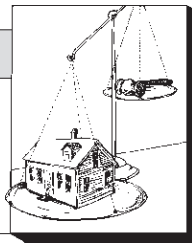


Disabilities Act Applies to Many

by Duncan MacKay



In August of 1990, President Bush signed one of the most far-reaching pieces of civil rights legislation to be enacted since the 1964 Civil Rights Act. The Americans With Disabilities Act (ADA) will have a drastic impact on all employers, including contractors and other light construction professionals.

The ADA extends the remedies provided by the Civil Rights Act of 1964 and the Rehabilitation Act of 1973. While present federal civil rights laws prohibit most employers from discriminating on the basis of sex, race, color, national origin, or religion, federal disability laws such as the Rehabilitation Act of 1973 have generally applied only to employers who performed contracts for the federal government or who otherwise received federal funds.

The ADA, however, extends the scope of coverage to all employers with 15 or more employees, as well as to state and local government agencies.

Who is Disabled?

The term "disability" has been defined by the act as: a physical or mental impairment that substantially limits one or more major life activities; a record of such impairment; or being regarded as having such an impairment. The phrase "major life activity" includes such functions as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working, among other things. It is easy to see that the act considers almost any activity to be a "major life activity."

The ADA also gives the term "disability" a very broad meaning. Conditions included within the reach of the act are: orthopedic, visual, speech, and hearing impairments; cerebral palsy; epilepsy; muscular dystrophy; multiple sclerosis; infection with the human immunodeficiency virus (HIV); cancer, heart disease, and diabetes; mental retardation; emotional illness; specific learning disabilities; addiction to lawfully prescribed drugs; and alcoholism, among other things. People with HIV (the AIDS virus) or other communicable diseases, such as hepatitis, are also specifically protected as long as they don't pose a risk to the health or safety of others.

Implications for Employers

The ADA prohibits discrimination as to any terms, conditions, or privileges of employment against any qualified individual who has a disability. In addition, the ADA places an affirmative obligation on employ-

ers to reasonably accommodate these otherwise qualified disabled employees. As an employer you have two major legal duties under the new law: don't discriminate; and accommodate qualified disabled individuals.

The ADA requires employers to reasonably accommodate disabled employees who are otherwise qualified for employment so that they can perform the essential functions of their jobs.

While the act doesn't specifically define the scope of "reasonable accommodations," it can require such relatively uncomplicated undertakings as the hiring of a reader for a blind employee or an interpreter for a deaf employee, or it might involve something as complex and costly as the implementation of voice activated or laser-controlled computer systems for an employee who is physically unable to type. The scope of "reasonable accommodations" depends on the circumstances in each particular case, and will likely provide a fertile ground for future litigation.

The act provides employers with narrow defenses to charges of discrimination. An employer must demonstrate either that the person is not "otherwise qualified" or that the accommodation required to enable disabled individuals to perform the essential functions of their jobs is unreasonable.

Of course, employers aren't required to hire unqualified workers solely because they are disabled. Nor are they obligated to provide accommodations that are so expensive and difficult to implement that they would impose an undue hardship upon their businesses. For instance, a small developing firm with 17 employees and \$500,000 per year in business might not be required to buy a costly computer system to accommodate a physically disabled office employee.

However, it is unclear from the language of the act whether the cost of the accommodation alone will be an acceptable reason for not complying. Other factors, such as the nature of the accommodation, overall financial resources of the employer, and the type of business will also be considered.

Hiring Disabled Construction Workers

Does this mean contractors will be expected to hire and accommodate physically disabled carpenters, for instance, even though they might have trouble getting around the (usually cluttered and dangerous) job site?

The answer is yes, as long as you meet the jurisdictional requirements of the act (15 employees or more). The entire purpose of the act is to give qualified disabled individuals the opportunity to ply their trades, whatever they may be and wherever they may be practiced.

For example, consider a contractor who receives an application from a paraplegic carpenter — someone confined to a wheelchair, but who has full use of his or her upper body. The contractor's consideration of the application would go something like this:

- **Is the person disabled?** Without a doubt, the person is suffering from a physical condition that limits one of the major life functions: walking.
- **Is the person qualified?** The answer to this depends to a certain extent on the "essential" duties of the carpentry position being filled.

Clearly if the applicant has never picked up a hammer before, he or she won't be qualified and needn't be further considered. If the person has more experience, however, the situation changes. For instance, if the position is for a finish carpenter — essentially responsible for cutting, measuring, and assembling wood into finished work in relatively controlled and accessible indoor settings — our applicant may be qualified if equipped with relevant experience and skills.

On the other hand, if the position is for a framing carpenter who will have to regularly climb and work on narrow beams or scaffolding and so on, then the applicant may not be qualified to perform the essential functions of the job. If such climbing is not one of the "essential" functions of the job, however, you cannot use it as a pretext for not hiring the person.

- **Is there anyone more qualified?** This question is tricky, because the person's disability cannot factor into your answer.

What you must ask is: Is there someone available with more experience, skills, or other qualifications than the paraplegic applicant? If so, you may hire the more experienced applicant. If there's not a more qualified applicant, then you must consider one last question.

- **Is there any way to reasonably accommodate the individual?** If you can clean the work area of debris and make it relatively safe and accessible to this applicant, if you can provide ramps or elevators for the individual, if you can have laborers bring materials to and from the individual as necessary so that he or she can safely perform the essential functions of a carpenter, then you probably can reasonably accommodate the person. And if that is the case, you must hire him or her.

If, however, providing such accommodations would either create an undue hardship on your company (under the criteria identified above) or directly threaten the health and safety of either the individual or other employees, then you cannot provide a reasonable accommodation and you are not obligated to give the person a job.

There is no simple answer. You will have to be creative to determine what you could do to allow such a person to perform the essential functions of the job. For instance, using the example above concerning climbing, beam work, and scaffolding work, if the individual could be transported to the location of the work via elevator and platforms could be built to allow him or her to move about safely, then you may be able to reasonably accommodate him or her without a "direct threat to health and safety."

While the questions in this analysis will not change, the answers will, and you will have to evaluate these situations on a case-by-case basis. The example above is intended only for illustration. If actually faced with such a situation, you should consult your attorney to determine how the law will apply to your exact factual circumstances before you make a decision.

Enforcement

The Equal Employment Opportunity Commission will enforce the ADA in a similar manner to its enforcement of Title VII of the Civil Rights Act of 1964. The act will include, as with Title VII, injunctive and back-pay relief for individuals discriminated against in their efforts to achieve equal employment opportunity.

The provisions of the ADA relating to disabilities in employment will be effective by August 1992. The act will initially cover all employers with 25 or more employees; after its second year it will cover employers with 15 or more employees. This lead time is provided to enable employers to make the necessary modifications to their operating procedures and policies, as well as to their physical facilities. Employers receiving federal funds or working on federal projects should not forget that they may already be covered by the Rehabilitation Act or other state disability laws.

The ADA will bring important and far-reaching changes to the business operations of all employers. While its effective date is more than a year away, employers should begin now to seriously consider the ADA's physical and functional impact on their businesses. ■

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