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Construction Cites

A periodic bulletin citing and analyzing legal and other developments affecting the construction industry

Construction Cites is published by the law firm of Vedder, Price, Kaufman & Kammholz and edited by the Construction Law Group and its group leader, Karen P. Layng. It is intended to keep our clients and interested parties generally informed on developments in the construction industry. It is not a substitute for professional advice.
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EEOC ISSUES GUIDANCE REGARDING TEMPORARY AND OTHER CONTINGENT WORKERS

The EEOC recently issued an Enforcement Guidance on the Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms (the "Guidance"). The Guidance appropriately warns that using individuals hired and paid by a staffing firm does not automatically relieve a company of its obligations under the federal employment discrimination statutes. Rather, Title VII of the Civil Rights Act of 1964 ("Title VII"), the Americans with Disabilities Act ("ADA"), the Age Discrimination in Employment Act ("ADEA"), and the Equal Pay Act ("EPA") may apply.

Coverage

As an initial matter, these four laws exempt companies that have fewer than the requisite number of employees. Title VII and the ADA apply to any employer with a minimum of 15 employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, while the ADEA applies to any employer with a minimum of 20 employees within the same time frame. The EPA applies to any employer who has more than one employee. For purposes of determining coverage, says the Guidance, a company must count every worker,

including staffing firm workers, with whom it has an "employment relationship" (see below).

"Employee" or Independent Contractor?

Assuming the requisite number is met, the federal antidiscrimination laws apply to a staffing firm worker when the worker is an employee as opposed to an independent contractor and the company for whom the work is performed has "the right to control the means and manner" of the individual's work performance. No shorthand formula, such as the label used to describe the worker, determines this issue. Instead, says the EEOC, all aspects of the relationship must be examined. Factors which suggest the worker is an employee of the company include the following:

- The company has the right to control when, where, and how the worker performs the job;
- The work does not require a high level of skill or expertise;
- The company rather than the worker furnishes the tools, materials, and equipment;
- The work is performed on the company's premises;
- There is a continuing relationship between the worker and the company;
- The company has the right to assign additional projects to the worker;
- The company sets the hours of work and the duration of the job;
- The worker is paid by the hour, week, or month rather than for the agreed cost of performing a particular job;
- The worker has no role in hiring and paying assistants;
- The work performed by the worker is part of the regular business of the company;

- The company is itself in business;
- The worker is not engaged in his or her own distinct occupation or business;
- The company provides the worker with benefits such as insurance, leave, or workers' compensation;
- The worker is considered an employee of the company for tax purposes (*i.e.*, the entity withholds federal, state, and Social Security taxes);
- The company can discharge the worker; and
- The worker and the company believe that they are creating an employer-employee relationship.

These factors are not conclusive or exhaustive. Rather, circumstances must be examined on a case-by-case basis to determine whether an employer-employee relationship exists for coverage purposes.

The fact that the staffing agency may also have some control over the worker does not affect a company's coverage by the antidiscrimination laws. Indeed, according to the EEOC, a "client of a temporary employment agency typically qualifies as an employer of the worker during the job assignment along with the agency. This is because the client usually exercises significant supervisory control over the worker." In the event both a company and its staffing firm exercise control, they are covered as joint employers.

Liability for Discriminating Against a Nonemployee

Even if a company with the requisite number of employees under the federal antidiscrimination laws does not qualify as a worker's employer, the company may still be liable for unlawfully discriminating against the worker, according to the Guidance. The antidiscrimination statutes not only prohibit an employer from discriminating against its own employees, but also prohibit it from discriminatorily interfering with an individual's employment opportunity with another employer. Accordingly, assuming a company is subject to the federal antidiscrimination laws with respect to its own employees, it is prohibited from interfering on a discriminatory basis with the worker's employment opportunities with the

staffing firm. For example, even if a staffing firm worker is not a company employee, the company must assign jobs in a nondiscriminatory matter. Thus, assuming the company has enough employees to be covered under the applicable antidiscrimination law, the company which rejects or adversely treats a worker for discriminatory reasons is liable either as a joint employer or as a third-party interferer.

Liability: Allocation of Remedies

Where both a company and its staffing firm have violated any of the antidiscrimination laws, they are "jointly and severally liable" for back pay, front pay, and compensatory damages, including pecuniary loss and emotional distress. As a result, either a company or its staffing firm can be held responsible by themselves for the full amount of these damages. On the other hand, punitive damages under Title VII and the ADA, and liquidated damages under the ADEA, are individually assessed against each party based on their respective degrees of malicious or reckless conduct.

Conclusion

As the EEOC Guidance makes clear, an employer who uses temporary workers cannot assume it is thereby insulated from EEO liability. The same EEO practices should be applied to all employees, temporary and regular.

If you have any questions about the EEOC Guidance, contact Vedder Price (312/609-7500).

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COMMON VIOLATIONS OF THE ADA CONSTRUCTION GUIDELINES

Did you know that under the Americans with Disabilities Act ("ADA") all new construction and alterations to existing facilities must comply with the ADA Standards for Accessible Design ("Standards") and that failure to comply with these Standards can expose those responsible to liability? As successful accessibility under the ADA is often measured in inches, a careful review of the

Standards is highly recommended.

As an overview, the ADA Standards establish general design requirements for building and site elements as well as specific technical standards for restaurants, parking lots, medical care facilities, mercantile facilities, libraries and places of transient lodging. Additionally, the Standards dictate how accessibility features must be incorporated into construction.

Full compliance is mandatory for all new construction projects and for any alterations to existing facilities. According to the United States Department of Justice ("DOJ"), the only general exemption is where compliance is "structurally impracticable." Full compliance is deemed structurally impracticable only in rare circumstances where the unique characteristics of the terrain prevent the incorporation of accessibility features. For example, according to the DOJ, a marshland which requires the construction of stilts would be excused from full compliance.

To aid in ensuring full compliance with the Standards, the DOJ has identified some common accessibility errors and omissions:

Parking

One of the most common errors occurs in the construction of parking areas which can easily exclude an individual with a disability. Some examples are as follows:

- The curb ramp projects into the access aisle preventing access to an individual in a wheelchair.
- The accessible parking space and access aisle are not level in all directions, which can cause a wheelchair to roll away from the vehicle, thus preventing safe access getting to and from the vehicle.
- There is no available route from accessible parking to an accessible entrance.
- No van-accessible spaces are provided in the parking area.

Accessible Routes

Another common error is found in pedestrian routes from accessible parking spaces, passenger loading zones, public transportation stops and public streets and sidewalks which are not accessible to the available entrance(s). Some examples include these:

- The curb ramp located across a circulation path has steep, unprotected side flares.
- The landing areas where ramps change directions are too small for wheelchair maneuvering.
- Ramps with slopes that exceed 1 inch of height to 20 inches of length (or 1:20) lack handrails and edge protection.
- Handrail extensions are not provided on the top and bottom risers of staircases.

Doors

The construction and installation of doors can also violate the Standards by preventing access by an individual with a disability. The following are examples:

- Adequate maneuvering clearance is not provided at doors, including doors to accessible toilet stalls.
- The shape of the door hardware requires tight grasping, pinching and twisting of the wrist to use.

Circulation Paths

Failure to leave adequate space in a circulation path which can result in a dangerous obstacle for an individual with a disability is another common error. For example:

- Objects protrude into circulation paths from the side or from posts which can cause serious injury to blind persons who cannot detect these objects from the sweep of their canes.
- Objects that overhang circulation paths preclude clear headroom.

Bathrooms

Similarly, public and common use bathrooms frequently are not accessible as required under the Standards. Common defects include these:

- Bathrooms with six or more toilet stalls lack a 36" wide ambulatory toilet stall.
- The door to the bathroom swings into the clear floor space obstructing accessible fixtures, controls and dispensers.
- When a transfer shower is used, it is often larger than the mandated 36" by 36" size.

Signage

Failure to mount signs as specified also violates the Standards because it can cause problems for blind or hearing-impaired individuals who expect to look in a consistent location for signs.

Visual Alarms

Although an audible alarm system is installed, if no visual alarms are provided, people who are deaf have no way of knowing that a building emergency has been declared.

Drinking Fountains

The inappropriate mounting of the spout of a drinking fountain can deny access to an individual with a disability in violation of the Standards. Typical violations are:

- Fountains are mounted too high for wheelchair access.
- Fountains are mounted too low for people who have difficulty bending over.

Restaurants

Failure to comply with the Standards can easily result when full access to food service areas to a person in a wheelchair is denied, as in the following instances:

- The area is too narrow and does not provide adequate clearance width for wheelchair

maneuvering.

- Condiment or utensil items are placed above the reach range of a wheelchair occupant or are not located in an accessible route.

Transient Lodging

In lodging facilities of 50 or more sleeping rooms, specific accommodations must be made available for individuals with disabilities. Errors in meeting the Standards often include:

- No rooms with roll-in showers, or the roll-in showers that are provided lack a fold-down seat.
- Wheelchair accessible rooms are not equipped with visual alarms and notification devices.
- Doors into and within guest rooms that are not accessible guest rooms do not provide a clear opening width for wheelchair access.

According to the Civil Rights Division of the DOJ, this sampling of common errors and omissions is intended to serve as a helpful tool; however, it is not a comprehensive or exhaustive list. The importance of compliance cannot be over-emphasized; when the ADA's minimum requirements are not met, a person with a disability may be inadvertently excluded or injured and liability can be imposed on those responsible for the error.

If you have any questions about the common violations of ADA Construction Guidelines, call Karen P. Layng (312/609-7891) or any other Vedder Price attorney with whom you have worked.

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THE ADA MAY APPLY TO ARCHITECTS, TOO

A federal district court in Minnesota has ruled that architects are not excluded from liability under the new construction provision of the Americans with Disabilities

cooperative associations.

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Act ("ADA"). Just as building owners and managers are potentially liable, architects now may also be sued where new construction violates the ADA. In so holding, however, the court left unanswered the question whether an architectural firm faces liability if its only involvement on the project is the *design* and if it has no involvement in the *construction* of the facility.

In *U.S. v. Ellerbe Becket, Inc*., 976 F. Supp. 1262 (D. Minn. 1997), the United States Department of Justice sued the architectural firm Ellerbe Becket, contending that Ellerbe Becket had designed several sports arenas and stadiums which failed to comply with the ADA's requirements regarding "lines of sight" for patrons with disabilities. The lines of sight requirement mandates that wheelchair users must have lines of sight to the floor or field which are comparable to those of other spectators. Specifically, wheelchair users must be able to see over the heads of spectators standing in front of them during sporting events.

In the *Ellerbe Becket* case, Ellerbe Becket sought to dismiss the lawsuit, contending that architectural firms are not subject to liability under the ADA. It argued that under the applicable section of the ADA, the only parties potentially liable are those who own, lease or operate a place of "public accommodation," a category which generally excludes architects. ("Public accommodations" are defined as facilities whose operations affect commerce and fit within one or more of twelve specific categories of public accommodations.)

The court disagreed, finding that the new construction provision of the ADA also covers "commercial facilities" in addition to public accommodations. Commercial facilities are those intended for nonresidential use whose operations affect commerce. Thus, the court refused to limit liability to owners, operators, lessors or lessees of public accommodations, as the result would leave no entity liable for violations of new construction accessibility standards for buildings which are only commercial facilities and not public accommodations. In so doing, the court relied on its finding that Congress clearly intended commercial facilities to be subject to the ADA's accessibility standards for new construction.

Under the ADA, new construction and alterations to existing construction must comply with the ADA's

Accessibility Guidelines. The Guidelines contain general design standards for building and site elements, such as parking, accessible routes, ramps, stairs, elevators, doors and entrances. They also include specific technical standards for restaurants, medical care facilities, mercantile facilities, libraries and hotels. Additionally, the Guidelines provide for how many, and under what circumstances, accessibility features must be incorporated in new construction or alterations.

Ellerbe Becket also argued that the ADA imposes liability only for entities which both design *and* construct facilities that are inaccessible to people with disabilities, and thus architectural firms should be exempt because they generally do not construct buildings. However, rejecting the proposition that architects are never involved in the construction of buildings, the court refused to decide whether such firms are exempt if they only design the facility. Since the Justice Department alleged that Ellerbe had participated in both design and construction of the stadiums and arenas, the court said it did not need to decide whether a party may be liable where it only designed a facility and did not participate in its construction.

Ellerbe Becket is consistent with an earlier case decided by a federal district court in Florida holding that architects are subject to liability under the ADA's new construction provisions. *Johanson v. Huizenga Holdings, Inc.*, 963 F. Supp. 1175 (S.D. Fla. 1997). In that case, the Florida court reasoned, "If architects are not liable under the ADA, then it is conceivable that no entity would be liable for construction of a new commercial facility that violates the ADA."

Accordingly, design firms must be careful that any specifications, drawings or other design criteria conform to, and meet, all ADA requirements to avoid significant liability by way of DOJ fines or punishment and potential civil suits.

If you have any questions about how the ADA applies to architects, call Karen P. Layng (312/609-7891) or any other Vedder Price attorney with whom you have worked.

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