

From Business Insurance Magazine, August 2, 2010

FIRMS STILL ADAPTING TO DISABILITY LAWS

20 years after ADA, changes to statute raise fresh questions

Judy Greenwald

The Americans with Disabilities Act has generated administrative headaches and litigation for employers since it was enacted 20 years ago, but many observers say the benefits of welcoming a new segment of the population to the workplace outweigh the drawbacks.

The ADA, which guarantees equal opportunity for disabled individuals in public accommodations, employment, transportation, state and local government services, and telecommunications, was signed into law by President George H.W. Bush on July 26, 1990 (see timeline, page 20).

While last week marked the 20th anniversary of that law, experts say it still is too early to clearly evaluate how the Americans with Disabilities Act Amendments Act of 2008 will affect the workplace. That law, which took effect in January 2009, was passed in response to U.S. Supreme Court decisions that narrowed the definition of who is disabled (see story, page 20).

Eleven federal agencies have various responsibilities under the ADA. The Equal Employment Opportunity Commission is responsible for enforcing ADA's Title I, which covers job-related issues.

Another federal agency with ADA responsibilities is the U.S. Department of Justice's civil rights division, which last week published notices of proposed rulemaking regarding accessibility requirements for websites, movies, equipment and furniture, and 911 call-taking technologies (see story, page 20). These proposals affect Title II of the act, which applies to state and local government entities, and Title III, which applies to issues of public accommodation.

In the workplace, the law prohibits discrimination in all employment practices for qualified individuals who have disabilities. Qualified individuals are defined as those who can perform the essential functions of their position with or without reasonable accommodation.

Observers say in addition to increasing awareness of, and sensitivity to, the disabled in society overall, the law has had a particularly significant impact in the employment arena.

“Some would say this is another administrative headache, to have to comply with the interactive process and the sometimes burdensome means of getting someone to be able to do their jobs with reasonable accommodations,” said Brian T. Ashe, a partner with law firm Seyfarth Shaw L.L.P. in San Francisco. But “it has taken an entire segment of society and a significant, and heretofore silent, segment of society and brought them into the mainstream,” he said.

Jonathan T. Hyman, a partner with law firm Kohrman Jackson & Krantz P.L.L. in Cleveland, said, “Most employers try to do the right thing by their employees, and I think to the extent that

the act has put in a regulatory regime of hoops that employers have to jump through to accommodate employees...it has increased diversity and helped employees with legitimate disabilities do their jobs better.”

Daniel Burnick, a shareholder with law firm Sirotte & Permutt P.C. in Birmingham, Ala., said, “I don't think that the costs associated with the ADA, as far as accommodations in the workplace, have been, in most instances, out of line.”

But complying has not always been easy for employers.

Employers “have had to come to grips with the ADA's purpose, which is not just to remedy discrimination when it takes place but to sort of proactively avoid it,” said Franklyn Steinberg III, a principal at the Steinberg Law Offices in Somerville, N.J., who represents employers and employees. In that sense, “it differs...from other kinds of anti-discrimination laws.”

Dennis Westlind, a partner with law firm Stoel Rives L.L.P. in Portland, Ore., agreed. Rather than just saying everyone must be treated the same, which is easier for employers “to wrap their minds around conceptually,” employers must make “reasonable accommodations” to comply with ADA.

This can be time consuming and expensive, he said. “Sometimes you have to go out of your way to adapt your facilities, to buy special equipment, to have your (human resources) person perhaps spend a lot of time with an employee who may be disabled” to determine if an accommodation is appropriate, Mr. Westlind said.

“A lot of time and energy has been spent in attempting to determine what a reasonable accommodation is” and in asking, “How do I implement the ADA?” said Wendy M. Lazerson, a partner with law firm Bingham McCutchen L.L.P. in East Palo Alto, Calif. “Certainly, employers must be mindful at all times of becoming aware of a disability, and what their obligation is if they become aware, and how to administrate their workforce in a way that the disabled are given proper accommodation.”

ADA-inspired litigation has been a major issue for employers.

Lawrence Z. Lorber, a partner with law firm Proskauer Rose L.L.P. in Washington, said initially, the No. 1 complaint made under the ADA was for bad backs. “There simply has been unnecessary litigation, which is wasteful and detrimental to the goals of the ADA,” he said.

Peter J. Petesch, a shareholder with law firm Littler Mendelson P.C. in Washington, said another downside to the ADA is that by the law's very nature, there has been a “lack of bright-line tests out there” on issues such as what constitutes essential functions of a job, whether an individual is disabled within the meaning of the law, whether the individual is qualified under the law “and how far must the employer go to make reasonable accommodation.”

These are all very fact-specific issues, he said. “There's no one-size-fits-all answer and that's caused, I suppose, some frustration. But it doesn't seem like there's any other formula for protecting, and ultimately accommodating, such widely varying needs in widely varying workplaces,” said Mr. Petesch.

Complicating the situation is enactment of the ADA Amendments Act.

Kelly-Ann Cartwright, a partner with law firm Holland & Knight L.L.P. in Miami, said the 20-year-old ADA “is a difficult statute to understand for some employers. The statute was written, and case law developed around the statute, and then the statute was recently changed again” with the ADA Amendments Act. “So employers are now having to deal with those changes” and how the courts may interpret them, she said.