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

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**THE ECONOMICS OF THE EMPLOYMENT  
PROVISIONS OF THE AMERICANS  
WITH DISABILITIES ACT:  
PART I—WORKPLACE  
ACCOMMODATIONS**

*Peter David Blanck\**

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.<sup>1</sup> Supporters of the law stress the overarching importance of the civil rights guaranteed by Title I's antidiscrimination 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.<sup>2</sup> Presently, there exists limited systematic empirical study of Title I implementation in general, and of the economic impact of the law on employers and others in particular. This lack of study hinders accurate analysis and interpretation of Title I by

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This Article is based on a presentation given on January 31, 1997, at *DePaul Law Review's* Symposium entitled *Individual Rights and Reasonable Accommodations Under the Americans with Disabilities Act*.

1. For a review, see Peter D. Blanck & Mollie W. Marti, *Attitudes, Behavior, and the Employment Provisions of the Americans with Disabilities Act*, 42 VILL. L. REV. (forthcoming 1997) (developing related aspects of the present article).

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 Part II of the Article, 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 174-76 and accompanying text.

both proponents and critics of the law.<sup>3</sup> 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 of this Article 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 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.<sup>4</sup> 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 work force;

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

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

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3. See NATIONAL COUNCIL ON DISABILITY, *ACHIEVING INDEPENDENCE: THE CHALLENGE FOR THE 21ST CENTURY—A DECADE OF PROGRESS IN DISABILITY POLICY SETTING AN AGENDA FOR THE FUTURE* 6 (1996) (recommending that accurate data about people with disabilities be collected, analyzed, and reported).

4. For a prior discussion of the provisions of Title I, see Peter D. Blanck, *Employment Integration, Economic Opportunity, and the Americans with Disabilities Act: Empirical Study from 1990-1993*, 79 IOWA L. REV. 853 (1994).

American work force.<sup>5</sup> In a truly competitive labor market, the value to an employer of a worker's labor should equal or exceed the worker's wage.<sup>6</sup> Nevertheless, as Professor Donohue has suggested, a worker's value is often contingent upon a worker's output and his employer's and relevant consumers' attitudes about him.<sup>7</sup> Thus, to a given employer, worker value may equal output or productivity plus a degree of attitudinal preference, or conversely disfavoring discrimination, toward the particular worker.<sup>8</sup>

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.<sup>9</sup> In such a market there may be increased value to employers (for example, greater 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.<sup>10</sup> Pro-

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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, 2585 (1994) (noting the implicit conception of equality that "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, 205-11 (Monroe Berkowitz & M. Anne Hill eds., 2d ed. 1989) (stating that "[t]he wage to be paid the worker would, in a competitive labor market, be equal to the worker's marginal contribution to the value of the firm's product"); Donohue, *supra* note 5, at 2585.

7. See Donohue, *supra* note 5, at 2585 (defining this concept as "contingent equality").

8. Cf. William G. Johnson, *The Future of Disability Policy: Benefit Payments or Civil Rights?*, 549 ANNALS AM. ACAD. POL. & SOC. SCI. 160, 164 (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 productive use of resources).

9. See, e.g., Bill Wolfe, *Shopping Trip-Ups: How Accessible Are Local Stores to People with Disabilities?*, COURIER-JOURNAL, Dec. 23, 1996, at 01E (linking retail store accessibility to shopping preference by consumers with disabilities).

10. See PETER D. BLANCK, COMMUNICATING THE AMERICANS WITH DISABILITIES ACT, TRANSCENDING COMPLIANCE: 1996 FOLLOW-UP REPORT ON SEARS, ROEBUCK AND CO., ANNENBERG WASHINGTON PROGRAM REPORT (1996) [hereinafter SEARS II]; PETER D. BLANCK, COMMUNICATING THE AMERICANS WITH DISABILITIES ACT, TRANSCENDING COMPLIANCE: A CASE REPORT ON SEARS, ROEBUCK AND CO., ANNENBERG WASHINGTON PROGRAM REPORT (1994) [hereinafter SEARS I].

ponents of Title I argue that the antidiscrimination 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.<sup>11</sup>

Under Title I's three-prong definition of "disability," a person with a disability covered by the law must have a known physical or mental condition or impairment that "substantially limits major life activities,"<sup>12</sup> "a record of" a physical or mental condition,<sup>13</sup> or is "regarded as" having such an impairment.<sup>14</sup> 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 impairments, cancer, mental illness, physical paralysis, or HIV. This prong employs a functional definition of disability that is determined on a case-by-case basis.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup>

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11. In *Alexander v. Choate*, 469 U.S. 287 (1985), the United States Supreme Court recognized that discrimination against people with disabilities is "most often the product, not of invidious animus," but rather of thoughtless and indifferent attitudes. *Id.* at 295. See generally MARTHA MINOW, MAKING ALL THE DIFFERENCE (1990) (describing the benefits of reshaping societal perceptions of disabled persons).

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) (1996). A "substantial" limit on the major life activity of working means the individual is significantly restricted in the ability to perform a class of job activities as compared to an average person with comparable training, skills, and ability. *Id.* § 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." *Id.* § 1630.2(k). An employer must rely on the record of disability in making employment-related decisions to be held liable under Title I. *Id.* § 1630.2(k) app. at 341.

14. 42 U.S.C. § 12102(2) (1994). 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 Compl. Man. (BNA) § 902 (Mar. 5, 1995) (defining the term "disability").

15. See ROBERT L. BURGDOFF, JR., DISABILITY DISCRIMINATION IN EMPLOYMENT LAW 129-30 (1995) (noting that disability is not necessarily based on name or diagnosis of impairment, but rather on the effect of that impairment on the life of the individual).

16. 29 C.F.R. § 1630.2(j) app. at 339; *cf.* *Murphy v. United Postal Serv.*, 946 F. Supp. 872, 881-82 (D. Kan. 1996) (finding high blood pressure impairment that is controlled by medication not a covered disability).

17. See BURGDOFF, *supra* note 15, at 145-46 (noting several conditions expressly excluded from coverage as a disability, including transvestism, homosexuality, and illegal drug use).

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.<sup>18</sup> Findings from the 1992 National Health Interview Survey show that nineteen million working-age adults, roughly twelve percent of the population between the ages of eighteen and sixty-nine years old, are restricted in the major life activity of working.<sup>19</sup>

The first-prong definition of disability does not mean that a covered individual must work at the job of his choice.<sup>20</sup> Rather, to fall under the first-prong definition, the individual's "access" to the relevant labor market must be substantially limited by the impairment or condition.<sup>21</sup> 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 the individual has a covered disability for purposes of Title I analysis.<sup>22</sup> A court must still assess whether the individual's impairment or condition creates a significant barrier to employment or to a particular labor market.<sup>23</sup> Factors considered in determining whether an impairment substantially limits the major life activity of work and is, therefore, a covered disability, include the individual's access to a geographic area, the number and type of jobs requiring similar training or skills (for example, the class of jobs in the relevant labor market), and the number and type of jobs

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18. See, e.g., *Weiler v. Household Fin. Corp.*, 101 F.3d 519, 526 (7th Cir. 1996) (holding that an individual did not have a covered disability when incapable of satisfying demands of particular job); *Gordon v. Hamm*, 100 F.3d 907, 912 (11th Cir. 1996) (holding that while side effects of chemotherapy treatment may be an impairment, the side effects did not substantially limit an individual to work in a class of jobs or in a broad range of jobs in various classes).

19. See STEVE KAYE, *DISABILITY WATCH: STATUS REPORT ON THE CONDITION OF PEOPLE WITH DISABILITIES 2* (Disability Rights Advocates and Disability Statistics Center (Dec. 19, 1996)) (on file with the *DePaul Law Review*) [hereinafter *DISABILITY WATCH*] (noting that more than half of this group—10.9 million people—report that they are unable to work). For extensive analysis of factors related to work limitation, see MITCHELL P. LAPLANTE & D. CARLSON, *DISABILITY IN THE UNITED STATES: PREVALENCE AND CAUSES*, 1992 (Disability Statistics Report No. 7: U.S. Dept. Ed., Nat'l Institute Disability Research 1996).

20. See, e.g., *Knapp v. Northwestern Univ.*, 101 F.3d 473, 480-81 (7th Cir. 1996) (holding that major life activity of working does not necessarily mean working at the job of one's choice); *Welsh v. City of Tulsa, Okla.*, 977 F.2d 1415, 1417 (10th Cir. 1992) (same); see also *Weiler*, 101 F.3d at 524-25 (holding that an individual did not have a covered disability when she was incapable of working under a particular supervisor because of anxiety or stress related to job review).

21. See, e.g., *EEOC v. Joslyn Mfg. Co.*, 5 Am. Disabilities Cas. (BNA) 1220, 1226 (N.D. Ill. 1996) (noting that 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*, *supra* note 15, at 156-57.

22. See 29 C.F.R. § 1630.2(j)(3)(i) (1996) (stating that the inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working).

23. See *Joslyn*, 5 Am. Disabilities Cas. (BNA) at 1225 (citing cases in support).

not requiring similar training and skills (for example, the range of similar jobs in the relevant labor market).<sup>24</sup>

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 (for example, a blind person or a person with mental retardation), that individual may have a disability under the first prong of the statutory definition.<sup>25</sup> This determination alone, however, does not indicate that the 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 labor market is demonstrated, then the individual may be disabled for purposes of Title I analysis. A subsequent determination is required to determine whether the individual is qualified for the job and whether the employer discriminated against him because of his disability.<sup>26</sup>

Unlike the first prong, the second and third prongs of the definition of disability (that is, "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 (for example, persons with a history of cancer or mental illness).<sup>27</sup> As mentioned above, a worker's value in a discriminatory market is sometimes heavily contingent upon the worker's output and his employer's, relevant co-workers', or consumers' preferential or discriminatory attitudes about the worker.<sup>28</sup>

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24. 29 C.F.R. § 1630.2(j)(3)(ii).

25. See *Joslyn*, 5 Am. Disabilities Cas. (BNA) at 1226 (citing *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).

26. 42 U.S.C. § 12112 (1994).

27. An example of a case involving all three prongs is *Joslyn*, where the plaintiff contended he was qualified for the job, was regarded as a person with carpal tunnel syndrome, had a record of this impairment that substantially limited his major life activity of working, and was denied employment on that basis. *Joslyn*, 5 Am. Disabilities Cas. (BNA) at 1224.

28. See *Donohue*, *supra* note 5, at 2585 (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 Marjorie L. Baldwin, *Can the ADA Achieve Its Employment Goals?*, 549 ANNALS AM. ACAD. POL. & SOC. SCI. 37, 43 (1997) (defining prejudice towards persons with disabilities); *Johnson*, *supra* note 8, at 161 (same).

In a situation where an employment action is made because of a worker's perceived disability and not on output, that is, not on the worker's actual qualifications, the value of the worker to the employer is distorted in a discriminatory manner.<sup>29</sup> 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 nondiscriminatory environment."<sup>30</sup>

Analysis of issues associated with employers' attitudes about perceived and "hidden" disabilities (that is, 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 work force. First, studies suggest that increasing numbers of individuals with perceived disabilities are entering the work force and are denied equal employment opportunity on the basis of biased attitudes and prejudice about their impairments.<sup>31</sup> Some studies find that the most common health impairments associated with disability are "hidden" conditions.<sup>32</sup>

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.<sup>33</sup> 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 (for example, biased attitudes toward individuals with physical disfigurements).<sup>34</sup> Unlike

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29. Title I imposes liability for discrimination whenever the prohibited motivation based on disability affects the employer's decision, that is, "when it is a 'but-for' cause." See *McNely v. Ocala Star Banner Corp.*, 99 F.3d 1068, 1073-75 (11th Cir. 1996) (concluding that a literal reliance on the phrase "solely" by reason of disability leads to results inconsistent with congressional intent).

30. Donohue, *supra* note 5, at 2586 (defining this concept under a Title VII analysis as "intrinsic equality").

31. See, e.g., *DISABILITY WATCH*, *supra* note 19, at 3-4 (finding that the 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., *id.* at 3.

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

34. See Harlan Hahn, *Antidiscrimination Laws and Social Research on Disability: The Minority Group Perspective*, 14 *BEHAV. SCI. & L.* 41 (1996); Linda H. Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 *STAN. L. REV.* 1161 (1995); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *STAN. L. REV.* 317 (1987).

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 (for example, if the worker is injured on the job).<sup>35</sup> Attitudinal bias may be 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.<sup>36</sup> 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.<sup>37</sup>

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, psychiatric illness, or any other recognized impairment. In these situations, discriminatory and biased attitudes would impact employment decisions rather than an obvious impairment affecting the actual market value of the individual's labor.<sup>38</sup> 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,

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35. See *Hedberg v. Indiana Bell Tel. Co.*, 47 F.3d 928, 933 (7th Cir. 1995) (discussing similarity between nonobvious nature of religious discrimination and disability discrimination in cases involving hidden disabilities).

36. See, e.g., *Fink v. Kitzman*, 881 F. Supp. 1347, 1369-70 (N.D. Iowa 1995) (describing pervasive discrimination persons with disabilities have experienced on the purported ground that "others would feel uncomfortable around them"); U.S. GENERAL ACCOUNTING OFFICE, *PEOPLE WITH DISABILITIES: FEDERAL PROGRAMS COULD WORK TOGETHER MORE EFFICIENTLY TO PROMOTE EMPLOYMENT*, GAO/HEHS-96-126, at 4 (1996) [hereinafter GAO REPORT] (noting attitudinal bias toward people with psychiatric disabilities includes labeling as unemployable).

37. See John J. Donohue III, *Advocacy Versus Analysis in Assessing Employment Discrimination Law*, 44 STAN. L. REV. 1583, 1601-02 (1992) (arguing that productivity gains or economic value to employers may be enhanced if antidiscrimination employment laws succeed in reducing such attitudinal discrimination and suggesting 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 antidiscrimination law).

38. See *Runnebaum v. NationsBank*, 95 F.3d 1285, 1295-96 (4th Cir. 1996) (noting that plaintiff believed he was discriminated against when his boss terminated him because she panicked upon learning he was HIV positive and not because of poor performance). 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. § 1630.2(l) app. at 341-42 (1996) (protecting those discriminated against on the basis of attitudes about disability).

impairments, such as genetic illness or HIV, in making hiring- or employment-related decisions.<sup>39</sup>

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."<sup>40</sup> The access to labor market test, increasingly adopted by courts, reflects a high standard to be met by plaintiffs in Title I employment discrimination cases brought under the first prong of the definition of disability. It is arguable that plaintiffs must meet this high standard 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 alone constitute unjustified discrimination under Title I unless these attitudes form the basis for subsequent discriminatory behavior toward "qualified" individuals.<sup>41</sup> 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.<sup>42</sup>

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.<sup>43</sup> For instance, an employee

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39. See *infra* notes 161-64 and accompanying text (noting approach also consistent with thrust of Health Insurance Reform Act of 1996).

40. Donohue, *supra* note 5, at 2585.

41. See, e.g., *Gordon v. E.L. Hamm & Assoc., Inc.*, 100 F.3d 907, 912-13 (11th Cir. 1996) (stating that 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, 1569 (S.D. Ga. 1996) (noting that to establish a *prima facie* case of discrimination under Title I, a plaintiff must show that the decision to terminate was causally connected to the employer's discrimination against a disability). There are several forms of employment discrimination under Title I. See 42 U.S.C. § 12112 (1994) (defining the term "discriminate"). Discrimination against a qualified individual with a covered disability because of that disability may result in a claim for "disparate treatment" (that is, other similarly situated nondisabled employees are treated more favorably). *Id.* In some cases, where there is no direct proof of such discrimination, employees may use a burden-shifting method (that is, 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 Sch.*, 100 F.3d 1281, 1286 (7th Cir. 1996) (discussing the 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 failure to make reasonable accommodations for a qualified job applicant or employee with a covered disability. 42 U.S.C. § 12112(b)(5)(A)-(B).

43. See, e.g., *Fenton v. Pritchard*, 926 F. Supp. 1437, 1444-45 (D. Kan. 1996) (holding that the plaintiff's violent nature and short temper were not impairments under Title I); *Pouncy v. Vulcan Materials Co.*, 920 F. Supp. 1566, 1580 n.8 (N.D. Ala. 1996) (commenting that character flaws,

may allege employment discrimination in circumstances where the appropriateness of that employee's workplace behavior is at issue.<sup>44</sup> 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.<sup>45</sup> The employee contended unsuccessfully that his behavior toward co-workers led his employer to perceive him as a covered person with a mental disability.<sup>46</sup> 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.<sup>47</sup> 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.<sup>48</sup> 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 dis-

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poor judgment, irresponsible behavior, and lack of impulse control are not necessarily impairments under Title I); *Greenberg v. New York*, 919 F. Supp. 637, 642 (E.D.N.Y. 1996) (same).

44. See *Blanck & Marti*, *supra* note 1.

45. *Fenton*, 926 F. Supp. at 1445-46. Negative case examples such as *Fenton* have been used by critics to suggest inefficiencies in Title I implementation. See *Blanck & Marti*, *supra* note 1 (noting other negative case examples). The representativeness of such cases to Title I implementation in practice is open to debate and study.

46. *Fenton*, 926 F. Supp. at 1445-46.

47. *Johnson*, 923 F. Supp. at 1569; see also *Holihan v. Lucky Stores*, 87 F.3d 362, 366 (9th Cir. 1996) (finding that an issue of material fact existed 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); *Stewart v. County of Brown*, 86 F.3d 107, 111 (7th Cir. 1996) (noting 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 the employee to be emotionally and psychologically imbalanced because the employer repeatedly was advised that the employee was mentally fit for his job); *EEOC v. Joslyn Mfg. Co.*, 5 Am. Disabilities Cas. (BNA) 1220 (N.D. Ill. 1996) (finding a genuine issue of fact existed 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).

48. 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 177-85 and accompanying text (noting that businesses are increasingly investing in accommodations for workers with and without disabilities).

abled for purposes of Title I analysis, regardless of whether an accommodation is required.<sup>49</sup>

### 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.<sup>50</sup> 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.<sup>51</sup>

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.<sup>52</sup> The concept of a "qualified individual" with a disability is 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.<sup>53</sup>

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49. See *Joslyn*, 5 Am. Disabilities Cas. (BNA) at 1225 ("[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*, 944 F. Supp. 897, 901 (S.D. Fla. 1996) (noting that the fact that an employer finds an applicant unqualified does not mean that it did not perceive applicant as disabled).

50. See, e.g., Walter Y. Oi, *Employment and Benefits for People with Diverse Disabilities*, in *DISABILITY, WORK AND CASH BENEFITS* 103 (Jerry L. Mashaw et al. eds., 1996) (noting that the ADA has not produced anticipated growth in employment).

51. See, e.g., John J. Donohue III, *Is Title VII Efficient?*, in *EQUAL EMPLOYMENT OPPORTUNITY: LABOR MARKET DISCRIMINATION AND PUBLIC POLICY* 137, 143 (Paul Burstein ed., 1994) (concluding that the theoretical attack on the efficiency of Title VII of the Civil Rights Act of 1964 is incomplete); Paula England, *Neoclassical Economists' Theories of Discrimination*, in *EQUAL EMPLOYMENT OPPORTUNITY: LABOR MARKET DISCRIMINATION AND PUBLIC POLICY* 59, 67 (Paul Burstein ed., 1994) (examining theory that most employment discrimination will disappear in competitive labor markets); Richard A. Posner, *The Efficiency and Efficacy of Title VII*, in *EQUAL EMPLOYMENT OPPORTUNITY: LABOR MARKET DISCRIMINATION AND PUBLIC POLICY* 147, 148 (Paul Burstein ed., 1994) (concluding that Title VII is not efficient or economically justified).

52. 29 C.F.R. § 1630.2(m), (n) (1996); cf. *Hegwer v. Board of Civil Serv. Comm'rs of City of Los Angeles*, 7 Cal. Rptr. 2d 389, 396 (Ct. App. 1992) (finding that a paramedic whose thyroid condition caused excessive weight gain was not a qualified employee because she exceeded the body-fat-based weight standards for fire fighters and emergency medical technicians which were reasonable means of insuring the health and safety of both employees and the public).

53. *Blanck*, *supra* note 4, at 864-65.

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.<sup>54</sup> Employers are not discouraged from searching for the most qualified individuals with or without disabilities.<sup>55</sup> 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 unqualified workers with or without covered disabilities.<sup>56</sup>

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.<sup>57</sup> 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.<sup>58</sup> Yet in establishing employment qualifications (that is, 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, in other words, independent of unfounded attitudes about the relation of a 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.<sup>59</sup>

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54. 42 U.S.C. § 12111(8) (1994).

55. *Cf. Oi, supra* note 50, at 112.

56. 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 infra* notes 78-82 and accompanying text.

57. *See Donohue, supra* note 5, at 2584-85.

58. *See, e.g., Mark A. Schuman, The Wheelchair Ramp to Serfdom: The Americans with Disabilities Act, Liberty, and Markets*, 10 ST. JOHN'S J. LEGAL COMMENT 495, 496 (1995) ("[T]he ADA denies an employer the right to determine the qualifications and abilities relevant to a job.").

59. *See infra* notes 130-45 and accompanying text (discussing the costs and benefits to employers associated with the provision of reasonable accommodations).

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.<sup>60</sup> 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.”<sup>61</sup> Thus, Congress did not intend for Title I to interfere with employers’ non-discriminatory, rational economic decision making.<sup>62</sup> Nevertheless, businesses of different sizes or with varying degrees of specialization have different needs with regard to the range of 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 led to initial uncertainty by the small business community about implementation of Title I.<sup>63</sup>

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 (that is, 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

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60. See *supra* notes 58-59 and accompanying text.

61. Burgdorf, *supra* note 15, at 192. Title I distinguishes 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) (1994).

62. *Weiler v. Household Fin. Corp.*, 101 F.3d 519, 526 (7th Cir. 1996) (“Congress intended simply that disabled persons have the same opportunities available to them as are available to nondisabled persons.”).

63. The requirements of Title I affect businesses with 15 or more employees. See Peter D. Blanck, *The Emerging Work Force: Empirical Study of the Americans with Disabilities Act*, 16 J. CORP. L. 693, 772 n.330, 778-79 (1991) (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).

affect labor and production requirements.<sup>64</sup> The determination of the essential or nonessential 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.<sup>65</sup> Factors considered in determining whether a direct threat exists include the duration of the risk, the nature of potential harm, and the likelihood that the harm will occur.<sup>66</sup> Employers are required to make an individualized and objective determination of direct threat based on the employee's present ability to perform safely essential job functions. This determination must be made on the basis of tests of current medical judgment<sup>67</sup> and not on anticipated lost productivity or predictions about the future impact of a disabling condition.

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.<sup>68</sup> Title I prohibits disability-related pre-employment inquiries and medical tests, but such examina-

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64. Burgdorf, *supra* note 15, at 210; *see also* 29 C.F.R. § 1630.2(p)(2) (listing factors relevant to undue hardship determination).

65. 42 U.S.C. § 12113(b) (1994); 29 C.F.R. § 1630.2(r) (1996) (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 (1996) (noting that Title I may require accommodations that eliminate or sufficiently reduce a direct threat); 29 C.F.R. § 1630.2(r) (noting that where a disability is involved, the employer must identify the specific behavior on the part of the individual that would pose a direct threat, considering the duration, nature and severity, likelihood of harm and imminence of harm of the disability).

66. 29 C.F.R. § 1630.2(r).

67. *Id.*; *see also* Jean Campbell & Caroline L. Kaufmann, *Equality and Difference in the ADA: Unintended Consequences for Employment of People with Mental Health Disabilities*, in *MENTAL DISORDER, WORK DISABILITY, AND THE LAW* 221, 225-26 (Richard J. Bonnie & John Monahan eds., 1997) (stating that the direct threat standard balances rights of persons with disabilities against the needs of society to prevent harm); *cf.* Oi, *supra* note 50, at 107-08, 112-13 (discussing the impact of a disability on worker productivity and noting that "disability steals time").

68. *See, e.g.*, Grenier v. Cyanamid Plastics, Inc., 70 F.3d 667, 675 (1st Cir. 1995) (holding that the employer did not violate the 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 the ability to return to work with or without an accommodation and type of accommodation necessary); *see* Knapp v. Northwestern Univ., 101 F.3d 473, 484 (7th Cir. 1996) (holding that a university's—analogueous to an employer's—medical determination of whether an individual is medically qualified, if reasonable, must be given deference by the court).

tions are permitted after a conditional job offer has been made.<sup>69</sup> 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 must be treated as confidential.<sup>70</sup>

Medical test results from a post-conditional offer of employment, or medical test 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.<sup>71</sup> If an employee alleges discrimination based on an employer's medical test that purports to screen out qualified 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.<sup>72</sup>

#### D. Reasonable Accommodations

The economic implication that has received the most attention involves Title I's effect 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.<sup>73</sup> The employer's right to structure jobs, however, may not violate Title I's requirement that the employer

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69. 42 U.S.C. § 12112(d)(3); EQUAL EMPLOYMENT OPPORTUNITY COMM'N, No. 915.002, ENFORCEMENT GUIDANCE: PREEMPLOYMENT DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS UNDER THE AMERICANS WITH DISABILITIES ACT OF 1990 36 (1994) [hereinafter EEOC ENFORCEMENT GUIDANCE]; see also Susan Alexander, *Preemployment Inquiries and Examination: What Employers Need To Know About the New EEOC Guidelines*, 45 LAB. L.J. 667, 678 (1994); Robert B. Fitzpatrick, *Employer Screening Procedures Under the Americans with Disabilities Act: What's Legal? What's Debatable?*, in CIVIL PRACTICE AND LITIGATION TECHNIQUES IN THE FEDERAL COURTS, 285, 290 (ALI-ABA Course of Study, Mar. 2, 1996), available in Westlaw, C106 ALI-ABA 285; David M. Katz, *Disability Queries Okay After Offering Job*, 16 NAT'L UNDERWRITER (PROP. & CASUALTY/RISK BENEFITS MGMT. ED.), JUNE 17, 1996, at 31 (discussing the window of opportunity for employers to ask about job applicants' disabilities after offers are made).

70. 42 U.S.C. § 12112(d)(3)(A)(B).

71. *Id.* § 12112(c)(4)(A); 29 C.F.R. § 1630.14(b)(3) (1996).

72. See 42 U.S.C. § 12113(a); *Murphy v. United Parcel Serv., Inc.*, 946 F. Supp. 872, 883 (D. Kan. 1996) (finding Department of Transportation driving qualification standards a complete defense to plaintiff's Title I claim); see also Kimberli R. Black, *Personality Screening in Employment*, 32 AM. BUS. L.J. 69, 113-15 (1994) (discussing methods to satisfy job-relatedness requirement that screening test validly relates to the job at issue).

73. Black, *supra* note 72, at 113-15.

provide "reasonable accommodations" for a qualified employee with a covered disability.<sup>74</sup>

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.<sup>75</sup> To be eligible for an accommodation, an employee must make his disability "known"<sup>76</sup> to the employer and request an accommodation. This requirement places a particular burden on an individual with a hidden and nonobvious disability to disclose in a timely manner the claimed disability and request the employer to provide an accommodation.<sup>77</sup> 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.<sup>78</sup> An employee is not

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74. See 29 C.F.R. § 1630.2(o); Barbara A. Lee, *Reasonable Accommodation Under the Americans with Disabilities Act: The Limitations of Rehabilitation Act Precedent*, 14 BERKELEY J. EMP. & LAB. LAW 201, 219-23 (1993).

75. See, e.g., 42 U.S.C. § 12111(9)(B) (providing that a qualified employee may request reasonable accommodation such as being transferred to a vacant and similar position with the employer). Compare *Overton v. Reilly*, 977 F.2d 1190, 1195 (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, 92 (8th Cir. 1991) (finding when employee with apraxia, a neurological disorder characterized by disruptions in concentration, performs satisfactorily when placed in a semi-private work space, the employer must take reasonable efforts to provide a "distraction-free environment"), and *Kent v. Derwinski*, 790 F. Supp. 1032, 1040 (E.D. Wash. 1991) (requiring reasonable accommodation for employee with mental retardation of sensitivity training of co-workers and use of care by supervisor in disciplining to avoid criticism or undue stress), with *Hudson v. MCI Telecommunications Corp.*, 87 F.3d 1167, 1169 (10th Cir. 1996) (finding request by employee with carpal tunnel syndrome for unpaid leave for an indefinite amount of time not reasonable), *Pesterfield v. Tennessee Valley Auth.*, 941 F.2d 437, 441 (6th Cir. 1991) (finding plaintiff's inability to handle criticism made it impossible to perform functions of job and it was not reasonable to require employer to provide a stress-free environment to accommodate disability), and *Kuehl v. Wal-Mart Stores, Inc.*, 909 F. Supp. 794, 803 (D. Colo. 1995) (holding that an individual who rejected a reasonable accommodation was not a qualified individual with a disability).

76. 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 Serv., Inc.*, 883 F. Supp. 379, 394 (N.D. Iowa 1995) (noting that the "ADA does not require clairvoyance") (quoting *Hedberg v. Indiana Bell Tel. Co.*, 47 F.3d 928, 933 (7th Cir. 1995), which stated that the employer cannot be liable without knowledge of the disability); *Morişky v. Broward County*, 80 F.3d 445, 448 (11th Cir. 1996) (same); see also *Burgdorf*, *supra* note 15, at 129-54.

77. See *Fussell v. Georgia Ports Auth.*, 906 F. Supp. 1561, 1569 (S.D. Ga. 1995); see also 29 C.F.R. § 1630.9 app. at 351 (noting that it is the responsibility of employee to inform employer of need for accommodation).

78. See, e.g., *Bultemeyer v. Fort Wayne Community Sch.*, 100 F.3d 1281, 1285 (7th Cir. 1996) (noting that the reasonable accommodation process requires good faith communication between employer and employee, and in a case involving an employee with mental illness, communication process is even more critical); *Taylor v. Principal Fin. Group*, 93 F.3d 155, 164 (5th Cir. 1996)

“qualified” if he cannot perform the job with or without an accommodation.<sup>79</sup>

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.<sup>80</sup> 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.<sup>81</sup> The duty of accommodation is cast as compromising the ideal of free market efficiency by imposing upon employers an affirmative duty to retain less economically efficient workers.<sup>82</sup>

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.<sup>83</sup> 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

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(noting responsibility for fashioning accommodation shared between employer and employee); *Beck v. University of Wis. Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996) (holding university not liable under the ADA where the plaintiff was responsible for breakdown in the accommodation process); see also 29 C.F.R. § 1630.2(o)(3) (setting forth accommodation process regulations).

79. 42 U.S.C. § 12112(8).

80. See, e.g., Donohue, *supra* note 5, at 2608.

81. Donahue, *supra* note 5, at 2609; cf. *Weiler v. Household Fin. Corp.*, 101 F.3d 519, 526 (7th Cir. 1996) (noting that the reasonable accommodation process does not require employer to “bump” other employees to reassign disabled employee, nor does it require an employer to create a new position for disabled employee); *Gile v. United Airlines*, 95 F.3d 492, 499 (7th Cir. 1996) (same).

82. 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, Jan. 13, 1997, at A-10 (noting that Title I reflects “an infringement of liberty for government to dictate whom employers must ‘accommodate’”).

83. Cf. *Vande Zande v. State of Wis. Dept. of 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* 3, 14 (Carolyn L. Weaver ed., 1991) (discussing economic impact of accommodation provision).

profit-maximizing firm would prefer the worker who is less costly to hire."<sup>84</sup>

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 antidiscrimination provisions, nor is there a requirement "to make the disabled equal."<sup>85</sup> Employer prerogative and economic need is not disturbed and the employer is not discouraged from searching for the most qualified worker.<sup>86</sup> 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.<sup>87</sup>

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.<sup>88</sup> Title I would require the employer to hire the legitimately more qualified worker, regardless of disability, and would require the provision of an

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84. Donohue, *supra* note 5, at 2608.

85. *See id.* 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 work environments to compensate for impairment-related limits on productivity").

86. *Cf.* Oi, *supra* note 50, at 112 (arguing that Title I creates efficiency losses by forcing employers to enact a *satisfying* employment policy); Weaver, *supra* note 83, at 6 (arguing that Title I forces employers to hire less productive workers). *But see, e.g.*, Martin v. General Mills, Inc., No. 95 C 2846, 1996 U.S. Dist. LEXIS 16436, at \*21 (N.D. Ill., Nov. 4, 1996) (holding that Title I does not require employers to retain less productive employees).

87. Donohue, *supra* note 5, at 2610 n.72.

88. 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* 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); SEARS II, *supra* note 10, at 56-61, app. D. (listing costs and benefits of particular accommodations).

accommodation.<sup>89</sup> 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.<sup>90</sup>

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.<sup>91</sup>

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"

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89. The requirement to hire a worker with a disability requiring accommodation is capped, however, by the employer's safe harbor provision of "undue hardship" examined below. See *infra* notes 100-04 and accompanying text.

90. See Pub. L. No. 100-430, 102 Stat. 1619 (1988) (codified at 28 U.S.C. §§ 2341, 2342, and scattered sections of 42 U.S.C.); see also *infra* notes 92-94 and accompanying text (noting that Title I discrimination may be based on an employer's failure to make reasonable accommodations for a qualified job applicant or employee with a covered disability).

91. 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 MENTAL & PHYSICAL DISABILITY 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 an absolute identity in working conditions between disabled and nondisabled workers." 44 F.3d 538, 546 (7th Cir. 1995). 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." *Id.*; cf. Feldblum, *supra* note 101, 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.").

accommodation.<sup>92</sup> Under this latter view, an employer has no duty to incur even a modest loss in value because it would not be "reasonable" (that is, economically rational) to accommodate the disabled employee.<sup>93</sup>

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.<sup>94</sup> 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.<sup>95</sup> Others argue that Title I provisions reflect a judgment 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 work force."<sup>96</sup>

Part II of this Article 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.<sup>97</sup> 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

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92. See *Vande Zande*, 44 F.3d at 542-45.

93. See Feldblum, *supra* note 91, at 619-21 n.6 (discussing Judge Posner's reasoning in *Vande Zande* decision by claiming that Posner unfortunately interpreted the word "reasonable" to include a form of "cost-benefit" analysis).

94. See Sherwin Rosen, *Disability Accommodation and the Labor Market*, in *DISABILITY AND WORK: INCENTIVES, RIGHTS, AND OPPORTUNITIES* 18, 29 (Carolyn L. Weaver ed., 1991).

95. See, e.g., Schuman, *supra* note 58, at 504-05 ("This is an affirmative obligation to offer those employees with disabilities better terms and conditions than those offered other employees, at greater cost to the employer than that spent on other employees.").

96. Richard V. Burkhauser, *Post-ADA: Are People with Disabilities Expected To Work?*, 549 *ANNALS AM. ACAD. POL. & SOC. SCI.* 71, 80-81 (1997) (arguing that Title I provisions force taxpayers to bear part of the cost of accommodations, either through higher costs or tax credits).

97. 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 antidiscrimination provisions are implicated and should impose no economic inefficiencies on employers. See Weaver, *supra* note 83, at 14 (discussing the probable impact of the legislation and the courts having the capacity to alter the costs of legislation by deciding what is reasonable and what is covered). 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.

leads to efficient and cost-effective workplace operation.<sup>98</sup> In the absence of accurate and reliable measures of worker "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 effect 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.<sup>99</sup> 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.<sup>100</sup>

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

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98. See *infra* notes 130-43 and accompanying text (noting atypical cases whose frequency in practice may be too small to rely upon for policy making purposes, and as in critiques by economists that Title I is inefficient and made without reliance on empirical study).

99. Decisions about undue hardship are made on a case-by-case basis. 42 U.S.C. § 12111(10) (1994); see also *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 138-40 (2d Cir. 1995) (discussing employer's cost-benefit analysis); *Gardner v. Morris*, 752 F.2d 1271, 2182-84 (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 Pub. Health*, 2 Am. Disabilities Cas. (BNA) 177, 182-83 (M.D. Fla. 1992) (holding that an 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 co-worker to perform employee's job).

100. Cf. Philip S. Lewis, *Attitudes and Behavior of Employers Toward Persons with Disabilities in a Post-ADA Labor Market* (1994) (unpublished Ph.D. dissertation, The Union Institute), abstracted in 55 DISSERTATIONS ABSTRACT INT'L No. 10, at 4593 (1994) (finding minimal difference in attitudes and behavior of employers of different sizes or type of business, but substantial differences regarding provision of accommodations with larger firms more likely to provide accommodations); Lisa M. Ehrhart, *A National Study of Employer Attitudes Toward Persons with Disabilities* (1994) (unpublished Ph.D. dissertation, Virginia Commonwealth University), abstracted in 55 DISSERTATIONS ABSTRACTS INT'L No. 7, at 1082 (1994) (finding no difference between assessed attitudes toward person with disabilities and size of business).

functions of the work force of the business.<sup>101</sup> This list of economic impact factors is meant to ensure that the 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.<sup>102</sup> Although the employer's undue hardship defense is assessed on a case-by-case basis, relevant economic, incremental, and opportunity costs claimed (for example, measured in terms of lost profits or market value) may vary by industry and will need to be assessed.<sup>103</sup>

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 antidiscrimination 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 antidiscrimination purposes of the law, but also reflects economically efficient and rational workplace practices that have 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.<sup>104</sup> 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.<sup>105</sup> One area that has received the most study, given the ability to quantify associated costs and benefits, has been the analysis of the eco-

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101. 42 U.S.C. §12111(10)(B).

102. See Feldblum, *supra* note 91, at 619 (discussing legislative history of undue hardship provision and that Congress rejected a bright-line amendment to Title I that would have tied the determination of undue hardship to a percentage of an employee's salary).

103. See Ralph R. Frasca & Bernard J. Winger, *The Americans with Disabilities Act of 1990: New Opportunities for Forensic Economists*, 6 J. FORENSIC ECON. 81, 86-90 (1993) (providing examples of incremental and net costs associated with provision of accommodations for different businesses).

104. Cf. GAO REPORT, *supra* note 36, at 3-4, 22 (finding absence of data collection efforts by agencies regarding ADA implementation).

105. Frederick C. Collignon, *Is the ADA Successful? Indicators for Tracking Gains*, 549 ANNALS AM. ACAD. POL. & SOC. SCI. 129, 130-32 (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 Because They Are There*, 7 J. DISABILITY POL. STUD. 77, 82-86 (1996) (critiquing prior researchers overreliance on labor force participation measures as indicator of effective Title I implementation).

nomic implications to employers of workplace accommodations under Title I.<sup>106</sup> This Part examines the ongoing debate regarding the economics of accommodations in light of emerging study of the area.<sup>107</sup>

As mentioned above, one common criticism is that the costs of accommodations outweigh the benefits provided to employers and persons with disabilities.<sup>108</sup> Critics contend that the required provision of reasonable accommodations places financial burdens and administrative costs on the operation of businesses.<sup>109</sup> 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.<sup>110</sup>

A common thread in these critiques is that they are made without reliance on data. In the absence of empirical information, it is no surprise that the attitudes and behavior of many employers reflect the view that the costs of accommodations outweigh the benefits.<sup>111</sup> It is

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106. See, e.g., Rosen, *supra* note 94, at 22 (finding previous research has been devoted to the connection between labor supply and disability); Weaver, *supra* note 83, at 5 (noting that “[t]he 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 *Employing People with Disabilities Makes Good Business Sense*, REGION V NEWS, (Great Lakes Disability & Bus. Tech. Assistance Ctr.), Fall 1995, at 4 [hereinafter GREAT LAKES] (finding that 28% of approximately 73,000 Title I charges through September 30, 1996, allege failure to provide reasonable accommodations, and that another 52% involve discharge).

107. The economic relationship among required public accommodations under Title III of the ADA (for example, 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 Karlan & Rutherglen, *supra* note 82, at 41 n.81 (noting the cost efficiencies theory regarding Titles I, II, and III of the ADA).

108. See, e.g., James Bovard, *Disability Intentions Astray*, WASH. TIMES, May 20, 1996, at A16 (concluding that the 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, 23 (1994) (discussing 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, 725-30 (1995) (finding that the costs which the ADA will likely impose on employers will ultimately be borne by consumers which will decrease the net wealth of American society).

109. See generally IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT (Lawrence O. Gostin & Henry A. Beyer eds., 1993) (reviewing Title I provisions). Title I also does not require that employers 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, 1162-64 (D. Kan. 1996) (holding that under Title I, an 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).

110. Thomas H. Barnard, *The Americans with Disabilities Act: Nightmare for Employers and Dream for Lawyers?*, 64 ST. JOHN'S L. REV. 229, 251-52 (1990); Willis, *supra* note 108, at 726-27.

111. See Collignon, *supra* note 6, at 231-38 (arguing that economists' negative theorizing about the costly effects of accommodation often do not consider the actual experiences of busi-

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.<sup>112</sup> More than three quarters of all Title I charges filed with the EEOC have been dismissed<sup>113</sup> because, among other reasons, the plaintiff alleging discrimination failed to show that he was qualified for the position.<sup>114</sup>

Many individuals with disabilities currently in the work force 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.<sup>115</sup> Findings from the 1989 National Health Interview Survey show that roughly 60 percent of working age adults with disabilities rate their health as good to excellent.<sup>116</sup> Nevertheless,

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nesses); Baldwin, *supra* note 28, at 49 (suggesting that the most frequent employer concerns about Title I include costs of accommodations).

112. 29 C.F.R. § 1630.2(m), (n) (1991); SEARS I, *supra* note 10, at 30-40; SEARS II, *supra* note 10, at 42; *see also* Helen L. v. DiDario, 46 F.3d 325, 334 (3d Cir. 1995) (stating that the 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." Deborah A. Calloway, *Dealing with Diversity: Changing Theories of Discrimination*, 10 ST. JOHN'S J. LEG. COMMENT. 481, 492 (1995) (interpreting Title I to judge individuals on the basis of their group status and not on their individual merits).

113. Lisa J. Stansky, *Opening Doors: 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*, A.B.A. J., Mar. 1996, at 66 (1996) (noting that 40% of claims were dismissed for having "no reasonable cause" and another 43% were closed for administrative reasons).

114. GREAT LAKES, *supra* note 106, at 5 (finding 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., 85 F.3d 187, 190-91 (5th Cir. 1996) (holding that woman treated for breast cancer with daily radiation therapy did not have a disability under the ADA).

115. 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. 2 SUCCESSFUL JOB ACCOMMODATIONS STRATEGIES (June 1996); *see also* Executive Summary of "Balancing Security and Opportunity: The Challenge of Disability Income Policy", 59 SOCIAL SECURITY BULLETIN 79, 79 (Spring 1996) (showing 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); DISABILITY WATCH, *supra* note 19, at 16 (citing DISABLED AMERICANS' SELF-PERCEPTIONS: BRINGING DISABLED AMERICANS INTO THE MAINSTREAM (Louis Harris & Assocs., Inc., ed., 1986)) (showing that 79% of persons with disabilities below the age of 65 who do not work report that they want to work).

116. *See* Kaye, *supra* note 19, at 12 (noting that in many cases, disability is the result of a past health problem or injury that does not presently require medical attention). For an extensive analysis of factors related to the self-reported health status of persons with disabilities, *see* Mitchell P. LaPlante, DISABILITY, HEALTH INSURANCE COVERAGE, AND UTILIZATION OF

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.<sup>117</sup>

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.<sup>118</sup>

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.<sup>119</sup> 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 effectiveness and efficiency.<sup>120</sup>

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ACUTE HEALTH SERVICES IN THE UNITED STATES (Disability Statistics Report No. 4: U.S. Dept. Ed., Nat'l Institute Disability Research 1993).

117. See, e.g., *Vande Zande v. State of Wis. Dept. of Admin.*, 44 F.3d 538, 543 (7th Cir. 1995) (claiming that if the employers have potentially unlimited financial obligations to 43 million disabled people, there will be an indirect tax greater than the national debt).

118. SEARS II, *supra* note 10, at 43 (citing 1995 SURVEY OF CORPORATE EXECUTIVES OF THE ADA (Louis Harris & Assocs., Inc. ed., 1995) [hereinafter LOUIS HARRIS SURVEY]); PRESIDENT'S COMMITTEE ON PEOPLE WITH DISABILITIES, ABILITY FOR HIRE 1 (Washington, D.C., 1996) (citing MASON-DIXON POLL, Florida Chamber of Commerce Foundation's Disability Awareness Project (Jan. 1995) (on file with the *DePaul Law Review*)) (noting that 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 Finds, Daily Lab. Rep. (BNA) 124 A17, A18 (June 27, 1996) (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).

119. See, e.g., SEARS II, *supra* note 10, at 42 (finding that the costs of accommodating qualified workers are relatively low and the economic and productivity benefits are relatively high).

120. See SEARS II, *supra* note 10, at 42-43; see also Francine S. Hall & Elizabeth L. Hall, *The ADA: Going Beyond the Law*, 8 ACAD. MGMT. EXECUTIVES 17, 17-26 (1994) (noting that one of the indirect benefits of following the ADA occurs when a corporation acknowledges reality and supports people with special needs, thereby gaining a strategic and competitive advantage).

In a series of studies conducted at Sears, Roebuck and Co. from 1978 to 1996,<sup>121</sup> 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.<sup>122</sup> 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.<sup>123</sup> The Sears studies also show that the direct costs of accommodating employees with hidden disabilities (for example, emotional and neurological impairments comprising roughly 15 percent of the cases studied) are even lower than the overall average of \$45.<sup>124</sup>

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.<sup>125</sup> In addition, almost two-thirds of the accommodations studied result in savings to the company in excess of \$5,000.<sup>126</sup> The savings associated with accommodations include lower job training costs and insurance claims, increased worker productivity, and reduced rehabilitation costs after injury on the job.<sup>127</sup> JAN reports that for every dollar invested in an effective accommodation, companies sampled realized an average of \$50 in benefits.<sup>128</sup> 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 (for example, median direct cost for accommodations was \$233 per covered employee), and from 1986 to 1995, the

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121. See, e.g., SEARS II, *supra* note 10, at 16 (stating that "Sears employs among its 300,000 person work force an estimated 20,000 persons with physical or mental disabilities").

122. *Id.* at 17 (noting "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"). Effective accommodations include assistive technology, physical access, changed schedules, assistance by others, and changed job duties. See Mary C. Daly & John Bound, *Worker Adaptation and Employer Accommodation Following the Onset of a Health Impairment*, 51 J. GERONTOLOGY S53 (1996).

123. SEARS II, *supra* note 10, at 18.

124. *Id.* at 20 (finding that from 1993 to 1996, the average cost for behavioral impairments was \$0 and the average cost for neurological impairments was \$13).

125. *Id.* at 26 (citing PRESIDENT'S COMMITTEE ON EMPLOYMENT OF PEOPLE WITH DISABILITIES, JOB ACCOMMODATION NETWORK (JAN) REPORTS (Oct.-Dec. 1994) (Washington, D.C., 1994)).

126. *Id.* (providing information on accommodations for employees with disabilities).

127. *Id.*

128. *Id.*; see also *infra* notes 146-49 and accompanying text (discussing a study of Canadian work force showing return on accommodation investment).

proportion of companies providing accommodations rose from 51 percent to 81 percent.<sup>129</sup>

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 work force diversity and inclusion, implementation has resulted in economically effective business strategies that transcend minimal compliance with the law and produce economic value.<sup>130</sup> 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<sup>131</sup>—roughly forty times the average of the direct costs of workplace accommodations.

Second, in terms of relative cost, although the direct costs of the accommodations for any particular disability tend to be low,<sup>132</sup> 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.<sup>133</sup> The trend toward the provision of accommodation in the workplace may suggest

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129. SEARS II, *supra* note 10, at 24 (citing LOUIS HARRIS SURVEY, *supra* note 128).

130. *See id.* (finding neither cost alone nor severity of disability determined Sears strategy toward the provision of accommodations); Collignon, *supra* note 6, at 208 (stating “firms saw accommodation as good business practice”); PETER D. BLANCK & CRAIG L. LAMAY, TRANSCENDING THE AMERICANS WITH DISABILITIES ACT: RESEARCH, POLICY, AND EMPLOYMENT STRATEGIES FOR THE 21ST CENTURY (forthcoming 1997) (manuscript on file with author) (discussing when employers hire, work with, and accommodate qualified employees with disabilities, they enhance their customer bases, employee morale, and business goals); *see also* Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Laws*, in EQUAL EMPLOYMENT OPPORTUNITY: LABOR MARKET DISCRIMINATION AND PUBLIC POLICY 247, 247-48 (Paul Burstein ed., 1994) (finding that organizations are motivated by legal process to construct law in ways consistent with societal norms and culture); David A. Thomas & Robin J. Ely, *Making Differences Matter: A New Paradigm for Managing Diversity*, HARV. BUS. REV., Sept./Oct., 1996, at 79-80 (explaining that fundamental changes in an organization’s hierarchy adopting a diverse workplace increases profitability, creativity, and flexibility of the workplace).

131. SEARS II, *supra* note 10, at 42.

132. 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, 798 (D. Colo. 1995) (discussing a Title I claim involving a requested accommodation of periodic sitting on stool while on work duty).

133. SEARS II, *supra* note 10, at 19-24; SEARS I, *supra* note 10, at 12 (noting that since 1972, fewer than 10% of Sears employees who were self-identified as disabled through the company’s Selective Placement Program required any kind of accommodation at the time of self-identification); *cf.* Karlan & Rutherglen, *supra* note 82, at 23 (arguing, without support of data, that an

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 work force and by reducing worker absenteeism.<sup>134</sup>

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."<sup>135</sup> Yet, as discussed above, absent a truly competitive labor market, attitudinal discrimination against qualified individuals with disabilities alone may necessitate the required provision of accommodations under Title I, at least for a large segment of the labor force affected by this market failure.<sup>136</sup> 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.<sup>137</sup> Over time,<sup>138</sup> with the lessening of prejudicial attitudes resulting from effective Title I implementation,

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accommodation in any form requires an employer to incur cost, and sometimes the "subsidy turns out to be a good investment" in terms of worker productivity or in attracting customers).

134. See Collignon, *supra* note 6, at 209 (stating that businesses are more likely to provide lower cost accommodations, particularly when a current employee becomes disabled); Weaver, *supra* note 83, at 9, 11-12 (noting that Title I provides economic incentives to businesses to hire individuals requiring accommodations that have indirect benefits to the firm or to customers); Deborah S. Cowans, *Employers Bear Millions in Elder Caregiving Costs*, BUS. INS., June 24, 1995, at 2 (discussing a study of a large manufacturer with about 87,000 employees who 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); Heidi Berven & Peter D. Blanck, *Economic Returns on the Employment Provisions of the Americans with Disabilities Act: Empirical Study of Disability-Related Patents from 1970 to 1997* (forthcoming 1997) (manuscript on file with author) (providing an analysis of positive economic projections associated with disability-related patents filed).

135. Rosen, *supra* note 94, at 26.

136. See *Bultemeyer v. Fort Wayne Community Sch.*, 100 F.3d 1281, 1286-87 (finding 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.

137. See Donohue, *supra* note 5, at 2585 (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. *Id.*

138. 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., 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) (examining the available evidence on the causes of African-American economic advances to access the contribution of federal policy); 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) (reviewing the accomplishments and shortcomings of federal opportunity law over the last 25 years).

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.<sup>139</sup>

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.<sup>140</sup> The studies at Sears suggest that the direct costs associated with many technologically based accommodations (for example, 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.<sup>141</sup> 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.<sup>142</sup> 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.<sup>143</sup>

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139. See Weaver, *supra* note 83, at 6 (noting that "[l]ost profits are the price an 'economic discriminator' pays to indulge his preferences"). 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.

140. See SEARS II, *supra* note 10, at 35-36; SEARS I, *supra* note 10, at 16-17, 26-29; 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) (concluding that 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 D. Blanck, Communications Technology for Everyone: Implications for the Classroom and Beyond, Annenberg Washington Program Report (1994); Deborah Kaplan et al., *Telecommunications for Persons with Disabilities: Laying the Foundation*, WORLD INST. ON DISABILITY REP. (Oakland, California, 1992).

141. See SEARS I, *supra* note 10, at 16-17.

142. See Collignon, *supra* note 6, at 205-06 (noting that universally designed accommodations may reflect more efficient way to undertake production and improve productivity of co-workers); Donohue, *supra* note 5, at 2612 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 82, at 23 (same).

143. SEARS II, *supra* note 10, at 22; see SHOSHANA ZUBOFF, IN THE AGE OF THE SMART MACHINE: THE FUTURE OF WORK AND POWER (1988); Edward H. Yelin, *The Employment of People With and Without Disabilities in an Age of Insecurity*, 549 ANNALS AM. ACAD. POL. & SOC. SCI. 117, 128 (1997).

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.<sup>144</sup> 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.<sup>145</sup>

Close examination is needed of direct and indirect costs and benefits of Title I implementation and who bears the costs and receives the benefits associated with workplace accommodations for qualified persons with covered disabilities.<sup>146</sup> A recent empirical study based on over 1,000 observations in the Canadian work force 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.<sup>147</sup> 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.<sup>148</sup> Injured workers who returned to the work force but to a different employer did "pay" for a portion of workplace accommodations by accepting substantially lower wages.<sup>149</sup>

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

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144. See Mary T. Giliberti, *Implementation of the Reasonable Accommodation Provisions of the ADA by the EEOC and the Courts*, 6 J. CAL. ALLIANCE FOR THE MENTALLY ILL 19, 19-20 (1995); Diane Sands, *Reasonable Accommodation or Improbable Emancipation?*, 6 J. CAL. ALLIANCE FOR THE MENTALLY ILL 19, 21-22 (1995).

145. 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).

146. See Morley Gunderson & Douglas Hyatt, *Do Injured Workers Pay for Reasonable Accommodation?*, 50 INDUS. & LAB. REL. REV. 92, 101 (1996) (indicating that "injured workers did not pay for workplace accommodations or reduced physical demands if they returned to their time-of-accident employer," but that "injured workers who . . . took jobs with an employer other than the time-of-accident employer did pay at least a portion of the cost of the accommodations by accepting lower wages in exchange for workplace modifications").

147. *Id.*

148. *Id.*

149. *Id.*; see also Karlan & Rutherglen, *supra* note 6, at 23 (suggesting, without support of data, 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 that cost).

different employer, who bears the associated costs, and how the 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.<sup>150</sup> Other studies show that accommodations for workers' health conditions extend their work life by an average of five years.<sup>151</sup>

Indirect costs associated with Title I implementation include related expenses for administrative, compliance, or legal actions.<sup>152</sup> The Sears study examined all 138 Title I charges filed with the EEOC against Sears from 1990 to mid-1995.<sup>153</sup> 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.<sup>154</sup> 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.<sup>155</sup>

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150. See Nancy R. Mudrick, *Employment Discrimination Laws for Disability: Utilization and Outcome*, 549 ANNALS AM. ACAD. POL. & SOC. SCI. 53, 68-70 (1997) (citing studies showing that a majority of persons injured in the workplace maintain their labor force attachment).

151. Burkhauser, *supra* note 96, at 80 (showing that the 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).

152. Peter D. 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) (discussing the direct and indirect costs associated with Title I implementation); see also Rosen, *supra* note 94, at 22-27 (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 (for example, inefficiencies and uncertainty) or benefits (for example, limited scope of inquiries) related to the case-by-case analytical approach required by Title I. *Id.* at 12-15 (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.

153. SEARS II, *supra* note 10, at 33-34.

154. *Id.* at 35-37 (finding 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 82, at 23 (arguing, without support of data, that 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).

155. See Kathryn Moss et al., *Assessing Employment Discrimination Charges Filed Under the Americans with Disabilities Act*, J. DISABILITY POL'Y STUD. (forthcoming 1997) (suggesting that

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.<sup>156</sup> Professors Karlan and Rutherglen have suggested a variety of factors involving Title I implementation and compliance that may help guide future study.<sup>157</sup> 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.<sup>158</sup> 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.<sup>159</sup> Moreover, broadly defined, indirect costs and benefits may include the impact of effective accommodations on employee morale, perceptions of the business and its reputa-

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the presence of Title I motivates parties to resolve disputes informally without resort to costly trial litigation and finding that variation in a charging party's likelihood of receiving a benefit based on the party's type of disability, race, and gender).

156. See, e.g., DISABILITY WATCH, *supra* note 19, at 22 (citing N.O.D./HARRIS SURVEY OF AMERICANS WITH DISABILITIES (Louis Harris & Assocs., Inc., ed., 1995)) (finding from survey of employers that 66% report that litigation has not increased as a result of the ADA, 82% report that the 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); *ADA Changes Decline But Monetary Awards Increase*, WASHINGTON FAX (President's Comm. on Employment of People with Disabilities, Washington, D.C.), Nov.-Dec. 1996, at 1 (on file with the *DePaul Law Review*) (citing EEOC records showing that Title I charge filings decreased by 10% during 1996 year as compared to 1995).

157. See Karlan & Rutherglen, *supra* note 82, at 30.

158. *Id.* at 30-31; see also Peter D. Blanck, *On Integrating Persons with Mental Retardation: The ADA and ADR*, 22 N.M. L. REV. 259, 263-64, 270-71 (1992) (discussing 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).

159. See, e.g., Calloway, *supra* note 112, at 494 (suggesting that in absence of study, reasonable accommodation requirement may foster backlash against Title I); 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); Donohue, *supra* note 37, at 1603 (suggesting need to study relative magnitude of costs to benefits in antidiscrimination employment laws); Oi, *supra* note 50, 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 work force). 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.

tion by customers and the community, or relationship to effective implementation of other laws such as the Family Medical Leave Act or workers' compensation laws.<sup>160</sup>

### III. CONCLUSION

Systematic evaluation of the economic implications associated with the emerging and existing work force 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.<sup>161</sup> 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.<sup>162</sup> 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.<sup>163</sup> 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.<sup>164</sup>

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 work force and identify potential disputes before they arise.<sup>165</sup> Independent

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160. See Peter D. Blanck, *Communicating the Americans with Disabilities Act, Transcending Compliance: 1997 Report on Direct and Indirect Costs and Benefits of Workplace Accommodations at Sears, Roebuck & Co.* (forthcoming 1997) (manuscript on file with author).

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

162. Health Insurance Reform Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936.

163. *Id.* (discussing how this antidiscrimination provision does not apply to individual insurance plans); cf. *EEOC v. CNA Ins. Co.*, Daily Lab. Rep. (BNA) 195, at D-89 (7th Cir. 1996) (rejecting the view that ADA Title I requires parity among physical and mental health benefits provided by employers). A similar study is required of the impact of the Mental Health Parity Act of 1996, Pub. L. No. 104-204, Title VII, 110 Stat. 2944, on employment opportunity for qualified persons with mental disabilities.

164. 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 (that is, work in the 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.

165. See Karlan & Rutherglen, *supra* note 82, 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).

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 the collection of information on attitudes, behavior, and the related economic implications of the law.<sup>166</sup>

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 work force.<sup>167</sup> 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.<sup>168</sup>

Despite the encouraging trends, estimates of unemployment levels for persons with disabilities range as high as 50 percent.<sup>169</sup> Some stud-

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166. See, e.g., Blanck & Marti, *supra* note 1.

167. *Id.* (describing a 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 (showing that data reflects a 27% increase of persons with severe disabilities in the work force from 1991 to 1994). *But cf.* Rosen, *supra* note 94, at 18, 22 (suggesting that an increase in disability benefits may discourage disabled persons from working).

168. 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, 110 Stat. 2105; Collignon, *supra* note 6, at 137-38 (suggesting reduction in welfare dependency as indicator of Title I implementation); *cf.* Rosen, *supra* note 94, at 28-29 (arguing that decreased labor force participation and increasing insurance benefits of persons with disabilities is inconsistent with Title I accommodation policies); Murray Weidenbaum, *Why the Disabilities Act Is Missing its Mark*, *CHRISTIAN SCI. MONITOR*, Jan. 16, 1997, at 19 (arguing that negative trends in labor force participation of people with disabilities are not related to Title I, but to other federal entitlement programs, such as Supplemental Security Income, that provide monetary incentives for persons with disabilities not to work). 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.

169. See Paul Wehman, *Employment Opportunities and Career Development*, in *THE ADA MANDATE FOR SOCIAL CHANGE* 45, 54 (Paul Wehman ed., 1993) (citing a poll which indicated that two-thirds of the people with disabilities are unemployed); 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 disa-

ies suggest that from the years 1970 to 1992, there has been no significant net change in the labor force participation rate among persons with disabilities.<sup>170</sup> As a result, the continued reality of economic, structural, attitudinal, and behavioral discrimination<sup>171</sup> increasingly may lead qualified individuals to assert their Title I rights in the future.<sup>172</sup> Analysis of job retention, assessment, advancement, disclosure, and accommodation strategies are needed to help qualified individuals keep their 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.<sup>173</sup>

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.<sup>174</sup> This study may include factors such as the types of jobs attained (for example, entry level, service-related, or production),

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bilities was \$1,713 compared to \$2,160 for workers without disabilities). Additional study is 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 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); H. Stephen Kaye et al., *Trends in Disability Rates in the United States, 1970-1994*, 17 DISABILITY STATISTICS ABSTRACT 1, 1-6 (Nov. 1996) (analyzing labor force rates and their relation to work limitations and disability).

170. See Yelin, *supra* note 143, at 124-25 (finding a disproportionate increase in persons with disabilities working part-time).

171. See SUPPORTED EMPLOYMENT: STRATEGIES FOR INTEGRATION OF WORKERS WITH DISABILITIES 54-58 (Paul Wehman et al. eds., 1992).

172. See Blanck & Marti, *supra* note 1 (detailing a 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 DISABILITY & SOC'Y 271, 282-83 (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 REHABILITATION COUNSELING 39, 39-45 (1992) (finding 25% of African-American women with disabilities are employed full time, as compared to 77% of Caucasian men, 57% of African-American men, and 44% of Caucasian women with disabilities); DISABILITY WATCH, *supra* note 19, at 20 (citing N.O.D./HARRIS SURVEY OF AMERICANS WITH DISABILITIES (Louis Harris & Assocs., Inc., ed., 1994)) (finding 30% of working-age adults with disabilities reported experiencing job discrimination based on their disability).

173. 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*, 17 J. REHABILITATION ADMIN. 129, 131-32 (1993) (describing a qualitative study of employer attitudes about disability).

174. 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* note 4, at 918-19; Tom Harkin, *The Americans with Disabili-*

amount of hours worked (for example, 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.<sup>175</sup> 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.<sup>176</sup>

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 centers, job-sharing strategies for workers with limited time availability, or employee assistance programs ("EAPs").<sup>177</sup> 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.<sup>178</sup> Analysis of these innovative

*ties Act: Four Years Later—Commentary on Blanck*, 79 IOWA L. REV. 935, 936 (1994) (noting that disability is a natural part of the human experience).

175. See Jerry L. Mashaw & Virginia P. Reno, *Overview*, in *DISABILITY, WORK AND CASH BENEFITS* 22 (Jerry L. Mashaw et al. eds., 1996) (finding that structural changes in economy affect job opportunities for workers with different disabilities); McNeil, *supra* note 169 (finding wage disparities among workers with and without disabilities).

176. See Mary C. Daly, *Who Is Protected by the ADA? Experience from the German Experience*, 549 ANNALS AM. ACAD. POL. & SOC. SCI. 101, 102 (1997) (arguing that many individuals with disabilities are "doubly disadvantaged" by having a poor education or job skills).

177. See Tyler D. Hartwell et al., *Aiding Troubled Employees: The Prevalence, Cost, and Characteristics of Employee Assistance Programs in the United States*, 86 AM. J. PUB. HEALTH 804, 804-08 (1996) (detailing a survey of 3,200 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 problems, and emotional problems); cf. Karlan & Rutherglen, *supra* note 82, 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 HARV. J.L. & PUB. POL'Y 753, 756 (1996) (suggesting that flexible work hours may accommodate needs of workers with children in child care).

178. See Martin H. Gerry, *Disability and Self-Sufficiency*, in *DISABILITY AND WORK: INCENTIVES, RIGHTS, AND OPPORTUNITIES* 89, 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 Worksite Health Promotion Activities: Summary*, 7 AM. J. HEALTH PROMOTION 452, 452-64 (1993) (detailing a 1992 survey of 1,507 work sites which 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 include qualified individuals with and without disabilities into productive work force participation in ways that add economic value to the company. See Daniel Stokols et al., *Integration of Medical Care and Worksite Health Promotion*, 273 J. AM. MED. ASSOC. 1136

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.<sup>179</sup> 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.<sup>180</sup> 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.<sup>181</sup>

Another study of Coors Brewing Company's wellness initiatives (for example, 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.<sup>182</sup> Likewise, a 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.<sup>183</sup> 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 2000, the costs to employers

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(1995) (finding that new technologies relate to cost-effective worksite wellness and health care programs); SEARS II, *supra* note 10, at 6.

179. See, e.g., Hal Clifford, *The Perfect Chemistry: DuPont's Work-Life Program*, HEMISPHERES 33, 34 (1996) (claiming a 637% 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).

180. Mary Greenwood & Joanne Henritze, *Coorscreen: A Low Cost, On-Site Mammography Screening Program*, 10 AM. J. HEALTH PROMOTION 364, 368 (1996) (noting that breast cancer screening was provided for roughly 4,000 employees, cost savings of program was \$3,110,080, and procedural costs for the program were \$668,690, with net savings of \$2,441,190).

181. In 1995, it is estimated that companies spent over \$100 billion rehabilitating 3.5 million employees with work-related injuries. Shelly Reese, *Building an Express Lane Back to Work*, 14 BUS. & HEALTH 24, 24 (1996) (arguing that return-to-work programs and accommodation strategies may ease worker rehabilitation costs).

182. See Martha McDonald, *Valuing Experience: How To Keep Older Workers Healthy*, 8 BUS. & HEALTH 35-38 (1990) (estimating that for older workers, stress control program could save company \$100,000 over a five-year period).

183. See Catherine Carythers, *Will Wellness Ever Really Catch On?*, BUS. & HEALTH: STATE OF HEALTH CARE IN AMERICA SUPPLEMENT 55-58 (1996) (describing wellness programs on stress, exercise, and eating habits).

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.<sup>184</sup> Moreover, the educational side-effects associated with Title I implementation and comprehensive accommodation strategies may enhance general employee morale, as well as positive attitudes about qualified co-workers with different disabilities or those who are members of other protected groups.<sup>185</sup>

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.<sup>186</sup>

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184. See Peter D. Blanck, *The Americans with Disabilities Act: Issues for Back and Spine-Related Disability*, 19 *SPINE* 103, 103 (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).

185. Andrew I. Batavia, *Ideology and Independent Living: Will Conservatism Harm People with Disabilities?*, 549 *ANNALS AM. ACAD. POL. & SOC. SCI.* 10, 20 (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).

186. See Peter D. Blanck, *Conceptions of Equality, Economic Efficiency and Affirmative Action under ADA Title I* (forthcoming 1997) (manuscript on file with author) (examining differing views of Title I's reasonable accommodation provision); Karlan & Rutherglen, *supra* note 82, 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 *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 Schriener, *Disability as Human Variation: Implications for Policy*, 549 *ANNALS AM. ACAD. POL. & SOC. SCI.* 148, 157 (1997) (arguing that disability implicates social issues beyond those associated with discrimination and stigma).