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Responses to Proposed Clarifications From Bartlett et al.

1. Drugs: Request -- Modify Harkin floor amendment to delete protection for an individual who "currently is a user of illegal drugs."

Response: GIVE -- STATUTORY LANGUAGE

Discussion:

* Bartlett is apparently referring to the mix-up in language that occurred on the Senate side. Language was accepted in Senator Helm's provision which inadvertently provided that if a disabled person was a current user of illegal drugs, that person was still protected. Senator Helm's language was then applied to the other sections of the bill (to be consistent).

* The fix here is easy: go back to the statutory language that everyone (Administration, business community etc.) had agreed to originally. That language says the following:

"For purposes of this Act, an individual with a disability does not include an individual who is a current user of illegal drugs, when the covered entity acts on the basis of such use.

(The underlined language is the original language everyone agreed to.)

2. Liability in contractual relationships

Two requests --

A) Add in section 102(b)(2) the concept that the covered entity knows the contractual relationship has the effect of discrimination.

B) Add that establishing such a relationship would be allowed if not having the relationship would constitute an undue hardship.

Response: GIVE -- ALTERNATIVE STATUTORY LANGUAGE

Discussion:

* Section 102(b)(2) of the ADA provides that discrimination includes "participating in a contractual or other arrangement or relationship that has the effect of subjecting a qualified applicant or employee with a disability to the discrimination prohibited by this title

* Bartlett's concern apparently is that an entity that needs to enter into a contract with another business (e.g., to buy a contact lens device), can't possibly **know** whether that entity happens to discriminate against its own employees in some way, and also may really **need** to do business with that particular company. Bartlett thinks the ADA contract provision makes the first entity liable for the discrimination of the second entity, and so he wants a knowing requirement and an undue hardship limitation.

* Bartlett has highlighted what could have been a plausible interpretation of the ADA contract provision -- but it is not what that provision was intended to cover. Therefore, we can add statutory language to make the provision clearer, so that the interpretation which Bartlett fears doesn't happen.

* The contract provision is intended to mean that if the first entity enters into a contractual relationship, which has the effect of subjecting its own employees or applicants to discrimination, that relationship is not allowed. For example, if the first entity entered into a contract with an employment agency, that had a blanket policy of not interviewing any mentally retarded people or people with epilepsy for employment with the first entity, that would be disallowed. What the employment agency did with regard to its own employees would be irrelevant for purposes of this particular ADA provision and the first entity would not be liable for that. (Same -- example re contracting with an inaccessible hotel to have a training program for employees.)

* In fact, there was a different provision in the original ADA which would have caused the problems Bartlett is afraid of. That provision said that discrimination included "aiding or perpetuating discrimination by providing significant assistance" to an organization that discriminates. (§101(a)(1)(D), H.R. 2273). That provision was deleted from the ADA after the Administration raised the same concerns Bartlett is raising now, and the more limited contractual provision was put in instead.

* So, to take care of Bartlett's concern (and he's right that the provision **could** have been **misinterpreted** to be **broader** than we intended), we can add **statutory** language that makes it clear that section 102(b)(2) applies only to an entity's own employees. It would be contorted grammar, but one could say:

> Discrimination includes "participating in a contractual or other arrangement or relationship that has the effect of subjecting a qualified applicant or employee with a disability, of the (first) entity entering into the contractual relationship, to the discrimination prohibited by this title ....

(We can do better grammar than this, but you get the general idea.)

3. Undue hardship

Two requests:

A) Linkage: Every time reasonable accommodation is mentioned in the ADA, "undue hardship" should be referred to as well.

Response: **GIVE -- REPORT LANGUAGE**

Discussion:

* There are ONLY two places in the bill where the term reasonable accommodation appears in the ADA and the term undue hardship does not appear. These are exactly the same two places in the Section 504 regulations where the term reasonable accommodation appears and the term undue hardship does not appear.

* Go to page 11, lines 17-22 (sec. 102(b)(5)). That's the **substantive** provision of the ADA -- which clearly states that an entity does **not** have to provide a reasonable accommodation if doing so would impose an **undue hardship.** This provision **directly** tracks the 504 reg, 42 CFR 84.12(a).

* Now go to p. 9, lines 3-15 (sec. 101(8)). This is where reasonable accommodation is defined. The term reasonable accommodation does not, in its definition, include the concept of undue hardship, because that's added later by the substantive section of the bill. It would look pretty stupid (legally) to add to the definition of reasonable accommodation that reasonable accommodation is limited by undue hardship, in light of the later substantive provision. However, one can easily have **report language** that says that, of course, the definitions must be read in light of the overall bill. (Somewhat stating the obvious, but

fine if that makes people more comfortable.)

* Now go back to pp. 11-12, lines 23-25; 1-3 (§102(b)(6)). This is the second place where reasonable accommodation appears without undue hardship. This provision states that discrimination includes denying an employment opportunity because of the need to make a reasonable accommodation. It has always been accepted that this provision refers to a reasonable accommodation that would not impose an undue hardship. In fact, this provision is taken verbatim from the 504 reg (42 CFR 84.12(d)) which also does not explicitly refer to undue hardship and also has always been interpreted to include that element. Again, it would be acceptable to add report language explaining that, of course, substantive provision #5 governs provision #6 with regard to undue hardship.

Request #2:

B) In **employment:** replace the current definition of "undue hardship" with a provision saying that, in determining undue hardship, "consider all site specific factors" including the cost of an accommodation relative to the value of the job in which the accommodation is being made.

In **public accommodations:** add consideration of site specific factors, such as net income of a site, to all concepts under the title: readily achievable; readily accessible; undue burden; fundamentally alter; and maximum extent feasible.

Response: **MAJOR GIVE (FROM OUR PERSPECTIVE) -- REPORT LANGUAGE ON SITE SPECIFIC FACTORS**
(Plus, report language on job description affecting type of reasonable accommodation.)

Discussion:

Employment

* It is totally unacceptable to delete the entire current definition of undue hardship in the employment section, which was negotiated at length with the Administration and is taken directly from the Section 504 regulations.

* With regard to having the undue hardship factors in employment include consideration of the cost of the accommodation relative to the value of the job, we can go along with report language that should meet the basic concern raised. The report language should not, however, be phrased in terms of "value of the job," because that is really distasteful to the disability community which would view it as enshrining in law that people in lower-paying jobs deserve less. Instead, we can reach the same

objective by saying that some jobs have **duties** that require more expensive accommodations than others (e.g., the time needs of a mail clerk for an interpreter is a lot less than the time needs of a CEO.)

* Re site-specific, this is **TOUGH**. We certainly do not want to relieve a parent company from all financial responsibility when it **does** have the resources to pay for a reasonable accommodation and if other types of financial decisions are made on a company-wide basis. Allowing decisions to be made just on site-specific factors could be a wide hole that big companies could drive through with impunity, basically ending up being treated just like small companies -- even though, in reality, they are quite large, with significant resources.

* On the other hand, we recognize that this is a concern which has been raised enough that it needs to be addressed in some fashion. We are **particularly wary**, however, of putting anything in **statutory language**. There are two reasons for this: 1) After working with possible language for some time, it is clear that there are so many complicated scenarios that could arise that we could not possibly anticipate all of them and therefore adequately address them in statutory language. This is truly an area better dealt with through detailed regulations. Otherwise, we could end up creating loopholes that **nobody** had intended to create. 2) The statute already says that the "size of the budget" and the "composition and structure of the workforce" are factors to be taken into account. It would be legitimate, therefore, for report language to explain how those factors are to be taken into account when one entity operates at multiple sites. There is no need for extra **statutory** language if report language is put in.

* It is still with quite some trepidation, however, that we could see agreeing to **report language** that a) would mandate consideration of site specific factors and b) would direct the EEOC to develop regulations on the issue. The report language would look something like this:

"In circumstances where a covered entity operates at multiple sites, a factor to be considered in determining undue hardship is whether provision of the accommodation would result in a significant adverse economic impact on a specific site, such as site closure. Another factor to be considered is the financial resources available to the specific site from the covered entity. The EEOC should develop guidelines for determining how these various factors should be taken into account."

Public Accommodation

* Once we've done employment, this section goes quicker.

* There are two terms mentioned by Bartlett, as requiring consideration of net income and other site specific factors, which are completely unacceptable. "Readily accessible" is the term used for **new construction** and **alterations.** There is **no** cost element built in **now** for new construction and alterations, so we certainly would not add now a **site specific** cost factor. Similarly, the term "maximum extent feasible" applies only in the alterations area.

* The term "readily achievable" does have a listing of the factors in the statute (including size of budget), and "undue burden" and "fundamentally alter" basically follow the "undue hardship" definition. So, the "give" here would be the same as above -- i.e., report language (with all the concerns and trepidation noted above still applying).

4. Threshold for accessibility alterations

Request: The ADA should include a specific threshold for when "alterations" and "major structural alterations" would trigger the "readily accessible" requirement.

Response: **GIVE -- STATUTORY LANGUAGE**

Discussion:

* The American Institute of Architects also raised concerns about this provision. They were particularly concerned about what would constitute a "major structural alteration" because that triggers the much more costly requirement of making the path of travel and facilities serving the altered area accessible as well.

* The following statutory language has been worked out, between disability folks and the AIA, to clarify the ADA's requirements. We think this should meet the concerns raised.

* On p. 38, strike line 20-23 (where ADA says: and where the entity is undertaking major structural alterations..."). Insert in lieu:

"and where the entity is undertaking an alteration that affects or could affect usability of or access to an area of the facility containing a primary function"

(pick up rest of sentence: "the entity shall make the alterations in such a manner that, to the maximum extent feasible, 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")

and then add:

"where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area **are not disproportionate to the overall alterations in terms of cost and scope** (as determined under criteria established by the Attorney General."

* This language has been signed off by AIA and the disability community.

5. Contagious diseases

Request: Substitute for the ADA term "direct threat," the "significant risk" standard from the Supreme Court Arline decision.

Response: **PASS -- NEED MORE INFO**

Discussion:

* This is a very straightforward legal question. The ADA "direct threat" provision is the one that says that it is a valid qualification standard that a person with a contagious disease not pose a "direct threat to the health or safety of others."

* We have always said that the "direct threat" standard in the ADA (and in the Civil Rights Restoration Act and in the Fair Housing Amendments Act, where similar language appears) means the Arline standard. That is: a person is not qualified if he or she poses "a significant risk of transmitting the infection to others in the workplace which cannot be eliminated by reasonable accommodation."

* There is no intention to get something **more** from the language of "direct threat" than we would get under the Arline standard. In fact, courts that have had occasion to apply the "direct threat" provision from the Fair Housing Act have applied the Arline standard.

* This is not, however, a straightforward political/strategic question. **Keeping the entire Arline "significant risk" standard completely intact is key to the AIDS community. Totally key.** Therefore, we are a bit concerned about having the whole sentence out there, dangling, able to be possibly snipped away by Dannemeyer in Energy and Commerce and

possibly on the floor (in a way that the more opaque "direct threat" may not be as vulnerable).

* Upshot: we need to do a little more investigation of the motive behind this request and do some strategic decision-making.

6. Monetary damages

Request: Limit the monetary damages that the AG can ask for in pattern or practice cases under public accommodations to "out-of-pocket expenses."

Response: NO GIVE.

Discussion:

* The damages available under public accommodations have already been radically cut back.

* The one piece of damages which was saved was in pattern or practice cases brought by the AG, if the AG requested monetary damages for the aggrieved party.

* The deal on the Senate side between the Administration and the Senate was clearly that all forms of monetary damages would be available to be requested by the AG.

* Of course, the AG has complete discretion to decide what to ask for -- and so the AG can decide, as the present AG said he would in his testimony -- to ask for only limited damages. While we view that statement as already somewhat counter to the spirit of the deal, the AG certainly did not negate the letter of the deal because his clear implication was that monetary damages could include more than out-of-pocket expenses if an AG chose to ask for them.

* As a basic principle on all of these Bartlett "clarification requests," if the issue concerns something that was directly considered and addressed in the deal with the Administration, we do not believe it is appropriate to make further changes now that would undercut that deal. The monetary damages request falls directly in this category.

7 and 18. Pattern or practice.

There are four requests:

#7. A) Provide that pattern or practice cases be considered in

terms of entity subdivisions, where the subdivisions are physically separate and have independent decision making authority.

Response: NO GIVE -- UNNECESSARY (POSSIBLE REPORT LANGUAGE)

Discussion:

* The deal with the Administration, as far as pattern or practice cases goes, was basically to follow the precedent of the Fair Housing Amendments Act.

* The Fair Housing Act says nothing, in statute, about how to treat entity subdivisions. There is no reason for the ADA to have anything different in its statute.

* We could agree to report language that says that, with regard to pattern or practice authority, courts should follow the precedent of Fair Housing and other civil rights laws regarding pattern or practice authority. So, however entity subdivisions are treated under those laws, we'll accept that for ADA.

B) Request: Clarify that a violation for purposes of determining a civil penalty is a pattern or practice violation.

Response: GIVE -- REPORT LANGUAGE

Discussion:

* Following the approach set forth above, our principle is that whatever applies in other civil rights laws re pattern or practice cases applies to the ADA.

* In that regard, it is accepted that the $50,000 civil penalty for a "first violation" refers to the first group of violations brought under a pattern or practice case. The "subsequent violation," which brings a possible $100,000 fine, is the second group of violations. We can have report language which makes that clear.

#18. C) Request: Resources of AG in pattern or practice/cases of general importance cases should be targeted to cases involving "willful or egregious" violations.

Response: NO GIVE -- UNNECESSARY

Discussion:

* This is the same discussion as in #7A. The deal was to

follow Fair Housing; there is no provision in the statute in Fair Housing which limits or targets pattern or practice cases to "willful or egregious" violations. There is no reason why the ADA statute should be any different from Fair Housing or any other civil rights law in this area.

* In any event, as a practical matter, this exhortation is particularly unnecessary. An AG certainly has flexibility to decide where to target his or her resources. If Bartlett and others want to make statements on the floor stating that they hope the AG will target his resources to these types of case, nothing is stopping them from doing so.

* Again, report language can certainly be put in saying that the practice under ADA for pattern or practice cases should be similar to what exists under other civil rights laws.

D) "Good faith" under sec. 308(b)(3) should be clarified to include consideration of whether defendant knew of or showed reckless disregard for the law, and whether the disability could have been reasonably anticipated by the defendant.

Response: **GIVE -- REPORT LANGUAGE**

Discussion:

* There is no reason to define "good faith" in statute.

* It would be possible to put in report language stating that, within the concept of good faith, a court should consider the factor of whether a defendant knew of or showed reckless disregard of the law.

* It is not clear to me what the "reasonable anticipation of disability" is supposed to mean. If they develop report language explaining that point, I am sure we could work with it.

8. Preemption

Two alternative requests:

A) If entity is covered by ADA, that preempts coverage under sections 503 and 504.

B) If entity is in compliance with secs. 503/504, that is deemed to be compliance with ADA.

Response: **NO GIVE (POSSIBLE REPORT LANGUAGE)**

Discussion:

* Alternative (A) is unacceptable because Section 504 provides certain remedies that ADA does not have (e.g., withdrawal of federal funds as a penalty) and it offers an administrative procedure for filing complaints (through the various agency Offices of Civil Rights) which is particularly important for disabled people who are usually poor and do not have access to lawyers. In addition, Sec. 503 requires affirmative action. So, secs 503 and 504 should not be preempted by the ADA.

* Alternative (B) is unacceptable because, while the ADA is based on Sec. 504, there are some areas where a conscientious effort was made to clarify the 504 requirements (e.g., what constitutes a reasonable accommodation) and to set forth all of these requirements clearly in one statute. That whole effort would be lost if compliance with 504 could just be deemed to be compliance with ADA.

* Because the nursing homes are lobbying this issue so strongly, it might be possible to say in report language [this is just CF/MH now] that compliance with ADA would be deemed to be compliance with Section 504 and Section 503, except that: a) the remedies and administrative procedures of 503 and 504 remain separately applicable; b) the affirmative action requirements of sec. 503 remain separately applicable; and c) the access requirements for existing facilities under sec. 504 remain separately applicable. (And, of course, if God forbid, we lose anything else in committee or the floor, which we will not, that part of 504 also remains.)

9 & 10. Business necessity/Burden of proof.

Request: Explicitly conform the ADA to the Wards Cove decision: change "business necessity" to "business justification," and place burden of proof on plaintiff.

Response: NO GIVE.

Discussion:

* The Wards Cove issue was extensively discussed with the Administration as part of the deal.

* The compromise reached was that the statutory language in the ADA would not go into detail about the burden of proof or define business necessity, but that the report would state that burden of proof and business necessity is governed by Section 504 law as it existed up till Wards Cove.

* This delicately crafted compromise should not be touched

at all.

11. Basis of discrimination.

Request: Clarify that omission of word "solely by reason of handicap" was not intended to mean that discrimination occurs when disability is a "nonsubstantial factor" in an employment decision.

Response: NO GIVE -- UNNECESSARY

Discussion:

* This was another issue directly addressed in the discussions with the Administration.

* It was accepted by all that the deletion of the phrase "solely by reason of handicap" made the ADA consistent with sec. 504 regulations and caselaw which recognize that existence of non-disability related factors should not immunize a decision in which disability has been a factor.

* There is no reason to add more on this issue than what already exists in the Senate Report (pp. 44-45). The gist of that report can be repeated on the House side.

12. Timing of compliance and regulations.

Two alternative requests:

(A) First 6 months after effective date of law should be an "education period"; next 12 months, only citations are given.

(B) Law does not become effective until 6 months after issuance of a technical assistance manual or 6 months after issuance of final regs.

Response: NO GIVE

Discussion:

* These suggestions are absurd, especially in light of the effective dates of the ADA and the history of regulation writing under disability law.

* The employment title does not become effective until 24 months after enactment, and the other titles 18 months after enactment. That's more than enough time for education. If

Bartlett wants to suggest that the effective dates should be changed to 12 months throughout, with the following 12 months being a period in which citations are given, he should definitely recommend that to the Administration. (I'm sure we could find him some backers among us.)

* In light of the history of disability law, in which it took four years and intense sit-ins to get the sec. 504 regulations issued, there is no way in which effective dates should ever be tied to when regs or a manual are issued.

13. Association provision.

Request: Limit the protection of the association provision to people related by blood, marriage, or legal adoption to the person with a disability.

Response: NO GIVE

Discussion:

* The association provision of the ADA protects a person who is discriminated against because of that person's association with a person with a disability.

* The Bartlett request would totally gut the basic purpose of the provision. Often the people who are discriminated against are not relatives, but rather are caretakers and volunteers. For example, a woman in Texas who volunteered in a Meals on Wheels program for people with AIDS got fired from a job that she had held for 20 years. She would be protected under the association provision as currently written, but not under the proposed revision. Nurses and doctors who care for people with AIDS are also often discriminated against and would not be covered under the revision.

* Making this change will not "defang" Dannemeyer and it would represent a major substantive loss.

14. Duty to investigate by the AG.

Request: The AG's authorization to investigate in the public accommodations title should be limited to investigations of alleged violations.

Response: NO GIVE.

Discussion:

* This was an issue directly discussed and addressed during

negotiations with the Administration.

* Under the deal, sec. 308(b) (pp. 48-49) was basically taken verbatim from the Fair Housing Act. Under the deal, an additional sentence was also added, which does not appear in Fair Housing (but which we found in another law). That sentence provides:

"The Attorney General shall investigate alleged violations of this title, which shall include undertaking periodic reviews of compliance of covered entities under this title." (emphasis added)

* The language here was chosen deliberately, not sloppily. The AG's investigative responsibility includes both investigating alleged violations and doing periodic compliance reviews. According to the Justice Department, this is common procedure under existing pattern or practice authority. This should not be changed

15. Essential functions

Request: Clarify that "essential functions" shall be those identified by the employer, absent compelling evidence to the contrary.

Response: **HALF-GIVE -- REPORT LANGUAGE**

Discussion:

* Under the ADA, a person with a disability is qualified if he or she can "perform the essential functions of the job."

* It is acceptable to have report language state clearly what the law is currently under Section 504: that is, that the employer has the prerogative, as an initial matter, to determine and to set forth what he or she considers to be the essential functions of the job. The plaintiff can then rebut that determination in court, under the accepted burdens of proof set forth under section 504 caselaw.

* It is **unacceptable** to create a new and **different** standard of proof from that which exists under Section 504. For example, under section 504, an employer may not simply pronounce that something is an "essential function," and then have that pronouncement simply accepted by the court unless the plaintiff presents "compelling evidence to the contrary." That would be establishing a completely new and different standard from the current 504 standard.

16. Anticipatory discrimination.

Two requests:

(A) Limit anticipatory discrimination in public accommodations to cases of new construction.

Response: **NO GIVE -- UNNECESSARY**

Discussion:

* The anticipatory discrimination provision in the public accommodations title (a person can sue if he or she is "about to be discriminated against") comes **verbatim** from the Fair Housing Amendments Act.

* The Fair Housing Act covers both new construction and discrimination in sale and rental of dwellings (for disability as well as for race, sex etc.) There is no limitation in Fair Housing with regard to the "about to be discriminated against" provision, limiting it to new construction. So, there is no reason for that limitation to be put solely in the ADA. In addition, there is no such limitation in Title II of the Civil Rights Act of 1964, which covers public accommodations.

(B) Clarify that anticipatory discrimination must be based on "reasonable grounds," as is required under Title II.

Response: **GIVE -- REPORT LANGUAGE**

Discussion

* It was never the intention that the "about to be discriminated against" provision would allow purely speculative claims to be brought. So, it would be acceptable to have report language state that the "reasonable grounds" provision in Title II governs ADA as well.

[Title II states: "Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 2000a-2 of this title, a civil action for preventive relief ... may be instituted by the person aggrieved..." sec. 2000a-3(a)]

17. Transportation and telecommunications.

Left to the joys of future memos ....

19. <u>Other concerns</u>:

Shouldn't even need to deal with these:

* Removing a private right of action would gut the bill.

* Having a small business exemption in the public accommodations title would effectively gut half the strength of that title.

* A ceiling on readily achievable is unnecessary and unacceptable.

CF 10/26/89
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