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AMERICANS WITH DISABILITIES ACT

By: Matt W. Zeigler, Esq.

On July 26, 1990 President Bush signed into law one of the most comprehensive pieces of legislation ever enacted that protects the rights of those working persons who may have disabilities. This act is called the Americans With Disabilities Act of 1990 ("ADA"). In its labor employment legislative history, Congress found the number of Americans with disabilities is increasing as the population as a whole is growing older. The design of the Act is to help the employment of some 43 million Americans who have one or more physical or mental disabilities. Congress' stated goal is "to assure equality of opportunity, full participation, independent living, and economic self-sufficiency" for them. The purpose is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and "to ensure that the Federal Government plays a central role in enforcing the standards established in this Act".

What follows is a brief summary of when this law is applicable, to whom it is applicable, what the new discrimination rules are, and some of their anticipated impact on employers.

Effective Date. There are four different parts, or Titles, of the ADA, only two of which that relate to the food industry: Title I - Employment, and Title III - Public Accommodations and Services Operated by Private Entities.

The effective date for the Employment section, Title I of ADA, is 24 months after the date of enactment, or July 26, 1992.

THE EMPLOYMENT TITLE.

Covered Employers. For the first two years following the effective date of ADA, that is for the period, July 1992, to July 1994, an Employer covered by ADA means any person, and its agents, who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year. (The meaning of "person" is the same broad definition as contained in the 1964 Civil Rights Act.)

The number of employees needed to be a "qualified" employer following the initial two years of the ADA drops from 25 to 15. So, on July 26, 1994, a covered employer is one who has 15 employees.

Prohibited Discrimination. The general rule prohibits discrimination against a

> …qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring,

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> advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

"Discrimination" has a very broad definition as under the Civil Rights Act of 1964, and has been expanded to include the failure to make

> "reasonable accommodations to the known physical or mental limitation of an otherwise qualified individual with a disability who is an applicant or employee unless the (employer) can demonstrate that the accommodation would impose an undue hardship on the operation of (its) business". (Emphasis added.)

Prohibited activities includes the use of "…qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability…" unless the standard, test or criteria is "job-related for the position is question and is consistent with business necessity". There is also an obligation to select a test and to administer a test in the "most effective manner" so that the test results reflect the skill of the employee/applicant not the effect of the disability, except where those skills are required by the job.

Pre-employment Physical Examinations. ADA states a new general rule that medical examinations and inquiries of an applicant relative to whether or not he or she has a disability or as to the nature and severity of such disability are prohibited, except where specifically permitted under the Act. The exception to the rule permits inquiries into the ability of an applicant to perform job-related functions.

Voluntary pre-employment medical examinations and histories are permitted but only after a conditional offer of employment has been made to an applicant but prior to the commencement of duties if all of the following criteria are met:

(1) all entering employees are subjected to such an examination regardless of disability;

(2) the applicant's medical information is collected and maintained separately and treated as a confidential medical record and may not be generally disclosed except to supervisors relative to restrictions on work and the necessary accommodations, first aid personnel, if the disability might require emergency treatment, and to governmental investigators; and

(3) the results of medical examinations are used only with purposes consistent with the ADA, outlined above.

A pre-employment medical examination cannot simply inquire as to whether or not the employee has a disability, but rather the employer must demonstrate any inquiry made is related to the job and consistent with business necessity.

What is a "undue hardship"? An Employer must reasonably accommodate an applicant/employee with a disability unless it would cause an "undue hardship". Undue hardship

means "an action requiring significant expense" when considering: (i) the nature and the cost of the accommodation; (ii) the overall financial resources of the facility involved, the number of employees and the effect of the cost or the impact of making the accommodation on the operation of the facility; (iii) the size of the employer, including the number, type and location of its facilities; and (iv) the composition of the workforce and the geographic location and the extent of the integration of the operations of the facility involved.

There is no minimum number, threshold or safe harbor of the cost of an accommodation that will provide a comfort level to an employer that he or she will not have to make the physical improvement is to its facility or the change in its operation. Hopefully, the required regulations to be written by the Equal Employment Opportunity Commission will provide some guidance in this area. The EEOC is required under ADA to provide regulations by July, 1991.

What is a "reasonable accommodation"? The reasonable accommodations that must be made without undue hardship include:

> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
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> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters and other similar accommodations for individuals with disabilities.

As used in this Act, "reasonable accommodation" has the same definition as in the 1973 Rehabilitation Act. What has been added is that before an employer is excused from making the reasonable accommodation, a "significant difficulty or expense" must be the "undue hardship" that prevents the compliance.

Defenses. Other defenses to a charge of discrimination under ADA are that the employment qualification standard, test or selection criteria is job-related and consistent with business necessity.

Qualification standards for an employer in the food industry permit the exclusion of an individual that poses a "direct threat to the health or safety of other individuals in the workplace" that cannot be eliminated by reasonable accommodation. A list of infectious and communicable diseases is to be prepared and published by January, 1991 and updated annually by the Secretary of Health and Human Services. An employer may refuse to assign or continue to assign an individual with an infectious and communicable disease to a food handling position.

Who is a Qualified Individual With A Disability? A qualified individual with a disability is defined to exclude only employees or applicants who are "currently engaging in the illegal use of drugs". This does not mean someone who no longer uses drugs or has completed a drug

rehabilitation program successfully, or someone who is presently in a "supervised rehabilitation program and is no longer engaging in such use" or is mistakenly regarded as a "user", but is no longer engaging in such use. However, it is permissible for an employer to adopt a drug testing program and other "reasonable policies and procedures" designed to test whether a former addict has fallen off the wagon. An employer is not prohibited from disciplinary actions based on the results of drug tests and such tests do not have to meet the requirements of a preemployment medical examination as stated above.

The ADA specifically states that an employer can hold an addict or an alcoholic to the same employment performance standards and behavior as it has for drug-free employees "even if the unsatisfactory performance or behavior is related to the drug use or alcoholism of such employees.

Notice Posting. There will be a new required posting of the provisions of this Act in the covered employer's workplace.

Enforcement. The enforcement procedure for an individual permit an him or her to sue for enforcement and the remedies available are the same as under the Civil Rights Act of 1964 which include back pay and injunctive relief. In addition, the state attorney general can initiate actions on behalf of the government for damages and injunctions.

Attorneys Fees. A prevailing party, other than the United States, may, in the discretion of the Court or any administrative agency, be awarded reasonable attorneys fees, litigation expenses and costs. The United States can also be liable the same as a private individual.

THE PUBLIC ACCOMMODATIONS TITLE.

Effective Date. The effective date for the Public Accommodations and Services Operated by Private Entities section, Title III of ADA, is 18 months after the date of enactment, or January 26, 1992.

Covered Entities. Private entities providing public accommodations that must comply with the provision of the Act specifically include bakeries, grocery stores, restaurants, bars or other establishments serving food or drink.

Prohibited Discrimination. The general rule prohibits discrimination that subjects

> …an individual or class of individuals on the basis of a disability …directly (or indirectly) to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.

There is a similar rule that requires that disabled individuals be afforded the opportunity to participate in such benefits be equal to that afforded to other individuals. Separate, but equal, facilities are acceptable under the Act.

The statute requires that a covered entity make reasonable modifications in its policies, practices or procedures, including architectural barriers and communications barriers that are structural in nature, unless it has a good defense. A good defense means that the entity can demonstrate (it has the burden to prove it) that making such modifications would "fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations" or where the removal of architectural barriers is not "readily achievable".

"Readily achievable" has a similar meaning as "undue hardship" in the Employment Title, basically looking to the cost of the project and the financial resources of the entity and that the alteration can be carried out "without much difficulty or expense".

Enforcement. The same remedies for enforcement as under the Employment Title are available.

Perceived Violations. The Act does not require a person to "engage in a futile gesture" if that disabled person knows that the covered entity does not intend to comply with the Act. This will require an employer to carefully monitor customer relations with the elderly and disabled portion of its customer base.

Conclusion. Regulations are to be written for both the Employment Title and the Public Accommodations Title, and when they are it is certain they will impact all businesses.