

THE RISK OBSERVER

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PROFESSIONAL UNDERWRITERS

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THE AMERICANS WITH DISABILITIES ACT

Americans with Disabilities Act, Public Law 101-336, was signed by the President on July 26, 1990 and became effective for employers with 25 or more employees on July 26, 1992 and for employers with 15 to 24 employees on July 26, 1994.

This act is civil rights law, and has its genesis in the Civil Rights Act of 1964 and the Rehabilitation Act of 1973. Much of the language is similar to the two laws cited and the intended effect is the same for affected persons: the prohibition of discrimination.

The law covers employment, public accommodations, transportation, access to state and local government services, and telecommunications. This memo will discuss Title I, employment.

The employment function is a highly sensitive activity which has an impact on the way your enterprise is operated, and the requirements of law may call for a substantive rearrangement or reorganization of the way people are employed, assigned, compensated, promoted, and otherwise directed. The law may also have a significant impact on your costs of operation, and you should be prepared to address the issues raised in the most effective and economical ways possible while maintaining your ability to deliver the services you provide.

In its basic terms, the law makes it impermissible to discriminate among prospective or current employees on the basis of that person's physical or mental disability, perceived disability, or past disability. Does this mean you must hire or promote someone who, for example, may be a paraplegic to drive a school bus or be a fireman? Not at all! The person affected must be able to demonstrate that he or she can do the job. In some cases, it may be necessary to make "reasonable accommodations" of the job content, the way it is performed, or the tools or devices used to allow the disabled person to perform the task.

If you can't discriminate on the basis of the person's disability, how do you place the right person in the right job? Instead of looking at the person, you should look at the job. The law provides that a written job description prepared before advertising, interviewing, or placing employees shall be evidence of the "essential functions" of the job on which to base a judgment of a disabled person's ability to do the task.

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This has always been considered a good personnel practice and helps to reduce subjectivity in the employment process with an increase in the element of fairness valued by most people. Each task must be analyzed for its discreet components and described in concrete terms. It must then be evaluated to be sure that the separate parts shown are essential functions, and not catch-all add-ons, which may rarely, if ever, be a regular part of the job. Selecting applicants based on non-essential or only peripheral considerations will not satisfy the law, and may bring charges of discrimination. Equal, fair access to jobs and benefits is the basic philosophical thrust and purpose of the law.



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When an applicant, otherwise qualified, indicates he or she can perform the essential functions of the job in question, how do you perform this? There is one direct way: an actual job performance test in which the applicant actually does all the essential elements described in the job analysis. This test must be real and conducted at the site where the job will be performed.

In certain cases, as we indicated above, some reasonable accommodations may have to be made so that a disabled person can do the job as well as any other candidate. What is reasonable? The law is less than precise about the matter, but does provide some general guidelines. It indicates that no employer shall be required to do something of significant difficulty or expense to accommodate the disabled. Taken into consideration are the size and resources of the employer, as well as the kind of activity in which the employer is engaged. Common sense and good will should go a long way to help avoid becoming a part of that body of case law.

A second means of establishing capability to do a described job might be through a medical examination of the affected person. This option, however, is somewhat limited and cannot be used in a discriminatory fashion. First, a candidate must be determined to be qualified in all other respects and made an offer of employment. The offer of employment can be contingent on the results of a medical examination, but the examination must cover only those matters directly related to the performance of the essential functions of the job. We emphasize that physical examinations for all prospective employees is a sound practice. Such a practice will help to avoid placing a new employee in imminent jeopardy because of the physical demands of the job, as well as protect other employees and the public from the results of an accident caused by a physical condition not discoverable in another fashion. In other words, it will help you make the best possible placement of each person employed and assist in determining what accommodations, if any; the person may require doing the job. It also permits medical judgment to be made by those qualified to do so, and removes some of the element of subjectivity from the hiring process.

Again the examination must be related to the essential functions of the job. Any finding of lack of qualification because of the potential for injury must be imminent and not remote, and the record created by a physician taking a medical history and conducting a physical examination must be treated confidentially. Voluntary physical examinations which are a part of a general employee health program are not affected.

The illegal use of drugs or the excessive use of alcohol are not considered disabilities under this act, and you may treat such users as you would any other employee in the performance of his or her job or in gaining access to a job. You must, however, treat recovered drug and alcohol users as affected persons, and you may not discriminate against them.

Finally, you may not discriminate against a prospective or current employee who is otherwise qualified because of a disability of an individual with whom the qualified person is known to have a relationship or association. This means it is illegal to refuse employment to a person because you think their spouse or dependents, for example, will create a greater than usual drain on your health maintenance or insurance plan, or that the association will somehow carry over to employment to your detriment.

In summary, it is recommended that the first step you should take to avoid problems under the law is to develop job descriptions which contain the essential elements of each job and clearly delineate the required abilities to do the job. Secondly, consider the desirability of health appraisals for all prospective



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employees who are job related and kept confidential. Such an examination could save your workers' compensation dollars in the future, as well as get the right person in the right job. And thirdly, consider requesting accommodation assistance from groups, which are advocates of the disabled. There are hundreds of practical ideas which have been developed to help the disabled do a job effectively and economically.

In conclusion, you should know that some states already have similar legislation on the books. In some cases, state law extends to employers with smaller numbers of employees than the federal law and, in some ways, is more restrictive in terms of employer action. You should identify the appropriate agency in your state responsible for enforcement of anti discrimination laws and learn what your obligations are, if any, under such laws.



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