional Offer .....	95
	1. What Constitutes a “Job Offer”? .....	96
	2. Post-Offer Medical Examinations and Inquiries.....	96
C.	During Employment .....	97
D.	Return to Work.....	98
§ 6.3	Confidentiality of Information .....	99
§ 6.4	Rights of People Without Disabilities to Bring Inquiry/Examination Claims—Standing.....	100
<b>Chapter 7. Reasonable Accommodation and Defenses.....</b>		<b>103</b>
§ 7.1	Overview and Illustrations .....	103
	A. Statutory Definitions .....	103
	B. EEOC Regulations .....	104
	C. Failure to Accommodate Claim: Summary .....	105
	D. Accommodation Illustrations .....	105
	1. Workplace Attendance, Schedule Modifications, and the FMLA.....	106
	2. Work from Home .....	109
	3. Job Reassignment—Generally .....	109
	4. Job Reassignment—Collective Bargaining or Seniority Agreement.....	111
	5. Company Policies, Discipline, and Termination.....	112
	6. Job Rotation.....	115
	7. “Light Duty” Positions .....	115
	8. Equipment Changes and Technology Updates.....	115
	9. Provision of Services Such as Interpreters and Job Coaches .....	116
	10. Leave of Absence .....	116
§ 7.2	Accommodation Process .....	117
	A. The Request.....	117
	B. Interactive Process.....	118
	C. Accommodation for “Regarded as” Disability.....	120
§ 7.3	Undue Hardship .....	120
§ 7.4	Burden of Proof .....	121
	A. Reasonable Accommodation and Undue Hardship .....	121
	B. Disparate Treatment—McDonnell Douglas Corp. and Price Waterhouse.....	123
	C. Disparate Impact—ADA Title I Class Actions.....	126
§ 7.5	Direct Threat Defense and Qualification Standards.....	127
§ 7.6	Direct Threat Defense to Others and to Self.....	128
<b>Chapter 8. Title I Enforcement and Remedies .....</b>		<b>133</b>
§ 8.1	Introduction to Remedies .....	133
§ 8.2	Title I Remedial Procedure .....	134
	A. Administrative Exhaustion .....	134
	B. Administrative Limitations Periods—Accrual.....	135
	1. Violations Outside the Limitations Period...	135

2.	Equitable Grounds for Relief from a Delayed Filing .....	137
C.	Statute of Limitations After Exhaustion of Administrative Remedies .....	137
D.	Role of the EEOC .....	138
1.	EEOC's Authority .....	138
2.	EEOC Procedures—Administrative Exhaustion.....	139
§ 8.3	Title I Remedies .....	140
A.	Equitable Remedies .....	141
1.	Injunctive Relief—Reinstatement.....	141
2.	Back Pay and Front Pay .....	141
a.	Back Pay .....	141
b.	Front Pay .....	142
c.	Limitations on Back and Front Pay— Mitigation .....	142
d.	Limitations on Back and Front Pay— Collateral Payments.....	142
B.	Compensatory Damages .....	143
C.	Punitive Damages .....	144
§ 8.4	Statute of Limitations .....	144
§ 8.5	Attorney's Fees.....	145
A.	Prevailing Party .....	145
B.	Reasonableness of Fees.....	145
§ 8.6	Mediation of Disability Rights Disputes .....	146
§ 8.7	Arbitration of Disability Rights Disputes .....	147
A.	Arbitrability of ADA Disputes.....	147
B.	Enforceability of the Arbitration Agreement: Procedural and Substantive Unconscionability ...	149
<b>PART 4. ACCESS TO PUBLIC SERVICES: ADA TITLE II</b>		
<b>Chapter 9. Statutory Background .....</b>	<b>153</b>	
§ 9.1	Overview.....	153
§ 9.2	Statutory and Regulatory Scheme.....	153
§ 9.3	Constitutionality .....	155
A.	Did Congress Validly Abrogate the States' Sovereign Immunity?.....	155
B.	Beyond <i>Lane</i> .....	160
C.	Other Constitutional Issues .....	163
<b>Chapter 10. Coverage.....</b>	<b>167</b>	
§ 10.1	Introduction.....	167
A.	“Public Entity” .....	167
B.	Prisons as Public Entities and a Cautionary Note.....	169
C.	Service, Program, and Activity .....	170
1.	General Rule—Broad Construction .....	170
2.	Employment Under Title II.....	171
§ 10.2	Elements of Title II Claim.....	171

§ 10.3	“Qualified Person with a Disability” .....	172
§ 10.4	Not Excluding, Denying, Discriminating— Affirmative Responsibilities of Public Entities .....	173
	A. Reasonable Modifications to Policies, Practices, and Procedures .....	175
	B. Opportunity for Equal Benefit .....	179
	C. Integration .....	180
	D. Facilities Modification .....	184
	1. Existing Facilities .....	184
	2. New or Modified Facilities .....	185
	E. Effective Communication .....	186
	F. Transportation .....	187
	1. Pre-ADA Statutes and Regulations .....	188
	2. ADA Transportation Provisions .....	188
	a. Subpart I—Trains, Cabs, Buses, and Other Paratransit .....	188
	i. Fixed Route Systems .....	188
	ii. Demand Response Systems .....	189
	iii. Transportation Facilities .....	190
	b. Subpart II—Intercity and Commuter Rail .....	190
§ 10.5	By Reason of Disability—Intentional Discrimination Versus Disparate Impact .....	191
§ 10.6	Remedies and Enforcement Overview .....	193
§ 10.7	Procedure .....	193
§ 10.8	Remedies .....	194
	A. Private Rights of Action .....	194
	B. Available Types of Relief .....	195

## PART 5. ACCESS TO PUBLIC ACCOMMODATIONS: ADA TITLE III

<b>Chapter 11. ADA Title III .....</b>	<b>201</b>	
§ 11.1	Overview .....	201
§ 11.2	Places of Public Accommodation and Commercial Facilities .....	201
	A. General .....	201
	B. Responsible Parties and Their Duties in Different Contexts .....	205
	C. Covered Areas .....	205
	D. Physical Structures .....	206
§ 11.3	Examinations and Courses .....	207
§ 11.4	Exempt Entities .....	208
§ 11.5	Relationship to Title II .....	210
§ 11.6	Geographic Limits .....	210
<b>Chapter 12. Prohibited Conduct .....</b>	<b>213</b>	
§ 12.1	Overview .....	213
§ 12.2	Reasonable Modifications .....	214
§ 12.3	Service Animals as Reasonable Modifications/ Accommodations .....	215

§ 12.4	Permissible Scope of Reasonableness/Fundamental Alteration .....	217
§ 12.5	Effective Communication .....	222
§ 12.6	Architectural Barriers .....	225
	A. Existing Facilities .....	226
	B. Alterations.....	227
	1. Path of Travel.....	228
	2. Technically Infeasible .....	228
	C. New Construction .....	229
§ 12.7	Enforcement and Remedies.....	230
§ 12.8	Procedures.....	231
	A. Notice .....	231
	B. Statute of Limitations.....	232
	C. Alternative Dispute Resolution.....	232
§ 12.9	Remedies .....	232
	A. Injunctive Relief.....	232
	1. Consequence of Lack of Damages .....	232
	2. Standing.....	232
	3. Examples of Injunctive Relief.....	233
	B. Enforcement by Contempt.....	233
	C. Enforcement by the Attorney General (DOJ)– Compensatory Damages and Civil Penalties .....	234
	D. Attorney's Fees.....	234
	1. Prevailing Party .....	235
	2. Reasonableness of Fees.....	236

## **PART 6. INDIVIDUALS WITH DISABILITIES EDUCATION ACT**

<b>Chapter 13. IDEA .....</b>	<b>241</b>	
§ 13.1	Overview.....	241
§ 13.2	Precursors to IDEA.....	241
§ 13.3	General Statutory Requirements of IDEA .....	242
§ 13.4	Persons Protected, Eligibility, Child Find, and Re-Evaluation .....	243
§ 13.5	Free Appropriate Public Education .....	244
§ 13.6	Least Restrictive Environment .....	247
§ 13.7	Educationally Related and Other Services .....	248
§ 13.8	Discipline, Behavior, and Restraint .....	249
§ 13.9	Residential Placement, Private School Placement, and Juvenile Justice Issues.....	250
§ 13.10	Special Education Process.....	252
§ 13.11	Exhaustion of Administrative Remedies.....	253
§ 13.12	Lessons from Endrew and Ehlena .....	255
§ 13.13	IDEA Civil Actions, <i>Pro Se</i> Representation in Federal Court, and Remedies.....	257

**PART 7. U.S. DOMESTIC AND INTERNATIONAL  
DISABILITY LAW AND POLICY**

<b>Chapter 14. Domestic Disability Law and Policy.....</b>	<b>261</b>
§ 14.1 Overview.....	261
§ 14.2 Disability and Employment Policy .....	263
§ 14.3 Workforce Investment Act.....	264
A. Overview .....	264
B. Applicability of the ADA to WIA .....	265
§ 14.4 Ticket to Work and Work Incentives Improvement Act.....	265
A. Overview .....	265
B. Applicability of the ADA to TWWIAs Employment Networks .....	266
§ 14.5 Social Security Disability Insurance .....	268
A. Overview .....	268
B. Interaction of the ADA and SSDI .....	268
§ 14.6 Temporary Assistance for Needy Families Programs .....	269
A. Overview .....	269
B. Applicability of the ADA to TANF .....	270
§ 14.7 Disability and Health Care Policy .....	271
§ 14.8 Medicare and Medicaid .....	271
A. Overview .....	271
B. Compliance and Litigation .....	272
§ 14.9 Patient Protection and Affordable Care Act .....	273
A. Overview .....	273
B. <i>Texas v. United States</i> and Subsequent Proceedings.....	276
§ 14.10 Genetic Discrimination.....	277
A. Genetic Information Nondiscrimination Act.....	278
B. Asymptomatic Genetic Traits Under the ADA .....	279
<b>Chapter 15. Disability and the Internet .....</b>	<b>283</b>
§ 15.1 Overview.....	283
§ 15.2 Internet Accessibility and ADA Applications .....	284
A. The “Place” Requirement.....	285
B. Effective Communication .....	286
C. First Amendment Issues .....	287
§ 15.3 Applications of Sections 504 and 508 of the Rehabilitation Act .....	288
§ 15.4 Twenty-First Century Communications and Video Accessibility Act .....	289
§ 15.5 Right to Web “eQuality” .....	290
A. Application of Web Content Accessibility Guidelines.....	291
B. Standing Redux.....	293
<b>Chapter 16. Disability and Tax Policy .....</b>	<b>301</b>
§ 16.1 Overview.....	301

§ 16.2	Tax Policies for Americans with Disabilities and Their Employers .....	301
§ 16.3	Tax Policy and Economic Security for Americans with Disabilities .....	303
	A. Achieving a Better Life Experience Act.....	303
	B. ABLE Act Eligibility and Contributions .....	305
	C. ABLE Act and the ADA's Objectives .....	306
<b>Chapter 17. International Disability Rights Law .....</b>		<b>309</b>
§ 17.1	Overview.....	309
§ 17.2	Global Status of People with Disabilities.....	310
§ 17.3	The United Nations .....	312
§ 17.4	United Nations Convention on the Rights of Persons with Disabilities.....	314
	A. CRPD Background .....	314
	B. CRPD Overview .....	315
	C. CRPD Article 12 and Recognition as Persons Before the Law .....	317
<b>PART 8. AFTERWORD</b>		
<b>Chapter 18. “Onward Disability Law and Policy”.....</b>		<b>321</b>
§ 18.1	Changing the World.....	321
§ 18.2	Disability Is Personal .....	322
§ 18.3	Rights, Aspirations, and Opportunity .....	325
§ 18.4	A World Without Disability Law and Policy? .....	328
<b>Endnotes .....</b>		<b>331</b>
<b>TABLE OF CASES .....</b>		<b>391</b>