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Legal Matters

ADA: Ready or not, here it is!

Employing the disabled:
What you need to know to protect your business

By Gregory P. Hawkins and Claude T. Hawkins

DO YOU RECOGNIZE the initials ADA? As a retailer, wholesaler or importer, you should. The Americans with Disabilities Act (ADA) is the most significant piece of human rights legislation since the Civil Rights Act of 1964.

Some say it will be one of the costliest laws ever legislated for American businesses, especially for small businesses, as many large companies already provide accommodations for the disabled. Others consider this response an overreaction. Paul G. Hearse, president of the Dole Foundation for Employment of People with Disabilities in Washington, D.C. advises that, "pessimists about the state of the economy, and therefore of its labor markets, should not underestimate the will to work of persons with disabilities."

You may agree with Jane West, editor of *The ADA — From Policy to Practice*, who feels the ADA is rightly deserved by a group she describes as "the largest (43 million), poorest, least employed, and least educated minority in America." You may be alarmed by yet another federally mandated benefits program — especially one as complex and potentially expensive for you as this one. The fact is, you will be affected. In the words of a guide published by the U.S. Chamber of Commerce, "If you are (a company) of any size, the Americans with Disabilities Act is bound to have a profound effect on the way you do business."

The most logical course of action for you is to become informed, then develop a plan before you are faced with a prospective employee with a disability or worse, litigation brought by that person or censure by one of the federal agencies assigned to administer the Act. The purpose of this article is to give you a basic understanding of Title I of the Act (employment) and some ideas as to how your business can adapt and perhaps prosper.

Title I went into effect on July 26, 1992, for businesses with 25 employees or more, and will become effective on July 26, 1994, for those with 15 employees or more. It prohibits all forms of discrimination against a "qualified individual with a disability...who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." This includes "new hires" and employees seeking advancement within a company.

The Act does not require affirmative action; as a business owner or manager you are not required to seek out disabled employees or meet a quota. Neither must you hire someone who is not qualified with regard to experience or training, nor hire a person with a disability who is less qualified than another applicant.

The huge diversity of disabilities necessitates a case by case definition as to what constitutes reasonable accommodation. This is complicated by the fact that undue hardship for one company may be feasible for another.

This lack of specific guidelines has engendered widespread frustration in the business community, often bordering on anger. Still, American entrepreneurs and executives by definition are problem solvers. When faced with a dilemma they break it down to its individual components (manageable pieces). While the ADA may seem monolithic, the basic components are (1) you, (2) the essential functions of the position for which you are hiring, (3) the qualifications and disability of the person who is applying for the positions, and (4) which reasonable accommodations will work for all parties involved.

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Essential job functions

A critical first step for you as an employer, whenever you are recruiting, advertising, hiring, promoting or firing, is to prepare a written job description, concentrating your efforts on detailing essential functions of the specific job. An essential function for a receptionist may be to answer the phone; someone unable to do this might be unqualified. Conversely, simply because everyone in the office occasionally picks up the receiver probably would not disqualify an individual who is unable to answer the phone from filling a clerk or typist position.

When writing a job description and listing the essential functions consider that the U.S. Equal Employment Opportunity Commission (EEOC) has several criteria when weighing evidence of essential functions:

- The actual work experience of present or past employees in the job.
- The time spent performing the function.
- The consequences to your business of not requiring that an employee perform the function.
- The EEOC will also consider the terms of a collective bargaining agreement.

Additionally, you may not ask an applicant whether he or she is disabled or about the nature or severity of a disability. Neither can you compel an applicant to take a medical examination before making a job offer. However, with respect to the job description you have established, you may ask them to describe or to demonstrate how, with or without reasonable accommodation, they will perform the essential functions of the job. Once a job is offered to an individual you may require a medical examination if everyone who will be working in the same job category must also take the examination. In the words of the EEOC, "You may condition the job offer on the results of the medical examination. However, if an individual is not hired because a medical examination reveals the existence of a disability, you must be able to show that the reasons are job related and necessary for conduct of your business (and) that there is no reasonable accommodation that would have made it possible for the individual to perform the essential job functions."

Reasonable accommodations

The overriding theme of the ADA is

to grant a person with a disability the benefits and privileges of employment equal to those available to other employees. Would an altered job description or special equipment allow the applicant to handle the job? (Modifying the work schedule, job restructuring, widening aisles between desks, installing telephone amplification devices for those with hearing disabilities, purchasing special computer screens for the visually impaired.) If so, it is likely that you would be required to make such changes and/or provide such equipment as a reasonable accommodation.

In many cases the disability may be obvious — a person in a wheel chair for example — and the applicant could be the best person to suggest a reasonable accommodation, based upon his or her own life or work experience. This often makes for a win-win situation.

Undue hardship

Perhaps more than any other wording in the Act the "undue hardship" clause has created the most confusion. Already reams of paper defining these two words are beginning to flow from government print shops. In essence, an undue hardship is an accommodation that is "unduly costly, extensive, substantial or disruptive, or would fundamentally alter the nature or operation of the business" (EEOC). The government regulatory agencies will consider the size of your business, financial resources and the nature and structure of your operation.

At the same time that you are gearing up to make your employment practices accessible to the disabled, many government and private agencies are striving to help you comply. Special funding is increasingly available through vocational rehabilitation agencies, plus state and federal tax credits or deductions. The applicant or employee also may be willing to provide the accommodation or help pay for the portion that constitutes undue hardship.

Consequences of discrimination

Since July 26, 1992, an individual with a disability may file a discrimination complaint with the Equal Employment Opportunity Commission within 180 days of an alleged discrimination. Many states and localities also have laws protecting the rights of the disabled and in such a case the complainant may have

up to 300 days to file.

The EEOC will first attempt to resolve the complaint using informal methods — mediation, persuasion and the like. If these are not sufficient they may utilize more elaborate options as contained in Title VII of the Civil Rights Act of 1964.

The individual has the right to file a private lawsuit and obtain a court order to stop discrimination, but money damages cannot be awarded (except attorney's fee), or file a complaint with the Attorney General who can file suit and obtain money damages and penalties.

The most common remedies will include hiring, promotion, reinstatement, and back pay. Reasonable accommodation is also included as a remedy.

Your choice

In all the confusion and misunderstanding surrounding the ADA, two things remain clear. Americans with disabilities have been excluded from America's work force and America's businesses have been commissioned to begin correcting the problem.

You must decide how best to comply with the Act. Call the agencies listed below, read the material they send you, and prepare written job descriptions of each job category. You may discover, as thousands of businesses that already employ people with disabilities, that they will benefit not only your staff, your customers, and your peace of mind, but also your bottom line. ☐

Where to get more information:

Equal Employment Opportunity Commission
1801 L Street SW
Washington, DC 20507

Architectural and Transportation Barriers Compliance Board
111 18th Street NW, Suite 501
Washington, DC 20036
(202) 653-7848

Department of Education
National Institute on Disability and Rehabilitation
400 Maryland Avenue SW
Washington, DC 20202
(202) 732-5066

Americans with Disabilities Act Information Line
(202) 514-0301