The Economics of the Employment Provisions of the Americans with Disabilities Act:
Part I -- Workplace Accommodations

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Introduction

Since its July 26, 1992 effective date, the implementation and effectiveness of Title I of the Americans with Disabilities Act (“Title I”) has been the subject of intense debate, among employers, courts, policymakers, academics, and persons with and without disabilities.¹ Supporters of the law stress the overarching importance of the civil rights guaranteed by Title I’s anti-discrimination provisions. Critics cast the law as overly broad, difficult to interpret, inefficient, and as a preferential treatment initiative. Others question whether the law’s economic benefits to employers, to persons with disabilities, and to society outweigh its administrative burdens. These and related issues have fueled the debate, some argue a backlash, of Title I.

This article examines one aspect of the ongoing evaluation and debate regarding Title I implementation, that is, arguments based primarily in economics.² Presently, there exists limited systematic empirical study of Title I implementation in general, and of the economic

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² The article attempts to examine the economic implications of Title I in ways consistent with prior cost-benefit analysis of the law suggested by economists. As mentioned in the final Part, however, this approach is not meant to suggest that other disciplinary or non-utilitarian views of the law are less valid or useful for assessing the impact of the law on employers, persons with disabilities or society. See infra notes 168-80 and accompanying text.
impact of the law on employers and others in particular. This lack of study hinders accurate analysis and interpretation of Title I by both proponents and critics of the law.³ Part I of this article examines the major economic justifications and critiques of Title I, in light of existing empirical information on the law’s implementation. Part II explores the economics of workplace accommodations required under Title I, in particular as reflective of efficient business practices with applications to persons with and without disabilities.

I. Economic Implications of ADA Title I

There are several economic efficiency justifications linked to the provisions of Title I, each of which may be cast in support or opposition to the purposes of the law and which may impact in significant and measurable ways the American economy. This Part examines these views with reference to the central provisions of the law and the existing, but limited, empirical study.⁴ The implications explored relate to the following propositions that are open to empirical verification:

1. **Definition of Disability.** Title I’s statutory definition of disability affects the value of labor in the American workforce;

2. **Qualified Individual with a Disability.** Title I affects employers’ ability to hire and retain “qualified” employees, and to define essential job functions and production requirements and, thereby, employers’ labor market efficiencies;

3. **Reasonable Accommodations.** Title I impacts employers’ decisions to provide effective and economically efficient “accommodations” for job applicants and employees with and without disabilities; and,

³ See Achieving Independence: The Challenge for the 21st Century -- A Decade of Progress in Disability Policy Setting an Agenda for the Future, National Council on Disability (July 26, 1996), at 6 (recommending that accurate data about people with disabilities needs to be collected, analyzed and reported).

4. **Undue Hardship.** Title I’s economic impact varies for employers of different sizes and in different labor markets.

**A. Definition of Disability**

Proponents and critics of Title I argue that the statutory definition of disability impacts, in either economically efficient or inefficient ways, the “value” of labor to employers in different segments of the American workforce. In a truly competitive labor market, the value to an employer of a worker’s labor should equal or exceed the worker’s wage. Nevertheless, as Professor Donohue has suggested, a worker’s value often is contingent upon a worker’s output and his employers’ and relevant consumers’ attitudes about the worker. Thus, to a given employer, worker value may equal output or productivity plus degree of attitudinal preference, or conversely disfavoring discrimination, toward the particular worker.

Worker value is linked also to relevant labor market biases or customer attitudes and preferences. A particular geographic market may have a high percentage of persons with disabilities, the elderly or others who value or require physical accessibility to retail establishments. This demand may lead to a preference by these individuals to shop at accessible stores, in addition to the hiring by the stores of individuals with similar needs as those in the relevant market. In such a market there may be increased value to employers (e.g., greater

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5 Worker “value” may be assessed in terms of the net dollar profit to employers, of hiring or retaining a worker in a given labor market. See John J. Donohue III, Employment Discrimination Law in Perspective: Three Concepts of Equality, 92 Mich. L. Rev. 2583, 2584 (1994) (“a worker’s wage should equal the market-determined value of the individual’s labor”).

6 See Frederick C. Collignon, The Role of Reasonable Accommodation in Employing Disabled Persons in Private Industry, in Disability and the Labor Market 196 (Monroe Berkowitz & M. Anne Hill, eds.) (1986); Donohue, supra note 5, at 2584.

7 See Donohue, supra note 5, at 2584 (defining this concept as “contingent equality”).

8 Cf. William G. Johnson, The Future of Disability Policy: Benefit Payments or Civil Rights?, 549 Annals, AAPSS 160, 164 (Jan. 1997) (arguing that labor market discrimination against persons with disabilities results more from inadequate information regarding their productivity than from prejudice, and that Title I defines worker value to employers in terms of the productive use of resources).

9 See, e.g., Bill Wolfe, “Shopping Trip-Ups: How Accessible are Local Stores to People with Disabilities,” The
profits) associated with retaining workers and serving customers with disabilities.

In a series of empirical studies discussed in greater detail in Part II below, my colleagues and I have illustrated how an employer’s sensitivity to disability-related preferences and customer attitudes may lead to enhanced economic efficiency for a particular business.10 Proponents of Title I argue that the anti-discrimination law promotes economic equality in employment, whether defined in terms of wages or career opportunities, and confronts attitudinal preferences and unjustified discrimination that is faced by qualified employees and job applicants with disabilities in different labor markets.11

Under Title I’s three prong definition, a person with a disability covered by the law has a known physical or mental condition or impairment that "substantially limits major life activities,"12 "a record of" a physical or mental condition,13 or is "regarded as" having such a condition.14 The first prong of the definition of disability is directed toward individuals with actual and substantial impairments or conditions, such as those with visual or hearing

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12 Major life activities include “caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” 29 C.F.R. § 1630.2(i). A “substantial” limit on the major life activity of working does not allow the individual to perform a class of job activities compared to an average person with comparable skills and training. 29 C.F.R. § 1630.2(j)(3)(i).

13 A record of disability means that one “has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.” 29 C.F.R. § 1630.2(k). An employer must rely on the record of disability in making employment-related decisions to be held liable under Title I. Appendix to 29 C.F.R. § 1630.2(k).

14 42 U.S.C. § 12102(2) (1993). Title I also prohibits discrimination on the basis of an association with a person with a disability. Id. § 12112(b)(4). To help evaluate the meaning of discrimination under Title I, the EEOC has issued interpretative guidance. See EEOC Compliance Manual § 902 (Mar. 5, 1995) (defining the term disability).
impairments, cancer, mental illness, physical paralysis, or HIV disease. This prong employs a functional definition of disability that is determined on a case-by-case basis. The first prong definition of disability is not only based on the diagnosis of the impairment but also on the effect of the impairment on the individual’s life. Physical characteristics, such as hair color or left-handedness, and temporary conditions, however, are not covered disabilities, nor are an individual’s economic, environmental, or cultural disadvantages.

Under the first prong of the definition, disability is interpreted to mean that the individual is substantially limited in a major life activity, for instance, in the ability to work in a class or range of jobs. Findings from the 1992 National Health Interview Survey show that nineteen million working-age adults, roughly 12 percent of the population between the ages of 18 and 69 years old, are restricted in the major life activity of working.

The first prong definition of disability does not mean that a covered individual must work at the job of his choice. Rather, to fall under the first prong definition, the


17 Several conditions are expressly excluded from coverage as a disability, including transvestism, homosexuality, and illegal drug use. See Burgdorf, supra note 15, at 145-46.

18 See, e.g., Gordon v. Hamm, 1996 U.S. App. LEXIS 31052 (11th Cir. 1996) (while side effects of chemo-therapy treatment may be an impairment, it may not substantially limit an individual to work in a class of jobs or in a broad range of jobs in various classes); Weiler v. Household Finance Corp., 1996 U.S. App. LEXIS 30896 (7th Cir. 1996) (individual not have a covered disability when incapable of satisfying demands of particular job).


20 See, e.g., Welsh v. City of Tulsa, Okla., 977 F.2d 1415, 1417 (10th Cir. 1992) (major life activity of working does not necessarily mean working at the job of one’s choice); Knapp v. Northwestern University, 1997 U.S. App. LEXIS 93, xx F.3d xxx (7th Cir. 1996) (same). See also Weiler v. Household Finance Corp., 1996 U.S. App. LEXIS 30896 (7th Cir. 1996) (individual not have a covered disability when incapable of working under a particular supervisor because of anxiety or stress related to job review).
individual’s “access” to the relevant labor market must be substantially limited by the impairment or condition.\textsuperscript{21} Put differently, an individual’s failure to qualify for one job in a given labor market, even because of a substantial impairment or condition, does not necessarily mean that individual has a covered disability for purposes of Title I analysis.\textsuperscript{22} A court must still assess whether the individual’s impairment or condition creates a significant barrier to employment or to a particular labor market.\textsuperscript{23} Factors considered in determining whether an impairment substantially limits the major life activity of work, and therefore is a covered disability, include the individual’s access to a geographic area, the number and type of jobs requiring similar training or skills (e.g., class of jobs in the relevant labor market), and the number and type of jobs not requiring similar training and skills (e.g., range of similar jobs in the relevant labor market).\textsuperscript{24}

The access to labor market test associated with the first prong of the definition of disability suggests that in cases where an employer fails to hire a job applicant with an actual impairment that forecloses the individual from working within a broad range of jobs in an industry or in a large company (e.g., a blind person or a person with mental retardation), that individual may have a disability under the first prong of the statutory definition.\textsuperscript{25} This determination alone, however, does not indicate that individual is qualified to perform the job in question. Rather, the test focuses on whether the individual’s access to the relevant labor market or job is limited due to the substantial nature of his impairment. If limited access to the relevant

\textsuperscript{21} See, e.g., EEOC v. Joslyn Manufacturing Co., 1996 U.S. Dist. LEXIS 9882 (N.D. Ill. July 11, 1996) (impairment excluded individual from a wide variety of jobs at employer in question). However, an individual may show a substantial limitation on a major life activity other than working and thereby be a covered person with a disability. Burgdorf, \textit{supra} note 15, at 156-57.

\textsuperscript{22} See 29 C.F.R. § 1630.2(j)(3)(i).

\textsuperscript{23} See Joslyn, \textit{supra} note 21, at *16 (citing cases in support).

\textsuperscript{24} 29 C.F.R. § 1630.2(j)(3)(ii).

\textsuperscript{25} See Joslyn, \textit{supra} note 21, at *16 (citing in support Cook v. Rhode Island, 10 F.3d 17, 25-26 (1st Cir. 1993); EEOC v. Chrysler Corp., 917 F. Supp. 1164, 1169 (E.D. Mich. 1996)).
labor market is demonstrated, then the individual may be disabled for purposes of Title I analysis. A subsequent determination is required of whether he is qualified for the job and whether the employer discriminated against him because of his disability.26

Unlike the first prong, the second and third prongs of the definition of disability (i.e., “record of” and “regarded as” having an impairment) are meant to prevent employment discrimination on the basis of biased attitudes toward individuals with perceived yet often presently asymptomatic conditions (e.g., persons with a history of cancer or mental illness).27 As mentioned above, in a discriminatory market, a worker’s value sometimes is heavily contingent upon the worker’s output and his employers’, and relevant co-workers’ or consumers’ preferential or discriminatory attitudes about the worker.28

In a situation where an employment action is made because of an individual’s perceived disability, and not on worker output, that is not on the worker’s actual qualifications, the value of the worker to the employer is distorted in a discriminatory manner.29 This distortion, and, in the aggregate, related market failure, may be reflected in lower wages to the discriminated against employee or in loss of equal job opportunity. The goal of Title I is to enable qualified workers with perceived disabilities to receive the actual “value of their labor in a


27 An example of case involving all three prongs is EEOC v. Joslyn Manufacturing Co., 1996 U.S. Dist. LEXIS 9882 (N.D. Ill. July 11, 1996) (plaintiff contending he was qualified for the job, regarded as a person with carpal tunnel syndrome and had a record of this impairment that substantially limited his major life activity of working, and was denied employment on that basis).

28 See Donohue, supra note 5, at 2584 (defining this concept as “contingent equality”). Arguably, all labor markets are discriminatory in that they reflect, in part, preferences of the relevant employers. Discrimination in labor markets prohibited by Title I, however, is meant to prevent unjustified disfavor or prejudice toward the protected class of covered and qualified individuals with disabilities; for instance, to prevent employment decisions that are not related to worker qualifications and that are based on negative attitudes toward an individual’s disability. See also Johnson, supra note 8, at 161 (defining prejudice towards persons with disabilities); Majorie L. Baldwin, Can the ADA Achieve its Employment Goal?, 549 Annals, AAPSS 37, 43 (Jan. 1997) (same).

29 Title I imposes liability for discrimination whenever the prohibited motivation based on disability effects the employer’s decision, that is, “when it is a ‘but-for’ cause.” See McNely v. Ocala, 1996 U.S. App. LEXIS 30020, at *15, 99 F.3d 1068 (11th Cir. 1996) (concluding a literal reliance on the phrase “solely” by reason of disability leads to results inconsistent with Congressional intent).
nondiscriminatory environment.”

Analysis of issues associated with employers’ attitudes about perceived and “hidden” disabilities (i.e., conditions that are not immediately obvious, such as Tourette’s Syndrome or epilepsy) serves several purposes related to the analysis of the statutory definition of disability and its relation to the assessment of the value of labor in the workforce. First, studies suggest that increasing numbers of individuals with perceived disabilities are entering the workforce and are denied equal employment opportunity on the basis of biased attitudes and prejudice about their impairments. Some studies find that the most common health impairments associated with disability are “hidden” conditions.

Second, the study of attitudes toward persons with hidden or perceived disabilities is illustrative of underlying biases and discrimination unrelated to actual worker value in the relevant labor market. Thus, diminished worker value reflected in lower wages for comparable work is not related to actual output or to customers’ preferences because of unfounded attitudinal discrimination (e.g., biased attitudes toward individuals with physical disfigurements). Unlike race or gender employment discrimination, the protected characteristics associated with hidden or perceived disabilities may not be immediately obvious to the employer, either at the time of hiring or during employment (e.g., if the worker is injured on the job). Attitudinal bias may be

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30 See Donohue, supra note 5, at 2585 (defining this concept as “intrinsic equality”).

31 See, e.g., Disability Watch, supra note 19, at 3-4 (finding most common health impairments associated with disability are “hidden” conditions, and persons with “hidden disabilities,” such as those with mental impairments, encounter severe attitudinal bias in the workplace).

32 See, e.g., Disability Watch, supra note 19, at 3.

33 See Blanck & Marti, supra note 1, at xx (reviewing research on attitudes about disability).


35 See Hedberg v. Indiana Bell Telephone Co, 47 F.3d 928, 931-32 (7th Cir. 1995) (discussing similarity between non-obvious nature of religious discrimination and disability discrimination in cases involving hidden disabilities).
reflected in unconscious or unstated negative views of a worker’s ability to perform a job, even though the individual with a perceived disability may be presently asymptomatic and qualified to perform the job in question.\textsuperscript{36} Resultant discrimination by an employer based on animus toward a qualified individual with a perceived disability may result in a loss of productivity or economic value to the employer.\textsuperscript{37}

A hypothetical case involving the “regarded as” prong of the definition of disability might involve a qualified asymptomatic individual being denied an employment opportunity because of the employer’s negative attitudes toward that individual’s predisposition for cancer, genetic illness, HIV disease, psychiatric illness, or any other recognized impairment. In these situations, discriminatory and biased attitudes impact employment decisions, rather than an obvious impairment or the actual market value of individual’s labor.\textsuperscript{38} From an economic standpoint, an employer would not be allowed under Title I to consider a presently qualified worker’s future lost value or decreased output from actual yet asymptomatic or perceived impairments, such as genetic illness or HIV disease, in making hiring or employment related decisions.\textsuperscript{39}


\textsuperscript{37} Professor Donohue has argued that productivity gains or economic value to employers may be enhanced if anti-discrimination employment laws succeed in reducing such attitudinal discrimination. Moreover, Donohue suggests that the economic benefits of even small gains in worker productivity may largely offset the direct or indirect costs associated with implementation of the particular anti-discrimination law. See John J. Donohue III, Advocacy versus Analysis in Assessing Employment Discrimination Law, 44 Stan. L. Rev. 1583, 1601-02 (1992).

\textsuperscript{38} See Runnebaum v. Nationsbank of Maryland, 1996 U.S. App. LEXIS 24659 (4th Cir. 1996). According to EEOC regulatory guidance, in certain situations, the access to labor market test may not apply to analysis of the second and third prong definition of disability; that is, an individual could be covered under these parts of the definition regardless of whether the employer’s attitudes “were shared by others in the field. . . .” See 29 C.F.R. 406 (app. to pt. 1630) (commentary on §1630.2(l)(1993). This approach is meant to protect those discriminated against on the basis of attitudes about disability.

\textsuperscript{39} See infra notes 156-58 and accompanying text (this approach also consistent with thrust of Health Insurance Reform Act of 1996).
Title I’s three prong definition of disability is consistent with prior conceptions of employment equality that aim to ensure that “a worker’s wage should equal the market-determined value of the individual’s labor.” The access to labor market test, increasingly adopted by courts, reflects a high standard to meet for plaintiffs in Title I employment discrimination cases brought under the first prong of the definition of disability. That is because the test is meant to ensure that Title I’s definition of disability does not distort the value of labor to employers or alter their rational labor market behavior. Likewise, an employer’s negative attitudes about people with actual or perceived disabilities do not by themselves constitute unjustified discrimination under Title I, unless they form the basis for subsequent discriminatory behavior toward “qualified” individuals. Proof of the link between discriminatory attitudes and behavior, or “discriminatory animus,” toward a qualified individual with a covered disability is an essential element of a Title I case.

Employment decisions based on perceptions of an employee’s personality problems, such as a short temper or poor judgment in the workplace, are not prohibited by Title I if the underlying impairment is not “regarded as” a covered disability. For instance, an employee may allege employment discrimination in circumstances where the appropriateness of

40 See Donohue, supra note 5, at 2584.

41 See, e.g., Gordon v. Hamm, 1996 U.S. App. LEXIS 31052, at *16 (11th Cir. 1996) (as with actual impairments, a perceived impairment must be substantially limiting and significant, presumably perceived to substantially limit an individual to work in a class of jobs).

42 See Johnson v. Boardman Petroleum, Inc., 923 F. Supp. 1563 (S.D. Ga. 1996). There are several forms of employment discrimination under Title I. Discrimination against a qualified individual with a covered disability because of that disability may be a claim for “disparate treatment” (i.e., other similarly situated nondisabled employees are treated more favorably). See 42 U.S.C. § 12112. In some cases, where there is no direct proof of such discrimination, employees may use a burden-shifting method (i.e., the McDonnell-Douglas burden-shifting test) to prove indirectly that an employer fired a qualified employee because of his disability. See, e.g., Bultemeyer v. Fort Wayne Community Schools, 1996 US App. LEXIS 29952 (7th Cir. Nov. 18, 1996) (discussing burden-shifting test in Title I context using direct or indirect evidence of discrimination). In addition, Title I discrimination may be based independently on an employer’s not making reasonable accommodations for a qualified job applicant or employee with a covered disability. See 42 U.S.C. § 12112(b)(5)(A)-(B).

that employee’s workplace behavior is at issue.\textsuperscript{44} In one such case, an employee who was terminated for inappropriate and threatening behavior toward a fellow employee was deemed not qualified and thereby not entitled to Title I protections.\textsuperscript{45} The employee contended unsuccessfully that his behavior toward co-workers led his employer to perceive him as a covered person with a mental disability. Cases of this type suggest that an employer’s negative attitudes toward an employee resulting in an adverse employment decision still must be based on defined disabilities that fall under the purview of the law.

In addition, employment discrimination under Title I will not be found where the employer does not “know” of, perceive or treat an employee’s impairment as a substantial limitation on the employee’s present ability to work.\textsuperscript{46} Thus, an employer’s economic or humanitarian decision to grant a leave, educational or vocational training, or other workplace accommodations to a worker are not indicative of that employer’s perceptions of a defined disability.\textsuperscript{47} Likewise, an employer’s decision not to hire an individual with an impairment for a position does not demonstrate that it perceives the employee as disabled for purposes of Title I

\textsuperscript{44} See Blanck & Marti, supra note 1, at xxx-xxx.

\textsuperscript{45} Fenton v. The Pritchard Corp., 1996 U.S. Dist. LEXIS 7750 (D. Kan. May 30, 1996). Negative case examples such as Fenton have been used by critics to suggest inefficiencies in Title I implementation. See Blanck & Marti, supra note 1, at xxx-xxx (for other negative case examples). The representativeness of such cases to Title I implementation in practice is open to debate and study.

\textsuperscript{46} Johnson v. Boardman Petroleum, Inc., 923 F. Supp. 1563 (S.D. Ga. 1996). See also Stewart v. County of Brown, No. 95-2776, 1996 WL 313212 (7th Cir. 1996) (employee did not make valid perceived disability claim even though employer thought he was excitable, ordered numerous psychological evaluations for him, and stated to third persons that he considered employee to be emotionally and psychologically imbalanced, because the employer repeatedly was advised the employee was mentally fit for his job); Holihan v. Lucky Stores, 96 Daily J. D.A.R. 7516 (9th Cir. June 26, 1996) (finding issue of material fact as to perceived disability claim where employer called employee into two meetings to discuss his “aberrational behavior,” asked him if he had problems, and encouraged him to seek counseling); EEOC v. Joslyn Manufacturing Co., 1996 U.S. Dist. LEXIS 9882 (N.D. Ill. E.D., July 11, 1996) (finding genuine issue of fact where employer contended it did not treat plaintiff’s carpal tunnel syndrome as an impairment that substantially limited his ability to work at one job in the plant and that plaintiff was not disqualified from a class of other jobs).

\textsuperscript{47} See Johnson, 923 F. Supp. at 1569. A related question involves the extent to which Title I lawsuits on the basis of perceived disability conflict with other policy concerns underlying the law, such as the goal to encourage employers to humanize their relationships with their employees. Id.; see infra notes 171-79 and accompanying text (businesses are increasingly investing in accommodations for workers with and without disabilities).
analysis, regardless of whether an accommodation is required.\textsuperscript{48}

\textbf{B. Qualified Individual with a Disability}

Proponents and critics of Title I argue that the law affects employers’ ability to hire and retain “qualified” employees and, thereby distorts labor market efficiencies. Some critics of the law contend that Title I implementation has resulted in economic waste and inefficiency, declines in productivity, and reverse discrimination toward qualified individuals without disabilities.\textsuperscript{49} These arguments often are made by analogy to alleged market inefficiencies associated with Title VII of the Civil Rights Act of 1964 implementation involving issues of race and gender.\textsuperscript{50}

An individual with a disability is “qualified” for purposes of Title I if he satisfies the prerequisites for the job, such as educational background or employment experience, and can perform essential job functions.\textsuperscript{51} The concept of a "qualified individual" with a disability is

\textsuperscript{48} EEOC v. Joslyn Manufacturing Co., 1996 U.S. Dist. LEXIS 9882 (July 11, 1996) (finding that the “test for whether a perceived impairment substantially limits a major life activity is not whether the employer’s rejection of the applicant was due to a good faith, narrowly-based decision that the applicant’s characteristics did not match specific job requirements. Rather, the proper test is whether the impairment, as perceived, would affect the individual’s ability to find work across a class of jobs or a broad range of jobs in various classes.”); Barnes v. Cochran, 1996 WL 557754 (S.D. Fla. Aug. 18, 1996) (the fact that an employer finds an applicant unqualified does not mean that it did not perceive applicant as disabled).


\textsuperscript{51} 29 C.F.R. § 1630.2(m & n) (1991). Cf. Hegwer v. Board of Civil Service Commissioners, 7 Cal.Rptr.2d 389 (1992) (paramedic whose thyroid condition caused excessive weight gain not a qualified employee because she exceeded the body-fat-based weight standards for firefighters and emergency medical technicians which were reasonable means of insuring the health and safety of both employees and the public).
central to the analysis of the link between improper discriminatory attitudes and behavior, as well as to the portrayal of the economic implications of Title I.\textsuperscript{52}

Title I does not require an employer to hire or retain individuals with covered disabilities who are not qualified, or to hire or retain individuals with covered disabilities over equally or more qualified individuals without disabilities.\textsuperscript{53} Employers are not discouraged from searching for the most qualified individuals with or without disabilities.\textsuperscript{54} Nor are employers required to incur burdensome efficiency or productivity losses or opportunity costs, whether defined in terms of economic value in the relevant labor market or in retaining non-qualified workers with or without covered disabilities.\textsuperscript{55}

Title I’s “qualified individual” requirement is meant to ensure that the value of a worker’s labor or productivity should equal or exceed the worker’s wage in a given labor market.\textsuperscript{56} Workers with covered disabilities are not deemed “equal” by their Title I status to workers without disabilities, nor are they provided preferential treatment in any aspect of employment. The goal of the qualified individual provision is to ensure that a worker with a disability who can perform legitimate essential job functions, with or without a reasonable accommodation, receives wages or other compensation that are comparable to his labor market value.

Critics of Title I argue that the definition of employee qualifications artificially constrains employers’ ability to define employees’ job functions and production requirements, thereby producing economic inefficiencies.\textsuperscript{57} Yet in establishing employment qualifications (i.e.,

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\item \textsuperscript{52} Blanck, supra note 4, at 864-65.
\item \textsuperscript{53} 42 U.S.C. §12111(8).
\item \textsuperscript{54} Cf. Oi, supra note 49, at 112.
\item \textsuperscript{55} The relation among job qualifications, essential job functions and Title I’s requirement that employers provide reasonable accommodations to qualified individuals is discussed below. See supra notes 76-80 and accompanying text.
\item \textsuperscript{56} See Donohue, supra note 5, at 2584.
\item \textsuperscript{57} See, e.g., Mark A. Schuman, The Wheelchair Ramp to Serfdom: The Americans with Disabilities Act, Liberty,
educational background requirements or essential job functions), Title I only requires that the applicant's or employee’s skills are to be considered independent of the purported disability; that is, independent of unfounded attitudes about the relation of disability to current job qualifications or of views about the efficacy or cost of an accommodation for a qualified individual with a disability. Employers are free to determine legitimate essential job functions or production requirements as they see fit.58

Several trends in Title I case law support the view that the qualified individual provision of Title I has served to ensure that a worker with a covered disability who can perform essential or fundamental job functions receives a wage that is comparable to his labor market value. First, as mentioned, employers are not required to alter production standards or to shape a job for an individual with a disability. Employers must maintain legitimate job requirements, however, as compared to those that are a “subterfuge” or pretext to exclude people with disabilities from equal employment.

As Professor Burgdorf has noted, “[e]mployers retain the prerogative . . . to determine what particular jobs need to be performed in their businesses and to establish the functions of those jobs.”59 Thus, Congress did not intend for Title I to interfere with employers’ non-discriminatory rational economic decision making.60 Nevertheless, businesses of different sizes or with varying degrees of specialization have different needs with regard to the range of

58 See also infra notes 126-41 and accompanying text (discussing the costs and benefits to employers associated with the provision of reasonable accommodations).

59 Burgdorf, supra note 15, at 192. Title I distinguished between essential and marginal job functions. Marginal functions are those incidental job requirements that are not necessary to the central performance of the job in question. Id. Employers may not exclude a qualified individual with a covered disability from employment on the basis of inability to perform marginal job functions. Many Title I cases involve the extent to which a particular job function is essential or marginal. Written job descriptions typically are used as evidence of essential functions. 42 U.S.C. §12111(8).

60 Weiler v. Household Finance Corp., 1996 U.S. App. LEXIS 30896 (7th Cir. 1996), citing Wernick v. Federal Reserve Bank of New York, 91 F.3d 379, 384 (2d Cir. 1996) (“Congress intended simply that disabled persons have the same opportunities available to them as are available to nondisabled persons.”).
essential functions required of a particular worker. Such economies of scale questions are
examined under the law on a case-by-case basis, which may have lead to initial uncertainty by
the small business community about implementation of the law.61

Second, as discussed below in the context of Title I’s “undue hardship”
provision, restructuring job functions as an accommodation to a covered individual with a
disability may or may not cause an employer an economic undue hardship (i.e., inefficiencies
due to a fundamental alteration of the required job) depending upon relative costs and benefits
associated with the specialization of the task, the size and nature of the business, the availability
of worker substitutes in the relevant labor market, or cyclical changes in the market or economy
that affect labor and production requirements.62 The determination of the essential or non-
essential nature of job functions also is made on a case-by-case basis.

Third, persons with actual, hidden, or perceived disabilities may be deemed
"unqualified" for a job in circumstances in which they are shown to pose a direct safety or health
threat to themselves or others in the workplace, regardless of their ability to perform essential job
functions.63 Factors considered in determining whether a direct threat exists include the duration
of the risk, nature of potential harm, and likelihood that the harm will occur.64 Employers are
required to make an individualized and objective determination of direct threat, based on the
employee’s present ability to safely perform essential job functions. This determination must be
made on the basis of tests of current medical judgment and not on anticipated lost productivity or

61 The requirements of Title I affect businesses with 15 or more employees. See Peter David Blanck, The Emerging
finding little difference in attitudes of small and large businesses toward the employment of persons with
disabilities, including views of low costs of workplace accommodations).

62 Burgdorf, supra note 15, at 210. See also 29 C.F.R. §1630.2(n)(2) (1993) (commentary on §1630.2(n)(ii)).

63 42 U.S.C. § 12113(a) (1993); 29 C.F.R. § 1630.2(r) (1991) (defining direct threat as a “significant risk of
substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable
accommodation”). See also 28 C.F.R § 36.208 (Title I may require accommodations that eliminate or sufficiently
reduce a direct threat); 29 C.F.R. § 1630.2(r)(1991) (where a mental or emotional disability is involved, employer
must identify the specific behavior on the part of the individual that would pose a direct threat).

64 29 C.F.R. § 1630.2(r).
predictions about the future impact of a disabling condition.\textsuperscript{65}

Fourth, pre- and post-employment inquiries regarding medical history or disability have been the subject of controversy in employment discrimination lawsuits involving the assessment of the qualifications of persons with different disabilities.\textsuperscript{66} Title I prohibits disability-related pre-employment inquiries and medical tests, but such examinations are permitted after a conditional job offer has been made.\textsuperscript{67} Medically-related employment tests, if used by an employer, must be administered to all employees regardless of disability, and with limited exceptions, the information obtained treated as confidential.\textsuperscript{68}

Medical test results from a post-conditional offer of employment, or medical results obtained during employment, may not be used to exclude a qualified individual with a covered disability from the job unless the exclusion is job-related, consistent with business necessity, and not amenable to reasonable accommodation.\textsuperscript{69} If an employee alleges discrimination based on an employer’s medical test that purports to screen out qualified


\textsuperscript{66} See, e.g., Grenier v. Cyanamid Plastics, Inc., 70 F.3d 667 (1st Cir. 1995) (employer not violate ADA where it inquired into ability of job applicant, former employee, with known psychological disability, to function effectively in the workplace and to get along with co-workers and supervisor, or where employer required applicant to provide medical information as to ability to return to work with or without accommodation, and type of accommodation necessary). See also Knapp v. Northwestern University, supra note 20 (university’s-- analogous to employer’s--medical determination of whether an individual is medically qualified, if reasonable, must be given deference by the court).


individuals with disabilities, the employer may rebut the claim by showing that the test accurately measures job skills that are consistent with business necessity, such as workplace safety or security requirements.\textsuperscript{70}

D. Reasonable Accommodations

The economic implication that has received the most attention involves Title I’s affect on employers’ ability to provide workplace accommodations for qualified job applicants and employees with disabilities. As discussed above, an employer may legitimately shape an employee’s work or production requirements as long as those requirements are job-related and not a pretext for discrimination against covered persons with disabilities.\textsuperscript{71} The employer’s right to structure jobs, however, may not violate Title I’s requirement that the employer provide “reasonable accommodations” for a qualified employee with a covered disability.\textsuperscript{72}

An accommodation is a modification or adjustment to a workplace process or environment that makes it possible for a qualified person with a disability to perform essential job functions, such as physical modifications to a work space, flexible scheduling of duties, or provision of assistive technologies to aid in job performance.\textsuperscript{73} To be eligible for an


\textsuperscript{71} Id.


\textsuperscript{73} See, e.g., 42 U.S.C. § 12111(9)(B) (1993) (qualified employee may request reasonable accommodation of being transferred to a vacant and similar position with the employer). Compare Kent v. Derwinski, 790 F. Supp. 1032 (E.D.Wash. 1991) (requiring reasonable accommodation for employee with mental retardation of sensitivity training of coworkers and use of care by supervisor in disciplining to avoid criticism or undue stress); Overton v. Reilly, 977 F.2d 1190 (7th Cir. 1992) (approving accommodation for chemist with depression of restricting job to decrease contact with public where contact with public occupied 5% of employees time); Arneson v. Sullivan, 946 F.2d 90 (8th Cir. 1991) (when employee with apraxia, a neurological disorder characterized by disruptions in concentration, performs satisfactorily when placed in a semi-private work space, employer must take reasonable efforts to provide a “distraction-free environment”) with Hudson v. MCI Telecommunications Corp., No 95-1252 (10th Cir. July 1,
accommodation, an employee must make his disability “known”\textsuperscript{74} to the employer and request an accommodation. This requirement places a particular burden on an individual with a hidden and non-obvious disability to timely disclose the claimed disability and request the employer to provide an accommodation.\textsuperscript{75} Once the request is made, the employer retains the right to choose the accommodation, as long as it is effective and the employee has a good faith opportunity to participate in the process.\textsuperscript{76} An employee is not “qualified” if he cannot perform the job with or without an accommodation.\textsuperscript{77}

Critics of Title I have characterized an employer’s obligation to provide accommodations to qualified persons as a form of market distortion leading to economic inefficiencies.\textsuperscript{78} They claim that the duty of reasonable accommodation creates for persons with disabilities an employment privilege or subsidy, in that it attempts to provide covered workers the wages they would receive in a nondiscriminatory free market.\textsuperscript{79} The duty of accommodation

\textsuperscript{74} Exactly how a “known” disability is defined for purposes of Title I has been the subject of some debate. See, e.g., Hutchinson v. United Parcel Service, Inc., 883 F. Supp. 379, 394 (N.D. Iowa 1995) (“ADA does not require clairvoyance”) (quoting Hedberg v. Indiana Bell Telephone Co., Inc., 47 F.3d 928, 932 (7th Cir. 1995)) (employer cannot be liable without knowledge of disability); Morisky v. Broward County, 80 F.3d 445, 448 (11th Cir. 1996) (same). See Burgdorf, supra note 15, at 129-54.


\textsuperscript{76} See, e.g., Bultemeyer v. Fort Wayne Community Schools, 1996 US App. LEXIS 29952 (7th Cir. Nov. 18, 1996) (reasonable accommodation process requires good faith communication between employer and employee, and in case involving employee with mental illness communication process is even more critical); Beck v. University of Wisconsin Board of Regents, 75 F.3d 1130 (7th Cir. 1996) (university not liable under ADA where plaintiff responsible for breakdown in accommodation process); Peterson v. Univ. Wisconsin, 818 F. Supp. 1276 (W.D. Wis. 1993) (employee may not refuse all good faith and reasonable attempts by employer at accommodation); Taylor v. Principal Financial Group, 93 F.3d 155, 164 (5th Cir. 1996) (responsibility for fashioning accommodation shared between employer and employee). See also 29 C.F.R. § 1630.2(o)(3) (1995) (accommodation process regulations).

\textsuperscript{77} 42 U.S.C. § 12112(a).

\textsuperscript{78} See, e.g., Donohue, supra note 5, at 2608.

\textsuperscript{79} Donahue, supra note 5, at 2609. Cf. Gile v. United Airlines, 95 F.3d 492, 499 (7th Cir. 1996) (reasonable accommodation process not require employer to “bump” other employees to reassign disabled employee, nor does it
is cast as compromising the ideal of free market efficiency by imposing upon employers an affirmative duty to retain less economically efficient workers.\textsuperscript{80}

There are at least three simplified hypothetical situations which illustrate the distribution of possible economic implications of the required provision of accommodations for qualified job applicants or employees covered by the law.\textsuperscript{81} A first example involves two equally qualified workers, that is workers who are equally productive and of equal economic value to the employer. Professor Donohue has set forth such a hypothetical: “[G]iven the choice between two equally productive workers, one requiring the expenditure of significant sums in order to accommodate him, one requiring no such expenditures, the profit-maximizing firm would prefer the worker who is less costly to hire.”\textsuperscript{82}

Donohue’s hypothetical is not problematic for Title I economic impact analysis. Title I does not require the employer to hire or retain a qualified individual with a covered disability, regardless of the need for accommodation, over an equally or more qualified individual without a disability. There is no resultant distortion of labor market or economic efficiencies by Title I’s anti-discrimination provisions, nor is there a requirement “to make the disabled equal.”\textsuperscript{83} Employer prerogative and economic need is not disturbed and the employer is require employer to create new position for disabled employee); Weiler v. Household Finance Corp., 1996 U.S. App. LEXIS 30896 (7th Cir. 1996) (same).

\textsuperscript{80} See Pamela S. Karlan & George Rutherglen, Disabilities, Discrimination, and reasonable Accommodation, 46 Duke L.J. 1, 14 (1996) (“Reasonable accommodation is affirmative action, in the sense that it requires an employer to take account of an individual’s disabilities and to provide special treatment to him for that reason.”); Editorial, Disabling Consequences, Richmond Times Dispatch, at A-10 (Jan. 13, 1997) (ADA Title I reflects “an infringement of liberty for government to dictate whom employers must ‘accommodate’.”).

\textsuperscript{81} Cf. Vande Zande v. State of Wisconsin Dept. Admin., 44 F.3d 538, 542-43 (7th Cir. 1995) (concluding that the term “reasonable” is intended to qualify the term “accommodation” so that the cost of any accommodation is not disproportionate to the benefit to the employer and the accommodation itself is efficacious, regardless of an undue hardship defense subsequently put forth by an employer). See also Carolyn L. Weaver, Incentives versus Controls in Federal Disability Policy, in Disability and Work: Incentives, Rights, and Opportunities 14 (Carolyn L. Weaver ed., 1991) (discussing economic impact of accommodation provision).

\textsuperscript{82} Donohue, supra note 5, at 2608.

\textsuperscript{83} See Donohue, supra note 5, at 2611. See also Johnson, supra note 8, at 164 (arguing that Title I “goes beyond the concept of equal opportunities for equally productive workers by requiring employers to modify job requirements or
not discouraged from searching for the most qualified worker. Moreover, as discussed in Part II, to the extent that many accommodation costs for workers with disabilities are fixed or sunk, the market incentive would be to retain the qualified disabled worker over an equally or less qualified nondisabled worker requiring no accommodation.

A similarly simple hypothetical involves two workers whose productivity varies. In this case, one individual with a covered disability is more “qualified” than an individual without a disability, say by three units of value to the employer. It requires a certain amount of unit value to accommodate this qualified worker with a disability, say three units of value. In this case, the net cost to the employer of employing the individual with a disability is comparable to employing the individual without the disability and their “value” is identical. Title I would require the employer to hire the legitimately more qualified worker, regardless of disability and require the provision of accommodation. A decision by the employer in this scenario to refuse the provision of accommodation to this qualified individual with a covered disability may constitute discrimination under Title I, assuming no undue hardship is associated with the provision of the accommodation.

work environments to compensate for impairment-related limits on productivity.”).

84 Cf. Oi, supra note 49, at 112; Weaver, supra note 81, at 6 (arguing that Title I forces employers to hire less productive workers). But see, e.g., Martin v. General Mills, Inc., 1996 U.S. Dist. LEXIS 16436 (N.D. Ill., E. Div. 1996) (Title I does not require employers to retain less productive employees).

85 Donohue, supra note 5, n.72.

86 There are many direct and indirect costs and benefits associated with the provision of accommodations, including staff time spent on planning of an accommodation, enhanced productivity of the particular workers, and even tax benefits to employers for expenses incurred in the provision of reasonable accommodations. See Sears II, supra note 10, at 56-61, app. D. (listing costs and benefits of particular accommodations); Burgdorf, supra note 15, at 325-27 (describing tax benefits and that employees may contribute to the cost of an accommodation, particularly when aspects of the accommodation are personal in nature).

87 The requirement to hire the worker with a disability requiring accommodation is capped, however, by the employer’s safe harbor provision of “undue hardship” examined below. See infra notes 98-102 and accompanying text.

88 See Pub. L. No. 100-430, 102 Stat. 1619 (codified at 28 U.S.C. §§2341, 2342; 42 U.S.C. §§3601 & 3602n., 3604-14, 3614a, 3615-19, 3631). See also supra notes 90-92 and accompanying text (Title I discrimination may be based on an employer’s failure to make reasonable accommodations for a qualified job applicant or employee with a
The more controversial third hypothetical also involves two workers whose productivity varies. In this case, one individual with a covered disability is more “qualified” than an individual without a disability by three units of value to the employer. However, it requires thirty units of employer value to accommodate the qualified worker with a disability, or ten times the direct cost of the accommodation. In this case, the net cost to the employer of employing the qualified individual with a disability is considerably more than is the cost of employing the less qualified individual without the disability.89

In this third scenario, a decision by the employer to refuse to provide an accommodation to the qualified individual with a covered disability may or may not constitute discrimination under Title I. This may be true, even though provision of the accommodation may be economically inefficient to the employer, assuming actual direct and indirect costs and benefits of the decision could be calculated. Discrimination may be found if no undue hardship is associated with the provision of an effective accommodation. Alternatively, discrimination may not be found if the element of cost or efficiency is interpreted to be implicit in the concept of a “reasonable” accommodation.90 Under this latter view, an employer has no duty to incur even a modest loss in value, because it would not be “reasonable” (i.e., economically rational) to accommodate the disabled employee.91

89 With regard to this third hypothetical, Professor Feldblum has suggested that although the “failure to provide a reasonable accommodation is a form of discrimination [as it may be in the hypothetical immediately above]; it is not a remedy for discrimination in the way that various forms of affirmative action might serve as remedies.” Chai R. Feldblum, The (R)evolution of Physical Disability Anti-discrimination Law: 1976-1996, 20(5) Men. & Phys. Dis. L. Rep. 613, 618 (1996). In contrast to this view, in the Seventh Circuit case Vande Zande v. State of Wisconsin Department of Administration, Judge Posner writes: “[W]e do not think an employer has a duty to expend even modest amount of money to bring about absolute identity in working conditions between disabled and nondisabled workers.”44 F.3d at 545 (Judge Posner continues: “The duty of reasonable accommodation is satisfied when the employer does what is necessary to enable the disabled worker to work in reasonable comfort.”). Cf. Feldblum, supra note 89, at 619 (“The ‘reasonable’ part of ‘reasonable accommodation’ refers to whether a requested accommodation is effective in ensuring the person with a disability can perform the job up to the standards required by the employer.”).


91 See Feldblum, supra note 89, at 619-20 (discussing Judge Posner’s reasoning in Vande Zande decision).
It is this third scenario that critics of Title I use to suggest that the accommodation provision, absent the high evidentiary burden on employers of showing undue hardship discussed below, in effect, is an affirmative subsidy to employees with disabilities. 92 Critics argue that the accommodation provision reflects a cost to employers incurred for employees with disabilities that is not spent on other employees without disabilities who arguably are more economically efficient but possibly less qualified or productive to perform the job in question. 93 Others argue that Title I provisions reflects a judgement by society that qualified persons with disabilities should be able to work, even when “the value of their output does not equal the cost necessary to accommodate them in the workforce.” 94

Part II examines in greater detail findings from studies addressing the economic effect on employers of the provision of accommodations. Additional study is required, however, of the costs and benefits associated with accommodations in different businesses, jobs, labor markets, and involving persons with varying disabilities. 95 Study is needed also of the frequency of occurrence of the three hypothetical cases highlighted above. This analysis may show that, in practice, accommodating qualified workers with and without disabilities leads to efficient and cost-effective workplace operation. 96 In the absence of accurate and reliable measures of worker


93 See, e.g., Schuman, supra note 57, at 504-05.

94 Richard V. Burkhauser, Post-ADA: Are People with Disabilities Expected to Work?, 549 Annals, AAPSS 71, 80-81 (Jan. 1997) (arguing that Title I provisions force taxpayers to bear part of the cost of accommodations, either through higher costs, or tax credits).

95 Many qualified individuals with perceived disabilities or with a record of impairment covered under the second and third prong of the definition of disability may not need an accommodation, even though they are denied employment opportunity on the basis that their employer believes an accommodation may be required in the future. In this case, the Title I anti-discrimination provisions are implicated and should impose no economic inefficiencies on employers. See Weaver, supra note 81, at 14. Empirical study is needed on employers’ attitudes about the need for accommodations for employees’ with actual and perceived disabilities. See supra notes 31-37 and accompanying text.

96 See infra notes 126-39 and accompanying text (in contrast to critiques by economists that Title I is inefficient, made without reliance on empirical study, and noting atypical cases whose frequency in practice may be so small to rely upon for policy making purposes).
“value,” however, economic efficiency arguments, pro and con, of accommodation implementation may need to be reevaluated.

E. Undue Hardship

A final economic implication involves Title I’s economic affect on employers of different sizes and in different labor markets, particularly with regard to the provision of reasonable accommodations. Title I does not require an accommodation if it would impose an "undue hardship" on the employer. An undue hardship requires significant difficulty or expense in relation to the accommodation or the resources of the company. A common critique is that accommodations for qualified individuals create hardships that are costly and burdensome for employers. Attitudes about the cost-effectiveness of accommodations by employers, however, often have more to do with unfounded beliefs than with the actual qualifications of persons with disabilities or their ability to add to employers’ economic value.

Title I identifies a number of economically-based factors to be considered in determining undue hardship, including the nature and net cost of the accommodation, the financial resources of the business, the number of persons employed at the business, the impact of the accommodation on the operation of the business, the geographic separateness of the business facilities affected, and the composition and functions of the workforce of the business.

97 Decisions about undue hardship are made on a case-by-case basis. 42 U.S.C. § 12111(10) (1993). See also Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 138-140 (2nd Cir. 1995) (discussing employer's cost/benefit analysis); Garner v. Morris, 752 F.2d 1271 (8th Cir. 1985) (providing physician and laboratory facilities in remote location for monitoring appropriate medication level of employee with bipolar condition constituted undue hardship); Hill v. Florida Dept. Of Public Health, 2 A.D Cases 177 (M.D.Fla. 1992) (employer did not have to eliminate public-contact function of position to accommodate employee with depressive disorder because accommodation would impose undue hardship by requiring coworker to perform employee’s job).


This list of economic impact factors is meant to ensure that business size, type, sales and relevant labor markets are not affected by accommodations that pose a financial hardship to the operation of the business or that fundamentally alter the nature of the business.\textsuperscript{100} Although the employer’s undue hardship defense is assessed on a case-by-case basis, relevant economic, incremental, and opportunity costs claimed (e.g., measured in terms of lost profits or market value) may vary by industry and will need to be assessed.\textsuperscript{101}

The next Part examines empirical study on the economics of the provision of workplace accommodations. Regardless of such analysis, proponents of Title I suggest that cost-benefit analysis is a secondary justification to the anti-discrimination purposes of the law. Yet, if it is the case that on average, the benefits and value to employers of effective accommodations implemented exceed the costs, then the accommodation provision is not only consistent with the anti-discrimination purposes of the law, but also reflects economically efficient and rational workplace practices that has applications to qualified persons with and without disabilities.

II. The Economics of Workplace Accommodations

It is apparent that answers to questions related to Title I implementation and interpretation must be guided increasingly by systematic empirical study.\textsuperscript{102} Professor Collignon has argued that it is crucial to establish baseline data and models of empirical study to help foster an informed dialogue about Title I implementation and effectiveness.\textsuperscript{103} One area that has

\textsuperscript{100} See also Feldblum, \textit{supra} note 89, at 619 (discussing legislative history of undue hardship provision and that Congress rejected bright-line amendment to Title I that would have tied the determination of undue hardship to a percentage of an employee’s salary).


\textsuperscript{103} Frederick C. Collignon, Is the ADA Successful? Indicators for Tracking Gains, 549 \textit{Annals, AAPSS} 129, 130-32 (Jan. 1997) (discussing various indicators of Title I implementation, including unemployment, poverty, and legal compliance rates). See also Corinne Kirchner, Looking under the Street Lamp: Inappropriate uses of Measures
received the most study, given the ability to quantify associated costs and benefits, has been the analysis of the economic implications to employers of workplace accommodations under Title I. This Part examines the ongoing debate regarding the economics of accommodations in light of emerging study of the area.

As mentioned above, one common criticism is that the costs of accommodations outweigh the benefits provided to employers and persons with disabilities. Critics contend that the required provision of reasonable accommodations places financial burdens and administrative costs on the operation of businesses. Some argue that the costs of accommodations are especially high for large employers, who may be held accountable for extensive modifications due to their greater financial resources.

A common thread in these critiques is that they are made without reliance on data.

Because They Are There, 7 J. Dis. Pol. Stud. 77, 82-86 (1996) (critiquing prior researchers over-reliance on labor force participation measures as indicator of effective Title I implementation).

See, e.g., Rosen, supra note 92, at 18, 22; Weaver, supra note 81, at 5 (“The central flaw of the ADA . . . is in the imposition on employers of a duty to ‘accommodate’ the mental or physical limitations of the disabled worker or applicant without weighing the expected benefits of such accommodation.”). See also Newsletter of the Great Lakes Disability and Business Technical Assistance Center, Region V News, vol. 16 at 4 (Fall 1996) (28% of approximately 73,000 Title I charges through September 30, 1996 allege failure to provide reasonable accommodations, another 52% involve discharge).

105 The economic relationship among required public accommodations under Title III of the ADA (e.g., accessible public transportation), Title I workplace accommodations, and employment opportunity for qualified persons with disabilities requires detailed analysis beyond the scope of this article. See also Karlan & Rutherglen, supra note 80, at n.81 (comparing cost efficiencies of Titles I, II and III of the ADA).

See, e.g., James Bovard, Disability Intentions Astray, Wash. Times, May 20, 1996, at A16 (ADA is costly and economically inefficient); Richard A. Epstein, The Legal Regulation of Genetic Discrimination: Old Responses to New Technology, 74 B.U. L. Rev. 1 (1994) (when the absolute right to refuse employment or insurance is denied, without exception, the employer or insurer is forced into a losing economic position); Christopher J. Willis, Comment, Title I of the Americans with Disabilities Act: Disabling the Disabled, 25 Cumb. L. Rev. 715 (1994-1995) (same).

106 See generally Lawrence O. Gostin & Henry A. Beyer (eds.), Implementing the Americans with Disabilities Act (1993) (reviewing Title I provisions). Title I also does not require employers to alter their insurance benefit plans to employees working part-time as an accommodation to their disability. See Tenbrink v. Federal Home Loan Bank, 920 F. Supp. 1156, 1162 (D. Kan. 1996) (under Title I employer may provide health benefits only to full time workers, even if this requirement results in reduction in benefits for workers with disabilities who are accommodated with part-time schedules).

In the absence of such information, it is no surprise that the attitudes and behavior of many employers reflect the view that the costs of accommodations outweigh the benefits.\textsuperscript{109} It is helpful to reiterate that Title I does not require employers to hire individuals with disabilities who are not qualified, or to hire qualified individuals with disabilities over equally or more qualified individuals without disabilities.\textsuperscript{110} More than three quarters of all Title I charges filed with the EEOC have been dismissed because, among other reasons, the plaintiff alleging discrimination failed to show that he was qualified for the position.\textsuperscript{111}

Many individuals with disabilities currently in the workforce have appropriate job skills, that is, they are “qualified” for purposes of the law, and have their accommodation needs met in reasonable and effective ways.\textsuperscript{112} Findings from the 1989 National Health Interview

\textsuperscript{109} See Frederick C. Collignon, The Role of Reasonable Accommodation in Employing Disabled Persons in Private Industry, in \textit{Disability and the Labor Market} 196 (Monroe Berkowitz & M. Anne Hill, eds.) (1986) (arguing that economists’ negative theorizing about the costly effects of accommodation often do not consider the actual experiences of businesses); Baldwin, \textit{supra} note 28, at 49 (suggesting that most frequent employer concerns about Title I include costs of accommodations).

\textsuperscript{110} 29 C.F.R. § 1630.2(m & n) (1991); \textit{Sears I}, \textit{supra} note 10, at 30-40; \textit{Sears II}, \textit{supra} note 10, at 42. See also Helen L. v. DiDario, 46 F.3d 325, 334 (3d Cir. 1995) (ADA ensures that qualified individuals be treated in "a manner consistent with basic human dignity, rather than a manner which shunts them aside, hides, and ignores them."). Nevertheless, some scholars cast Title I’s reasonable accommodation provision as “contrary to our understanding of equal treatment developed under other anti-discrimination statutes.” See Deborah A. Calloway, Dealing with Diversity: Changing Theories of Discrimination, 10 \textit{St. John’s J. Leg. Comm.} 481, 492 (1995) (interpreting Title I to judge individuals on the basis of their group status and not on their individual merits).

\textsuperscript{111} Lisa J. Stansky, Five Years after its Passage, the Americans with Disabilities Act Has Not Fulfilled the Greatest Fears of its Critics—or the Greatest Hopes of its Supporters, 82 \textit{A.B.A. J.} 66 (1996); \textit{Newsletter of the Great Lakes Disability and Business Technical Assistance Center, Region V News}, vol. 16 at 5 (Fall 1996) (as of September 30, 1996, 46% of Title I charges filed with the EEOC were dismissed for having no reasonable cause; another 40% were closed for administrative reasons, including claims that they were withdrawn or were closed because the complaining parties failed to cooperate with the agency). See also Ellison v. Software Spectrum, Inc., 1996 WL 284969 (5th Cir. May 30, 1996) (woman treated for breast cancer with daily radiation therapy did not have a disability under the ADA).

\textsuperscript{112} A study by the National Academy of Social Insurance found that many qualified persons with disabilities prefer to work and only use disability benefits as a last resort. \textit{2 Successful Job Accommodations Strategies} (June 1996). See also \textit{Balancing Security and Opportunity: The Challenge of Disability Income Policy}, at 10. Washington, DC: National Academy of Social Insurance (Jan. 25, 1996)(about half of the 34 million working-age adults who experience mental illness over the course of a year are employed; about one-third of the 16.8 million persons with work disabilities are in the labor force, either working or looking for work); Harris, Louis & Associates, Inc. \textit{Disabled Americans’ Self-perceptions: Bringing Disabled Americans into the Mainstream}. Washington, DC: Harris, Louis & Associates (1986) (66% of persons with disabilities below the age of 65 who do not work report that they want to work).
Survey show that roughly 60 percent of working age adults with disabilities rate their health as good to excellent. Nevertheless, some courts presume that most impairments by definition impact an individual’s “ability to perform up to the standards of the workplace” and increase the relative costs to employers of hiring the individual.

In contrast to this view, surveys show that executives have favorable attitudes toward the employment and accommodation of qualified employees with disabilities. A 1995 Harris Poll of business executives found that 79 percent of those surveyed believe that the employment of qualified people with disabilities is a boost to the economy, while only 2 percent believe it poses a "threat to take jobs" from people without disabilities.

The developing empirical evidence also does not reflect the view that Title I’s accommodation provision is a preferential treatment initiative that forces employers to ignore employee qualifications and economic efficiency. To the contrary, studies of accommodations suggest that companies that are effectively implementing the law demonstrate the ability or “corporate culture” to look beyond minimal compliance of the law in ways that enhance economic value. The low direct costs of accommodations for employees with disabilities has been shown to produce substantial economic benefits to companies, in terms of increased work productivity, injury prevention, reduced workers' compensation costs, and workplace

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115 Louis Harris and Associates and National Organization on Disability, 1995 Survey of Corporate Executives of the ADA (Washington, D.C., 1995) [hereinafter Harris Study]; Mason-Dixon Poll, Florida Chamber of Commerce Foundation’s Disability Awareness Project (Jan. 1995) (72% of businesses that hired persons with disabilities reported that the employment of people with disabilities had a favorable effect on their business and 87% said they would encourage other employers to hire persons with disabilities); OSHA Rules By Far Most Burdensome for Employer Chamber Survey Fines, 1996 DLR 124 d25 (June 27, 1996) (In rating the relative burden of requirements issued under various labor and employment laws on a scale of 1 (least) to 10 (most burdensome), small employers rated ADA requirements at 4.8 compared to a 6.2 for OSHA, and a 4.4 for the Fair Labor Standards Act).

116 See, e.g., Sears II, supra note 10, at 42.
effectiveness and efficiency.  

In a series of studies conducted at Sears, Roebuck and Co. from 1978 to 1996, a time period before and after Title I's July 26, 1992 effective date, nearly all of the 500 accommodations sampled required little or no cost. During the years 1993 to 1996, the average direct cost for accommodations was $45, and from 1978 to 1992, the average direct cost was $121. The Sears studies also show that the direct costs of accommodating employees with hidden disabilities (e.g., emotional and neurological impairments comprising roughly 15 percent of the cases studied) is even lower than the overall average of $45.

Other studies show that accommodations for employees with disabilities lead to direct and indirect benefits and cost-effective applications that increase the productivity of employees without disabilities. Studies by the Job Accommodation Network (“JAN”) demonstrate the benefits to employers of accommodations for qualified employees. More than two-thirds of effective accommodations implemented as a result of a JAN consultation cost less than $500. In addition, almost two-thirds of the accommodations studied result in savings to the company in excess of $5,000. The savings associated with accommodations include lower job training costs and insurance claims, increased worker productivity, and reduced rehabilitation


118 Sears employs among its 300,000 person work force an estimated 20,000 persons with physical or mental disabilities. See Sears II, supra note 10, at 8-9.

119 72% required no cost, 17% cost less than $100, 10% cost less than $500, and only 1% cost more than $500, but not more than $1,000. Id. at 17. Effective accommodations include assistive technology, physical access, changed schedules, assistance by others, and changed job duties. Mary C. Daly & John Bound, Worker Adaptation and Employer Accommodation Following the Onset of a Health Impairment, 51B J. Gerontology S53 (1996).


121 Id. at 20 (from 1993 to 1996, average cost for behavioral impairments was $0 and average cost for neurological impairments was $13).

JAN reports that for every dollar invested in an effective accommodation, companies sampled realized an average of $50 in benefits. Likewise, the results of a 1995 Harris Poll of more than 400 executives show that more than three-quarters of those surveyed report minimal increases in costs associated with the provision of accommodations (e.g., median direct cost for accommodations was $233 per covered employee), and from 1986 to 1995, the proportion of companies providing accommodations rose from 51 percent to 81 percent.

Several general implications may be drawn from the existing findings. First, the degree to which many companies comply with the accommodation provisions of Title I appears to have more to do with their corporate cultures, attitudes, and business strategies than with the actual demands of the law. For many companies with a culture of workforce diversity and inclusion, implementation has resulted in economically effective business strategies that transcend minimal compliance with the law and produce economic value. In this regard, studies of accommodation costs at Sears showed that the indirect cost of not retaining qualified workers is high, with the average administrative cost per employee replacement of $1,800 to $2,400—roughly forty times the average of the direct costs and resultant benefits of workplace

123 Id.
124 Id. See also infra notes 142-44 and accompanying text (study of Canadian workforce showing return on accommodation investment).
125 Harris Study, supra note 115, at ___.
Second, in terms of relative cost, although the direct costs of the accommodations for any particular disability tend to be low, many companies regularly make informal and undocumented accommodations that require minor and cost-free workplace adjustments that are implemented directly by an employee and his supervisor. The trend toward the provision of accommodation in the workplace may suggest that employers are realizing positive economic returns on the accommodation investment; for instance, by enabling qualified workers with covered disabilities to return to or stay in the workforce, and reducing worker absenteeism. 

Professor Rosen points out, however, that where the benefits of accommodations exceed the costs “there is no inherent reason to expect that labor markets free of government intervention will fail to provide job accommodations in normal job situations.” Yet, as discussed above, absent a truly competitive labor market, attitudinal discrimination against qualified individuals with disabilities alone may necessitate the required provision of

127 Sears II, supra note 10, at 42.

128 Although many of the accommodations studied at Sears involve simple and common sense strategies, these same accommodation requests in other settings have been the subject of litigation. See, e.g., Kuehl v. Wal-Mart Stores, Inc., 909 F. Supp. 794 (D. Colo. 1995) (Title I litigation involving requested accommodation of periodic sitting on stool while on work duty).

129 Sears II, supra note 10, at 19-24; Sears I, supra note 10, at 12 (since 1972, fewer than 10 percent of Sears employees who self-identified as disabled through the company's Selective Placement Program require any kind of accommodation at the time of self-identification). Cf. Karlan & Rutherglen, supra note 80, at 23 (without support of data, arguing that accommodation in any form requires employer to incur cost, and sometimes the “subsidy turns out to be a good investment” in terms of worker productivity or in attracting customers).

130 See Heidi Berven & Peter David Blanck, Economic Returns on the Employment Provisions of the Americans with Disabilities Act: Empirical Study of Disability-Related Patents from 1970 to 1997, xxx Obermann Proceedings Working Paper Series xxx (forthcoming 1997) (analysis of positive economic projections associated with disability-related patents filed); Collignon, supra note 6, at 209 (businesses more likely to provide lower cost accommodations, particularly when current employee becomes disabled); Deborah Shalowitz Cowans, Employers Bear Millions in Elder Caregiving Costs, 29(3) Bus. Insur. 2 (1995) (study of large manufacturer with 87,000 employees estimates $5.5 million in lost productivity and time associated with employees providing personal care for elderly relatives, and accommodations such as flexible work schedules mitigate these costs); Weaver, supra note 81, at 9, 11-12 (Title I provides economic incentives to businesses to hire individuals requiring accommodations that have indirect benefits to the firm or to customers).

131 Rosen, supra note 92, at 26.
accommodations under Title I, at least for a large segment of the labor force affected by this market failure.\footnote{See Bultemeyer v. Fort Wayne Community Schools, supra note 42, at 42 (bad faith in reasonable accommodation implementation process often reflective of irrational attitudinal bias by employer). Thus, independent of the effects of the civil rights guaranteed by the law, the crux of the normative question is whether Title I is economically rational.} This is true given that the value of a worker with a disability often is contingent upon his output and his employers’ and others’ attitudes about the worker.\footnote{See Donohue, supra note 5, at 2584 (discussing concept of “contingent equality”). Research is needed also on the extent to which contingent worker value varies across industries or with different labor markets.} Over time,\footnote{Long-term empirical assessment of Title I is necessary as has been discussed and conducted, for instance, on the Civil Rights Act of 1964. See, e.g., David L. Rose, Twenty-Five Years Later: Where do we Stand on Equal Employment Opportunity Law Enforcement, in equal Employment Opportunity: Labor Market Discrimination and Public Policy, 39 (Paul Burstein ed. 1994); John J. Donohue III & James Heckman, Continuous versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks, in Equal Employment Opportunity: Labor Market Discrimination and Public Policy, 183 (Paul Burstein ed. 1994).} with the lessening of prejudicial attitudes resulting from effective Title I implementation, and with increased knowledge from empirical study, employers who were formerly “economic discriminators” against qualified persons with disabilities may be less willing or less able to incur lost profits to satisfy their discriminatory tastes or preferences.\footnote{See Weaver, supra note 81, at 6 (“Lost profits are the price an ‘economic discriminator’ pays to indulge his preferences.”), citing Gary S. Becker, The Economics of Discrimination (2d ed.) (1971). Study is needed of the impact of the emerging consumer market comprised of people with disabilities and the affect that this market will have on employers’ preferences and economic ability to hire and retain qualified workers with disabilities. See Sears I, supra note 10, at 8-9.}

Third, accommodations involving universally designed and advanced technology have been shown to enable groups of employees with and without disabilities to perform jobs productively, cost-effectively and safely.\footnote{See Sears I, supra note 10, at 14-17, 26-29; Sears II, supra note 10, at 35-36; S.F. Wilson, et al., A Technical Assistance Report on Consumer and Ex-patient Roles in Supported Housing Services. Burlington, VT: The Center for Community Change through Housing and Support (1991) (the effect of hiring people with psychiatric disabilities was to improve the level of individual attention and accommodation to all employees, thus creating a more positive working environment). See also Peter David Blanck, Communications Technology for Everyone: Implications for the Classroom and Beyond, The Annenberg Washington Program Reports (Washington, D.C.: The Annenberg Washington Program in Communications Policy Studies of Northwestern University, 1994); Deborah Kaplan, et al., Telecommunications for Persons with Disabilities: Laying the Foundation, World Institute on Disability Reports (Oakland, California, 1992).} The studies at Sears suggest that the direct costs associated with many technologically-based accommodations (e.g., computer voice synthesizers)
enabled qualified employees with disabilities to perform essential job functions and that these strategies create an economic “ripple effect” throughout the company, as related applications are developed subsequently that increased the productivity of Sears employees without disabilities.137 These findings suggest that the direct costs attributed to universally designed accommodations may be lower than predicted, particularly when their fixed or sunk costs are amortized over time.138 In addition the Sears findings support those of organizational researchers showing that many traditional blue-collar jobs increasingly require workers to use or monitor computers that control equipment performing work tasks, and that workers with disabilities may increasingly and efficiently perform such essential job functions.139

Future examination is needed of the type, effectiveness, and cost of accommodations at large and small organizations, using standardized means for gathering and analyzing information.140 Study must be conducted on the fears and stigmas associated with disclosure of actual and hidden disabilities and the resulting employment consequences; for instance, the extent to which qualified job applicants and employees with hidden disabilities forgo the benefits of accommodations due to fear of disclosure, thereby potentially depriving the labor market and employers of a source of value.141

Close examination is needed of direct and indirect costs and benefits of Title I


138 See Collignon, supra note 6, at 205-06 (universally designed accommodations may reflect more efficient way to undertake production and improve productivity of co-workers); Donohue, supra note 5, n.72 (suggesting that if accommodation costs for workers with disabilities are sunk, then the market incentive would be to retain the qualified disabled worker over an equally or less qualified nondisabled worker requiring no accommodation); Karlan & Rutherglen, supra note 80, at 23 (same).


141 See, e.g., Collignon, supra note 6, at 231 (noting a need for studies on those accommodations requested by job applicants who subsequently are not hired).
implementation, and who bears the costs and receives the benefits associated with workplace accommodations for qualified persons with covered disabilities.\textsuperscript{142} A recent empirical study based on over 1,000 observations in the Canadian workforce examined the extent to which the costs of workplace accommodations are shifted by employers to injured workers through wage adjustments upon the injured worker’s return to work after a workplace injury.\textsuperscript{143} The researchers found that injured workers did not incur the cost of workplace accommodations when they returned to their time-of-accident employer. Presumably, these workers were “qualified” to resume their essential or comparable job duties in ways that added economic value to the employer. Injured workers who returned to the workforce but to a different employer did “pay” for a portion of workplace accommodations by accepting substantially lower wages.\textsuperscript{144}

Additional study is required of the extent to which accommodations for workplace injury enable qualified workers with covered disabilities to stay or return to work at their time-of-accident employer or to a different employer, who bears the associated costs, and how they costs vary with job type and other factors such as insurance coverage rates. Some researchers have suggested that, over time, the provision of Title I accommodations may increase or at least help maintain employment rates by enabling newly disabled workers to retain employment.\textsuperscript{145} Other studies show that accommodations for workers’ health conditions extend their work life an average of five years.\textsuperscript{146}


\textsuperscript{143} Id.

\textsuperscript{144} See also Karlan & Rutherglen, supra note 80, at 23 (without support of data, suggesting that persons with disabilities face higher costs of searching for a job than do persons without disabilities, and that if costs to employer of accommodation by job transfer are greater than costs of worker job search then worker should bear cost).

\textsuperscript{145} For a review, see Nancy R. Mudrick, Employment Discrimination Laws for Disability: Utilization and Outcome, 549 Annals, AAPSS 53, 68-70 (Jan. 1997) (citing studies showing majority of persons injured in the workplace maintain their labor force attachment).

\textsuperscript{146} Burkhauser, supra note 94, at 80-81 (range of work life extension from accommodations was found to be from 2.6 to 7.5 years, but authors suggest that range is affected by severity of condition and expected prognosis rates).
Indirect costs associated with Title I implementation include related expenses for administrative, compliance, or legal actions.\textsuperscript{147} The Sears study examined all 138 Title I charges filed with the EEOC against Sears from 1990 to mid-1995.\textsuperscript{148} The findings showed that almost all of the EEOC charges (98 percent) were resolved without resort to trial litigation, and many through informal dispute processes that enabled qualified employees with disabilities to return to productive work.\textsuperscript{149} Consistent with the Sears findings, a 1997 study of nationwide trends in Title I charges filed with the EEOC showed that 94 percent of beneficial outcomes were obtained by the charging parties before full EEOC investigations and formal litigation were initiated.\textsuperscript{150}

Additional analysis is needed on a national scale of the patterns and magnitude of the costs and benefits associated with Title I implementation, compliance, and related litigation.\textsuperscript{151} Professors Karlan and Rutherglen have suggested a variety of factors involving

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\item \textsuperscript{147} Peter David Blanck, Transcending Title I of the Americans with Disabilities Act: A Case Report on Sears, Roebuck and Co., 20 Mental & Physical Disability L. Rep. 278, 283-84 (1996) (discussion of direct and indirect costs associated with Title I implementation); see also Rosen, supra note 92, at 23 (same). Some studies also suggest that the administrative, compliance, and legal costs associated with Title I implementation are not as great as some predicted. See Sears II, supra note 10, at 43. Research is needed, however, on employers’ costs associated with the threat of Title I sanctions or litigation; for instance, the legal costs incurred when an employee with a disability is terminated even for valid reasons. Research is needed on the costs (e.g., inefficiencies and uncertainty) or benefits (e.g., limited scope of inquiries) related to the case-by-case analytical approach required by Title I. Id. at 12-14 (discussing EEOC’s 1995 modifications to Title I charge processing and prioritization process, designed to reduce charge backlog). Other costs and benefits related to potential Title I charges and capable of study relate to the planning of an accommodation or the impact of an accommodation on training and safe workplace practices for fellow employees without disabilities.

\item \textsuperscript{148} Sears II, supra note 10, at 33-34.

\item \textsuperscript{149} Id. at 35-37 (in addition, of the cases studied, the average settlement cost to Sears, exclusive of attorney fees, was $6,193). See also Karlan & Rutherglen, supra note 80, at 23 (without support of data, arguing there is an advantage of settlement over litigation in Title I context for persons with disabilities compared to other protected groups, due to factors such as hypothesized limitations in job search ability of persons with disabilities).

\item \textsuperscript{150} See Kathryn Moss, Matthew Johnsen, & Michael Ullman, Assessing Employment Discrimination Charges Filed Under the Americans with Disabilities Act, xxx J. Disability Policy Studies xxx-xxx (1997) (suggesting that presence of Title I motivates parties to resolve disputes informally without resort to costly trial litigation, also finding that variation in a charging party’s likelihood of receiving a benefit based on party’s type of disability, race and gender).

\item \textsuperscript{151} See, e.g., Louis Harris & Associates, The National organization on Disability Harris Survey on Employment of People with Disabilities (1995) (survey of employers finding that 66% report that litigation has not increased as a result of the ADA, 82% report that ADA is worth the cost of implementation, 27% report that it costs more to employ a person with a disability than a person without a disability); President’s Committee on Employment of People with Disabilities, 5(2) Washington Fax 1 (Nov./Dec. 1996) (citing EEOC records showing that Title I
Title I implementation and compliance that may help guide future study. They hypothesize that, given the low cost of many accommodations and high costs attendant to litigation, employers and applicants or employees with disabilities create a “bargaining range” within which they negotiate the costs and benefits associated with minimum accommodation the employee or applicant may accept and the costs and benefits associated with the maximum accommodation the employer may undertake. Analysis of the relative magnitude of direct and indirect costs and benefits associated with the accommodation process, for different employers and for workers with and without disabilities in similar jobs, may enable a more accurate assessment over time of the economic impact of Title I. Moreover, broadly defined, indirect costs and benefits may include the impact of effective accommodations on employee morale, perceptions of the business and its reputation by customers and the community, or relationship to effective implementation of other laws such as the Family Medical Leave Act or workers’ compensation laws.

charge filings decreased by 10% during 1996 year as compared to 1995).

152 See Karlan & Rutherglen, supra note 80, at 30.

153 Id. at 30-31. See also Peter David Blanck, On Integrating Persons with Mental Retardation: The ADA and ADR, 22 N.M. L. Rev. 259, 263-64, 270-71 (1992) (discussion of the benefits of alternative dispute resolution practices in cases involving persons with disabilities, including the development of a “settlement framework” and “dynamic” working relationships among the parties).

154 See, e.g., Collignon, supra note 6, at 208 (discussing the economic benefits of accommodation, and reviewing study of accommodation costs and benefits under Rehabilitation Act of 1973); Calloway, supra note 110, at 494 (suggesting that in absence of study, reasonable accommodation requirement may foster backlash against Title I); Donohue, supra note 37, at 1603 (suggesting need to study relative magnitude of costs to benefits in anti-discrimination employment laws); Oi, supra note 49, at 39 (suggesting the need for study comparing the average productivity and the costs and benefits of accommodations for a random sample of persons with and without disabilities, in and out of the workforce). Future studies may examine the economic relationship among Title I implementation, Title VII of the Civil Rights Act of 1964 implementation, and laws such as workers’ compensation laws, health insurance laws, the Family Medical Leave Act, and OSHA regulations, given that employment discrimination lawsuits increasingly allege multiple claims of discrimination under various laws. See Blanck & Marti, supra note 1, at xxx-xxx.

III. Conclusion

Systematic evaluation of the economic implications associated with the emerging and existing workforce of qualified persons with disabilities is needed for several reasons. First, study of the labor force of qualified persons with disabilities may aid in long-term Title I implementation, as well as interpretation of related initiatives such as welfare, health care, and health insurance reform.156 The Health Insurance Reform Act of 1996, for instance, is written to ensure access to portable health insurance for employees with chronic illness or disabilities who lose or change their jobs. Under the law, group health plan premium charges may not be based solely on disability status or the severity of an individual’s chronic illness.157 The combined economic impact of the Health Insurance Reform Act and Title I on reducing employment discrimination facing qualified persons with covered disabilities is a promising area for study.158

Second, study limited to the analysis of litigation and the EEOC charges associated with Title I implementation, while necessary, tends to focus discussion on the “failures” of the system, as opposed to economically efficient strategies designed to enhance a productive workforce and identify potential disputes before they arise.159 Independent of study of the enforcement of the civil rights guaranteed by Title I, the long-term promise of the law to raise awareness of the promise of equal employment opportunity for qualified persons requires

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156 Johnson, supra note 8, at 160-62 (arguing that ADA must be evaluated in context of other social welfare programs, for instance, with regard to economic incentives to work or return to work).


158 For instance, if a particular job-related medical intervention, such as gene therapy for chemical sensitivity to workplace air contaminants, would enable a qualified worker with a disability to perform his job (i.e., work in this particular workplace), could this be considered a form of reasonable accommodation either required by Title I, assuming no undue hardship, and to what extent could the procedure then be covered by the employee’s health insurance group plan? Discussions with Robert Olick aided in the development of this hypothetical.

159 See Karlan & Rutherglen, supra note 80, at 30-31 (arguing that reported Title I cases present a skewed picture of accommodation costs and benefits, for instance when they involve situations where accommodation costs are high and job availability is limited).
the collection of information on attitudes, behavior, and the related economic implications of the law.  

Third, some evidence suggests that Title I implementation has coincided with larger numbers of qualified persons with severe disabilities entering the labor force. In 1996, the U.S. Census Bureau released data showing that the employment to population ratio for persons with severe disabilities has increased from roughly 23 percent in 1991 to 26 percent in 1994, reflecting an increase of approximately 800,000 people with severe disabilities in the workforce. Examination is required of the economic impact of Title I on workplace accommodation costs and benefits against this backdrop of increased labor force participation of qualified workers with disabilities, particularly in the context of the recent reforms to welfare policy.

Despite the encouraging trends, estimates of unemployment levels for persons with disabilities range as high as fifty percent. Some studies suggest that from the years 1970

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160 See, e.g., Blanck & Marti, supra note 1, at xxx.

161 See also Blanck & Marti, supra note 1, at xx (longitudinal study from 1990 to 1995 tracking employment trends for several thousand persons with mental retardation finding that during this initial Title I implementation time period, 43% of the participants attained integrated employment and relative unemployment levels decreased from 39% to 12%, and that in 1995 participants’ job skills related to their earned income levels); “Six Years after Signing of Law, ADA has been cited in more than 1,000 Suits,” Disability Compliance Bulletin, LRP Publications, Aug. 15, 1996 (data reflects a 27% increase of persons with severe disabilities in the workforce from 1991 to 1994). Cf. Rosen, supra note 92, at 18, 22.

162 Study is needed of the interaction of Title I to the 1996 Welfare Reform Law; for instance, study of the impact on persons with disabilities of the requirement under welfare reform that the head of families on welfare must work within two years or lose benefits. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. Law 104-193 (1996); Collignon, supra note 6, at 137-38 (suggesting reduction in welfare dependency as indicator of Title I implementation). Cf. Murray Weidenbaum, Why the Disabilities Act is Missing its Mark, The Christian Science Monitor, at 19 (Jan. 16, 1997) (arguing that negative trends in labor force participation of people with disabilities are not be related to ADA Title I, but to other federal entitlement programs, such as Supplemental Security Income, that provide monetary incentives for persons with disabilities not to work); Rosen, supra note 92, at 28-29 (arguing that decreased labor force participation and increasing insurance benefits of persons with disabilities is inconsistent with Title I accommodation policies). Further analysis is needed of the relation among changes in the labor force participation of persons with different disabilities, Title I implementation, federal work-related entitlement programs, and changes in general population and employment rates.

163 See Paul Wehman, Employment Opportunities and Career Development, in The ADA Mandate for Social Change 145, 154 (Paul Wehman ed., 1993). See also John McNeil, U.S. Bureau of the Census, Survey of Income and Program Participation (1994) (reporting that in 1994, for persons with disabilities between the ages of 21 to 64 years, roughly 14 million of 29 million individuals (48%) were unemployed; the mean monthly income for workers with disabilities was $1,713 compared to $2,160 for workers without disabilities). Additional study is
to 1992, there has been no significant net change in the labor force participation rate among persons with disabilities. As a result, the continued reality of economic, structural, attitudinal, and behavioral discrimination increasingly may lead qualified individuals to assert their Title I rights in the future. Analysis of job retention, assessment, advancement, disclosure, and accommodation strategies are needed to help qualified individuals keep jobs and achieve their potential. This analysis is particularly important for those qualified individuals with severe disabilities, who may be most susceptible to unfounded negative attitudes about their labor force potential and value.

Study must address the social and cultural factors, and the structural and cyclical changes in the labor market and the economy, that influence employment opportunity for persons with and without different disabilities. This study may include factors such as types of jobs needed of this population, for instance, with regard to the nature of disability and the types of jobs held by persons with and without disabilities. See also Disability Watch, supra note 19, at 17 (summarizing national survey results regarding the employment status of people with disabilities and suggesting that studies show no significant increases in their labor force participation since 1991); L. Trupin, D.S. Sebesta, Edward Yelin, & Mitchell P. LaPlante, Trends in Labor Force Participation among People with Disabilities, 1983-1994, Disability Statistics Report No. 10: U.S. Dept. Ed., Nat’l Institute Disability Research (1997) (analysis of labor force rates and relation to work limitations and disability).

See Yelin, supra note 139, at 124-25 (also finding a disproportionate increase in persons with disabilities working part-time).


See Blanck & Marti, supra note 1, at xx (longitudinal study from 1990 to 1995 tracking employment trends for several thousand persons with mental retardation finding that participants engaged in “self-advocacy” more likely to attain competitive employment and have higher earned incomes); David Pfeiffer, ‘We Won’t Go Back’: The ADA on the Grass Roots Level, 11(2) Disability & Society 271-84 (1996) (finding members of the disability community reporting empowerment and cynicism resulting from Title I implementation); William J. Hanna & Elizabeth Rogovsky, On the Situation of African-American Women with Physical Disabilities, 23 J. Applied Rehab. Counseling 39-45 (1992) (25% of black women with disabilities are employed full time, as compared to 77% of white men, 57% of black men, and 44% of white women with disabilities); National Organization on Disability/Harris Survey of Americans with Disabilities, Louis Harris & Associates (1994) (30% of working age adults with disabilities reported experiencing job discrimination based on their disability).

See Baldwin, supra note 28, at 52 (suggesting that Title I may have little impact on equal employment for persons with severe disabilities who are subject to the greatest discrimination in the labor market); Marta W. Casper, Seasons of Change – The Americans with Disabilities Act: Implementation in the Work Place, J. Rehab. Admin. 129, 132 (Aug., 1993) (qualitative study of employer attitudes about disability).

This study is needed given that many nondisabled individuals or members of their family will experience a disabling condition during the course of their lifetime that affects their employment activities. See Blanck, supra
attained (e.g., entry level, service-related, or production), amount of hours worked (e.g., full time and temporary positions), geographic differences in labor markets and hiring patterns, turnover, productivity, retention, wage, and promotion rates, availability of transportation to work, and provision of accommodations.\textsuperscript{169} It may also include analysis of persons with disabilities who are particularly vulnerable to changes in economic conditions, such as those in poverty, or those with minimal education or job skills.\textsuperscript{170}

Similar analysis is needed of cost-effective workplace accommodation strategies affecting qualified job applicants and employees without disabilities, such as those geared toward employee wellness programs, flexible hours for workers with young children, employer-sponsored child care enters, job sharing strategies for workers with limited time availability, or employee assistance programs (“EAP”s).\textsuperscript{171} As Martin Gerry has suggested, many companies already expend large sums of money accommodating the needs of workers without disabilities, which in the aggregate may be substantially greater than the costs associated with accommodations for qualified workers with covered disabilities.\textsuperscript{172} Analysis of these innovative


\textsuperscript{170} See Mary C. Daly, Who is Protected by the ADA? Experience from the German Experience, 549 \textit{Annals, AAPSS} 101, 102 (Jan. 1997) (arguing that many individuals with disabilities are “doubly disadvantaged” by having a poor education or job skills).

\textsuperscript{171} See Tyler D. Hartwell, Paul Steele, et al., Aiding Troubled Employees: The Prevalence, Cost, and Characteristics of Employee Assistance Programs in the United States, 86(6) \textit{J. Pub. Health} 804-08 (1996) (survey of 3200 work sites finding 33% of employers with 50 or more employees offer EAPs with median cost per eligible employee of $20, most commonly addressing worker substance abuse, family and emotional problems). Cf Karlan & Rutherglen, supra note 80, at 39-40 (casting accommodation as “an individualized form of affirmative action” that may have applications for deterring employment discrimination based on gender and race); Joan C. Williams, Restructuring Work and Family Entitlements Around Family Values, 19 \textit{Harv. J.L. & Pub. Pol’y} 753, 756 (1996) (flexible work hours may accommodate needs of workers with children in child-care).

\textsuperscript{172} See Martin H. Gerry, Disability and Self-Sufficiency, in \textit{Disability and Work: Incentives, Rights, and Opportunities} 92 (Carolyn L. Weaver ed., 1991) (suggesting that large businesses are increasingly investing in attracting and retaining qualified employees “in a more holistic way” with disability as only one component of the measure of potential productivity and value); U.S. Dept. of Health & Human Services, 1992 National Survey of
strategies may show that they effectively and efficiently complement accommodations required by many qualified workers with disabilities.

For instance, studies show that workplace accommodation strategies enhance the productivity and job tenure of those large numbers of qualified workers without disabilities who are injured on the job or who may become impaired in the future.\textsuperscript{173} In an eight year study of Coors Brewing Company’s health screening program covering almost 4,000 employees, the company realized net and direct savings of roughly $2.5 million, in terms of saved payments in short-term disability, temporary worker replacement, and direct medical costs.\textsuperscript{174} Given a conservative estimate of $100 average direct cost per employee for workplace accommodations based on the Sears findings described earlier, the savings generated by the Coors study could fund accommodations for 25,000 qualified workers.\textsuperscript{175}

Another study of Coors Brewing Company’s wellness initiatives (e.g., health screening and education, exercise, stress, and smoking cessation programs) found that the company saves up to eight dollars for every dollar invested in these programs.\textsuperscript{176} Likewise, a

Worksite Health Promotion Activities, 7 \textit{Am. J. Health Promotion} 452-64 (1993) (1992 survey of 1507 work sites found that 81\% of companies offered employee health promotion activity). Likewise, many large companies are employing universal workplace and job site design and access to efficiently include qualified individuals with and without disabilities into productive workforce participation in ways that add economic value to the company. See \textit{Sears II, supra} note 10, at 6; Daniel Stokols, Kenneth R. Pelletier, & Jonathan E. Fielding, Integration of Medical Care and Worksite Health Promotion, \textit{xx J. Amer. Med. Assoc. xxx-xxx} (1995) (new technologies relate to cost-effective worksite wellness and health care programs).

\textsuperscript{173} See, e.g., Hal Clifford, \textit{The Perfect Chemistry: DuPont's Work-Life Program}, \textit{Hemispheres} 33, 34 (1996) (claiming a 637 percent return on expenditures for its LifeWorks program, a program designed to help employees deal with job and life pressures, based on estimated value of resulting increased performance, employee retention, stress reduction, and reduced absenteeism).

\textsuperscript{174} Henritze J. Greenwood, Coorscreen — A Low Cost, On-site Mamography Screening-Program, 10(5) \textit{Am. J. Health Promotion} 364-70 (1996) (breast cancer screening provided for roughly 4,000 employees, cost savings of program was $3,110,080, procedural costs for program were $668,690, with net savings of $2,441,190).

\textsuperscript{175} In 1995, it is estimated that companies spent over $100 billion rehabilitating 3.5 million employees with work-related injuries. See Shelly Reese, Building an Express Lane Back to Work, 14(11) \textit{Business & Health} 24-29 (1996) (arguing that return-to-work programs and accommodation strategies may ease worker rehabilitation costs).

\textsuperscript{176} See Martha McDonald, Valuing Experience: How to Keep Older Workers Healthy, 8(1) \textit{Business and Health} 35-38 (1990) (for older workers, stress control program estimated to save company $100,000 over a five year period).
nine year study of 28,000 Union Pacific Railroad employees found that their wellness program resulted in net savings of $1.3 million to the company. These findings suggest the huge economic implications associated with the development of cost-effective accommodations strategies designed to prevent workplace injury and to help retain the increasing numbers of qualified employees with and without disabilities. Considering that by the year 2,000, the costs to employers associated with back injury alone in the workplace are estimated to approach $40 billion, examination of the economic savings related to accommodation strategies, injury prevention and wellness programs is warranted. Moreover, the educational side-effects associated with Title I implementation and comprehensive accommodation strategies may enhance general employee moral, as well as positive attitudes about qualified co-workers with different disabilities or those who are members of other protected groups.

In conclusion, this article has explored the economics of Title I implementation. Clearly, further empirical study of Title I is needed to address the law’s economic, cultural, and symbolic impact on employers and others in society. The economic model has yet to demonstrate empirically the hypothesized labor market inefficiencies associated with the operation of the law, particularly those claimed to be linked to the provision of workplace accommodations. Yet independent of economic analysis and related disciplinary study of Title I, definition is necessary of the social and moral policies underlying the equal employment of qualified persons with covered disabilities.

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178 See Peter D. Blanck, The Americans with Disabilities Act: Issues for Back and Spine-related Disability, 19(1) Spine 103-07 (1994) (citing studies estimating that in 1990, the cost to society of back related disability included an estimated $16 billion in workers’ compensation costs, lost productivity, and other intangible costs).

179 Andrew I. Batavia, Ideology and Independent Living: Will Conservatism Harm People with Disabilities?, 549 Annals, AAPSS 10, 20 (Jan. 1997) (arguing that Title I may be interpreted to require employers to accommodate the needs of employees with and without disabilities, rather than an infringement on business objectives).

180 See Peter David Blanck, Conceptions of Equality, Economic Efficiency and Affirmative Action under ADA Title I, xxx Obermann Proceedings Working Paper Series xxx (forthcoming 1997) (empirical study of differing views of Title I’s reasonable accommodation provision); Karlan & Rutherglen, supra note 80, at 25 (concluding that “[t]he prohibitions against discrimination and the requirements of accommodation . . . require more than efficiency.
and less than charity.”); Gregory S. Kavka, Disability and the Right to Work, 9(1) Soc. Phil. & Pol. 262, 288 (1992) (concluding that economic analysis should not be sole criterion for defining social policy toward employment for qualified persons with disabilities); Richard K. Scotch & Kay Schriner, Disability as Human Variation: Implications for Policy, 549 Annals, AAPSS 148, 157 (Jan. 1997) (arguing that disability implicates social issues beyond those associated with discrimination and stigma).