

Wichita Chamber of C

AMERICANS WITH DISABILITIES ACT

- Tim Witzman -

Concerns of The Wichita Area Chamber of Commerce

Listed below are seven areas in the Americans with Disabilities Act (HR 2273) where business is seeking changes. The Wichita Area Chamber of Commerce encourages efforts to prohibit discrimination against, and make accommodations for the disabled. However, The Chamber feels this legislation is so vague and subjective that it would result in monumental litigation until the courts define the requirements. The ADA would burden employers with enormous compliance expenses without truly addressing the needs of the disabled. Each area is followed by recommendations.

I. Vagueness of Terms

ADA: Title I (employment section), states that an employee must be able to perform the "essential functions" of a job and not those that are "marginal".

OUR CONCERN: The Small Business Administration defines a small business in the manufacturing or wholesale industry as one with 500 or fewer employees. Retailers and services are considered a small business if they have \$3.5 million or less in sales annually. The "essential functions" of a job are particularly difficult to define when you consider that small businesses often hire people to do a variety of different tasks while larger employers tend to hire employees to do one particular job. The number of "essential functions" would be extremely difficult to define.

Employers should only be required to define those functions of a job that are bona fide occupational qualifications.

ADA: ADA requires that employers make physical changes to buildings and work equipment, if to do so would not impose "undue hardship" and if the changes are "readily achievable."

OUR CONCERN: Employers should be given the opportunity to make a full and fair assessment of what's an "undue hardship" and what's achievable. This would also reduce the incentive to litigate, as judges would be giving full and

fair consideration to an employer's assessment.

Economic reality to the "undue hardship" of an individual facility should also be considered, not the financial strength of the parent company.

II. Compliance Dates

ADA: Employer compliance with Title I (employment section) is required two years after the effective date. Employer compliance with Title III (public accommodations section) is required 18 months after the effective date. Both deadlines are regardless of whether or not the regulations have been completed.

OUR CONCERN: Regulations provide specificity, telling employers how to comply. Therefore, the effective date of business compliance should be tied into the date that final regulations are issued. Without complete regulations, businesses will be faced with another confusing Section 89 compliance problem.

III. Preemption of Civil Rights Protections For the Disabled

ADA: No preemption for laws at the local, state or federal level which address civil rights for the disabled is included.

OUR CONCERN: The litigating party should be required to choose one statute under which to proceed. ADA language is also written assuming that all cases will go through the judicial process. Administrative remedies should be available and required prior to litigating a claim in order to reduce the incentive to litigate.

IV. Small Business Exemption - Public Accommodations Section

ADA: While a small business exemption exists under Title I, no such exemption exists under Title III.

OUR CONCERN: An amendment providing similar relief for small business under the public accommodations section should be offered.

V. Anticipatory Lawsuits

ADA: ADA states that an individual can sue if he/she has "reasonable grounds" to believe he/she is about to be discriminated against in the future.

OUR CONCERN: An amendment should clarify that anticipatory lawsuits can be allowed only for future construction violations, where there is physical evidence that access for the disabled will not be possible in the future. This legislation is also written on the presumption that complaints will be taken directly through the court system. Administrative review should be considered first to reduce the amount of litigation.

VI. Violations and Penalties

ADA: When a "pattern and practice" case is brought under Title III (public accommodations section), monetary damages and civil penalties are available at the discretion of the Attorney General and the court.

OUR CONCERN: First, a distinction should be made between unintentional violations and those that are willful and egregious. Second, monetary damages should be limited to actual, out-of-pocket expenses. Third, it should be made clear that civil penalties may be imposed in cases of willful and egregious violations only.

Legislation should not provide for jury trials, punitive and compensatory damages because it will only generate lawsuits, not job opportunities. Remedies should be specifically identified and limited to back pay, front pay, injunctive relief and other make-whole remedies.

VII. Tax Credits

ADA: ADA does not offer financial assistance under the public accommodations provisions.

OUR CONCERN: Consideration must be given to the amount that a business is expected to pay to accommodate the handicapped. Financial incentives would go far in helping small businesses comply. Section 190 of the Internal Revenue Code should be expanded past the \$35,000 maximum to allow tax credits for all expenditures made to accommodate the disabled.