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The Disabled And Work: Some Problems Raised and Highlighted by the Americans with Disabilities Act of 1990

Peter M. Panken, Esq.

The Act Defines Disability So Broadly as to Include Practically Everyone

It would certainly seem that this new act would apply to those obviously disabled—blind, deaf, paralyzed, crippled, palsied, wheelchair-bound, mentally handicapped, etc. But the definition of disabled is so broad that it may be applicable to many people whose apparent fault is inability or unwillingness to do the work, but who will hide behind the claim of disability. In fact, the term disability is defined so broadly that a person without a disability can fit the definition of disability. Under § 3(2) of the act, disability includes:

A. "a physical or mental impairment that substantially limits one or more of the major life activities";

B. "a record of such impairment," even if the individual is not presently impaired; and

C. "being regarded as having such an impairment," even though an individual never did and does not now have such an impairment.

There are few of us who could not fit into these broad definitions of disability. Fortunately, most of those working with minor or perceived disabilities will have little claim of employment discrimination. But those individuals whose performance suffers may claim disability as a ground to support litigation.

There will be Litigation as to What are the "Essential Functions" of a Job

The definition of "qualified individual with a disability" under Title I of the ADA includes an individual with a disability who can perform the essential functions of the employment position that the individual holds or desires—*with or without "reasonable accommodation."*
Section 101(8) says that:

"consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job."

Translated from legalese into practical application, this means that an employer is going to be bound by its job descriptions.

It, therefore, becomes very important for each employer to review its job descriptions to ensure that all of the essential elements of every job are properly listed. Employers who are not equipped or who are not willing to do this kind of analysis and to keep it up to date as jobs change may be better off without job descriptions, relying instead on what, in fact, the job requires.

The Distinctions That Must Be Drawn Are Very Difficult To Apply

Every employment decision involves discrimination. Human Resource Managers must make choices. But if they decide for the "wrong" reason, employers may incur liability. Liability is imposed when a trier of fact decides the employer chose for the wrong reason. Be sure that everything an employer's agents say or write will be used against the employer.

The application of a vague legal standard such as "reasonable" to a set of employment criteria or decisions makes predicting the outcome of litigation difficult until several years of litigation have gone by. The ADA is replete with many such definitional and application problems. Uncertainty will, therefore, prevail for several years.

The ADA prohibits employment discrimination against "a qualified individual with a disability because of the disability." [§ 102(a)] "Qualified" means the ability to perform "the essential functions" of the position "with or without reasonable accommodation." [§ 101(8)] And employers must make "reasonable accommodation" which does not impose "undue hardship."

The question of the "reasonableness" of an accommodation leaves wide latitude to the person who must decide what is reasonable and what is "undue hardship" to an employer which would excuse making "reasonable accommodation." Another vague term is "qualification." While the statute says that an employer's definition of qualification is to be given great consideration, the employer's business judgment will, in fact, frequently be second guessed in such cases.
The Disabled and Work

In short, for several years after enactment employers will be at risk until bright line tests begin to appear after litigation. Employers can expect a decade or more of uncertainty until the Supreme Court decides many of the issues which will be raised.

Some employers will adopt no-risk policies. Others will opt to take risks and litigate close questions. Be assured that all covered employers will be forced to react.

Medical Exams and Inquiries

Pre-employment medical examinations and inquiries will be prohibited under the ADA. In effect, applicants can’t be asked “how are you?” but only “can you do the job?”

An employer can no longer make inquiries as to the disabilities of the applicant. All an employer can ask is whether the applicant has the ability to perform job-related functions. [§§ 102(c)(2)(A) and (B)]

Employers are permitted to require medical examinations after an offer of employment has been made to a job applicant and prior to the commencement of the employment. An offer of employment can be made conditional on the results of the examination only if all entering employees are subjected to such an examination regardless of disability. Information obtained regarding the medical conditions of the applicant must be collected and maintained on separate forms and in separate medical files and must be treated as confidential, with certain very limited exceptions regarding work restrictions, first aid and safety. In effect, employers should carefully segregate medical records so they cannot seem to be used in employment decisions.

Drugs and Alcohol

The ADA neither helps nor hurts an employer seeking to maintain a drug-free workplace or a drug-free workforce. Employees cannot claim disability by reason of their current use of illegal drugs and employers can still act adversely on the basis of current illegal use of drugs. Drug users are held to the same performance standards as non-disabled employees.

The ADA states that an employer may prohibit the “illegal use of drugs” and the “use of alcohol” in the workplace. The employer may also “require that the employee shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace.” [§ 104(c)(2)]

While testing for illegal drug use is not subject to medical examination strictures, the ADA neither “encourage[s],” “prohibit[s],” nor “authorize[s]” drug testing or acting on the results of the tests. [§ 104(d)(2)] This provision will be used to argue that state and local laws
protecting drug users as disabled or regulating employment-related drug
testing are not preempted by the ADA.

"Reasonable Accommodation"

Some reasonable accommodation is relatively inexpensive. A special
phone for the hearing impaired is a one-time charge of small impact. On
the other hand, hiring a full-time reader or signer to communicate is an
expensive item. The ADA does not tell us whether this cost can be
reflected in the pay of the disabled applicant.

The ADA does allow employers to justify failure to make "reasonable
accommodation" if it would impose "undue hardship." But large firms
will have a difficult time relying on the undue hardship defense. Query,
however, whether an employer can deduct some or all of the cost of the
accommodation from the remuneration of the disabled employee.

Reasonable accommodation specifically includes accessibility. This
can be very expensive if architectural changes are needed. But the cost is
minimized if included in planned new construction or reconstruction.

Asking the employee what accommodation they need at least narrows
the field of options. Suggesting reasonable and less costly alternatives can
evidence the good faith that proves reasonableness. For example, install-
ing a low drinking fountain for the wheelchair-bound is far more expen-
sive than installing a reachable paper cup holder, yet it still allows the
wheelchair-bound to quench their thirst expeditiously.