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PREPARING FOR ADA:

THE BATTLE BETWEEN REASONABLE ACCOMMODATION

AND UNDUE HARDSHIP

By: Matt W. Zeigler, Esq.

What must an employer reasonably do to accommodate individuals with disabilities under the Americans with Disabilities Act of 1990 (ADA), which becomes effective on July 26, 1992, for employers with 25 or more employees? When is the line crossed and a reasonable accommodation becomes an undue hardship? Discovering the answer will be the true test of compliance. (This Article is Part 2 of a two part series of *Personnel Notes*. Part 1, dealing with job descriptions, was published in the April, 1992 Edition of the Michigan Food News.)

In preparing for these articles, it is apparent that the ADA and the "Technical Assistance Manuals" published by the Equal Employment Opportunity Commission (TAM) take a fundamentally new approach to the hiring and employment of handicapped persons in the workplace. The approach can perhaps best be described as focusing on the Ability of the individual and what he or she can do, rather than on what is the person's disability.

I am sure that each of us can recall an experience in which we or a member of our families have been touched by a person with at least a temporary disability. My seven year old daughter recently had surgery on her leg which requires that she be on crutches for two weeks. At her school, an older building, she is unable to go to her lower level locker because there was no way for her to get up and down the stairs.

In April, we focused on the essential elements of job descriptions, and how to write them. So, the first part of any approach to resolving the questions of the ability of an employee or an applicant to perform a task is to determine those essential elements of the task. Next, it is necessary to determine whether or not the employee or applicant is a "qualified individual with a disability" and, thus, is entitled to protection under the ADA.

This second part assesses the need for a reasonable accommodation. This step is required after the employer has determined that an employee/applicant is qualified to perform the specific identified essential job functions. If an employee or an applicant with a disability is otherwise qualified to perform these essential job functions, then the ADA directs that such a person should be hired to fill or be transferred to that position if no accommodation is required or only a reasonable accommodation is indicated. What is reasonable is to be determined on a "case by case" basis.

I. REASONABLE ACCOMMODATION. This requirement comes about because of our U.S. Congress recognized that 43 million Americans have one or more physical or mental disabilities and the number is increasing as our population grows older. Further, Congress found that such individuals face a special form of discrimination and are without any form of legal redress. Further,

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Congress found that this discrimination unfairly denies such individuals the ability to compete on an equal basis with non-disabled individuals.

Reasonable accommodation is defined in the ADA as:

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(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 provisions of qualified readers or interpreters, and other similar accommodations for individuals with disabilities. (ADA, Title I, Sec. 101(9)).

Some examples of these basic principles are:

1. The accommodation must be effective. The accommodation must provide an opportunity for the disabled person with the ability to achieve the same level of performance or to enjoy benefits or privileges as the non-disabled. For example, if there is an employee lunch room on the second floor without handicapped access to it, then an employer must provide a comparable lunch room on the first floor or access to the second floor if it is not too expensive. The cost of installing an elevator would cause an undue hardship.

2. The reasonable accommodation need not be the best accommodation available, so long as it is effective. For example, if an employer has a part-time employee available as a reader for a blind employee when needed, an employer would not have to hire a full-time employee as a reader, so long as this will enable the blind employee to perform the job duties effectively.

3. The accommodation is limited to employment-related barriers. An accommodation is to be directly related the ability of the employee to perform the task at hand. For example, if a sighted employee becomes blind, an employer should reassign that employee to an available vacant position if that employee is otherwise qualified for that position. However, if a blind employee requested reassignment to a warmer climate, because the employee preferred that environment, the transfer is not required by the ADA because the accommodation is not related to the employee's disability.

4. An employer is not required to provide an accommodation that is primarily for personal use. If the accommodation for the disabled person is for daily activities both on and off the job, then it may not be required as a reasonable accommodation. However, if specially designed glasses are needed by a visually impaired employee to use a computer monitor, then the employer may be required to provide the same. "If deep pile carpeting in a work area makes the use of a manual wheelchair difficult, the employer may need to replace the carpet, place a usable surface over the carpet in areas used by the employee, or provide a motorized wheelchair." TAM, Sec 3.4.

II. UNDUE HARDSHIP. Reasonable accommodation is counter-balanced by the competing value of undue hardship. Although an accommodation may be reasonable and valuable to the handicapped individual, an employer is not required to implement the accommodation if such would cause the employer undue hardship.

The factors to be considered in determining whether an accommodation would impose an undue hardship on a covered entity include:

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- (i) the nature and cost of the accommodation needed under this Act;
- (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such a facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
- (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
- (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity. (ADA, Title I, Sec. 101(10)).

The most surprising aspect of this law is the absence of any defined monetary value or formula for determining what is or is not undue hardship. The TAM indicates that what may be undue hardship for one employer may not be undue hardship for another. In addition, the larger employers are expected to make greater and more expensive accommodations than are expected of smaller employers. Congress specifically rejected a proposed amendment that set an upper limit of cost at 10% of the affected employee's salary. The resulting focus is clearly not on the employee, but rather on the available resources of the employer.

In short, the principles that establish undue hardship are: that it is unduly costly; extensive; substantial; disruptive; or that would fundamentally alter the nature or operation of the business. At this point, there are no clear rules of thumb.

One principle within the ADA is the tenet that the disabled employee can be offered the opportunity to help pay for the cost of the undue hardship portion of the accommodation. For example, if an accommodation costs \$2,000 and the employer is somehow able to demonstrate that the reasonable cost of the assisting device is \$1,500, the employee "should be offered the option of paying the additional \$500". TAM, Title I, Sec. 3.9.

In conclusion, the ADA represents a fundamentally different way to approach the employment of disabled employees in the workplace. Each employer, in approaching the ADA as well as the Michigan Handicapper's Civil Rights Act (already effective and which has similar protections for the disabled employees), may wish to review their employee handbooks and/or write job descriptions for their positions which identify the essential tasks. Once these are in place, an employer is in the position to consider the factors of undue hardship on its business when confronted with the request from an individual with a disability for a reasonable accommodation.