

Insurance Buyers' News

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Liability

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ADA Updates Effective Now

On September 25, 2008, the president signed into law the Americans with Disabilities Act Amendments Act of 2008, which clarifies and strengthens employee protections under the Americans with Disabilities Act. The law became effective on January 1, 2009. How will it affect your business?

The original Americans with Disabilities Act (ADA) became effective on July 26, 1992. Its employment provisions apply to organizations with 15 or more workers. They prohibit employers from discriminating against an employee or applicant on the basis of disability or illness, and require employers

to make "reasonable accommodations" for otherwise qualified disabled workers if it would not impose an "undue hardship" on the employer.

Since its adoption, the ADA has protected thousands of disabled workers. In Fiscal Year 2006, the Equal Employment Opportunities Commission (EEOC) resolved 15,708 disabili-

ty discrimination charges and recovered \$54.4 million in monetary benefits for complainants (not including money obtained through litigation). However, because of the law's complexity, many disputes surrounding enforcement ended up in the Supreme Court. Over the years, several of these rulings have weakened employee protections under the ADA.

This Just In

The Computer Security Institute's 2008 survey found nearly half (49 percent) of responding organizations suffered a computer virus incident, making it the most common type of computer security "incident." Next came insider abuse of networks (44 percent), followed by theft of laptops and/or other mobile devices (42 percent).

The most costly computer security incidents involved financial fraud, "with an average reported cost of close to \$500,000...The second-most expensive, on average, was dealing with 'bot' computers within the organization's network...[at] nearly \$350,000 per respondent. The overall average annual loss reported was just under \$300,000."

Respondents had also experienced domain name system incidents (10 percent) and "targeted attacks" (27 percent), or malware attacks aimed at a particular organization or type of organization.

More than two-thirds of respondents (68 percent) had a formal information security policy, while 18 percent were developing one. Smaller organizations without dedicated IT security staff may want to hire a consultant to assess their information security procedures and policies. For information on insuring your computers and data, please call us.

ADA—continued on Page 4



Don't Forget Your Fire Extinguishers

Fire extinguishers are an often forgotten part of a loss control program. To make sure they work in an emergency, they need regular inspection and maintenance.



discount premiums for businesses protected by sprinklers. Most sprinkler systems work by activating once they sense the heat of a fire. But sprinklers aren't effective for all situations. Sprinklers might not activate soon enough to prevent extensive smoke damage; they can also damage your building contents—particularly electronics. And if you rent your premises, installing sprinklers might be impractical or impossible.

That's why every business, even ones with sprinklers, needs at least one fire extinguisher per floor. A fire extinguisher can stop a small fire from becoming a large one; however, one type of extinguisher will not work on all types of fires. For best results, match the type of extinguisher to the type of combustibles in the area:

Class "A"—Ordinary combustibles (wood, paper, cloth, rubber, etc.)

Class "B"—Flammable liquids (fuel oil, gasoline, cooking grease, solvents, etc.)

Class "C"—Energized electrical equipment (wiring, fuse boxes, electric motors, etc.)

Class "D"—Combustible metals (magnesium, sodium, zirconium, etc.)

Inspections and maintenance

In time of crisis, a non-working hydrant is worse than none at all. Every organization

needs a procedure for inspecting and maintaining its extinguishers to keep them in working order.

1 Assign someone the job of inspecting all the company's fire extinguishers. If you don't have a dedicated safety department, this could be someone with maintenance or operations duties.

2 Check each extinguisher for the following at least once a month, more often if a fire extinguisher is located outdoors or exposed to extreme heat, cold, dust or dirt:

- * **Location. Is the extinguisher accessible and not blocked?**
- * **Does it have adequate pressure? On extinguishers with gauges, the needle should be in the green zone – not too high and not too low.**
- * **Are the pin and tamper seal intact?**
- * **Are instructions for use of the extinguisher posted in a visible location nearby?**
- * **Is it in good condition? A dented, rusted or dirty extinguisher might not work properly. Either clean and test or replace it.**
- * **Shake dry extinguishers to prevent settling, if the manufacturer recommends doing so.**

3 Create a checklist of items to examine during the inspection. Have your inspector complete a checklist for each fire extinguisher each time he or she does an inspection.

4 Conduct regular maintenance on all extinguishers. At least once a year, every fire extinguisher needs to be tested. This should be done by a professional.

For information on discounts you can obtain on your property insurance for having fire extinguishers, sprinklers and other fire protections, please call us. ■

In 2007, approximately 116,500 fires occurred in nonresidential structures, causing 105 deaths and 1,350 injuries, and more than \$3 billion in direct losses.

These statistics only give part of the picture of fire's devastation. In addition to direct property damage, businesses can suffer indirect damage from fire, including lost productivity, lost income and loss of market share. Experts estimate these costs at an additional \$10 billion per year.

Sprinkler systems can help prevent widespread structural damage, so insurers usually



Preparing for Flu Season

It's flu season now. Is your business prepared?

The U.S. hasn't seen a major pandemic since the Hong Kong flu, which caused 35,000 deaths in the U.S. in 1968. However, in a world where air travel brings 1.6 billion people across international borders each day, a highly infectious strain of influenza could become a global problem in a very short time.

The U.S. Centers for Disease Control and Prevention (CDC) is taking the threat seriously. Late last year, it awarded \$25 million to fund 55 projects in 29 state and local health departments for influenza pandemic preparedness.

Seasonal, epidemic and pandemic flu

Outbreaks of the influenza virus, or "the flu," occur every year, generally beginning in October and peaking in January or February. The CDC, which monitors and analyzes outbreaks, categorizes an outbreak as an epidemic when "more cases of disease than expected in a given area or among a specific group of people over a particular period of time" occur.

Pandemic flu differs from ordinary "seasonal" flu viruses or epidemics. Pandemic flu is a virulent human flu that causes a global outbreak, or pandemic, of serious illness. Pandemic flus generally occur when a virus ordinarily found in animals mutates and spreads to hu-

mans. Because people have little natural immunity, the disease can spread easily. Currently, there is no pandemic flu, although public health experts are keeping a careful eye on the avian flu, warning that it could mutate into a form that spreads more easily.

If a flu pandemic occurs, public health experts estimate it could kill 200,000 to 1.9 million people in the U.S., and 180 million to 360 million people worldwide. Loss control experts agree that businesses are woefully unprepared for dealing with this type of crisis. Businesses themselves agree: in a survey released in December 2005, "...66 percent of respondents said their company had not adequately planned to protect itself from a pandemic flu outbreak, while 14 percent said they had adequately planned and 20 percent were undecided." (Source: Deloitte Center for Health Solutions)

Some considerations for employers:

✦ **In event of pandemic, people of working age will be hit the hardest.** Unlike seasonal flu, which primarily affect the young, the old and those with weakened immune systems, in past flu pandemics, 20- to 30-year-olds suffered the highest death rates. The World Health Organization (WHO) estimates that pandemic may debilitate up to 25 percent of the workforce at any one time.

✦ **Vaccines will be ineffective.** According to the Centers for Disease Control, a vaccine's ability to protect depends on the similarity or "match" between the virus strains in the vaccine and those in circulation. Because pandemics occur when new or rapidly mutating viruses spread, existing vaccine stocks will not work—and it takes six months or more to develop new vaccines.

✦ **Public health quarantines may occur,** preventing workers and customers from coming to your business premises.

✦ **Quarantines on imports may also be imposed.** Even without quarantines, worker shortages and travel restrictions might interrupt the delivery of goods and materials your business needs.

Insurance considerations

Unfortunately, there's little coverage available for pandemics. Business income policies typically pay only when loss or damage to covered property causes a business interruption, so your policy likely will not cover income lost due to pandemic. Nor will contingent business interruption policies cover you if a pandemic closes or slows production at a "dependent location," such as a key supplier or vendor.

A pandemic could also affect your benefits program. Pension plans that pay death benefits could face liquidity problems if death rates increase. Businesses that self-insure their employee medical benefits could drain their cash flow.

Your workers' compensation program is unlikely to face pandemic-related claims, unless you are in the healthcare industry, since workers' compensation covers only work-related illnesses.

Directors and officers of publicly traded companies could face liability claims if the company experiences pandemic-related losses and shareholders allege they did not adequately prepare. Your directors and officers liability (D&O) policy may cover this type of claim. However, the best policy is to prevent this type of claim from occurring by taking reasonable steps to prepare for a pandemic.

For more information on minimizing your exposures, please contact us. ■



The 2008 Act attempts to resolve this problem by:

- Overturning four Supreme Court decisions that have eroded the disability protections under the ADA, restoring original Congressional intent.
- Rejecting strict interpretation of the definition of disability, and making it absolutely clear that the ADA is intended to provide broad coverage to protect anyone who faces discrimination on the basis of disability.
- Prohibiting the consideration of mitigating measures—such as medication, prosthetics and assistive technology—in determining whether an individual has a disability.
- Covering people who experience discrimination based on a perception of impairment regardless of whether the individual experiences disability.
- Providing that reasonable accommodations are only required for individuals who can demonstrate they have an impairment that substantially limits a major life activity, or a record of such impairment. Accommodations need not be provided to an individual who is only “regarded as” having an impairment.

The new Act retains the ADA’s basic definition of an individual with a disability as one who:

- Has a physical or mental impairment that substantially limits one or more major life activities;
- Has a record of such an impairment; or
- Is regarded as having such an impairment.

However, it changes the way that these statutory terms should be interpreted in sever-

- al ways. Most significantly, the Act:
- directs EEOC to revise its definition of the phrase “substantially limits”;
 - expands the definition of “major life activities” to include two lists. The first list includes many activities that the EEOC has recognized (such as walking) as well as activities that EEOC has not specifically recognized as major life activities, such as reading, bending and communicating. The second list includes major bodily functions (“functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions”);
 - states that mitigating measures other than “ordinary eyeglasses or contact lenses” shall not be considered in assessing whether an individual has a disability;
 - clarifies that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active;
 - provides that an individual subjected to an action prohibited by the ADA (such as failure to hire) because of an actual or perceived impairment will meet the “regarded as” definition of disability, unless the impairment is transitory and minor;
 - provides that individuals covered only under the “regarded as” prong are not entitled to reasonable accommodation; and
 - emphasizes that the definition of “disability” should be interpreted broadly.

Action Steps for Employers



If you haven’t already taken steps to update your ADA compliance procedures, here’s where to start:

1. Familiarize yourself with the new law. The EEOC’s new regulations defining what a “substantial limitation” means won’t be available until later in the year; however, expect them to be more pro-employee than pro-employer.
2. Audit your human resource policies and forms and any employee notices or handbooks to make sure they reflect the amendments.
3. Educate employees on their rights under the new, amended ADA.
4. Check your employment practices liability insurance (EPLI) limits. The revised ADA expands coverage to more people and covers more disabilities, making it easier for employees and applicants to make claims of disability-based discrimination.

For more information on complying with the ADA and other employment laws, please contact us. ■

Epidemic or Pandemic Action Steps:

- 1 Update your emergency procedures (you do have written ones, don’t you?) to include what to do if an epidemic or pandemic causes widespread illness or quarantines.
- 2 Because flu victims generally are contagious for several days, develop flexible sick-leave policies to encourage sick employees to stay at home and avoid spreading illness.
- 3 If you self-insure medical benefits, make sure you have adequate stop-loss insurance.
- 4 Identify all employees whose jobs (or essential functions thereof) could be performed at home or off-site. Develop a telecommuting program that would allow these people to work at home in event of emergency. Work with IT staff to get systems in place to allow telecommuting.
- 5 If a pandemic occurs, have nonessential employees stay at home. Avoid gathering large groups together in enclosed spaces, such as meeting or conference rooms. Substitute telecommunications wherever possible for face-to-face contact.
- 6 Educate employees on proper sanitation to prevent the spread of disease. This includes washing hands after sneezing, coughing or using the bathroom and before and after eating, and staying home when ill. Those whose immune systems are compromised might want to wear facemasks when in public. ■