Small Business and the Americans with Disabilities Act

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This is the third in a series of BH articles featuring various aspects and implications of the Americans with Disabilities Act. In the November-December 1996 issue, William Roth and Vichard Morfopoulos focused on job analysis and the ADA, while Philip C. Grant discussed definitions of essential and marginal job functions in our March-April 1997 issue.

Since its inception, the Americans with Disabilities Act has been viewed by both large and small firms as a confusing and intimidating employment law. Although litigation since its enactment in 1991 has focused on larger employers, the scope of the law and its potent enforcement penalties continue to loom as an economic and operational obstacle to the unprepared and uninitiated smaller enterprise. Indeed, it is but a matter of time before small businesses find themselves fully in the fray of ADA litigation. This is demonstrated by the fact that, since the law was passed, more than 72,000 ADA claims (almost 10,000 in 1996) have been filed, resulting in almost $116 million in monetary awards.

We shall review the lessons of court cases, the nuances of the Equal Employment Opportunity Commission's ADA regulations and guidelines, and the opinions of legal scholars to outline the ADA's legal and operational implications for the small business sector. Because the vast majority of reported ADA decisions and guiding principles thus far have focused on companies with more than 500 employees (exceeding the Small Business Administration's typical definition of a small business), we will try to identify and extend the implications of this legal history to the small business environment.

In particular, our purpose is to focus on the implications of ADA's Title I—its "employment" provisions—with regard to four key questions of concern to small businesses:

1. Who is covered by the law?
2. What are the employer's rights and responsibilities?
3. What penalties are actually associated with this law?
4. What practical steps can be taken to ensure compliance?

The main points of the discussion are summarized in Table 1 on the next page.

With litigation and the press focusing on large companies, the small firm can get lost in the maze of requirements, practical applications, and implications that accompany the ADA.

WHO IS COVERED UNDER THE ADA?

Particularly among very small companies (those with 25 or fewer employees), an important concern is whether they are covered by the ADA. The answer is, in reality, a two-part response. The first part pertains to the question of who is a "covered employer," and the second, who is a "covered employee."

Covered Employer

The statutory definition for the term "employer" is "a person engaged in industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person." This definition carries a variety of implications for the small business. For instance, even though the employer may seem to operate exclusively in one state, the phrase "persons engaged in industry affecting commerce" would extend the ADA to any business using interstate communication facilities (telephones, faxes, e-mail) or transportation ser-
Table 1
ADA Summary for Small Business Employers

<table>
<thead>
<tr>
<th>Coverage</th>
<th>Employer Responsibilities and Rights</th>
<th>Consequences of Noncompliance</th>
<th>Employer Response</th>
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<tbody>
<tr>
<td>Covered Employer&lt;br&gt;• 15 or more employees&lt;br&gt;– in current or previous calendar year&lt;br&gt;– for more than 20 weeks</td>
<td>Responsibilities&lt;br&gt;1. Do not discriminate in discipline, discharge, hiring, harassment, and employment privileges&lt;br&gt;2. Provide reasonable accommodation in response to: employee requests known disabilities&lt;br&gt;3. Examples: changes in work rules modification of sick leave policies job redesign employee reassignment&lt;br&gt;4. Eliminate pre-offer physicals</td>
<td>Rights&lt;br&gt;1. Establish and maintain legitimate job-related requirements in employment decisions define essential job functions (EJFs) require proof of ability to perform EJFs&lt;br&gt;2. Establish hiring criteria need not hire unqualified need not hire &quot;dangerous&quot; workers can hire best qualified</td>
<td>Consequences of Noncompliance&lt;br&gt;1. Investigation costs:&lt;br&gt;• economic costs: disruption/morale stress&lt;br&gt;2. Potential defense costs&lt;br&gt;• attorney fees&lt;br&gt;• expert witness fees&lt;br&gt;• court costs&lt;br&gt;3. Remedies&lt;br&gt;• accommodation orders&lt;br&gt;• make-whole remedies (e.g., back pay)&lt;br&gt;• compensatory damages&lt;br&gt;• punitive damages&lt;br&gt;• claimant's attorney and witness fees&lt;br&gt;4. Increased insurance costs</td>
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Covered Employee<br>• is qualified for job with or without reasonable accommodation<br>• has a physical/mental disability<br>• has a record of disability<br>• is perceived to have a disability This includes people who either are currently disabled or have a history of it, such as chronic back problems or a heart condition. Further, it includes those who are merely thought to have a disability and thus would embrace, say, people who are rumored to be mentally unstable. Those definitions suggest that small business employers who fail to hire an individual based on fears that he would not “fit in” with a small work force, or may invite negative reactions by key customers, are particularly at risk. Attitudes and assumptions of coworkers and even customers can cause a person to be considered disabled and, therefore, protected by the ADA.

Key to all this, then, is the definition of what constitutes a “disability.” According to the ADA, a person with a disability is one who has a physical or mental impairment that substantially limits one or more major life activities. The term “physical

vices. Also important are the limitations placed on the number of employees and the duration of their employment. Of particular note is the fact that the ADA excludes small firms with fewer than 15 employees who work 20 calendar weeks during the current or preceding year. However, businesses reliant on part-time employees should note that many courts have held that this definition includes all employees on the payroll—even part-time workers. In sum, these provisions dictate that the law applies even to very small companies, almost all of whom are considered by the EEOC to be engaged in interstate commerce.

Covered Employee<br>The ADA’s protection runs to an individual who: (a) has a disability, (b) has a record of a disability, or (c) may be regarded as having a disability.
or mental impairment" is broadly defined to mean most physical disorders or conditions and many mental or psychological disorders. Although business has lobbied for an exhaustive listing of ADA disabilities, no such list exists. Instead, the law and related enforcement efforts have made it clear that the definition of a disability will be determined on a case-by-case basis. However, employers should generally expect the definition to include significant vision and hearing impairments, emotional disturbances and mental illness, seizure disorders such as epilepsy, orthopedic and motor disabilities, speech impairments, learning disabilities, and other serious health impairments of major body systems, such as diabetes, heart disease, cancer, HIV, and so on. At the same time, the ADA itself excludes from this definition some specific conditions that present potentially serious issues in a small business context. Among these are compulsive disorders (gambling, kleptomania), sexual predisposition factors (homosexuality or bisexuality), and illegal drug use (if not currently seeking assistance for such use).

Part of the ADA definition of "disability" requires that the impairment substantially limit one or more major life activities. The term "substantially limit" does not include temporary, common, non-chronic impairments with limited long-term impact—broken limbs, sprained joints, concussions, appendicitis, influenza, and the like. The definition of a "major life activity" includes tasks such as caring for oneself, performing manual tasks, walking, sitting, hearing, speaking, breathing, learning, and working. Together, these two factors indicate, for instance, that the law would not require an employer to accommodate a person with a broken leg that mended normally, but would require efforts to meet the needs of a person who could not regain full use of a previously broken leg.

**EMPLOYER RESPONSIBILITIES AND RIGHTS**

Once it is evident that a small business is indeed covered by the ADA, the question becomes: What are the employer's legal rights and responsibilities in dealing with applicants and employees with disabilities? Essentially, there are two broad areas of obligation for large and small employers alike: (a) the employer must not discriminate against people with disabilities and (b) the employer must provide reasonable accommodation for them (see Table 1).

**Nondiscrimination**

A particularly hazardous problem noted earlier for small employers is the tendency to discriminate against a disabled person based on the fear of how the employee will be perceived by customers. Also hazardous is the tendency to discriminate based on unfair assumptions or the stereotypes of a small work force.

The ADA prohibits an employer from discriminating against an employee with regard to "job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." While this definition covers quite a broad range of activities, small employers may reasonably expect the hiring process to afford the greatest potential for discrimination. An employer must define essential job functions (EJFs) and convey this information to all applicants, whether they have apparent disabilities or not.

To meet this obligation, it is necessary to define what constitutes an EJF. Although there is no specific listing of EJFs, the ADA regulations and court rulings have generally defined them to include the primary job duties intrinsic to the employment position, rather than incidental, marginal, or peripheral functions. For instance, regulations assert that a job function is "essential" because: (1) the job exists to perform the function; (2) there is a limited number of other employees available to perform the function; and (3) the function is highly specialized, requiring expertise. Factors affecting whether a function is essential can include: (1) the amount or percentage of time spent performing it; (2) the consequences of not requiring the current individual to perform it; and (3) the work experience of past and present employees in the job. Based on these general guidelines, courts often focus on the basic physical requirements—walking, climbing, standing, lifting—that are part of virtually all types of jobs. In one case, it was found that lifting and standing for a long period of time were considered EJFs of an assistant grocery store manager. In the case of an air conditioner assembler, it was essential that he be able to stand and lift to perform his job.

Mental and social requirements affecting small firms' primary concern with a "personalized service" advantage are also considered EJFs. The ability to greet customers and address sales matters on the telephone are interpersonal skills that were considered EJFs for a customer service representative who was unable to perform them because of constant panic attacks. Similarly, according to recent EEOC guidelines on the ADA and psychiatric disabilities, an employer has the right to enforce its customer service expectations by disciplining an employee who, because of an alleged mental disability, temporarily loses her patience and shouts at patrons and coworkers.

The law also prohibits certain specific hiring practices small firms have often adopted because
of their limited capacity to bear the costs of illness or disability-related behaviors. For instance, the ADA forbids overly general inquiries, such as asking an applicant how many times he was absent in his previous employment due to illness. For small employers seeking to control workers’ compensation liability and costs, the law specifically prohibits inquiries about previous workers’ compensation claims. Similarly, the ADA provides that pre-employment physicals can be required only as part of a conditional job offer.

**Reasonable Accommodation**

The reasonable accommodation issue is keenly regarded by small firms because they are often disadvantaged in their financial and operational ability to provide accommodations. As feared by small business advocates and ADA critics, the vagueness and ambiguity of the term (intentionally left vague for the purpose of providing flexibility and allowing the reasonableness of accommodation to be determined on a case-by-case basis) has also led to about 28 percent of the approximately 20,500 filings made under the ADA. Although most decisions have involved government employers and large corporations, the responsibility of accommodation looms as a primary source of exposure for small businesses as well.

In dealing with this issue, it should first be noted that the duty to accommodate is triggered by either a request for accommodation or the presence of an obvious need. Once this need is identified, two key questions arise: How much accommodation is required? And what forms of accommodation are acceptable? First, the level of accommodation that is reasonable or is instead an “undue hardship” and therefore unreasonable requires a fact-specific, case-by-case analysis. Such factors as the nature and cost of the accommodation in relation to the employer’s size and resources, including the number of employees and the disruptive impact the accommodation would have on the nature of the business operation, should be analyzed. The ADA clearly predicts that financial assistance and tax relief can turn an accommodation that would otherwise impose an undue hardship into a reasonable accommodation. Moreover, large businesses generally will be required to make more elaborate and extensive accommodations than small ones.

Second, as to the question of acceptable forms of accommodation, ADA regulations generally require job or work environment adjustments that will enable a qualified applicant or employee with a disability to perform the EJFs. This means that the employer must be willing to consider changes in ordinary work rules, facilities, and job terms and conditions in order to employ a disabled person. Most typically, accommodations pertain to paid and unpaid sick leave, modification or acquisition of equipment, access to facilities, shift changes, work modification, job restructuring, and employee reassignment.

**Employer Rights**

The ADA is not designed to disregard employers’ legitimate job-related requirements in hiring and retention. A company is not required to set aside legitimate education, experience, or skill requirements, and it can put forth its legitimate qualification standards as a defense to an ADA suit. The small business employer should always remember, however, that all requirements should be job-related and pertinent to the employee’s ability to perform. Overall, employers are not required to pass up the best-qualified candidate or eliminate legitimate standards and criteria for hiring, promotion, or retention.

In applying these general rights to the hiring process, employers are entitled to certain specific actions. First, and perhaps most important, a firm does not have to hire an individual who cannot, even with accommodation, perform the essential functions. And it can demand that an applicant be able to “demonstrate” the capability of performing the job’s main physical and mental requirements. Such demands, typically made of people with obvious or disclosed disabilities, might require that they actually show or describe how they would perform the tasks in question.

Second, the employer does not have to incur an “undue hardship” in meeting the applicants’ or employees’ needs. Because smaller firms often lack the resources and work force scale needed to make extensive accommodations, the question becomes: What constitutes a reasonable accommodation? Despite their considerable length and detail, the ADA and EEOC regulations do not specifically define this issue, but instead offer a multistep process for answering the question. Basic to the process is the assertion that the employer’s duty to accommodate arises only for obvious, known, or disclosed disabilities. Indeed, many reported lawsuits brought by terminated employees under the ADA have been dismissed in favor of the employer because the employee simply failed to request that an accommodation be made.

"The ADA clearly predicts that financial assistance and tax relief can turn an accommodation that would otherwise impose an undue hardship into a reasonable accommodation."
The next step involves the employer's response to a request for accommodation. Of some comfort to companies with limited resources are studies showing that before and after the ADA's enactment, most accommodations have involved little or no cost and can be effected with minimal disruption to business operations. Many involve the challenge of creativity more than cost. The company need not even provide the exact accommodation requested or demanded by the employee. The duty is only to make any "reasonable" accommodation. Refusing to accept a company's accommodation that a court finds reasonable causes the employee to be deemed "unqualified" and unprotected by the ADA, requiring dismissal of the case. Similar results occur when the employee refuses to participate in the process.

**Types of Reasonable Accommodations**

Determining an employer's rights and responsibilities in providing reasonable accommodation is a particularly thorny problem in the small business context. As noted earlier, considerable case law has been developed regarding the issue of whether an accommodation was "reasonable" or was an "undue hardship" defined as "an action requiring significant difficulty or expense" when considered in light of a number of factors. Courts are sensitive to the plight of small firms, so such factors are applied on a case-by-case basis and typically include the nature and cost of the accommodation in relation to the size and resources of the employer, the number of employees available for accommodation purposes, and the disruptive impact on the firm's operation. Below is a brief summary of recent ADA decisions affecting two major forms of accommodation requests: (1) those seeking equipment modification or acquisition and (2) those requesting administrative shifts through either job duty modifications or work force adjustment.

**Acquiring or modifying equipment.** A big concern of small employers is that they must bear major equipment costs to accommodate a disabled employee. Case law, however, suggests that this fear may be exaggerated. In *Vande Zande v. State of Wisconsin Dept. of Admin.* (1995), a leading ADA case, a state agency was not required to accommodate an employee on medical leave by providing her with a computer at her home. Although the agency had substantial resources, the court noted that government costs are an issue and that the employer's large size and financial resources are only some of several factors to be considered. Likewise, the accommodation request by a manual punch press operator that she be provided a forklift or tow motor and a driver to operate it in order to accommodate her back condition was found unreasonable and an undue hardship because of its cost and disruptiveness. On the other hand, a request that a hearing-impaired computer operator be provided a text telephone system to help her fulfill her responsibilities was not ruled an unreasonable accommodation or undue hardship. These cases suggest that, even for big companies, courts are reluctant to force large scale equipment purchases.

**Administrative accommodations.** Typically, administrative accommodations are posed as requests to either redesign the job or make the work force adjustments needed to adapt to the person's disability. The courts have made it clear that there is no duty to modify a job by delegating essential functions to other jobs, or engaging in such activities as restructuring jobs for applicants (rather than current employees) or eliminating key duties. Forced delegation or elimination of essential functions is an unreasonable accommodation request. A customer service representative of an optical company suffering constant panic attacks did not have to be accommodated by eliminating the essential function of using the telephone or meeting customers.

Further, an employee who cannot perform all essential functions with reasonable accommodation is not "qualified" under the ADA. A grocery store chain was not obligated to reinstate an assistant manager with a disability by eliminating the essential functions of standing or lifting. Nor do employers have to make temporary light duty assignments into permanent positions even if the assignments are provided (by policy) to employees returning from illness or injury. However, if the employer has provided light duty as a policy, such as reassignment to a temporary desk position for a recovering ill or injured employee, it should also be provided to individuals with a disability.

Administrative requests pertaining to work force adjustments typically involve requests for leaves of absence, modification of existing work schedules, or reassignment to temporarily vacant positions. In a small business environment, such requests may pose a particular burden because the size of the work force constrains the firm's flexibility and overall capacity to respond.

Several court cases have examined employers' responsibilities in meeting the ADA's accommodation expectation by providing *leaves of absence*. In one case, the offer to provide unpaid...
leave in lieu of termination was considered a reasonable accommodation by a bank. Similarly, a request for a month-long leave of absence for alcohol treatment by a truck driver of a major grocery chain was deemed a reasonable accommodation. On the other hand, both an eight-month medical leave of absence for a computer company customer service clerk and a one-year leave for a cook were found to constitute unreasonable accommodation demands. In yet another case, an employer was not obligated to provide an indefinite leave of absence for a bus driver with a diabetic condition.

When it comes to work schedule modification requests, courts focus on the availability of alternative positions and the employer's resources. A request for a shift change from night to day by an employee with a visual impairment is typical of this. Other cases involve a request for flexible hours or part-time work. For instance, providing a 30-hour work week with flexible schedules was deemed a sufficient accommodation to a telemarketer with an asthma condition who could not work full-time.

Concerning requests for assignment to a vacant position, courts have ruled first of all that the employer is not required to create a new position or transfer other employees to create a vacant position. Thus, a grocery store assistant manager who, because of a job injury, could no longer lift or stand could not require the employer to create a new position. Nor was an air conditioner assembler who could not stand or lift because of a fused ankle entitled to demand that the employer either promote him, create a new position, or reassign him into a currently occupied position. Courts have also ruled that there is no obligation to violate seniority rights in a collective bargaining agreement with a union; in one such case, a worker with a seizure condition could not require a railroad to bump other employees and provide him with a position.

Covered employers must carefully attend to requests for accommodation. On the other hand, the extent of the employer's duty to accommodate is measured in large part by its capacity and resources. Taken together, court decisions suggest that all requests must be considered seriously but that small businesses may be able to exercise considerable discretion in refusing those that impose "unreasonable" costs and/or administrative disruption.

CONSEQUENCES OF NONCOMPLIANCE

Even though it appears that the ADA's nondiscrimination and accommodation requirements may not be unduly burdensome for employers, companies may still be tempted to skirt ADA requirements altogether or "wait and see" what happens when the first claim is made. But such strategies can ultimately prove penny wise and pound foolish. Noncompliance with the ADA can result in a civil rights discrimination charge filed with, and investigated by, the EEOC and state agencies. Ultimately, the charge can ripen into a civil rights suit in federal court. The impact on small employers is varied (see Table 1) and can be catastrophic even if they are ultimately found not guilty of a violation.

Basic Principles of an ADA Case

The small firm should understand that it may face one of two forms of ADA discrimination claims. The first, adverse impact, requires no burden of proof of intent to discriminate but is established by significant statistical imbalance or impact on employees hired, promoted, or retained. Such cases typically involve discrimination that has occurred because of the use of job qualifications or standards for promotion or retention that bear no relationship to the successful performance of the job. However, because the essence of an "impact" discrimination case involves proof based on a relatively large number of employees, the more likely exposure for the small firm would be the second form of discrimination claim, disparate treatment. This is a particularly hazardous claim because, if proven, it is the form of discrimination that is associated with compensatory and punitive damages.

In defending themselves against potential litigation, small firms should understand that the law requires a "good faith" effort to identify and provide reasonable accommodation. Specifically, such effort must include evidence of consultation with the disabled person as well as objective evidence and conscientious compliance efforts. Consequently, the employer's opinion about what constitutes a good faith effort will not be decisive but will be a trial matter in which the employer will still bear the evidentiary burden of proof.

Investigation Process Costs

As the federal agency charged with investigating ADA violations, the EEOC will begin checking out the complaint of either an employee or applicant by conducting an interview to determine
whether a violation may have occurred. If it finds that the claim is based in whole or in part on a possible violation, a charge will be prepared and the investigatory process begins. The employer (the “respondent”) will be required to submit a written response to the charge, assert defenses to it, and produce relevant documents.

This stage itself can be burdensome for a smaller company. Although such charges must be taken seriously, the employer may find it difficult to afford the economic expense and disruption associated with devoting managers, HR staff, and even attorneys to the task of responding to document requests and questions. To do otherwise, however, could promote even further disruption, morale problems, and stressful uncertainty by allowing even meritless claims to remain unresolved and exceed the EEOC’s investigation deadlines.

If, after investigating the claim, the EEOC finds “cause” to believe a discrimination was partly or wholly the basis for the alleged adverse employment decision, the agency will move into a “conciliation” settlement stage. It is then that the EEOC fulfills its obligation to settle the charge by seeking an accommodation or cash settlement. If the firm agrees to such a request, the ADA often has opted for settlement at this stage to prevent additional time and economic investment to defend against the claim.

If the agency finds “no cause” for discrimination, it will complete its processing of the charge. The employer should consider bearing whatever costs necessary to obtain this result, because such a finding removes the possibility that the EEOC will file a suit in its own name. This will not guarantee an end to the claim, because the EEOC will issue a “right to sue” letter to the claimant that opens the door for the individual suit in federal court. However, as a practical matter, a “no cause” finding limits the claimant’s ability to file suit because attorneys are generally less interested in representing cases in which the EEOC has made this determination.

**Litigation Remedies and Costs**

Once a case makes its way to federal court, the employer has compromised its ability to limit costs through a negotiated solution and has incurred a generally greater economic risk in the form of court-ordered “make whole” remedies and payments for damages to the plaintiff. Moreover, smaller firms that do not maintain a legal staff are confronted with potentially significant outside payments to such experts across the duration of the litigation proceedings. Given the potential enormity of these issues, then, we offer some considerations for small business managers before taking the case to court.

**“Make Whole” Remedies**

A minimal cost of losing an ADA claim is that the employer may have to offer some form(s) of “make whole” remedies that have been available in civil rights cases for nearly 30 years. These include court orders and injunctions directing employers to hire applicants, promote or reinstate terminated employees, pay back wages, and, particularly under the ADA, make reasonable accommodations ordered by the court. It is important to note that, because any remedies ordered by the court would be expected to extend to “similarly situated” employees or applicants, the loss of a single claim could impose a potentially disastrous economic and administrative ripple through the organization.

**Damages**

A second major consideration is that, with the passage of the 1991 Civil Rights Act, the consequences of losing a civil rights action became even more formidable. In a major departure from the tradition of merely authorizing “make whole” remedies, Congress established the ability to award compensatory and punitive damages for discriminatory treatment in violation of the ADA. Compensatory damages can include future economic loss, pain and suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses. Punitive damages can also be awarded to punish and deter the employer if it is shown that the employer acted “with malice or reckless indifference” to an ADA-protected right.

Although compensatory or punitive damages of employers with 15 to 100 employees is limited to $50,000, small firms falling within the definition of “small business” (fewer than 500 employees) can be required to pay up to $200,000. It is important to note that the damage cap is established on a per plaintiff basis. Thus, if a company with 201 employees were to be sued by 10 plaintiffs, the total potential damage liability could be $2,000,000. Further, overall damages on a per-plaintiff basis can also exceed the ADA cap be-
cause claimants usually sue on the basis of laws other than the ADA alone. It is common practice for civil rights claimants to include separate state law claims for emotional distress, defamation, assault and battery, and even other state law civil rights violations. These claims can be joined and tried together in the federal case, if the circumstances surrounding the adverse employment decision support them. So damages awarded under these legal theories can far exceed the theoretical ADA caps.

Since the passage of the 1991 Civil Rights Act, employers must also understand that ADA claimants have a right to demand a jury trial on an ADA violation. This is significant because, when granting damage awards to personally injured individuals, juries frequently consider businesses—even small companies—to be "target defendants" with "deep pockets." So employers should anticipate that the claim of an already disabled person alleging workplace discrimination, particularly with aggravating facts of intent, will be treated with great sympathy. Even more threatening, employers should also be cautioned that, as opposed to a judge's decision, results of a jury trial are harder to predict.

As an example of the substantial recoveries available under the ADA, the first suit filed by the EEOC under the new law, EEOC v. ARC Security Investigations, Ltd. (1995), resulted in a jury verdict of $572,000 for the discharge of an executive director who suffered from a brain tumor. The jury deliberated for 90 minutes before returning an award that included $22,000 in back pay, $50,000 in compensatory damages, $250,000 in punitive damages against the firm, and $250,000 in punitive damages personally against the owner. In EEOC v. Complete Auto Transit (1997), another recent case brought by the EEOC, the jury awarded $5.5 million to a terminated transportation worker who suffered from epilepsy but could still perform the essential job functions. Specifically, the award comprised $192,000 in back pay, $960,000 in compensatory damages, and an unprecedented $4.35 million in punitive damages—believed to be the largest obtained by the EEOC for a single plaintiff in any ADA action. (Pursuant to the cap on compensatory and punitive damages provided by the Civil Rights Act of 1991, the awards in both these cases were subsequently reduced.) So far, most ADA suits have resulted in out-of-court settlements and expenses in the form of "make whole" and accommodation orders. But the filing of 18,000-plus cases with the EEOC last year alone suggest that decisions similar to these will be forthcoming.

**Attorney and Expert Witness Fees**

In addition to paying its own attorney fees, the ADA also authorizes the court to order a firm to pay successful ADA plaintiffs' attorney fees and other court-related costs, such as filing the suit itself and trial preparation costs. Such fees are limitless and can run in the hundreds of thousands of dollars, greatly exceeding the amount of compensatory damages recovered by an ADA plaintiff. Meanwhile, the plaintiff is not exposed to a corresponding level of risk. Specifically, if an employer has successfully defended an ADA claim, it is very difficult to recover its own attorney fees from the plaintiff because it will have to show that the ADA suit was brought in bad faith merely to harass the employer.

One reason to expect that ADA cases will be vigorously pursued in the courts is that the damages provisions of the 1991 Civil Rights Act create a potentially lucrative source of income for plaintiff attorneys working under contingency fee agreements. Thus, law firms, such as those specializing in personal injury cases and accustomed to gaining substantial fees through such agreements, are now attracted to ADA cases and the possibility of large fee recoveries based on damages awards. In short, with the availability of damages, there is now an attractive and previously unavailable fund to reach.

In addition to attorney fees, Congress established that a successful ADA plaintiff may recover expert witness fees. Because of the technical nature of health issues and accommodation alternatives, many ADA plaintiffs retain expert witnesses—doctors, psychiatrists, logistics and accommodation experts—to make their case. As with attorney fees, an employer who loses an ADA case may be ordered to pay, without limits, the costs of these highly paid experts.

**Insurance**

The wide variety of relief available under the Civil Rights Act, and particularly the availability of damages, with the attendant encouragement of litigation, has caused employers to consider insurance for protection. Civil rights violations coverage under general liability policies has been uneven. Specialized civil rights policies are now becoming available that provide for the payment of damages as well as for legal counsel and attorney fees. Although a growing number of small
employers are now turning to such insurance, it is expensive and, like all other insurance policies, becomes cost-prohibitive or simply unavailable for employers with a history of ADA claims.

**COMPLIANCE ACTIVITIES**

Small businesses may be concerned that they lack the flexibility or resources to make a "good faith" effort to prevent discrimination and provide reasonable accommodation. However, the economic consequences of noncompliance suggest that the costs of making such an effort may be relatively inexpensive insurance against the costs of defense. To make a "good faith" effort, the employer should (a) develop and make known an ADA-related policy, (b) identify essential functions associated with key jobs, (c) train interviewers and other managers who participate in hiring processes, and (d) provide support to supervisors and line managers likely to be responsible for dealing with accommodation requests and discrimination charges. Listed below are specific factors to be considered by the small business employer with regard to each of these activities.

**Develop an ADA Policy**

Small firms are often advised to create as few policy statements as possible in order to minimize potential legal and practical entanglements. However, such advice normally is not intended to promote legal compliance, but rather to prevent policies that are unworkable in a small business environment and likely to compromise the employer's "residual rights" claim to all job rights other than those limited by contract, policy, or statute. Thus, when weighed against the ADA's "good faith effort" requirement, the employer would be well advised to voluntarily initiate at least a basic ADA policy.

Developing an effective ADA policy requires the creation of both a policy statement and, perhaps more important, sound administrative procedures to support it. Small firms should avoid simply "borrowing" policies developed by larger companies that have both the legal and administrative resources to support expansive and intricate policy declarations. Tailor-made policy statements should be composed that include at least the following:

- A statement that affirms the employer's compliance with the ADA;
- A brief specification of potential consequences for noncompliance; and
- A reference to internal sources for dealing with ADA complaints.

Given the limited resources and legal/technical expertise of smaller employers, the task of creating an administrative support process to back up an ADA policy becomes a primary issue. In general, the process must be widely visible, realistically accessible, and empowered to take action. Based on the logic that human resource managers are usually responsible for implementing and tracking employment policies, the firm's HR representatives are often designated as the key contact source. However, although the HR office may be highly visible and potentially more accessible than line managers (who are often the source of discrimination complaints), there are at least three reasons this approach should be considered with caution in a small business environment.

First, HR managers in small companies tend to lack the organizational power needed to investigate and resolve complaints effectively, especially those lodged against key managers in the firm. Second, because the HR function of smaller companies is often comprised of one or two HR generalists rather than a staff of employment specialists, the ability to respond to complaints simply may be beyond its physical and/or technical capabilities. Finally, and perhaps most important, such a policy moves the focus away from line managers as the preferred and potentially more effective action source and aggravates the adversarial perception of the HR function as the company's "compliance cop."

One strategy for dealing with these issues is to develop a policy that establishes the line manager as the first element of the complaint process, then offers an appeal to a review board comprising a high-ranking HR manager and similarly situated line managers. This approach serves to minimize appeals by giving line managers a specific chance to respond directly to ADA issues (rather than to "end run" appeals to HR managers). At the same time, it affords both the political power and administrative resources needed to investigate and resolve complaints. Moreover, this strategy is sensitive to the political sensibilities of a small business setting and allows HR managers to serve a more productive role as an ADA resource and enabler to line managers.

**Identify Essential Job Functions**

Recall that the ADA stipulates that decisions about employees and applicants must be related to the performance of essential job functions.
Thus, the employer must conduct some form of job analysis that, at the very least, defines such functions for entry-level jobs and jobs that are likely to impose significant or unusual physical and mental requirements. Because small firms tend to lack adequate job incumbent sample sizes to permit the statistical interpretation of paper-and-pencil job analysis methods, employers will likely be required to conduct some form of individual or observational job analysis interviews with job holders and their immediate supervisors. An alternative method for accomplishing this task is to gather job experts into critical incident job analysis groups to identify key performance situations and specify the physical or mental requirements needed for successful performance in such situations. Whereas the critical incident method requires a significant time commitment and a job analyst well trained in its procedures, it has the decided advantage of using small sample sizes to identify critical behaviors and related mental and physical requirements effectively. Moreover, it complies with court expectations and the Uniform Guidelines on Employee Selection Procedures stating that job analyses must include as many input sources as possible and focus on specific performance behaviors.

To identify EJFs, small business employers can draw on a variety of readily available and inexpensive consulting resources such as those provided by the Small Business Administration (SBA) and the EEOC. These sources offer supporting documents and the experience gained through dealings with numerous organizations to aid individual employers in the complex task of identifying specific EJFs and specifying their relative importance. Another useful resource in defining EJFs is the EEOC’s ADA Technical Assistance Manual, which describes the factors used by the EEOC to define an EJF and provides a checklist of relevant physical and mental activities.

**Train Interviewers**

ADA statistics show that, as of September 1996, more than 7,000 ADA hiring discrimination complaints had been filed with the EEOC. Case facts and legal reporters suggest that the failure of the hiring process to identify and accommodate physical or mental disabilities was often a key factor in the more than 58,000 discharge and accommodation claims filed in the same time period. These factors, along with the salience of job interviews in the hiring processes of smaller firms, dictate that businesses must make sure interviewers have a clear description of the EJFs associated with entry jobs and are trained to handle specific ADA-related responsibilities.

Interviewers should receive training in three critical areas: avoiding illegal inquiries, investigating accommodation requirements, and wielding effective interpersonal skills. The first two elements pose a particularly thorny problem in that, unlike other employment laws that generally bar any inquiries about protected class factors (age, race, national origin), the ADA requires interviewers to avoid illegal inquiries about physical and mental disabilities while taking specific steps to investigate such factors and determine both the ability to meet EJFs and identify accommodation requirements. Accordingly, interviewers must be taught to avoid patently illegal inquiries and focus on abilities, rather than disabilities. They must learn to enact the “rule of the affirmative” in the interview process by presenting the candidate with EJFs and conducting a problem-solving investigation to determine any accommodations the candidate might need.

As to interpersonal skills training, interviewers should become versed in the mechanics of interviewing a person with a disability, such as a hearing-impaired candidate, and avoiding disturbing tendencies, such as the inclination to stare at a physical disfigurement. Such training is necessary both to enhance the exchange of information needed for effective interview decisions and to prevent EEOC complaints based on the perception that the interviewer was adversely affected by the applicant’s physical or mental disability.

**Provide Support to Managers**

As with so many other aspects of management in a small company, the success or failure of the firm’s efforts to comply with the ADA rests in the hands of a relatively small number of managers and supervisors. Thus, it is critical that these people receive the support necessary to meet such an onerous responsibility. Such support can consist of developing evaluation and reward systems that recognize and encourage specific acts in support of the ADA. One small business initiated a program that paid its seven production supervisors to attend two Saturday workshops designed to identify EJFs in the production process and develop accommodation strategies for dealing with the most likely forms of physical disabilities (back injuries, limited motor skills). In another company, supervisors and other employees were provided nominal cash awards on a quarterly basis and annual recognition awards for suggestions that identified potential barriers to employing the disabled and proposed solutions to such barriers.

Perhaps the most effective means of supporting managers is to provide workshop training programs that focus on techniques and strategies for managing the business within the expectations of the ADA. Such training might begin with
a review of the Act and its implications for managerial rights and responsibilities. Attention should also be given to explaining the company's ADA policy and the importance of the manager's role in enacting this policy. Finally, considerable effort should be devoted to specific strategies for dealing with issues related to managing a person with a disability (such as coworker harassment or discrimination), dealing with poor performance or attendance, responding to accommodation requests, and so on.

Because smaller employers may lack the expertise and/or financial resources to develop and present such programs “in-house,” an alternative is to enroll some, or all, key managers in an ADA supervisory management workshop offered by a variety of universities or executive training firms across the United States. Although this strategy clearly does not afford the company-specific focus of an “in-house” program, it does offer the advantages of a relatively low training cost investment (good programs can be found for $15 per training hour per person) and the opportunity to exchange ideas about ADA management issues and their solutions with participants from a variety of organizations.

As a final point, it is important that supervisors be provided solid technical expertise on ADA-related issues. In smaller firms, such support may, of necessity, take the form of providing a library of reference sources that supervisors may use to gain information on their own. The Internet offers a wide variety of Web sites that offer useful insights, clear information, inexpensive or free counseling services, and even the EEOC guidelines. Among those most directly geared to small businesses are the ten regional Web sites associated with the “ADA Technical Assistance” (ADA-TA) program, a source of ADA technical guidance, referral, and education created by funding through the National Institute on Disability Research of the U.S. Department of Education. Through the ADA-TA home page (http://www.icdi.wvu.edu/tech/ADA.HTM), an employer may gain access to the Disability and Technical Assistance Center (DBTAC) geared to providing small business employers with answers to questions, compliance information, service resources, and technical information specific to their geographic region. Another Web site is that of the Job Accommodation Network (JAN). Through its home page (http://janweb.icdi.wvu.edu), employers can gain access to more than 180 links designed to provide information about job accommodations and the employability of people with disabilities. Particularly useful are up-links that provide information about accommodating specific disabilities and those that offer a “list of lists” of disability resources.

Finally, the EEOC’s Web site (http://www.eeoc.gov) provides access to most documents related to the ADA (including the Technical Assistance Manual), a description of employer responsibilities under the ADA, and a summary of legal and administrative updates. This site also offers a Question and Answer up-link that provides the EEOC’s “answers” to a variety of commonly asked ADA employment questions. These resources, in conjunction with support from those responsible for administering the firm’s ADA policy, are basic but essential elements in ensuring the success of supervisors and managers as key contributors to ADA compliance in small business settings.

In highlighting the implications of the ADA for the small business sector, we have examined four key questions regarding this law in terms of management issues and factors relevant to the small business environment. Generally, our intent here is to increase awareness of the ADA’s implications and propose potential actions that small business managers can realistically pursue to ensure compliance with this law. Given the complexity of the ADA and its very broad implications for all businesses, the scope of our discussion has been limited to some of the more central issues and should not be considered as legal advice of any kind. To deal successfully with specific ADA issues, readers are advised to consult outside reference sources (some of which are noted here) or the services of a consultant or legal counsel.

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