THE ADA AND YOUR FIRM

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When the Americans with Disabilities Act was signed into law by President Bush on July 26, 1990, there was much hand-wringing by law firm managers. They—myself then included— imagined hordes of applicants applying for jobs they were clearly unqualified for, and using rejections as test cases to put teeth into the new legislation. It was yet another hurdle to overcome in the increasingly difficult process of hiring good employees. A decade later, we are still waiting for the applicants to show up.

Even though our fears seem to have been largely unfounded, that is not to say that well thought out and designed human resource policies are not still necessary. Historically, social legislation takes one or two decades to gain momentum and impact our work habits. Cases must wind their way through the courts to fully reveal the extent of the impact the legislation will have on business practices. The ADA is no exception, and the first three such cases were just recently decided by the United States Supreme Court.

The media also plays a significant role in increasing awareness of worker's rights, and can result in a sharp increase in litigation. As an example, the number of sexual harassment claims filed annually rose dramatically following the Clarence Thomas nomination hearings, and has not yet shown any sign of decreasing. So all it will take will be one highly publicized case, or one heart-throbbing movie (along the lines of "Philadelphia Story") and that horde of litigious applicants might just be showing up at your door after all. This is no time to get sloppy with employment procedures.

Sadly, two-thirds of all Americans between the ages of 16 and 64 with a disability are not working. And 66% of those individuals, or 8.2 million people with a disability, say they want to work but are unable to find jobs. If you have someone in your family who is disabled, or have a friend or acquaintance with someone in their family who is disabled, your perspective changes. No longer are these potential litigants, but rather good people who deserve to be given a reasonable chance at gainful employment, provided they are otherwise qualified. "Otherwise qualified" is really what it comes down to; it's what our fears are all about. We are afraid that we will wind up with someone not really qualified, or worse, that we will be forced to bear the financial or disruptive burden of seemingly unreasonable accommodations, only to employ someone who still does not measure up to the standards of our other employees. And the unacceptable alternative is to face costly litigation and a "jackpot-lottery" jury mentality.

In order to allay our fears, protect ourselves from potentially expensive litigation, and position ourselves to provide equal employment opportunities to qualified disabled

applicants, a variety of employment procedures are called for. And although the ADA only applies to employers with 15 or more employees in each working day in each of 20 or more calendar weeks in the current or preceding calendar year, the employment procedures which follow should be practiced even if your firm is too small to be covered by the ADA.

Essential Functions of the Job

A qualified individual means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the job at the time of the employment decision (without regard to the possibility of future incapacity). The individual must also be "otherwise qualified" by having the appropriate educational background, employment experience, skills, licenses and so forth. The essential functions of the job are those tasks which are fundamental to the position. It is up to the employer to show that functions defined as essential are indeed truly essential to the job.

There are a number of factors which should be taken into consideration when making a determination regarding whether a function is essential. For example, if removing a function fundamentally alters the job, it is essential. If the position exists in order to perform a particular function, it is essential. The degree of skill or expertise required to perform the function helps determine if it is essential. And so forth.

Having properly written job descriptions for all positions at the firm is an absolutely essential employment practice. Each job description will describe the essential functions of the position, as well as the "other qualifications" required, such as degrees, experience and education. If your firm is advertising an open position without having a properly written job description in place first, you are leaving yourself wide open to a suit for discrimination under ADA, as well as under the Civil Rights Act.

Interviews and Job Applications

Your firm is prohibited from making any inquiries into the existence, nature, or severity of an applicant's disability or worker's compensation history prior to the offer of a job. This prohibition is designed to prevent the immediate discriminatory exclusion of applicants. However, your firm may make pre-employment inquiries into the ability of an applicant to perform essential job functions. Hence, the need for the well-written job description.

Your firm cannot refuse to hire an applicant because his or her disability prevents the applicant from performing marginal job duties. But you may ask an applicant to describe, or even *demonstrate*, how, with or without reasonable accommodation, the applicant will be able to perform essential job functions. Keep in mind, however, that this request must be made of ALL applicants in the same job category.

Many firms use pre-employment testing of job applicants. Secretaries, for example, may be tested in proofreading, spelling, grammar, typing, and so forth. You may inquire on

your application form whether the applicant needs reasonable accommodation to take a pre-employment test, and to request that you be informed of this within a reasonable amount of time before the test. You may also request documentation of the need for accommodation. Note that you may not use qualification standards, employment tests, or other selection criteria that screen out, or tend to screen out, an individual with a disability solely on the basis of the disability, unless you can demonstrate the criteria is job-related to the position, and consistent with the needs of your business. So you must select and administer tests in such a way as to ensure that test results accurately reflect job skills and aptitude, and not the individual's impairment.

Reasonable Accommodation

The ADA requires employers to provide "reasonable accommodation for known physical or mental limitations of qualified individuals with a disability." Although it is generally the responsibility of the individual to inform the employer that an accommodation is necessary, there are exceptions when, depending on the employer's knowledge of the disability, an employer may be obligated to provide an accommodation, even if not requested by the employee. As a consequence, if you are aware of a new employee's impairment of some sort, you would be best served by initiating the conversation, but only after hiring has been completed.

What constitutes reasonable accommodation? If you are faced with such a request and are not sure, you should seek qualified counsel to determine an appropriate response. Generally, the most common reasonable accommodations include modification of your facilities to make them more accessible and usable, job restructuring (of marginal responsibilities), modification to work schedules, and acquisition or modification of equipment. The EEOC Technical Assistance Manual states that "[a]n accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities."

The ADA requires employers to provide accommodations, unless such accommodation would impose undue hardship on the employer, meaning that the accommodation would involve significant difficulty or expense. There are four factors to take into consideration when deciding if the undue hardship exclusion might apply: 1) the nature and cost of the accommodation; 2) the impact the cost of the accommodation will have on the overall operations of the facility; 3) the impact the cost of accommodation will have on the overall operations of the employer; and 4) the type of operations of the employer.

Responding to Requests for Accommodation

It should be apparent that reasonable accommodation determinations can be complex. Unless your decision is a "no brainer" on the YES side, you should seek qualified counsel prior to making any response. Probably the most important point that can be made is that *you should never answer NO out of hand*. If your impulse is to say no, say nothing other

than you will give consideration to the request and respond in a reasonable length of time. And then review the request, with the assistance of qualified counsel, to make a determination and frame your response. It can be this small extra effort which can make the difference between becoming a defendant in an ADA lawsuit, or not. At the very least, if an applicant requests an accommodation in pre-employment procedures, you should most definitely say YES if at all possible. So you should be prepared to provide an interview in an accessible location, modify the location of a computer for testing if necessary, provide assistance in completing the application form, and so forth.

In the course of interviewing applicants, and in having frank discussions with those who have been hired, your firm will acquire information concerning an employee's or applicant's medical condition or history. You should be aware that this information must be maintained in a separate medical file and must be treated as a confidential medical record. That means that these files should be kept in a separate location physically from personnel files, under lock and key, and that the number of people who have access to them are strictly limited to those managers with a "need to know" the contents of the file. Note that this applies to all of your employees, not just those who have a disability. The employer's confidentiality requirements under the ADA protects the rights of persons with disabilities, and, if strictly complied with, also serves to assist the employer in responding to a discrimination claim, by showing that the employee's medical condition was not a known factor in a particular employment decision.

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