National Tooling & Machining Association
NTMA PRECISION
Business Management Advisory
For Precision Custom Manufacturers

LR32 **File: LABOR RELATIONS**

AMERICANS WITH DISABILITIES ACT

SUMMARY

The Americans with Disabilities Act (ADA) was signed by the President on July 26, 1990. Most NTMA member companies have to comply with federal regulations implementing the ADA. ADA goes beyond merely prohibiting discrimination against the disabled — it requires affirmative action by the employer. Companies with 15 or more employees must have been in compliance effective July 26, 1994.

The ADA was written to help eliminate employment barriers faced by the disabled. In theory, these changes should increase the size and quality of the labor pool. Some companies may find they can take advantage of these changes. Its purpose is to eliminate discrimination against an estimated 43,000,000 "qualified individuals with disabilities." A qualified individual is one who is capable of performing the "essential functions" of a job.

ADA regulations define essential functions as the fundamental duties of a job – those tasks which make the job necessary. For instance, the ability to reach or lift may be an essential function for an employee who works on a loading dock. Similarly, an operator of a manually fed press must be able to feed parts. The employer should define, in writing, the essential functions of the jobs in the office and plant. These functions should be included in written job descriptions and hiring criteria before interviewing or advertising begins. Factors which are considered in determining a job's essential functions include:

- The employer's judgment as to which functions are essential;
- Written job descriptions prepared before advertising or interviewing for the job;
- The amount of time spent performing the function of the job;
- The consequences of not requiring an employee to perform the function;
- The terms of a collective bargaining agreement.

The ADA provides that no covered employer shall discriminate against a qualified individual with a disability with regard to: job application procedures, hiring, advancement, discharge, compensation, job training and other terms, conditions and privileges of employment. It obligates the employer to make "reasonable accommodations" to permit an employee with a disability to perform the duties of the job unless providing such accommodations would result in an "undue hardship" on the business.

Reasonable accommodation is one that will enable an otherwise qualified individual with a disability to perform the essential functions of a job, and may include: making existing employee facilities accessible to, and usable by, employees with disabilities; job restructuring; acquiring or modifying equipment; modifying work schedules; and, providing readers or interpreters.

Employers are required to make reasonable accommodations for a qualified disabled individual unless doing so would impose an undue hardship which means an action requiring significant difficulty or expense. The ADA enumerates a number of the factors to be considered in making this determination, such as: the nature and cost of the accommodation; company size and financial resources; and the impact significant changes in accommodation would have on the nature or structure of the employer's operations. Undue hardship decisions must be made on a case-by-case basis. The employer must be able to document and prove that an accommodation would cause undue hardship.

EMPLOYEE RESPONSIBILITY

Employers are obligated to accommodate only the known limitations of an otherwise qualified, disabled individual. Generally, it is the responsibility of the applicant or employee to inform the employer that an accommodation is needed. This may occur, for example, through submission of medical restrictions. If the employee does request an accommodation, but cannot suggest an appropriate one, the employer and

the employee should work together to find a reasonable solution.

An employee (and job applicant) is required to identify his/her impairment to the employer in order to gain ADA protections.

DISABLED

There are three ways in which an individual can be identified as "disabled." A person is disabled if he or she:

Has physical or mental impairments that substantially limit one or more major life activities. These impairments can be obvious, as in the case of a person confined to a wheelchair; or hidden, as in a person who is dyslexic;

Has a history of substantially limiting physical or mental impairments. This definition includes a past history of illness, such as cancer, or a heart condition. Also included are alcoholism and past episodes of mental illness;

Is regarded as having a substantially limiting disability or impairment. Individuals with a cosmetic disfigurement or AIDS are sometimes regarded as disabled, although they may not suffer from an impairment that limits their abilities. An employer cannot refuse to hire or promote someone because of concerns about the negative reactions of others.

The ADA makes it against the law to discriminate against a qualified person with a disability in any of the following:

Job application procedures. This includes the recruiting, advertising, and processing of employment applications.

Hiring or discharge. This includes hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff and rehiring.

Compensation. This includes monetary or other forms of compensation (benefits), as well as changes in compensation.

Job Training. This includes selection and financial support for training, including apprenticeships, professional meetings, conferences and other related activities, and selection for leave to pursue training.

Advancement. This includes job assignments, job classifications, position descriptions, lines of progression, and seniority lists.

Other terms, conditions and privileges of employment. This includes all employer sponsored activities, including social and recreational programs.

Other employment practices specifically prohibited include:

Limiting, segregating or classifying employees based on their disability. It is unlawful, under ADA, to make employment decisions that adversely affect the opportunities for status of a disabled individual based on common beliefs or presumptions. Employment decisions concerning disabled individuals must be based on factual evidence of their ability to perform the job, on a case-by-case basis. For instance, deciding not to hire an epileptic because "all epileptics are safety risks" would be a violation of the law.

INQUIRIES

An employer may make pre-employment inquiries as to whether an applicant has the ability to perform job-related functions, but not as to whether an applicant has a disability or the nature or severity of such disability.

The employer may not ask a prospective job candidate if he or she has a disability. Even generic inquires, such as, "tell me about the state of your health," are prohibited.

The employer may only inquire about an applicant's ability to perform specific job-related functions. Pre-employment tests are not banned by ADA. However, they cannot be structured to screen out individuals with disabilities (unless the ability in question is an essential function of the job). Tests should be structured to measure ability rather than reflect a disability. For instance, an employer may need to provide a reader for a dyslexic individual taking a written test so that test results reflect the applicant's knowledge — not his impaired ability to read.

MEDICAL EXAMINATIONS

A medical examination can be required only after a job offer has been made and prior to commencement of employment duties. An offer of employment can be conditioned on the results of such an examination if: (1) the examination is job related and consistent with business necessity; (2) it is required of all entering employees in the same job category; and (3) its results are maintained on separate forms, in separate medical files, treated as confidential, and used only in accordance with the Act.

Like pre-employment testing or screening, it is illegal to conduct a medical exam of an employee, or a prospective employee, if the intent of the exam is to determine if a disability exists, rather than the ability to do the job. Employers are prohibited either directly or through a third party agency from inquiring about an individual's workers' compensation history prior to making a job offer. **Post-offer medical exams can be given where:**

- A job offer has been tendered and all applicants in the same job category are subject to the same exam;
- The exam is used to determine the ability of the employee to perform the job;
- To comply with other federal laws, (FHA, DOT, FAA).

The ADA has stricter requirements concerning medical inquiries and examinations of employees, as opposed to applicants who have received conditional job offers. With employees, the examination must be job-related and consistent with business necessity. Employee examinations may be job-related and necessary:

- When and employee is having difficulty performing the job;
- When an employee becomes disabled;
- When assessing reasonable accommodation;
- When other laws require testing.

If a medical examination reveals a disability, the employee cannot be removed or prevented from accepting the job unless the disability specifically prevents the employee from performing the essential functions of the job even despite reasonable accommodation. The medical examination must not use criteria designed to screen out individuals with disabilities, unless those criteria are job related and consistent with business necessity.

DRUGS/ALCOHOL

Drug tests or screens are not medical examinations under the ADA, and employers may test job applicants and employees for the illegal use of drugs.

Employers may prohibit the illegal use of drugs and alcohol in the work place and can discipline employees for such use. However, applicants or employees who have been rehabilitated or who are participating in a supervised rehabilitation program, and are no longer using illegal drugs, are included in the definition of a qualified employee with a disability.

Employees who are recovered (or recovering) drug or alcohol abusers are protected under ADA. Current users of illegal drugs are not protected. An individual whose alcohol consumption affects his or her job performance is also not protected under the ADA. The ADA neither prohibits nor encourages drug testing.

LITIGATION

The "case-by-case" nature of individual disabilities has the potential to create a lawyer's bonanza of court cases and rulings which will further define an employer's obligations under ADA.

Substantial litigation continues to define the ADA's vague terms of "undue hardships," "reasonable accommodation," "essential job functions of the job," and the like. It is important to consult with the company attorney and other experts to make sure the company complies with all aspects of the ADA, from recruitment to termination.

The tooling and machining industry — which, for the most part, is made up of small employers — can ill afford to spend precious dollars on costly litigation. Therefore, employers should begin following preventive activity immediately.

Companies which have reviewed and planned for ADA requirements will be in a better position to protect themselves from potential lawsuits.

The employment provisions of ADA will be enforced under the same procedures used by Title VII of the Civil Rights Act. Complaints regarding discrimination may be filed with the Equal Employment Opportunity Commission or designated state agency. Remedies include hiring, reinstatement, back pay, court orders to stop discrimination (injunctive relief) and reasonable attorneys' fees and costs. Compensatory and punitive damages are also available; an exception exists where there exist good faith efforts at reasonable accommodation.

Any person who feels they have been discriminated against under the provisions of the ADA may begin a civil action for relief.

An employer is not required to hire a disabled person if doing so poses a direct threat to the health or safety of that person or others. This standard is difficult to satisfy. Moreover, if a reasonable accommodation can be made to eliminate a safety hazard, or reduce it below the level of a direct threat, the employer cannot discriminate against an otherwise qualified applicant who is disabled. An employer cannot "deny an opportunity to an individual with a disability merely because of a slightly increased risk."

Determining whether a person poses a health or safety risk must be based on objective criteria, not subjective perceptions or fears. Federal guidelines provide four specific factors to be considered when assessing risk:

- The duration of the risk;
- The nature and severity of potential harm;
- The likelihood that the potential harm will occur;
- The imminence of the potential harm.

An individual with a disability cannot be prevented from participating in a company health or life insurance program based solely on his or her disability, if the disability does not pose increased risks. Under ADA rules, benefit plans can continue to be developed and administered in accordance with accepted principles of risk assessment. Any benefit plan decisions not based on risk classifications must conform with ADA's non-discrimination rules. Further, an employer cannot discriminate against a disabled person because his or her disability is not covered by your group insurance program, or the person's disability might cause insurance premiums or workers' compensation costs to increase.

WHAT TO DO NOW

Review, revise and implement job descriptions, employee qualification and selection procedures and criteria, and policies relating to medical examinations, training, testing, light duty and work restrictions.

Examine plant facilities to determine whether they need to be modified in order to be readily accessible to, and usable by, individuals with disabilities. If the cost of modification is very high — in relation to the size, income, financial resources, etc. of the business — modifications may not have to be made, at least until new construction or remodeling occurs; but if the cost of the needed modifications are modest, the employer will have to bear these costs. In short, the most

important thing for an employer to do now is to survey the physical plant and the policies and procedures in place for the employment of all employees.

STATUTORY DEADLINES

I. Employment
The ADA requirements become effective:

- July 26, 1992, for employers with 25 or more employees.
- July 26, 1994, for employers with 15-24 employees.

II. Public Accommodations
The ADA requirements become effective:

- January 26, 1992, generally.
- August 26, 1990, for purchase or lease of new vehicles that are required to be accessible.
- January 26, 1993, for new construction.

Generally, lawsuits may not be filed until January 26, 1992. In addition, except with respect to alterations, no lawsuit may be filed until:

- July 26, 1992, against businesses with 25 or fewer employees and gross receipts of $1 million or less.
- January 26, 1993, against businesses with 10 or fewer employees and gross receipts of $500,000 or less.

III. Transportation

Public bus systems
The ADA requirements become effective:

- January 26, 1992, generally.
- August 26, 1990, for purchase/lease of new buses.

Public rail systems — light, rapid, commuter, and intercity (Amtrak) rail
The ADA requirements become effective:

- January 26, 1992, generally.
- August 26, 1990, for purchase/lease of new rail vehicles.
- By July 26, 1995, one car per train accessibility must be achieved.
- By July 26, 1993, existing key stations in rapid, light, and commuter rail systems must be made accessible with extensions of up to 20 years (30 years, in some cases, for rapid and light rail).

Privately operated bus and van companies
The ADA requirements become effective:

- January 26, 1992, generally.
- July 26, 1996 (July 26, 1997, for small providers) for purchase of new over-the-road buses.
- August 26, 1990, for purchase/lease of certain new vehicles (other than over-the-road buses).

IV. State and Local Government operations
The ADA requirements become effective:

- January 26, 1992.

V. Telecommunications
The ADA requirements become effective:

- July 26, 1993, for provision of relay services.

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