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THE AMERICANS WITH DISABILITIES ACT AND LOCAL NONPROFIT ORGANIZATIONS: CAN COMPLIANCE HURT THOSE WHO WERE SUPPOSED TO BE HELPED

by

Nancy I. Lasher*
Ronald C. Goldfarb**

Preface

The Americans with Disabilities Act of 1990¹, which became effective in July, 1992, was enacted with the Congressional finding that "some 43,000,000 Americans have one or more physical or mental disabilities" and that an aging population was likely to produce an increasing number of citizens with such handicaps.² The 15.5 percent of the potential American workforce which is disabled has approximately a 60 percent unemployment rate.³ With numbers of that magnitude, protective legislation was obviously required.

The Vocational Rehabilitation Act of 1973⁴ preceded the Americans with Disabilities Act. Provisions of that statute prohibit federal agencies⁵, contractors having contracts of \$2,500 or more with the federal government⁶ and recipients of federal financial assistance⁷ from engaging in any form of employment discrimination based upon disability.

It requires no authority to state that the clear purpose of these statutes is to benefit those with disabilities. They both attempt to protect the disabled from avoidable employment barriers caused by their disability. It is the thesis of this paper that the effect may occasionally be otherwise. Compliance with the Americans with Disabilities Act⁸, in particular, may result in organizations with the same avowed purpose of helping those with disabilities, and others in need, being hindered in their activities. That effect can occur even though hindsight may reveal that the steps that had to be taken to be in compliance were not especially costly. The perception of the cost and complexity of compliance may well divert energy and other resources from the goal of providing service. It would be tragic, not merely ironic, if that occurred.

We will focus on several smaller community based charities which provide services to those with various illnesses or conditions which have been defined as disabilities under the ADA.⁹ The value of these organizations to the community at large and the fact that these organizations provide services which would otherwise have to be supplied by the federal and state governments is evidenced by the practice of exempting "many nonprofits...from the levies that finance government, primarily income, sales, and *ad*

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valorem taxes."¹⁰ In a time of shrinking government involvement and funding, these service agencies frequently are the only lifeline available to those in need.

The Inclusive Nature of the Statute

While the Vocational Rehabilitation Act of 1973 applied only to those organizations receiving federal funding, the ADA has a much wider reach since it applies to all employers who have "15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year."¹¹ The ADA makes no exceptions for nonprofit¹² organizations. The only employers to whom the Americans with Disabilities Act does not apply are the United States, a federally owned corporation, an Indian Tribe or a private membership club.¹³

Testifying before the House Education and Labor Subcommittee on Select Education, which was considering the ADA, Steve Beebe (representing the American Health Care Association) sought an exemption from the Act for nonprofit medical facilities.¹⁴ He argued that the inability of such organizations to raise "prices" to recoup the costs of compliance with the ADA and the large number of disabled persons served mandated such special treatment.¹⁵ The details of his proposals need not be considered since none made their way into the statute nor was any exemption granted nonprofit entities. The only provision of the ADA which may ameliorate the most egregious effects is that which permits an application for relief from compliance based upon undue hardship.¹⁶ The effectiveness of that section will have to be shown over time.

Perhaps the Committee was persuaded by the testimony of Nikki Van Hightower, the former director of a nonprofit social service center who told the Committee that her experience was that the cost of adding accommodations for the disabled, during a renovation, was not more than 1 percent of the total construction.¹⁷ The experiences and expectations of others will be discussed later.

Accommodations Required by the Americans with Disabilities Act

The statute requires that employers covered by the statute must make "reasonable accommodations for those with disabilities."¹⁸ Examples of necessary changes which must be made for an employer to be in compliance with the ADA include "making existing facilities used by employees readily accessible to and usable by individuals with disabilities"¹⁹ and providing for "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities."²⁰

What is not specified are any parameters or limits as to the extent or the expense of the required accommodations. The word "reasonable" has only just begun to be tested

and until a significant body of case law develops, owners, managers and operators will continue to operate in something of a vacuum as to their actual or potential liability.

The Concerns of Local Nonprofit Organizations

As a statute which has only recently become applicable to small organizations,²¹ there are many uncertainties as to the effect it may have on those entities. The perception, expressed by the Small Business Legislative Council, is that "[m]ost small-business owners are very nervous about this law. There's a real sense of apprehension out there."²² In particular, nonprofit, social service organizations are fearful as to the effect compliance may have on their operations or even their very survival. In an era of decreasing government and corporate support, these institutions are concerned that even the most modest expenditures they may have to incur will result in a diminution of services to their clients.

Methodology

A questionnaire was designed to sample the respondents' level of familiarity with the ADA and the impact the law has had on their nonprofit agencies. The survey consisted of eleven questions. The answers were a combination of "yes/no" check offs, two other check off questions which asked about the amount of time spent on ADA compliance and the participant's knowledge of ADA requirements, specific requests for greater detail where appropriate, and a general request for comments about the ADA and nonprofits. A cover letter explained that the purpose of the survey was to assess the impact of the ADA on the operation of nonprofit organizations.

The survey was sent to the heads of twenty one Family Service agencies in New Jersey. These agencies were chosen because they are small community based agencies (ranging in size from approximately \$500,000 per year annual budgets to approximately \$11,000,000) for whom compliance may be an economic burden. These organizations, which qualify for tax exempt status under Section 501(c)(3) of the Internal Revenue Code, have many clients who themselves may qualify as "disabled" but for whom government safety nets have diminished. Forcing these nonprofits to comply with the ADA may ultimately do more harm than good as valuable resources must be shifted away from providing services to providing accommodation.

Results

Of the twenty-one surveys sent, nine were returned for a total response rate of 43 percent. Two of the nine respondents (22 percent of those who responded) reported that the ADA did not apply to their organizations. All of the respondents had some degree of knowledge of the ADA, with three of the nine respondents (33 percent) considering themselves "very" familiar and the other six (67 percent) considering themselves "somewhat" familiar. All but two of the agency directors reported spending "some" time on compliance, but not "a great deal" of time.

While one respondent (11 percent) reported that the ADA had an impact on the organization's interviewing practices, none of the respondents' hiring decisions had been affected by the law. Given the breadth of the ADA requirements with regard to the interview and hiring process, these already overburdened nonprofit executives may not realize how much of a change is required in order to comply.

The Equal Employment Opportunity Commission recently issued "guidelines" for the appropriate questions to ask job applicants when trying to assess whether a candidate could perform the essential functions of the job.²³ However, small community based nonprofits do not have human resource professionals on their staffs whose task it is to ask the right questions during interviews. It is not likely that an executive director will intuitively recognize that it is permissible to ask a prospective employee, "Are you currently illegally using drugs?" while the seemingly more innocent, "What medications are you currently taking?" is not allowed.²⁴ Thus, the potential exists for innocent, yet costly mistakes.

A major concern for small nonprofit corporations today is the dwindling amount of financial resources available to meet the ever increasing need. When the ADA was enacted, the focus of concern of the business community was the cost of compliance. When Sears, Roebuck and Company reported average compliance costs of \$121.00 per accommodation made, the business community breathed a collective sigh of relief.²⁵ However, while Sears, Roebuck numbers its employees in the thousands and its human resources budget in the millions, community based nonprofits count their employees one at a time and have budgets that barely exist. While flexible scheduling is an accommodation that may be possible to make at no cost (when dealing with a large workforce), many accommodations carry substantial price tags. One respondent reported spending \$30,000 for a staircase with a wheelchair lift, and another respondent reported making "adaptations" that cost \$20,000.

The ADA provides an exemption from compliance if an "undue hardship" would result.²⁶ However, there is no definitive rule about when a requested accommodation can be refused. The survey asked whether the agency directors were aware that this exemption exists. Five of the respondents (56 percent) knew of the exemption while four of them (44 percent) did not. One of the respondents had considered applying for the exemption, although none actually have applied.

The final questions sought the executives' opinions about whether the ADA places an unfair burden on charitable nonprofits and whether such institutions should be exempt. While most of the respondents did not have sharp objections to the ADA's applicability to their agencies, some of them indicated the need for additional funding or flexible rules to assist them with compliance. Three of the respondents (33 percent) said that the ADA was an unfair burden while five (56 percent) indicated it was not unfair. One respondent left the question unanswered.

Only one respondent (11 percent) stated that charitable nonprofits should be exempt from the ADA. Five respondents (56 percent) felt that their agencies should not be exempt. Three respondents left the question blank. Two of the responses to the question on exemption were accompanied by comments: one person indicated that "special considerations should be given" and the other said that "special funding" should be made available for compliance. The latter executive emphatically stressed, "Nonprofits have no money for this!"

Responding to the general request for comments, one agency director summed up the frustrations felt by many of her colleagues, "The hardship in compliance is trying to bring antiquated buildings into compliance due to financial burden and actual structure of the building - the budget is already stretched beyond limits..."

Recommendations

The ADA is an important law with laudable objectives. However, as this preliminary study indicates, at a time when small community based charitable nonprofits are struggling with reduced funding and greater need, the imposition of the requirements of the ADA upon this sector only adds additional stress to already overstretched resources. The ADA's impact on agencies whose mission it is to help those with disabilities must be studied further to ascertain whether the resource shifting which may be required by the statute ultimately results in a reduction of services to the community.

While the "undue hardship" exception may provide relief for financially pressed human services agencies, the imprecisely defined nature of this provision may only create additional confusion. The better choice may be to amend the law to create a definitive exemption for charitable nonprofits whose mission it is to assist those who are supposed to reap the benefits of the Americans with Disabilities Act. The very essence of those organizations is to assist the disabled and the agencies themselves, rather than the federal government should determine how to expend their resources.

¹42 USC § 12101-12213 (1990).

²*Id.* at (a) (1).

³DAWN D. BENNETT-ALEXANDER & LAURA B. PINCUS, *Employment Law for Business* 353 (1993).

⁴29 U.S.C. §§ 701-796 (1985).

⁵*Id.* at § 791.

⁶*Id.* at § 793.

⁷*Id.* at § 794.

⁸Sometimes cited as the ADA.

⁹42 U.S.C. § 12102 2(A) - (C). The term "disability" includes "a physical or mental impairment that substantially limits one or more of the major life activities" of an individual or "a record of such an impairment" or "being regarded as having such an impairment."

¹⁰JODY BLAZEK, *Tax and Financial Planning for Tax-Exempt Organizations 1* (1990). Section 501(c)(3) of the Internal Revenue Code grants tax exempt status to organizations operated for, *inter alia*, religious, charitable, scientific or educational purposes.

¹¹42 U.S.C. § 12111 (5)(B).

¹²Nonprofit, as opposed to not-for-profit, is the term used by most such organizations, though some statutory schemes, such as New York's, use the latter nomenclature. New York Not-For-Profit Corporation Law § 100 (McKinney 1993).

¹³42 U.S.C. § 12111 (5)(B)(i) and (ii).

¹⁴Comm. Print 1990 at 1788.

¹⁵*Id.* at 1790, 1791.

¹⁶42 U.S.C. § 12111(10). Undue hardship may result from "an action requiring significant difficulty or expense, when considered in light of" such factors as "the nature and cost of the accommodation" "the overall financial resources of the facility" and "the type of operation ... of the covered entity."

¹⁷Comm. Print 1990 at 1788.

¹⁸42 U.S.C. § 12111 (9).

¹⁹*Id.* at (9)(A).

²⁰*Id.* at (9)(B).

²¹For two years after it was enacted, the Americans with Disabilities Act only applied to organizations with 25 or more employees. Effective July 26, 1994, its reach was expanded to those with 15 or more employees. 42 U.S.C. § 12111 (5)(A).

²²Jeffrey A. Tannenbaum, *More Small Employees Must Adhere to Disabilities Act*, Wall St. J., July 25, 1994, at B 2.

²³WADE LAMBERT, *Have You Ever? New EEOC Guidelines for Job Interviewing Baffle Employers*, Wall St. J., July 15, 1994, at B1.

²⁴*Id.*

²⁵BARBARA PRESLEY NOBLE, *A Level Playing Field, for Just \$121*, N.Y. Times, March 5, 1995, at F21.

²⁶42 U.S.C. § 12111 (10) (1990).

INTRODUCING THE NEW
LIMITED LIABILITY COMPANY
TO THE CLASSROOM*

by
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Introduction

Prior to October 24, 1994, if a small group of individuals desired to form a business they were forced to select from a variety of traditional but less than ideal options. On that date, New York State's new Limited Liability Company ("LLC") law became effective.¹ The legislation was designed to make available in a single business form, a combination of the most attractive business, legal and tax features. Entrepreneurs no longer have to compromise their primary objectives due to the limited choice of business forms.

The Limited Liability Company statute offers instructors an opportunity to introduce students to a timely and rather momentous piece of legislation by interpreting and illustrating its features through a process of comparison with the traditional business forms.

This paper will briefly review the history of the LLC, describe the classic categories of features by which the traditional business forms are analyzed, review the particular characteristics of the conventional business forms, compare the new LLC to those business forms, and highlight other features of the LLC. Appendix "A" contains a chart summarizing the comparisons. The sequence of topics in the paper mirrors the author's order of presentation in the classroom. The teaching methodology is designed to refresh and reinforce the students' existing knowledge of partnerships and corporations, and to critically analyze those business forms, thereby illustrating the utility of the LLC. Repeated comparisons of the features of the conventional business forms to each other and to the LLC provide the framework for the new information. I submit that our students will find learning about the LLC to be a graceful and natural extension of their knowledge of law because of their familiarity with the conventional business units. They will appreciate that the new law is a logical response to a real business need.

Brief History of LLC Legislation

New York was not the leader in the LLC movement; in fact, in July 1994, when then Governor Cuomo signed the enabling legislation², it was somewhat of a latecomer.

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