



EPISODE 53: SMALL BUSINESS AND THE ADA

Event Date: February 7, 2018

Presenter: Beth Milito, Senior Executive Counsel of the National Federation of Small Business

Host: Barry Whaley - Project Director, Southeast ADA Center

VOICE-OVER ANNOUNCER: Blog Talk Radio. (Music) Welcome to WADA ADA Live! Talk radio. Brought to you by the Southeast ADA Center, your leader for information, training and guidance on the Americans with Disabilities Act, and here's your host.

BARRY WHALEY: Good afternoon, and welcome to WADA ADA Live! On behalf of the Southeast ADA Center, the Burton Blatt Institute at Syracuse University and the ADA National Network, I want to welcome you to episode 53 of ADA Live!

Hi everybody, my name is Barry Whaley, and I'm the project director for the Southeast ADA Center and I'm your host today.

Today's episode of WADA ADA Live! will be discussing small business in the ADA. The Americans with Disabilities Act requires that businesses make reasonable accommodations for qualified employees with disabilities under Title I of the act, but keep in mind that Title I only applies to businesses with 15 or more employees.

Title III of the ADA, though, requires that businesses regardless of how many employees they have makes their goods and services available to customers and clients with disabilities.

In this episode, we'll discuss small business concerns, challenges, and best practices in accommodating both employees and customers as required under the ADA. Before we begin, just as a reminder, ADA Live! listening audience, you can submit your question about small business and the ADA at any time at our website. Adalive.org

It's my pleasure now to introduce our guest for today, Beth Milito. Beth is a senior executive counsel for NFIB, the National Federation of Independent Businesses. NFIB

represents about 300,000 small businesses in every state and focuses on federal and state policy and compliance assistance on all small business issues.

So Beth, welcome to our show!

BETH MILITO: Barry, thank you so much for having me today!

BARRY WHALEY: Sure. It's great. Beth, let's get right into it. Let's start talking about some of the big concerns you hear from small businesses when it comes to ADA compliance.

BETH MILITO: And I think the biggest question I get from small business owners relate to the who and the what. Those two "W" questions. As a small business owner, you generally know that certain legal provisions might not apply to your business under a certain size. We have a lot of laws with employee thresholds. And as you said in our introduction, there is Title I of the ADA does contain an exemption for businesses that employ fewer than 15 people. But Title III is any business open to the public, regardless of the size of the business.

So the who, who does it apply to, who is covered.

And the second, what do I have to do. Oh my gosh, this provision applies to me. What do I have to do? The who and the what I hear from most often for small business owners. And I think the second theory with the what is concerns over cost, particularly with a public accommodation. Oh my goodness, how much will this cost? How far do I have to go? How much do I have to do? So I think those are the two biggest concerns, you know, who and what.

BARRY WHALEY: Right. I understand. And we're going to talk about cost a little bit later in the show. But that's interesting.

So I'm curious. What challenges have small businesses faced in going back to your issue of the what and accommodating. Let's start with employees. What concerns have they had in accommodating employees with disabilities?

BETH MILITO: And I think most recently I'm hearing more concerns related to the lead issues and requests for leave. So as you said at the outset, Title I of the ADA applies to all small businesses with 15 or more employees. But I will tell you Barry that almost regardless of size, small business owners have an awareness of the ADA. And as you know many states have a disability law that has a lower employee threshold, which many small businesses are aware of and know they're subject to.

There is I want to do something, I need to do something. Again, what is it I need to do? And then when it comes to these requests for leave that sometimes come in from

either the physician or physician's note, or an employee. And it does seem that more often physicians almost seem to assume that hey every employer is going to be able to provide four or six weeks of unpaid leave as a reasonable accommodation. And that's simply not the case when it comes to a small business. And I'll give an example of something that again this probably comes up about once a week. I get a call from a small business owner who again wants to do something for the employee, understand the employee needs some sort of accommodation. The business owner may not be using that term "accommodation." But it's more, you know, "Employee X, I want to do something for them. They can't continue in their current position. And I got a note from their physician saying they need six weeks' leave. I'm not sure if I can do that. Is there something else?" So working with the business owner and going through what the law is and what the law requires. And letting the business owner know some probing can be done.

Again, that's not the legal term. But you are allowed to inquire a little bit more about, you know, what the employee's limitations are and you are allowed to maybe make, you know, a counter offer.

As I said, more often nowadays physicians just assume that every employer is the same and is going to be able to okay we're going to give Beth six weeks off and that's not going to be a problem. She'll come back in six weeks and everything will be fine. That's just not the case.

And maybe there is something the employee can do, you know, light duty. Or maybe, you know, in three weeks the employee could come back and do light duty. So working through with business owners that, you know, this kind of unpaid leave might not work for you. But then it's not necessarily what the law requires. There may be another accommodation that the would work out.

BARRY WHALEY: Right. And I think the courts themselves would have led to some confusion with this, Beth. There is no depending on the circuit, there are different rulings in regard to leave. So that adds to the confusion, as well. Plus, you know, not only ADA, but then we also have FMLA might apply in situations, depending on the size of the business, as well. So again, it comes back to that confusion of the who and the what. Wouldn't you say?

BETH MILITO: Yes, exactly. Exactly. I recently talked with a business owner.

And this was a small business. Under 10 employees. And he had kept an employee on payroll for over 1 year. So on payroll, on paid leave, for one year. And the employee, again the business owner was not subject to any family leave. Certainly not the federal FMLA, which is the 50 employee threshold. But kept them because of his own goodwill and also because he was not aware of what the law required. And he

said I was kind of thinking I should have checked. He just assumed he couldn't do anything or even ask anything. And after talking with me and consulting the employee, both the employee and the employer agreed that it was best for the employer to work on a disability application. Because the employee said to the employer, the business owner, I'm never going to be able to come back to work. But it had taken 12 months for the business owner to kind of get up the courage to poke the bear, if you will. And gee! How long does this need to go on for?

Again, you know, kind of afraid to ask sometimes I hear from business owners. So it can be very challenging.

And you're right, too. With the courts there isn't necessarily a clear answer on the leave issue, the unpaid leave issue.

BARRY WHALEY: You know, it's interesting you mentioned the employer continuing someone on full pay for a whole year while they're off or whatever. And to me, and this is a little off script, but it sounds like this is kind of how Americans see the essence of small business. That small business itself is very welcoming and very much, or perhaps more interested in their employees than perhaps a larger organization.

BETH MILITO: I would agree with that. I've been at NFIB now for almost 15 years and I agree wholeheartedly with that. That's the beauty of being an employee in a small business. There is more flexibility that is afforded to employees. And in this situation, too, I would add that the employer had continued to pay benefits. And that was one of his big concerns with doing a termination. Gee, this gentleman is now not only going to get a paycheck, but is not going to have benefits anymore. But on the flip side, the business owner just could not. This was becoming very much a hardship for the business.

But, you know, as I said I think together finally reaching out to the employee and involving the employee's doctor, too, then, you know, I think ultimately a result was reached. I think long term, it's going to be better for everybody.

BARRY WHALEY: Right. And thank you, Beth. I appreciate that. So let's switch gears for a minute. Because you mentioned cost is always an issue, especially with small businesses. And I'm wondering, Beth, let's talk about resources and tax credits, tax deductions, that might be available to small businesses to comply with ADA and barrier removal. For instance, we know that there's small business tax credit that allows for barrier removal. And that credit is a \$5,000 credit. Then we also have the architectural reduction that any business regardless of size could use that would allow for barrier removal up to \$15,000. And I'm curious small businesses, do you believe that they are aware of these resources and utilize them?

BETH MILITO: Unfortunately they are not aware. I know that for a fact. And very often, too, their tax professional, whether it's an accountant or CPA or even just a bookkeeper is not aware that these resources are available, too. And that's unfortunate because it would be a big help. I mean in a small business where even, you know, redoing the lines in your parking lot is an expense that the business owner may not necessarily have planned for. To say nothing of oh gee I think I need to renovate my bathroom to make it accessible. So these are resources that I think would help a lot of small businesses come into compliance or to better comply. I mean, and as you know, barrier removal is an ongoing obligation, too. So it's almost as though in some businesses there's always improvements you could be making, too. So it would be great if these resources could be better publicized. I mean I know that's something that the national network does a great job of doing. Here at NFIB, I also try to make business owners aware of it. And making tax professionals aware that this is available, too, would be a great thing.

BARRY WHALEY: All right. Thanks Beth. So we've talked a little about the what. Let's talk a little more about the who and talk about accommodations that small businesses have made for people with disabilities. Can you talk about some successful accommodations among your membership that have helped to make somebody successful?

BETH MILITO: Yes. And at the outset, I want to say I think often a small business might be too quick to dismiss a request for accommodations because of son sensor about cost. And for the reasons we just discussed, because there are sometimes tax incentives that are available to help. And also sometimes community organizations. And I'll go back to that. That can help too. So I would say to the small business owner, don't automatically dismiss a request for accommodation simply because of cost. Not only could it be a violation of the ADA, but there's often alternative funding options that could be available such as state programs or county programs or tax deductions.

And the example I'll go back to was a business owner who had a request from an employee for a listening device. It was essentially a new phone. It was a very small business. Only two employees. And the business owner just did not have even \$100 to make any sort of office upgrade, if you will. It was the employee who mentioned gee you might be able to call a community college that offers grants, you know, essentially free checks, free money if you will, to buy this device where the employee was a student at the time. And sure enough the business owner called the community college, and the community college covered the cost of the new phone. So at the end of the day you had a happy employee, a happy employer, and just really the business owner was thrilled and he said, you know, I just didn't know services like this were available. That the help like this was available. He was prepared to go out, you know,

and use his credit card to purchase the equipment. And he shared that at the outset. This was not a situation where the business owner had said no, I can't afford it. It was I don't have the cash in the bank to do this, so I guess I'm going to have to go out and charge this and I don't know when I'll pay off that credit card bill. That's just an example of don't automatically dismiss a request for an accommodation.

You know, another situation I had a few years ago was with a business owner who owned a gas station. And an applicant had come in and he was looking for a new attendant.

And an applicant came in who only had one arm.

And the business owner, he called me because he said I don't think, you know, again awareness about the ADA. He said I don't think this individual is a good fit. I said why? He said in the state or town he was in rather we get a lot of requests from elderly folks and others who are disabled and need assistance pumping gas. We are very community friendly and we are out there a lot of times pumping gas. And I said well does this applicant, has this applicant told you that he cannot pump gas? Well no. He told me that he could. And I said well have you, you know, and you should do this probably with all your applicants. Not just one. You don't want to single out any one individual. But bring him in. Give it a try. Give it a go. If otherwise he is the best qualified and has the personality for the job, which was obviously very important because they're customer focused, you know, give it a go. And sure enough, not a problem at all. Whereas the business owner's initial thought was gee, how could this person do this? That's not the way to go about it. It's changing the mindset if you will, Barry. And again it all worked out. This is also, too, a reminder.

And I say this when I do seminars on the ADA. Remember it apply to applicants. It was a good situation where the business owner knew that. He had not said no. He was just calling for some assistance and working through. Again, I know that's the kind of thing that the ADA National Network is so good at doing with business owners. You all are the experts in working through what could be a possible accommodation. How can you make this work?

BARRY WHALEY: You know, that's interesting because obviously a lot of times in hiring regardless of the size of the business, Beth, that there is unconscious bias and play on the part of somebody hiring. You know, the assumption being made that someone that only had one arm could not pump gas. So sometimes challenging ourselves in regard to those biases is a good thing in being aware.

BETH MILITO: Exactly. Exactly. And, you know, this is a situation, too, where I suspect the business probably had less than 15 employees. But there was never any, you know, I'm going to rely on this threshold to get out of this law. That's not what I

hear from business owners. It's what can I do and how can I go about doing this, you know, also keeping in mind that I've got limited means necessarily. Work on both sides.

BARRY WHALEY: Right. And it's good you bring up the point of resources. Because often we don't, we as business owners, people as people who employ people, don't know what the resources are in our community. And then when we start looking and we're surprised at how broad those resources can be. So thank you, Beth. I appreciate that. Let's talk a second about small businesses and what they face in terms of physical accessibility.

BETH MILITO: And that is probably the more challenging area, I think, or what I hear about more. Because, you know, again that does not have the size exemption there. So Title III, the public access portion of the ADA apply to all businesses regardless of size. So small business owners really need to ensure ongoing compliance to avoid potential legal liability.

And, you know, some of the things that business owners, I counsel them to do kind of, I don't want to say the easier things, but the more obvious things is, you know, you need to have an ongoing effort to make sure that your business, you've done all you can to be accessible. So starting with if you have a parking lot, you know, take a look. What is your parking lot. Do you have, are there anybody parking spaces that are well marked? Sized correctly? Free of clutter. It's not the spot that if you're a restaurant, that your delivery guy just pulls up in to hop in and out of. It's kept up and accessible at all times. You want to make sure that your business is welcoming at the get go. Inside the business, when it comes to inside the business. Can individuals with disabilities enter and move around the business freely. Are displays or display boxes in the way? You see this sometimes in retail stores. It wasn't there originally, but as you've done a new display or whatever, again you've got that ongoing obligation to make sure that, you know, you've done your barrier removal. Every day. You know? Check it out and make sure. Because somebody with a disability moves through this business, moves through these aisles freely. There's an accessible and it's wide and it remains clear.

And then the third thing I will say, kind of through the parking lot, accessibility in the business, and then the other thing is service animals, too. So I think, you know, I come across businesses. I live in Alexandria, Virginia. Kind of an old, quaint, historic town. I saw a sign that said absolutely no animals. That's probably not the best sign to have up there. Or "service animals are welcome." I've seen that too, with an exclamation mark.

Small businesses need to welcome individuals with disability and their service animal. You need to make sure you have a clear policy and that you communicated this policy to your employees, too. That's very important. That service animals are welcome. And there is no, you know, license that you can access. If you ask to see any sort of license, that's illegal. If it's a service animal, that's it. That's where it stops. Or in some instances I have talked to business owners who have had a pony come in. But communicating that to your employees. That's very important that employees are aware of that, too.

And just having a way to communicate with customers who have vision, hearing, or speech disabilities is very important. You know, if you're a restaurant. Again, this is working through, you know, what can we do? How can we accommodate the individual? It doesn't mean that every restaurant needs to print up braille menus. But there are other ways that you can communicate the menu to individuals reading them out loud, for instance. But just make sure that your staff knows there is an obligation to do that. And would never come out and say no. So I think those are just a few things that small businesses can do that I encourage them to do. You know, every day making sure that everybody knows that you're open and available for business. And you'll do all you can to make sure that everybody can take advantage, everybody in the public can take advantage of all your services and all your goods.

BARRY WHALEY: Those are all excellent points, Beth. Thank you so much. ADA Live! listening audience, if you have questions about small businesses and the ADA or any of our other ADA Live! topics, you can submit your questions any time at on line forum adalive.org. That's adalive.org. Let's pause for a minute now for a word from our sponsor, the National Federation of Small Businesses.

VOICE-OVER ANNOUNCER: National Federation of Independent Business is America's leading small business association, promoting and protecting the right of small businesses to own, operate, and grow their businesses. Check out NFIB's free online business resources, read about our latest advocacy efforts and discover how NFIB is working to protect the rights of small business owners coast to coast. Each day, NFIB publishes brand-new business resources to help small business succeed and grow, including tips for business success, information on how the newest laws affect you, innovative business ideas and more. To learn more about the NFIB visit their website at: www.nfib.com.

BARRY WHALEY: Hi folks, and welcome back to the show. We're talking with Beth Milito, senior executive council with the NFIB about small businesses and the ADA. Beth, I think we avoided the topic for long enough and it's kind of the elephant in the room that needs to be addressed and this may be the time. Regarding Title III lawsuits, is this a real threat to small business? Or is this exaggerated fiction?

BETH MILITO: It's a real threat to small businesses. The 2016 lawsuit count, I think was pretty remarkable with 6,601 ADA Title II lawsuits that were filed just in federal court. And this is an increase over 2015. So the threat is real!

Now I do want to say that lawsuits aimed at bringing about compliance with equal rights laws like the ADA are important in advancing the cause. I agree with that point. But some of the serial litigators I think do more to rake in damages than increase accessibility. And the media, you know, stories about the lawsuits, too. It gets small business owners' attention. And goes back to the concern over the cost. Because they see these headline lawsuits, you know, and over accessibility. As soon as they get a demand letter or anything, it's kind of fear and panic. And they just kind of want to make it go away. A business owner who receives a demand letter for tens of thousands of dollars of payment is almost always going to choose to pay rather than litigate. Pay the minimal amount just to make this go away. Because they know legal fees, court, everything, is expensive. And that just really doesn't do anything. That payment to increase accessibility.

BARRY WHALEY: Yeah. And I think it's important, Beth, to make the distinction, I think you have here, between serial litigators and the law itself. That the issue here is not the value of the law or the value of compliance on the part of small business in regard to either hiring or physical accessibility. And just to make sure that we understand that distinction, we have had two previous WADA episodes on these very topics. Episode 18 and 19, which were earlier episodes. Episode 18 is entitled "When attorneys come knocking, how accessible is your business." And there is episode 19 "Before attorneys come knocking, readily achievable barrier removals."

Beth, let's move on. The workforce is aging. Additionally, we know that the way we shop for goods and services has dramatically changed just the last five or ten years. Thank God for Amazon. I never have to leave the house. So now we have to be concerned with both physical accessibility and Web accessibility. How can small business meet these future challenges?

BETH MILITO: And it is a challenge, Barry. You're right. Right now we don't have any website accessibility regulations. Courts are all over the place in the lawsuits that have been filed. And there are no real clear guidelines as to what is required of a business when it comes to designing a website and accessibility. I will just say when a business owner has asked me and asked me about anything ADA related, whether it's Title I or Title III, I tell them don't be afraid to seek help. If you get a request, whether it's from an employee or a customer, and I mean maybe it's something off the bat easy. But if it's something that's going to require, you know, a structural change or anything, don't be afraid to reach out and seek help. In other words, a knee jerk reaction would be to say no, don't do that, seek help. Again, the ADA National Network, you all are

phenomenal. The centers are phenomenal. And just a great resource. And, you know, call. Ask for help. You know, I'm not sure I'm doing this right. I'm not sure my website is right. Is there something else I can do to make it better? Reach out for help.

BARRY WHALEY: Very true. Thank you, Beth. And we do have throughout the network people who are just very talented, especially in terms of virtual accessibility. So, you know, please use the national network as a resource.

What's one thing, Beth, that you would like to share with disability advocates when it comes to small business and the ADA? A lot of our listeners are disability advocates and what would you like them to know?

BETH MILITO: The small business owners, when it comes to ADA regulations don't have detailed awareness. So they're poorly socialized among small business owners. The regulations. Again, awareness that there's the law and, you know, in most instances the public accessibility applies to all businesses. But the regulations themselves are very complex. They're very long. They're very technical, particularly the Title III regulations. Very technical. And small businesses don't have the expertise or the capital to understand the regulations. They need help. They want help. And if a business owner's first notice of noncompliance with the law is a demand letter, that's not necessarily in my opinion a good thing. A good way about making sure the business gets in compliance. Because at the end of the day, that's what we all want. For the business to be in compliance and to be open and accessible to the public and to employees, too.

So just keeping in mind that it can be very challenging for a small business owner to know all the details when it comes to the ADA regulations. And as we've talked about repeatedly here today, Barry, their resources are limited.

BARRY WHALEY: Very true. And Beth, I'll just throw in a commercial now and I will at the end, too, is that questions about ADA and questions about compliance, we have wonderful technical assistance people that you can reach through our 800 number. And that number is 1 800 949 4232. People can reach out to us because it is a very complex law. And it's very difficult for a small business or for anybody really to understand.

Beth, ADA.gov. It's a division of the United States Department of Justice, the Civil Rights Division, they have an online course called reaching out to customers with disabilities. That explains how the ADA applies to businesses in ten short lessons. Beth, I'm wondering if there are other resources you can recommend that would be helpful to get more small businesses into compliance with ADA?

BETH MILITO: I mean to start with, businesses can all be NFIB members, you don't have to be an NFIB member, but you can call NFIB. 800 NFIB now. And more often, Barry, I do refer them out to experts, like the ADA national network. I know the EEOC has guidance at EEOC.gov on the Title I provisions of the ADA. That can be helpful.

The Department of Justice I believe also has a hotline. And in addition, they have a small business guide, which is available at www.ADA.gov. And I share that with business owners when they're dealing with the Title III provisions of the ADA. There are a lot of resources there and it's publicizing and getting the word out to small business owners. And there are a lot of free resources available, too. And that's wonderful.

BARRY WHALEY: Great. Thank you, Beth. That's good information. The resources Beth mentioned, as well as some others, these resources can be found on our ADA Live! website under "resources." And we're about out of time, Beth. So as I like to do, near the end of the episode, I want you to pull out your crystal ball, dust it off, and tell us what the future looks like for small businesses.

BETH MILITO: Well, from our economic trends survey, we're getting very positive readings, very positive feedback. Business owners that I talk with are looking to hire. You know, it can be a challenge finding qualified workers, particularly in some areas of the country. But they're really looking to hire. And I think this bodes well for those looking for jobs out there.

And I think that, you know, working together with other groups like yours, too, and getting the word out about resources that are available, it will make it, it will help small businesses that might be, you know, concerned or have hesitation about hiring, you know, an individual with a disability. Knowing that there's help. Knowing that there's assistance. That it's not going to be quite as challenging or problematic or expensive as they might think is a great thing.

BARRY WHALEY: Thank you so much. Beth, we're about out of time. You've been a great guest. Listeners, our guest today was Beth Milito, the senior executive counsel with the National Federation of Independent Business. I want to remind you that this episode and all previous episodes are available at our website, adalive.org. Episodes are archived in a variety of formats. Streaming audio, accessible transcripts of audio. We also have a Spanish language version of our shows. And they're available to download as pod cast to listen at your convenience. I want to thank our ADA Live! listening audience for tuning in today. As always, we're thankful for your support and listening to this series of ADA Live! broadcasts. Finally, as a reminder, if you have questions on any of the topics at ADA, you can go to adalive.org. And I hope you'll join

us on March 7th for our next episode. We'll be talking with representatives from the National Council of Aging about aging in place.

Finally if you have questions about the Americans with Disabilities Act, you can always contact your regional center at 1 800 949 4232. Again, that's 1 800 949 4232. And remember, all calls are free and they're confidential.

VOICE-OVER ANNOUNCER: (Music) Thank you for listening to ADA Live! Talk radio. Brought to you by the Southeast ADA Center. Remember to join us the first Wednesday of each month for another ADA topic, and you can call 1-800-949-4232 for answers to your ADA questions.
