The Americans with Disabilities Act (ADA) has opened a lot of doors for people with hearing loss to venues such as movies, television, sports events and live theater. The law also attempts to provide us with similar benefits and protections in the workplace. But for a number of reasons, the impact of the law in the workplace is limited.

The Workplace and the Law

By John Waldo

An important up-front limitation on the reach of the Americans with Disabilities Act (ADA) is that small private businesses are exempt. The ADA applies only to private employers with 15 or more employees. Many businesses have fewer employees, and are exempt. But because larger businesses and government agencies employ more people than exempt smaller businesses, the majority of workers are covered

Conceptually, the ADA requirements are quite simple. Covered businesses may not discriminate against individuals with a disability who are capable of performing the essential functions of the job with or without a reasonable accommodation, unless providing the accommodation would impose an undue hardship.

While that formulation is easy enough to state, it contains a number of terms that do not tell either the worker or the boss what either must do in any specific situation. A considerable number of judgment calls are involved, and most close calls go to the boss. Worse yet, many courts and juries seem to feel that the ADA is somehow unfair. The result is that except in rare cases of overt and blatant discrimination, workplace cases based on disability discrimination are difficult to win.

What Constitutes Actual Discrimination?

This can be trickier than it seems is to ascertain what constitutes actual discrimination. In the absence of persistent harassment, prohibited discrimination requires a specific adverse job action—failure to hire or promote, demotion, significant discipline, or discharge. Some actions that an employee might find personally offensive, such as not including the worker with hearing loss in after-hours social events, would not rise to the level of an adverse job action, although such actions might be evidence of discrimination if an adverse job action is ever taken.

Define Essential Functions of the Job

The underlying concept here is generally protective of the worker with a

disability—the inability to do something only marginally necessary for doing one's job can't be the basis for an adverse action.

But there are a couple of catches. First, the boss has considerable leeway to define "essential functions," and as a practical matter, bosses are usually able to persuade hearing judges or juries that the ability to communicate readily is essential in a lot of contexts.

Second, the worker has virtually no entitlement to any kind of accommodation not geared to performing an essential function. For example, an attorney with a hearing loss would likely be entitled to an amplified telephone to make business calls, whereas a file clerk with hearing loss would not be entitled to an amplified phone to call for pizza or talk to his or her children.

To obtain an accommodation, the employee must disclose the disability and furnish medical proof if asked. The boss and employee then engage in an "interactive process" to determine whether a reasonable accommodation is available, and what that might be. Certain accommodations for people with hearing loss are obvious and are usually easily obtained—amplified or captioned telephones, or a cubicle in a quiet area. Others are sometimes sought but are never considered reasonable, such as assignment to a different supervisor.

A change in job description is a tricky area—the boss need not reduce the performance expectations of the existing job, but might need to restructure the job requirements or consider a transfer to a vacant position. Nor does the boss need to provide special privileges, like putting a worker with hearing loss into a private office if others with the same job classification are in cubicles. Nor is a transfer required if it would violate union seniority rules.

Undue Hardship

The boss need not provide an accommodation that would impose an "undue hardship," and unfortunately, there is virtually no guidance as to when a financial burden crosses the line from a "due" to an "undue" hardship. The more significant issue is that "reasonable" accommodation and "undue" hardship are not two sides of the same coin, but are separate inquiries.

Businesses do not fire or demote good workers, disabled or not, which means there is almost always some explanation for the action that does not involve disability.

For example, it would not impose an undue hardship on Walmart to engage a sign language interpreter to enable a greeter who is deaf to interact with the public. But it would be difficult indeed to persuade a court or jury that it would be reasonable to require Walmart to spend many times the wages of a low-paid worker to hire interpreters.

Disclosing Disability

A practical question that arises continuously is when or whether a worker should disclose the hidden disability of hearing loss. Employers cannot ask about a disability prior to extending an offer of employment. But the need for an accommodation and, therefore, the need to disclose might well arise in the pre-offer stage.

For example, if the employer conducts preliminary telephone interviews, an applicant with the hearing loss faces the uncomfortable choice of either trying to get through it—hoping that the interviewers aren't using a speakerphone—or disclosing that he or she is using a captioned phone or video relay service. Or if an interviewer suggests adjourning to a noisy restaurant or bar, the applicant might face the choice of declining and asking for a quiet location or accepting and having a difficult experience.

What if Things Go Badly?

If a worker with hearing loss is subjected to an adverse job action like discharge, the worker can file an administrative complaint with the federal Equal Employment Opportunity Commission. Should the EEOC not resolve the matter, the individual can file a private lawsuit. But to prevail, the worker has to show that the action in question was taken because of the disability.

In practice, that showing is extremely difficult to prove. Businesses do not fire or demote good workers, disabled or not, which means there is almost always some explanation for the action that does not involve disability.

As imperfect as the ADA is, it works much better for existing employees who become disabled than it does for applicants. Unless an employer is dense enough to state in the "so sorry" rejection letter that the applicant was rejected because of disability—and I have yet to see that happen—the business can almost always claim that another applicant was simply more qualified. The frustrating irony is that an underlying reason for not hiring an individual with a disclosed disability could be fear of being sued.

The ADA has been a significant benefit to workers with hearing loss by elevating consciousness about disability and accommodation. But it is not a particularly effective remedy. As Gallaudet's first deaf President I. King Jordan has said, "Deafness can be frustrating, but deafness can also be hilarious."

Our best workplace tools are a realistic appraisal of what we can and cannot do, a great attitude and a sense of humor. ***HLM***

John Waldo is an attorney whose practice focuses on legal issues arising out of hearing loss, a practice that combines his 25 years in the courtroom and his lifetime experience with a significant hearing loss. He practices principally in Washington state and is the advocacy director and counsel for the Washington State Communication Access Project, www.wash-cap.com. *He and his wife Eve divide their time between Portland, Oregon and Houston, Texas.*