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# Legal Forum

## Americans with Disabilities Act

### Physician-Shareholder Practice Groups and ADA Compliance

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This article examines the application of Americans with Disabilities Act requirements to professional associations like physician practice groups. In general, employers with 15 or more full-time employees must comply with the Act. However, the definition of an employee is sometimes unclear, especially as applied to business entities commonly used by physician practice groups. A recent case decided by the United States Court of Appeals for the Ninth Circuit held that physician-shareholders of a professional corporation are employees for Americans with Disabilities Act coverage purposes. Analogous cases in other federal circuits have held differently, likening the "owners" of professional corporations to partners in a partnership, who are not considered employees. Similar questions arise for popular business entities, such as Limited Liability Companies and Limited Liability Partnerships. This article discusses the nature of the business forms commonly used by physician practice groups and how their characteristics impact employee status for Americans with Disabilities Act coverage. It then suggests that examination is useful beyond business formation characteristics to the purpose of the Americans with Disabilities Act and other employment antidiscrimination statutes. [Key words: Americans with Disabilities Act, employees, physician practice groups] **Spine 2003;28:309–313**

*Spine* professionals and other practicing physicians must comply with federal and state disability employment antidiscrimination laws. The employment provisions of the Americans with Disabilities Act of 1990 (ADA), Title I, cover only those physician practice groups with 15 or more full-time employees.[2,4,5] However, the ADA's definition of an employee is unsettled, especially with regard to physicians practicing in small organizations.

The 15-employee threshold is relevant for physician practice groups because ADA coverage may turn on whether the physician owners are considered employees under the law. By understanding the nature of business entities used by physician groups and the interplay between the ADA and other employment discrimination laws, *Spine* professionals and others can make more informed decisions about which business form suits their practice needs and risk management concerns.

This article examines the circumstances under which physician-owners of professional associations are considered employees for purposes of ADA coverage. It discusses the two primary approaches taken by federal courts when ruling on the issue— one line of cases holding physicians are employees, the other holding they are not—and the rationale behind each position. It then considers how this issue impacts physician practice organizations and how it might impact their choice of business form.

### ADA Title I Coverage

Title I of the ADA prohibits entities covered by the Act from discriminating against a "qualified individual with a disability" because of his or her disability.[3,6] An employer is among the entities covered by the Act and is defined as an entity engaged in industry affecting commerce with 15 or more employees working 20 or more weeks in the current or preceding year.[2] An employee is defined as an individual employed by an employer.[1]

Several United States Circuit Courts of Appeals have examined what constitutes an employee in a professional service organization under various antidiscrimination laws. Recently, the Ninth Circuit ruled in *Wells v. Clackamas Gastroenterology Associates, P.C.*[21] that physician-shareholders of a professional corporation (PC) are employees for purposes of determining ADA coverage. The Ninth Circuit was the first federal circuit court to address the issue of whether a PC shareholder is an employee under the ADA.

Other federal courts have addressed the issue under the Civil Rights Act of 1964 and other employment antidiscrimination laws (*e.g.*, The Age Discrimination and

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Employment Act [ADEA]), which have language similar to the ADA. As a result, courts have applied similar reasoning when interpreting the ADA, making the law from other antidiscrimination cases analogous to ADA issues. This was the case in *Wells v. Clackamas*, discussed below, which presents the issue of when ADA Title I coverage requirements apply to small physician practice groups.

### Physician Practice Groups and The ADA: Wells v. Clackamas

Deborah Wells brought suit against her employer, Clackamas Gastroenterology Associates, P.C., claiming it violated the ADA. The defendant physician group filed a motion to dismiss, claiming it was not subject to the ADA because it did not have the requisite number of full-time employees to trigger ADA coverage. The practice group had four physician shareholders. If the physician shareholders were not counted as employees, the practice group would not be covered because it would fall below the 15-employee threshold. The issue then was whether the physician shareholders of this professional corporation were employees under the ADA.[20]

The district court ruled in favor of the defendant physician group, finding the physicians were not employees. However, the appellate court reversed the lower court decision and ruled in favor of the plaintiff, Wells. It reasoned that because the four physicians had created a professional corporation, signed employment agreements with the corporation, and taken advantage of the corporate tax structure, they could not argue they were mere business partners, which would preclude their employee status under the ADA.[21] The appeals court rejected the physicians' argument that, because their economic reality was functionally equivalent to a partnership, they should be viewed as partners under the ADA and not subject to its requirements.[21]

### Other Circuit Court Decisions

Although the Clackamas practice group argument failed in the Ninth Circuit, this argument has been endorsed by other federal courts of appeals. The Seventh Circuit, in *EEOC v. Dowd & Dowd, Ltd.*,[14] held that shareholders of a PC are not employees under the Civil Rights Act of 1964.[14] In *Dowd*, the Equal Employment Opportunity Commission (EEOC) alleged the defendant, a professional corporation, violated Title VII[9] "by failing to amend its Health Benefits Plan to include pregnancy benefits."[14]

As in *Wells*, the *Dowd* case reached the Seventh Circuit because the professional corporation moved to have the case dismissed, claiming it was not a covered employer because the shareholders were not employees as defined by Title VII.[14] The Seventh Circuit agreed with the defendant corporation, reasoning that PC shareholders in medical practice are "far more analogous" to general partners, who are not employees, than corporate shareholders, who may be employees.[14]

The appeals court reasoned further that the economic and state regulatory similarities between partnerships and professional corporations should control whether the shareholders are employees and not the mere formalities of state business formation laws.[14] The decision highlighted the central issue: whether credence when determining who is a covered employer should be given to the business form and the business entity the physician group elects to use for its practice or to the economic substance, control, management, taxation, and other aspects of the practice.

In addressing this question, the Eighth Circuit reached a similar conclusion interpreting Title VII in *Devine v. Stone, Leyton & Gersman, P.C.*,[10] as did the Eleventh Circuit interpreting the ADEA in *Fountain v. Metcalf, Zima & Co., P.A.*[16] Those courts considered the issue under facts similar to *Wells* and *Dowd* and chose to side with the Seventh Circuit's "economic realities" reasoning, holding that shareholders are not employees. Nevertheless, the Ninth Circuit decision in *Wells* is not without other support—the Second Circuit determined shareholders are employees in *Hyland v. New Haven Radiology Associates, P.C.*,[17] although it later clarified its ruling on the issue (for the more narrow rule, see *Drescher v. Shatkin*, decided in 2002).[11,15]

### Implications for Physician Practice Groups

The issue in *Wells* is important for medical professionals practicing in small organizations and those contemplating such arrangements. This is because choice of business form may affect coverage by the ADA and other employment antidiscrimination statutes. In addition to business formation considerations such as liability, transferability of ownership, management control, and duration, ADA liability should be considered.

However, even if ADA implications do not affect choice of business form, professionals should be aware of its requirements. Physician practice groups comprised of approximately 15 persons are particularly affected by the *Wells* decision because their choice of business form can affect their ADA coverage and hence liability. Because the federal courts of appeals have defined ADA coverage differently, an organization's jurisdiction is important. The United States Supreme Court may provide a consistent interpretation in the future, but until that time, appellate court decisions will control in their jurisdictions.

Although *Wells* and the other cases discussed primarily address professional corporations, the analysis of business form also is relevant to Limited Liability Companies (LLCs) and Limited Liability Partnerships (LLPs), and potentially to other professional service organizations. Organizational filings with Secretaries of State suggest the PC form has declined in favor of LLCs and LLPs.[12] Because the characteristics of these limited liability entities resemble those of the PC, professionals practicing in a LLC or LLP face the issue of who qualifies

as an employee under employment antidiscrimination statutes. In fact, use of LLCs and LLPs by practicing professionals is so pervasive that those business forms likely will dominate this discussion in the future.[12]

### *Implications of Business Form*

To examine the argument over characterizing medical professionals in limited liability entities (*e.g.*, PC, LLC, LLP) as employees under employment antidiscrimination statutes, one must first understand the nature of business forms. Because each state adopts its own statutes governing the formation of business entities, and the statutes vary, it is important to assess the formation nuances.[18] This section describes the characteristics of these entities in general terms; of course, practitioners should consult their attorney for authoritative guidance on entity formation.

Putting taxation issues aside, four factors typically affect the choice of business form: extent of liability, centralization of management, continuity of life, and transferability of interest.[18] Before the 1960s inception of PCs, physicians wishing to practice in small organizations could do so through a general partnership. In the 1960s, states began allowing professionals (primarily physicians) to form professional corporations, saving incorporated professionals significant taxation on employee retirement plans.[13] Whereas general partnership did not allow for limited liability, centralization of management, continuity of life, or free transferability of ownership, a corporation provided those features, plus the favorable taxation status. In the 1990s, states began adopting limited liability entity statutes, allowing physicians to obtain the advantageous "pass through taxation" (a generic term describing the taxation of an aggregation of individuals as opposed to taxing the entity the taxpayers operate) of partnership while maintaining limited liability for acts of other professionals in their practice (as they would enjoy in a PC).[18]

Limited liability entities have attributes once exclusive to the partnership or corporate form. As a general matter, LLCs and LLPs enjoy pass through taxation (like a partnership), limited liability for the actions of other professionals (like a corporation), centralization of management (like a corporation), continuity of life (like a corporation), and transferability of interest (like a corporation).[18] This hybridization of corporate and partnership characteristics in limited liability entities led to the "form *versus* substance" debate at issue in *Wells*—whether the "owners" of physician practice groups are partners or employees for ADA coverage.

### *Economics of Business Entities and the ADA: Reconciling Divergent Views*

The economic implications of limited liability entities make the issue in *Wells* particularly timely. On one hand, PCs, LLCs, and LLPs are legal entities with professionals electing to perform services on the entity's behalf as "employees." On the other, the organization, management, taxation, and operation of these entities resembles that of partnership, suggesting the owner-employees are partners in economic substance, if not in state law form. As mentioned, the rulings of the federal courts of appeals are divided over which approach to follow. However, a more complete analysis includes not only the business formation aspect, but also knowledge and consideration of the ADA's design and purpose.

The majority and dissenting views in *Wells* both recognized the form *versus* substance controversy. The majority chose to follow the Second Circuit's reasoning in *Hyland v. New Haven Radiology Assocs., P.C.*, exalting form over substance. This was because the physician-shareholders made a "deliberate decision" to practice as a corporation to achieve certain advantages, and, therefore, should not be allowed to claim the advantages of partnership.[21]

The *Wells* majority focused on the autonomy of business formation decisions, arguing the doctors should not be allowed to escape ADA coverage when they accepted it voluntarily by incorporating.[21] Defendant Clackamas group cited another Ninth Circuit opinion, *Strother v. Southern California Permanente Medical Group*,[19] in arguing for nonemployee treatment of "partners" under the ADA.[21] Strother held that general partners could be considered employees under employment antidiscrimination laws in certain situations, but it did not specify which facts would cause partners to be characterized as employees. It did, however, name facts to consider in the analysis, including control of the partnership, its size, and compensation structure.[19] But the majority distinguished *Strother* on the basis that while shareholders may be employees of a corporation, they cannot be partners because those roles are mutually exclusive.[21]

The dissenting judge in *Wells* gave several reasons why the economic realities analysis used by the Seventh Circuit in *EEOC v. Dowd & Dowd, Ltd.* is more persuasive than the majority view.[22] First, she pointed to previous Ninth Circuit condemnations of form over substance, particularly in *Strother*, and cited to circuit opinions using the economic realities analysis.[22]

Second, the dissenting judge believed that physicians practicing in PCs in Oregon are more like general partners because the shareholders are personally liable for their professional conduct and participate in managing and operating the firm (in contrast to a corporate employee).[22] Finally, she referred to the reasoning behind the ADA's 15-employee coverage requirement "to spare" small firms like medical practice groups from the expense of the antidiscrimination laws, to establish procedures to assure compliance, and to allow lawsuits when good faith efforts at compliance fail.[22] Thus, the dissent argued that, under the majority holding, two medical clinics, identical in size and every respect, would be treated differently for ADA coverage because of business form.[22]

### *Practice Group Considerations for Addressing ADA Requirements*

Resolution of the issue in *Wells* will result from a proper understanding of the purpose and intent of the ADA and other employment antidiscrimination statutes. The ADA states its purpose as fourfold:[6,7,8] to eliminate discrimination against persons with disabilities, set enforceable standards for disability discrimination, establish the federal government's role in enforcing the Act,[8] and use Congressional authority to address the disability discrimination.[8] When using the term "discrimination," Congress focused on three elements: physical barriers, discriminatory practices, and stereotypical attitudes.[8] The question becomes how should courts interpret the Act to eliminate discrimination against persons with disabilities.

Where the "plain language" of the ADA is ambiguous, courts typically look to Congress' reasoning behind the law's passage.[7] Federal courts have a duty to effect the purpose of the ADA, and that duty should help to inform the ADA coverage analysis at issue in *Wells*. Yet, the *Wells* majority did not focus on the ADA's purpose, possibly the strongest argument in favor of a liberal interpretation of business form. The *Wells* dissent, by contrast, did emphasize "the purpose of the numerical requirement" to show the importance of focus on the ADA's goals, rather than the mere form of business associations.

Thus, the issue in *Wells* is who is an employee for ADA coverage. The issue is not who is considered an employee under state business formation statutes. The *Wells* court, and others deciding the issue, therefore assessed not solely to economic realities for resolution but also the ADA's language. In light of the ADA's purpose to "eliminate discrimination against individuals with disabilities" and "ensure active federal enforcement of the Act's provisions," courts need to address a viewpoint that will accomplish these multiple goals.

A reasonable conclusion is that a broader coverage definition effectuates the purpose of the ADA by preventing employers from avoiding compliance and liability solely by their choice of business form. Although the outcome in *Wells* is functionally consistent with ADA policy, its reasoning is not. In contrast, the Seventh Circuit's reasoning under the economic realities test for coverage of employment antidiscrimination statutes may distort the goals of ADA coverage. If courts address the transparency of economic distinctions that frustrate the ADA's purpose, we might expect future decisions consistent with the outcome in *Wells*, ruling physicians are employees, and increasing the number of practicing physician groups covered by the ADA and other employment antidiscrimination statutes.

On the surface, the issue for physician and other small professional practice groups is how ADA coverage may affect their choice of business formation. Yet, studies show that the cost of ADA compliance often is less significant than tax and liquidity considerations when choosing a business form.[6] However, the expense of replacing a qualified worker (*e.g.*, who can be accommodated reasonably) and litigating employment discrimination claims is more onerous, and therefore should be considered in the choice of business formation. The weight professionals lend to these concerns will depend their understanding of the issues, their aversion to risk and other economic factors affecting business formation.

## ■ Conclusion

As *Spine* professionals and other physicians form or continue to practice in small groups, they must be mindful of employment discrimination coverage, compliance, and liability. Although federal courts have determined coverage requirements by defining an employee in a business form context, a more comprehensive analysis includes assessment of the purposes of the statutes at issue. In so doing, courts may determine physicians practicing in LLPs and LLCs are "employees" under the ADA. Certainly, physician practice groups hovering around the 15-employee threshold should understand the ADA and monitor developments in this emerging area of law.

### ■ Key Points

- We reviewed the definition of "employee" under the ADA.
- We provide an analysis of physician practice group business forms.
- We analyzed ADA coverage of physician practice groups.

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## Erratum

In the erratum regarding the article "Multisurgeon Assessment of Coronal Pattern Classification Systems for Adolescent Idiopathic Scoliosis: Reliability and Error Analysis" in the October 15, 2002, issue of this journal, an author's name was misspelled. **Geisinger** K should have been **Giesinger** K. The publisher regrets this error.

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