**12. AMERICANS WITH DISABILITIES ACT**

**Instruction**

Introductory Comment

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**Introductory Comment**

 This chapter provides jury instructions for actions brought under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, *et seq.*  The ADA was first enacted in 1990 and became effective July 26, 1992. The ADA Amendments Act of 2008 (ADAA) became effective January 1, 2009. The ADAA reflected Congress’ view that the Supreme Court had interpreted the ADA in an unduly narrow fashion in *Toyota Motor Manufacturing v. Williams*, 534 U.S. 184 (2002), and *Sutton v. United Air Lines*, 527 U.S. 471 (1999). *See Weaving v. City of Hillsboro*, 763 F.3d 1106 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 1500 (2015). The jury instructions in this chapter are consistent with the ADAA. Accordingly, if a trial involves misconduct that occurred before January 1, 2009, the court must modify the instructions to reflect prior legal standards. The ADAA is not retroactive. *Becerril v. Pima Cnty. Assessor’s Office*, 587 F.3d 1162, 1164 (9th Cir. 2009).

 The legislative purposes of, and findings for, the ADA are set forth in § 12101 and are very broad. Essentially, the ADA provides a national mandate for the elimination of discrimination against individuals with disabilities in critical areas such as employment, housing, public accommodations, education and access to public services. § 12101(a)(3), (b).

 As the Supreme Court has observed, “[t]o effectuate its sweeping purpose, the ADA forbids discrimination against disabled individuals in major areas of public life, among them employment (Title I of the Act) [42 U.S.C. §§ 12111–12117], public services (Title II) [§§ 12131–12165], and public accommodations (Title III) [§§ 12181–12189].” *PGA Tour, Inc. v. Martin*, 432 U.S. 661, 675 (2001). Title I protects only employees of employers with 15 or more employees. 42 U.S.C. § 12111(5)(A); *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440, 444-51 (2003) (defining “employee”); *Castle v. Eurofresh*, 731 F.3d 901 (9th Cir. 2013) (analyzing whether prisoner can be deemed “employee”).

 Under the ADA, a “disability” is defined as: (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment. 42 U.S.C. §12102(2).

 Because a substantial majority of the reported Supreme Court and Ninth Circuit decisions arise under the employment provisions of the ADA, these instructions focus on employment claims under the ADA. In the employment context, a qualified individual with a disability may show an ADA discrimination in either of two ways: by presenting evidence of disparate treatment or by showing a failure to accommodate. *Dunlap v. Liberty Natural Prods., Inc*., 878 F.3d 794, 798 (9th Cir. 2017) (“We have recognized that a failure-to-accommodate claim is ‘analytically distinct from a claim of disparate treatment or impact under the ADA.’”) (quoting *Johnson v. Bd. of Trustees of Boundary Cty. Sch. Dist*., 666 F.3d 561, 567 (9th Cir. 2011)).

 “Both disparate-treatment and disparate-impact claims are cognizable under the ADA.” *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003); *Lopez v. Pacific Maritime Ass’n*, 657 F.3d 762, 767 (9th Cir. 2011) (leaving open question of how § 12112(b)(6) applies to disparate impact claim). For a case involving a pre-employment claim under the ADA, *see E.E.O.C. v. BNSF Rwy. Co.*, 902 F.3d 916 (9th Cir. 2018).

 In *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73 (2002), the Supreme Court sanctioned expansion of the business necessity defense based on EEOC regulations. *Chevron* involved the propriety of a worker with a liver condition being laid off by his employer due to the unavoidable exposure to toxins at a refinery creating health risks for the worker. There exists under the ADA, 42 U.S.C. §§ 12112(b)(6), 12113(a), an affirmative defense for an employment action under a qualification standard “shown to be job-related and consistent with business necessity,” which “may include a requirement that an individual should not pose a direct threat to the health or safety of other individuals in the workplace.” The unanimous opinion in *Chevron* held it was reasonable for the EEOC, through the enactment of a regulation (29 C.F.R. § 1630.15(b)(2) 2001) to carry “the defense one step further, in allowing an employer to screen out a potential worker with a disability not only for risks that he would pose to others in the workplace but for risks on the job to his own health or safety as well . . . ”  *Id*. at 78-79, 86-87; *Hutton v. Elf Atochem North America, Inc.,* 273 F.3d 884, 892-94 (9th Cir. 2001) (applying “direct threat” affirmative defense factors in EEOC regulations to analysis of qualification standards).

 A plaintiff’s remedies in employment actions under the ADA are generally the same remedies available under Title VII governing employment discrimination. 42 U.S.C. § 12117(a). *See* Introductory Comment to Chapter 10 (“Civil Rights—Title VII—Employment Discrimination; Harassment; Retaliation”) for a summary of available remedies under Title VII. Compensatory and punitive damages are not available, however, in a retaliation claim under the ADA. *Alvarado v. Cajun Operating Co.*, 588 F.3d 1261, 1270 (9th Cir. 2009) (“Because we conclude that ADA retaliation claims are redressable only by equitable relief, no jury trial is available.”)

 The Committee recommends that Chapter 10 be consulted to instruct a jury on hostile work environment, definition of common terms, constructive discharge, or defenses such as bona fide occupational qualification, bona fide seniority system, or after-acquired evidence.

 The Committee notes, as stated above, that these instructions focus on employment claims under Title I of the ADA, and not Title III, which addresses public accommodations. In *Lopez v. Catalina Channel Express, Inc.*, 974 F.3d 1030 (9th Cir. 2020), the Ninth Circuit explained that discrimination under Title III of the ADA specifically includes a failure to remove architectural barriers in existing facilities of public accommodation when such removal is readily achievable. Announcing a new rule of burden-shifting in the Ninth Circuit, the Court stated “only if the plaintiff first makes a plausible showing that the barrier removal is readily achievable, does the defendant then have to negate that showing and prove that the removal is not readily achievable.” *Id.* at 1036. Even if a defendant can demonstrate that the removal of a barrier is not readily achievable, the defendant may still be liable under the ADA if it fails to make its goods, services, facilities, privileges, advantages, or accommodations available through alternative methods so long as such methods are readily achievable.

 In *Langer v. Kiser*, 57 F.4th 1085 (9th Cir. 2023), the Ninth Circuit held it was legal error to base a credibility determination on a plaintiff’s history of ADA litigation, on a plaintiff’s status as an accessibility advocate or “tester,” or on the plaintiff’s decision to forego claims against neighboring businesses, because past litigation history is not “a basis for questioning the sincerity” of a plaintiff’s intent to return to a facility, and “there is no past patronage or bona fide customer requirement to bring an ADA claim.” *Id.* at 1095-99. A court “may still make a credibility determination against a serial litigant, but there must be something other than the fact that the litigant files a lot of ADA cases to instill doubt in [their] testimony.” *Id*. at 1097

 The Ninth Circuit explained *in Langer* that “the actual usage of the facility in question” is determinative of whether it is open to the public such that compliance with Title III of the ADA is mandated. *Langer*, 57 F.4th at 1102. “Absent information about actual usage, considerations such as the nature of the entity and the facility, as well as the public’s reasonable expectations regarding use of the facility, may further guide a court’s analysis.” *Id.*

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