Come In Off The Ledge, It's Really Not That Bad

Understanding And Surviving Recent Changes In The FMLA And The Americans With Disabilities Act – June 24, 2009

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Change – A Universal Constant

- "Change is the nature of the universe." (*I Ching,* "The Book of Change")
- "I put a dollar in one of those change machines. Nothing changed." (George Carlin)

The Americans with Disabilities Act (the "ADA") – *Not* Change for the Better

- Recent changes (effective January 1, 2009), under the ADA Amendments Act of 2008 (the "ADAAA").
- Why the changes?
  - Congress' desire to reverse recent decisions by the US Supreme Court, which had interpreted the reach of the ADA narrowly (so, for employers, this is *not* change for the better).

What's the ADA, Again?

- Federal discrimination law, prohibiting discrimination against disabled individuals and requiring reasonable accomodation of disabilities
- Remember, state laws can (and often do) provide *additional* protections, and where there is a conflict the more protective statute will apply

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What Does The ADAAA Do?

- Expands the Definition of Covered "Disability"
  - (i) an impairment that substantially limits one or more major life activities, (ii) a record of such impairment, or (iii) being regarded as having such an impairment –this much has not changed. *But*
  - The ADAAA changes the way these terms are to be *interpreted*

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"Substantially limits" – Not *That* Substantial

- ADAAA rejects Supreme Court's statement that "substantially limits" is intended to be a "demanding" standard, and overturns view that an impairment must prevent or severely (or even "significantly") restrict activities that are of central importance to most people's lives
- Instructs EEOC to come up with new definition, by regulation

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What does this mean for you?

- We'll have to wait for the EEOC's regulations (more on that shortly), but certain to broaden the number of employees covered by the ADA

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"Major Life Activities" - Expanded

- Two, non-exhaustive lists
- Activities
  - Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working
- Major Bodily Functions
  - Normal cell growth, functions of the immune system, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions

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"Major Life Activities" – Limiting Just One (Or Even *Part* of One) Is Enough

- Being limited in only *one* major life activity is enough to trigger coverage
- Ability to perform one or more particular tasks within a category of activities does not preclude coverage (*e.g.,* an employee who, in general, can dress himself and cook may still be limited in the major life activity of "manual tasks" if unable to button clothes or cut vegetables)

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What does this mean for you?

- Broadens the number of employees who may be eligible for protection under the ADA

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Mitigating Measures – Don't Count

- With the exception of ordinary eyeglasses or contact lenses (those that *fully correct* vision), measures that mitigate the effects of a disability are *not* to be considered

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Mitigating Measures (continued)

- So the mitigating effects of, among others, the following must be ignored in determining whether an individual is disabled:
  - Medications, prosthetics, hearing aids, mobility devices, assistive devices and other technologies, auxiliary aids or services (such as interpreters)

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What does this mean for you?

- Broadens the number of employees who may be eligible for protection under the ADA

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Assume the Worst for Episodic Impairments

- A condition that is episodic or in remission is a disability if it would substantially limit a major life activity when active

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What does this mean for you?

- Broadens the number of employees who may be eligible for protection under the ADA

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"Regarded as disabled" – Proving Discrimination Made Easier

- Prohibits discrimination against a qualified individual "on the basis of disability" (removing prior requirement that the qualified individual *have* a disability)
- Provides that an individual may be "regarded as having" an impairment even if the impairment (or perceived impairment) is *not* perceived to limit a major life activity

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"Regarded as disabled" – A bit of relief (at last)

- Regarded as" disability status:
  - *Does not apply* to impairments with an actual or expected duration of six months or less, *and*
  - Does *not* create a duty to accommodate, if an employee's only disability is a "regarded as" one

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What this means for you

- Broadens the number of employees who may be eligible for protection under the ADA on the basis of being "regarded as" disabled
- *But*, "regarded as" limited to non-transitory impairments, and does not (by itself) create a duty to accommodate

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No "reverse discrimination" claims

- The ADAAA makes clear that "abled" employees cannot bring a claim asserting discrimination on the basis of *not* being disabled (for example, because they were passed over for a vacancy, or forced to take on more work)
- "Jealous" co-workers can grumble, but not recover under the ADA

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What this means for you

- Employers don't have to worry about legal claims by non-disabled co-workers who feel "disadvantaged" (or overburdened) by reasonable accommodations provided to disabled employees (but may still have to worry about union contract provisions)
- Further weakens employer reliance on co-worker unhappiness as a basis for denying accommodations (though this was already weak to begin with)

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So what should you do?

- Glad you asked. Here are a few suggestions.
- If there is uncertainty about whether an impairment qualifies as a covered disability, you may want to assume that it does qualify, and move on to other aspects of the analysis (such as whether the individual is qualified, or whether a requested accomodation is reasonable, or would cause an undue hardship).

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So what should you do? (continued)

- Make sure that managers know what to do in the face of an accomodation request, since they will have to do it more often now

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So what should you do? (continued)

- Review your policies (and practices) to ensure that you are engaging in an interactive process, whenever an accomodation request is made (or when the need for an accomodation is obvious), in order to determine whether there is *any* reasonable accomodation (though not necessarily the requested one) that would enable a qualified individual to perform the job, without undue hardship.

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So what should you do? (continued)

- Remember that just because more individuals will need to be treated as "disabled," that does not mean that all of them will be able to prevail on disability claims.
- Individuals still need to be "qualified," accommodations still need to be "reasonable" and cannot cause an "undue hardship," employers still have a defense where an employee or applicant would pose a "direct threat" to the health or safety of self or others, and disabled employees can still lawfully experience adverse actions for legitimate, non-discriminatory reasons

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What should you do? (continued)

- Bolster your “not qualified” defense (for example, review your job descriptions to ensure that any listing of “essential functions” is complete and up to date)
- Make sure that medical staff are not the final word on requested accommodations
- Centralize the handling of accomodation requests

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So what should you do? (continued)

- Be alert for new developments from the courts and the EEOC. Gee, here comes one now!

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EEOC to propose ADAAA regulations

- On June 17, 2009, the EEOC announced its intention to move ahead with proposed regulations implementing the ADAAA
- The regulations still need clearance by OMB before they will be put out for public comment
- The proposed regulations are not yet available, even in draft form

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EEOC Regulations (continued)

- The proposed regulations will apparently add more medical conditions to the ADAAA's list of impairments constituting a "disability," and will further lighten the burden of proving that an impairment "substantially limits" a major life activity.
- So, stay tuned!

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FMLA – Like A Box Of Chocolates

- Something old
  - 12 weeks of leave in a 12 month period for employees who have worked for the employer for a total of at least 12 months and at least 1250 hours within the preceding 12 months, on account of the employee's own, or a family member's, serious health condition, for the birth or care of a newborn child, or for placement of a child through adoption or foster care
  - Applies to employees who work at a site where, within 75 miles, the employer employs at least 50 employees

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Many things new

- What?
- New regulations, issued by the US Department of Labor, effective January 16, 2009
- Why?
- Responding to (*not* attempting to overturn) a series of Supreme Court decisions invalidating earlier regulations, and new statutes providing military family leave

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The Specifics – Military Service Leave

- Military Caregiver Leave
  - Employees who are family members or next of kin of "covered service members" eligible for 26 workweeks of leave in a *single* 12 month period to care for service member with serious illness or injury incurred in the line of active duty in the regular armed forces or reserves
  - Eligible employees include both "family members" (spouse, son, daughter or parent) of the service member, and next of kin where not a "family member"
  - One time only (not recurring year after year)
  - The 26 workweeks of leave swallows up the 12 weeks of other FMLA leave

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Military Caregiver Leave (continued)

- May use accrued paid time off if that would be permitted under standard leave policies
- Caregiver must give 30 days' notice if need for leave is foreseeable
- Leave may be intermittent
- Certification may be required, but no second or third opinions

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Qualifying Exigency Leave

- For family members of individuals in National Guard and Reserves (only) who are called up to active duty
- To deal with exigencies arising when the individual is on active duty, or has been called up to active duty, such as:
  - Childcare and school activities
  - Short notice deployment (for seven days from notice)
  - Military events
  - Financial and legal arrangements
  - Counseling
  - Rest and recuperation
  - Post-deployment activities
  - Other activities agreed to between employer and employee

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Qualifying Exigency Leave (continued)

- May be taken intermittently
- Employee may use paid leave if allowed under employer's leave policies generally
- Employer may request copy of military orders and documentation of the specific need for the employee's absence
- 12 weeks of leave, but included within the normal FMLA allotment of 12 weeks

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Getting Off The Hook For Late Designation of FMLA Leave

- Former regulations required an employer to designate leave as FMLA leave within two business days, and provided that an employer that failed to do so could not designate leave retroactively
- New regulations extend employer's designation period to five business days, and preclude retroactive designation only where the employee would be unfairly prejudiced (but you still need to designate on time)

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Intermittent Leave – Getting Better

- Employees who take leave to attend medical treatment must make a "reasonable effort" (and not merely "attempt") to schedule leave so as not to unduly disrupt the employee's operations

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Light Duty – Doesn't Count

- At least two courts had held that an employee on leave who returns to light duty is still counting down the FMLA leave entitlement
- The final regulations reject this view. Time spent on light duty does not count, and the employee's right to return to work is held in abeyance during the light duty period

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Waiver of FMLA Rights – Feel Free

- The new regulations reject the view of one federal appeals court that FMLA rights could only be waived if approved by the US DOL or a federal court
- Under the regulations, backward-looking waivers of FMLA rights are enforceable
- *Prospective* waivers, however, are *not*

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Serious Health Conditions – How Bad Is It, Doc? Some Clarifications

- Three consecutive full calendar days of incapacity plus two visits to a health care provider – the visits must occur within 30 days of the beginning of the period of incapacity, and the first visit must be within seven days of the incapacity
- Three consecutive full calendar days of incapacity plus an ongoing regimen of treatment – first visit must be within seven days of the incapacity
- Periodic visits for chronic serious health condition – at least two visits per year

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Perfect Attendance Awards - Perfected

- Okay to deny a perfect attendance award to an employee who had an FMLA-covered absence, so long as the employer also denies perfect attendance awards to employees on other types of leave

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It Would Be Nice If You Called Once In Awhile – You Know I Worry

- Employees who are absent on account of an FMLA-covered circumstance must still follow the employer's normal call-in requirements, absent unusual circumstances

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Fitness for Duty Certifications

- Okay to require that the certification address the returning employee's ability to perform the essential functions of the job (don't have to settle for a one-liner anymore)
- Where reasonable safety concerns exist, may require a fitness for duty certification before permitting return from intermittent leave

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The New Forms

- *Use Them* (or some reasonable modification of them)
- They allow you to get helpful information, and keep you from asking for more than you are allowed to get
- Available at http://www.dol.gov/esa/whd/fmla/index.htm

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The New Poster

- *Post it!*
- Available at http://www.dol.gov/esa/whd/regs/compliance/posters/fmlaen.pdf
- Covered employers (those with at least 50 employees in the private sector, and *all* public sector employers) must post in conspicuous places, *even if no eligible employees!*

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Your FMLA Policies

- Unless you have modified them in the last six months, are almost certainly out of date.
- Fix them now!

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