

SPECIAL Report



NATIONAL ROOFING CONTRACTORS ASSOCIATION

LEGISLATIVE ALERT!

July 9, 1991

TO: NRCA Members

RE: **Striker Replacement**

Did you know that the U.S. House will soon vote on whether to prohibit you from hiring permanent replacement workers during a strike, perhaps forcing you to temporarily or permanently close your business? Don't be fooled -- this will effect union and open shop businesses. Please contact your Representative on H.R. 5/S. 55 (Striker Replacement) with this message:

The Honorable John Doe
U.S. House of Representatives
Washington, DC 20515

Dear Representative Doe:

You may not be aware of the impact H.R. 5, Striker Replacement, will have on my business. If two or more of my employees decide to go on strike, and if I am unable to hire replacement workers, I could be out of business. The roofing industry is particularly vulnerable to this legislation because of multiemployer jobsites and strict construction deadlines.

I am particularly concerned over the fact that anytime the strikers decide to return to work, I would have to reinstate the striking workers and fire the temporary workers. Skilled workers are very hard to find in my industry, and it would be difficult for me to find temporary workers who would accept a job knowing they could be fired at any moment.

As you well know, businesses across the country and especially in the construction field have been hard hit by the recession. Sales are down and the competition for remaining jobs is fierce. This legislation would have a tremendously adverse impact on my business and, combined with the other government regulation I already deal with, could put me out of business.

Please vote against H.R. 5 in any form.

Sincerely,

Roofing Contractor

If you need to confirm who your representative is, please call the Washington office at 800/338-5765.

Q: What "monetary damages" can be assessed in the event of a successful charge of discrimination in public accommodations?

A: None, except in a lawsuit brought by the Attorney General involving pattern and practice. The Attorney General must specifically request such damages. These damages do not include punitive damages.

For more information on the ADA, please contact the NRCA Washington Office at (202) 546-7584, or (800) 338-5765.

from asking how often the individual will require leave for treatment or use leave as a result of incapacitation because of the disability. However, the employer may state the attendance requirements of the job and inquire whether the applicant can meet them.

Q: Can an employer consider "direct threat" as a qualification standard?

A: Yes, an employer may require, as a qualification standard, that an individual not pose a direct threat to the health or safety of himself/herself or others. Like any other qualification standard, such a standard must apply to all applicants or employees and not just to individuals with disabilities.

Q: What kind of penalties are in the ADA?

A: Applicants or employees charging discrimination under ADA must first go to the EEOC. A plaintiff must exhaust all administrative remedies before going to court. If a plaintiff wins, relief is limited to "make whole" remedies such as reinstatement, back pay and legal fees.

More detailed guidance on specific issues will be forthcoming in the EEOC's Compliance Manual. Several Compliance Manual sections and policy guidances are currently under development and will be issued in the coming months. Among other things, they are expected to explore further issues concerning workers' compensation matters.

Title III/Public Accommodation

The preceding discussion on employment discrimination under the ADA also applies to the staff at your company headquarters. The headquarters is much different than a construction site and would be considered permanent as opposed to temporary. The essential functions of many of the positions at headquarters would be administrative, and headquarters itself would be considered a "public accommodation."

The chances are good that as a roofing contractor, you might not have much "walk-in" traffic. Nonetheless, all businesses must remove barriers that limit accessibility to the disabled by January 26, 1992 or later, depending upon the size of the business. (See the first page.)

The intent of the public accommodations portion of the ADA appears aimed at large retail businesses and office buildings. Removing barriers for disabled customers isn't necessary unless "readily achievable"; that is "easily accomplishable without much difficulty or expense."

accommodation, can perform the essential functions of such position.

Section 1630.2[n] Essential functions-[1] In general. The term **essential functions** means the fundamental job duties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position. [3] Evidence of whether a particular function is essential includes, but is not limited to: [i] The employer's judgment as to which functions are essential; [ii] Written job descriptions prepared before advertising or interviewing applicants for the job; [iii] The amount of time spent on the job performing the function; [iv] The consequences of not requiring the incumbent to perform the function; [v] The terms of a collective bargaining agreement; [vi] The work experience of past incumbents on the job; and/or [vii] The current work experience of incumbents in similar jobs.

Section 1630.2[o] Reasonable accommodation. [1] The term **reasonable accommodation** means: [ii] Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or [iii] Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

Section 1630.2[p] Undue hardship-[1] In general. **Undue hardship** means, with respect to the provision of an accommodation, significant difficulty or expense incurred by a covered entity, when considered in light of the factors set forth in paragraph [p][2] of this section. [2] **Factors to be considered.** In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include: [iii] The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities; [iv] The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and [v] The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

Section 1630.2[q] Qualification standards means the personal and professional attributes including the skill, experience, education, physical, medical, safety and other

To have legal standing, a disabled applicant or employee must be able to do the "essential functions" of a job. If necessary, the employer must make "reasonable accommodation" to help the disabled person work, unless it would cause "undue hardship." NRCA commented on this in 1990, explaining to the EEOC:

"The construction industry is a unique employer. Employment is both temporary and seasonal. The construction worksite is a place where permanence and consistency are virtually unknown. Workers may work at one location for only a few days, and points of accessibility for workers change daily as a project enters different stages of completion. The temporary and continually changing nature of the worksite make almost any accommodation an 'undue hardship.'

"It is a construction safety maxim that the fewer workers necessary to do a job, the safer the worksite. Clearly, helper classified employees for the disabled at worksites is contrary to that rule. Also, construction is physically demanding work. 'Essential functions' often include potentially hazardous activity requiring special training, skills and protection. Accommodation in such circumstances would create undue hardship and, very possibly, unsafe working conditions for the disabled worker and others.

"This is particularly so for roofing work, which is distinguished from other types of construction in that it is exterior work done at higher elevations. The fewer workers on a roof, the better, and the following safety check list must be followed: a long sleeved shirt, buttoned at the cuff and within one button of the collar; properly fitting pants without cuffs; high-top shoes or boots with thick rubber or composite soles; gloves with snug-fitting cuff; rubber gloves when working with chemicals, solvents or adhesives; goggles or face shield where required; a full face shield for kettle use; hard hats when there is a hazard above; a respirator, when required; do not wear rings on fingers; and, do not wear earphones, you will not be alert to verbal warnings or requests for help from other workers.

"Roofing involves extensive use of ladders and hoists. Workers must unload heavy and bulky roofing materials, and operate roof cutting, spudding, tear-off, and vacuum equipment. They must avoid burns from hot asphalt and kettles, contact with solvents and adhesives, and injury from flying nails. Roofing is done in every kind of weather and on flat and sloped roofs. The roofing worker must be aware of the edge of the roof and openings at all times." [Letter from William A. Good, Executive Vice President, NRCA, to EEOC, November 2, 1990]