SPECIAL Report

NATIONAL ROOFING CONTRACTORS ASSOCIATION

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Americans With Disabilities Act Update

July 26, 1991 Regulations

Introduction

As required by the Americans with Disabilities Act (ADA), the Equal Employment Opportunity Commission (EEOC) printed employment discrimination regulations on July 26, 1991. They go into effect July 26, 1992 for companies with 25 or more employees, and July 26, 1994 for companies with 15 or more employees. Employment provisions fall under Title I of the ADA.

The Architectural and Transportation Barriers Compliance Board issued guidelines July 26, 1991 under Title III for the Department of Justice to establish accessibility standards on new construction and alterations in places of public accommodation and commercial facilities. Regulations on access to existing private businesses that serve the public go into effect January 26, 1992, but not until July 26, 1992 for companies with 25 workers or less and gross annual receipts of $1 million or less, and July 26, 1993 for companies with 10 or fewer employees and gross annual receipts not exceeding $500,000. Any new facility ready for occupancy after January 26, 1993 must meet all accessibility rules.

Most NRCA members will be covered by ADA regulations, but don't panic, the more you know about what is -- and isn't -- expected of you, the more confidence you will have in your business practices.

Title I/Employment Discrimination

Legal exposure regarding employment practices is always of concern to roofing contractors. ADA's discrimination regulations are consistent with this concern, but should not cause fear.

NRCA's comments amplified report language from both the House Education and Labor Committee and Judiciary Committee that was written to accompany the ADA. The Education and Labor report states, "The second factor noted in subsection 101(9), for determining whether or not an accommodation would impose an undue hardship, focuses on the type of operation maintained by the entity. This would include, for example, consideration of the special circumstances incurred on certain types of temporary worksites common in the construction industry. For example, under some circumstances, it might fundamentally alter the nature of a construction site or be unduly costly to implement or maintain physical accessibility, for an applicant or employee who uses a wheelchair if, for example, the site's terrain and building structure change daily as construction progresses. The Committee recognizes that some accommodations that can easily be made in an office setting may impose an undue hardship in other settings. While the Committee believes that undue hardship standards may be developed on an industry by industry basis where particular types of operations common to an industry present special circumstances, the ultimate determination is a factual one which must be made on a case-by-case basis."

NRCA joined other construction industry associations to pursue industry-specific language in the ADA employment discrimination regulations, which culminated in a coalition statement to EEOC followed by a meeting with the EEOC Vice Chairman.

In response to these comments, the EEOC amended the interpretive guidance on Section 1630.15[d] (Defenses) to note that an accommodation that poses an undue hardship in a particular job setting, such as a temporary construction site, may not pose an undue hardship in another setting. The EEOC also refers to the construction industry in the interpretive guidance, Section 1630.2[r] (Direct Threat), that an individual not pose a direct threat to himself/herself or to others.

Important Sections

Definitions are found in Section 1630.2, and, generally speaking, the EEOC's definition of disability seems narrower than in its proposed regulations. These terms are particularly important for roofing contractors:

Section 1630.2[m] Qualified individual with a disability means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable

requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired.

Section 1630.2[r] Direct Threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include: [1] The duration of the risk; [2] The nature and severity of the potential harm; [3] The likelihood that the potential harm will occur; and [4] The imminence of the potential harm.

Frequently Asked Questions

Q: What pre-employment tests are permitted or prohibited by the ADA? (physicals? drug tests?)

A: The ADA allows employers to require medical examinations after a conditional offer of employment. In the ADA, drug testing is not considered a medical examination. Employers may test for use of illegal drugs at any point prior to and after employment. Also, physical agility tests are not medical examinations and so may be given at any point in the application or employment process. Such tests must be given to all similarly situated applicants or employees regardless of disability. If such tests screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, the employer would have to demonstrate that the test is job-related and consistent with business necessity and that performance cannot be achieved with reasonable accommodation.

Q: Can an employer inquire at the pre-offer stage about an applicant's workers' compensation history?

A: No, and an employer cannot inquire as to whether an individual has a disability at the pre-offer stage of the selection process. Employers may ask questions that relate to the applicant's ability to perform job-related functions. However, these questions should not be phrased in terms of disability. An employer may not use an application form that lists a number of potentially disabling impairments and ask the applicant to check any of the impairments he or she may have. In addition, an employer may not ask how a particular individual became disabled or the prognosis of the individual's disability. The employer is also prohibited

A Tax credit exists for small businesses that make expenditures to provide access for disabled persons. A business is eligible if its gross receipts for the preceding taxable year did not exceed $1 million, or it has fewer than 30 full-time employees. The Credit is an amount equal to 50 percent of the eligible disabled access expenditure between $250 and $10,250; the work must be done on an existing structure. New construction does not qualify for the credit and must be accessible to and usable by disabled persons.

Frequently Asked Questions

Q: If the employee lounge or rest room is on a lower or upper floor, must an employer provide an equal facility on the main floor for a mobility-impaired employee?

A: Only if the cost is not significant and thus is not an "undue hardship." Options like reallocating the use of space and moving furniture or redesignating who could use a rest room (male, female) on the floor on which the disabled person worked, likely would not be an "undue hardship." Construction of an entirely new rest room likely would be an "undue hardship."

Q: Must all sales and checkout areas be retrofitted to accommodate disabled employees or disabled customers? What retrofits are required?

A: The work areas would not have to be retrofitted. Only "reasonable accommodations" would be required to the extent that such accommodations would not be an "undue hardship." For disabled customers, the removal of barriers must be "readily achievable."

Q: If a two-floor store has a basement where merchandise is stored must an elevator be installed?

A: No, it would not be required for an existing building unless building an elevator could be easily accomplishable and could be carried out without too much difficulty or expense. In the case of new construction or renovation, installation of an elevator would be required if it is three stories or more, or is a shopping mall, or an office of a health care provider.

By March 30, 1995...

Roofing contractors using existing equipment must retrofit it to meet the requirements for closures. These requirements are that it must be substantially leak tight so as to allow no more than slight dripping or trickling. Closures must be designed and constructed to withstand, at all operating temperatures, without substantial damage, twice the weight of the load. In other words, the lid on a kettle will have to stay closed and be virtually leak tight if the kettle were turned upside down, and it would have to be strong enough to withstand twice the weight of a full load.

Once the above requirements are met, the kettle or tanker may be used for 20 years from the date of manufacture (as stated above). After that time, further design modifications must be made or it will have to be replaced by a new one.

NRCA Response

NRCA's initial strategy is to formally petition for a reconsideration of this rule. This petition (filed on November 4) addresses two points: first, that in the original comments made to this rule, NRCA asked to be exempted because there is no historical accident data to justify this type of regulation on the roofing industry; and second, that the rule specifically singles out the roofing industry without any specific rationale. DOT has sixty days to respond.

Additionally, NRCA will meet with kettle and tanker manufacturer representatives and other asphalt industry representatives to discuss the impact of this new rule and to devise other strategies to mitigate its effects.

This rule will be particularly burdensome on small contractors who would not normally fall under DOT's Federal Motor Carrier Safety Regulations (FMCSRs). DOT fines can be very severe (up to $10,000 per violation) and unlike other regulatory agencies, these regulations are enforced by state police in addition to DOT compliance officers. Kettles and tankers are conspicuous vehicles, so be sure you are in compliance. NRCA has produced compliance materials for DOT's FMCSRs. For more information, please call NRCA.