

By Michael L. Antoline, J.D.

Are You Ably Educated? Part II

Make sure your hiring practices are in compliance with the Americans with Disabilities Act.

LAST MONTH WE TALKED ABOUT THE AMERICANS with Disabilities Act (ADA) in the context of businesses and their customers who have disabilities. This relationship is covered primarily under Title III of the ADA, Public Accommodations. As a business owner, there's another area of the ADA with which you need to be familiar: employment. This month, we'll examine the ADA in the context of a spa owner's responsibilities to disabled employees. This section of the ADA is referred to as Title I (see "Does This

Apply to Me?" on page 36), and its standards differ somewhat from those of Title III.

If you're an employer covered by Title I, it's unlawful under the ADA to discriminate in "recruitment, hiring, promotions, training, pay, social activities and other privileges of employment." In short, an employer may not discriminate in *any* employment practice. This wording also implies that both applicants and current employees are protected from discrimination. Since applicants are covered, it should be no surprise that an employer may not make certain inquiries about a prospective employee's disabilities before a job offer is made.

Interestingly, the protections offered by the ADA also extend to persons who have a known relationship with an individual who has a disability. Let's take, for example, the employee who has a child who's disabled. The ADA prohibits discrimination against the employee based on his or her child's disability.

Hiring Guidelines

The best thing an employer can do to prepare for any job interview is to completely understand and be able to articulate the essential functions of the job. The key word here is "essential." We all ask employees to do a lot of different things in the course of a day, but for interview purposes the spa owner must know the core functions of the job and differentiate those from the marginal job functions. The ADA insists that the employer measure a prospective employee against the core functions of a job, to prevent those with disabilities from being discriminated against on the basis of minor or incidental job functions. During an employment interview, or before an offer of employment is made, an employer may not ask the applicant any questions about the nature or severity of a disability, but can ask about his or her ability to perform a specific job



“Does This Apply to Me?”

To be covered under Title I of the Americans with Disabilities Act, the section that concerns rules of hiring and employment, an employer must employ 15 or more workers working 20 or more weeks during the year. This is not to be confused with coverage under Title III, the Public Accommodations portion of the ADA, which deals primarily with customers. With Title III there's no employee minimum, and most businesses that are open to the public—and therefore most spas—are covered.

The rules governing how to determine who's actually an employee for ADA purposes are fairly complex. Spas often have a number of independent contractors so for this issue, and any other about which you have doubts, I recommend consulting the ADA home page at www.usdoj.gov/crt/ada/ or dialing the toll-free ADA information lines at 800/514-0301 (voice) or 800/514-0383 (TDD).—MLA

function. Therein lies the importance of knowing the job's essential functions.

As an employer covered by the ADA, you may not ask a prospective employee to undergo a medical examination before offering a job. The job offer must be made first, and if medical examinations are part of your employment process you can extend a conditional offer of employment on a successful outcome *only* if this same procedure is followed with all employees.

If during a job interview with a disabled person you as the employer determine that he or she can perform the essential functions of the job, then the inquiry is over and you have a candidate in the running. If you

interview a disabled person and it appears that he or she wouldn't be able perform the essential functions of the job considering the disability, you must then go one step further and ask, “Could this prospective applicant perform the essential functions of the job with a ‘reasonable accommodation?’” What's a reasonable accommodation? Well, it can be just about anything. The ADA website defines it as “any modification or adjustment to a job or the work environment that will enable a qualified applicant or employee with a disability to participate in the application process or to perform essential job functions.”

Still, these are just words. What about examples?

Examples of reasonable accommodation include making existing facilities readily accessible, or restructuring a job.

The website aids us again. “Examples of reasonable accommodation include making existing facilities used by employees readily accessible to and

usable by an individual with a disability; restructuring a job; modifying work schedules; acquiring or modifying equipment; providing qualified

readers or interpreters; or appropriately modifying examinations, training or other programs. Reasonable accommodation also may include reassigning a current employee to a vacant position for which the individual is qualified, if the person is unable to do the original job because of a disability even with an accommodation.” Now, many of these accommodations sound very expensive. And, given the right set of circumstances, they can be. However, if the experience of Sears is any guide, the cost to the spa owner to make reasonable accommodations wouldn’t be much at all. The ADA website

Alcoholism and Drug Abuse

The teaser question in the June Legal Pad column asked whether alcoholism was considered a qualifying disability under the Americans with Disabilities Act. The answer is yes. Alcoholics are considered people with disabilities who are protected, but only if they’re still able to perform the essential functions of the job. Accommodation in this situation doesn’t allow an employee to come to work intoxicated. The employer may discipline or discharge an employee if the use of alcohol affects job performance and can do so in the case of using alcohol in the workplace.

Drugs are an entirely different story. Drug testing isn’t considered a medical examination under the ADA and therefore, may be performed before a job offer with the hiring decision based on the test results. Illegal drug users are defined as being individuals without qualified disabilities under the ADA, so they’re not covered. Be careful to distinguish between illegal drugs and lawfully prescribed drugs. Information regarding the use of lawfully prescribed drugs must be kept confidential.

The ADA doesn't require an employer to give preferential hiring treatment to persons with disabilities.

discusses a study commissioned by Sears that “indicates that of the 436 reasonable accommodations provided by the company between 1978

and 1992, 69% cost nothing, 28% cost less than \$1,000 and only 3% cost more than \$1,000.”

An employer must make rea-

sonable accommodations allowing a disabled person to function in the job—unless that accommodation causes an undue hardship. Unfortunately, the ADA's formal definition of “undue hardship” isn't very helpful: “Undue hardship is defined as an action requiring significant difficulty or expense when considered in light of a number of factors. These factors include the nature and cost of the accommodation in relation to the size, resources, nature and structure of the employer's operation.” The bottom line is, undue hardship may be determined by your bottom line. In reality, undue hardship is determined on a case-by-case basis. Published court cases may be our only independent guide.

It's important to note that the ADA doesn't require an employer to give preferential hiring treatment to persons with disabilities. You as a spa owner can select the person most qualified for the position. Let's suppose that two people apply for a custodial position at your spa. One is able-bodied and has 10 years' experience as a custodian, and the other has a mental disability but can otherwise perform all of the essential job functions and has five years' experience. You can choose the person with 10 years' experience without running afoul of the Americans with Disabilities Act.

Yes, compliance with the ADA is yet another regulatory burden for spa owners. But with a little study and policy polishing, it becomes second nature. Besides, in complying with the ADA you aren't only following the law; you're doing the right thing. ●

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