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The Changing Face of Employment Disability Law

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Increasingly, employers must address issues concerning disabled individuals and employment. Roughly 50 million Americans are disabled, and a little over 22% of our labor force is estimated to include individuals with disabilities. In July 1990 –some 19 years ago – the original Americans With Disabilities Act ("ADA") was signed into law. Its purposes were twofold. For individuals with medical conditions or limitations, the ADA was intended to prevent discrimination in all aspects of employment: hiring, advancement, compensation, and continued employment. The ADA was also designed to facilitate the ongoing and productive employment of disabled individuals. Most states have also adopted their own complimentary employment laws concerning disabled individuals and employment.

In September 2008, the ADA Amendments Act was signed. Its provisions went into effect January 1, 2009. Through the Amendments Act, Congress intended to broaden the ADA's coverage. The Equal Employment Opportunity Commission (EEOC) is charged with investigating alleged violations of the ADA and enforcing its requirements. In addition to making changes to the ADA's statutory language, Congress directed the EEOC to develop new regulations interpreting the ADA Amendments, and specifically instructed the EEOC to issue guidelines broadening the scope and coverage of the ADA.

In June, the EEOC issued its proposed regulations. In September 2009, those proposed regulations were published in the Federal Register, and written comments have been solicited through November 23, 2009. 74 Fed. Register 48, 431. In a nutshell, the ADA Amendments and the EEOC's proposed regulations expand the definition of individuals who may be considered "disabled" and who fall under the protection of the ADA. Effectively, the Amendments and the proposed new regulations impose increased obligations on employers, when it comes to employing disabled individuals.

One additional wrinkle: increased enforcement of the ADA. The current 2010 budget proposal reflects a $23 million increase in funding for the EEOC and its investigative and enforcement activities. The EEOC's Website announces its intention to hire additional attorneys and

investigators. The changes in the law and increased enforcement activity mean employers and legal professionals who assist employers must appreciate these changes and encourage informed, proactive approaches by employers to disability issues.

Who Is "Disabled?"

In order to fall under the protection of the ADA, an individual must be found to be "disabled." This starts with a broader definition of who is "disabled" under the ADA Amendments and the EEOC's proposed enforcement guidelines. Remember, the ADA covers not only the more traditional physical conditions; the ADA applies to mental disabilities, as well. Because we are more familiar with physical conditions that are generally more easily recognized and understood, employers tend to be better equipped to handle these issues. On the other hand, mental disabilities are more difficult to recognize, are sometimes concealed by the employee, and frequently are more thorny. Initially, an employer may find themselves dealing with the manifestation of an unknown psychological condition – ¬for example, lack of cooperation, failure to complete assigned work and the like – and later discover they are dealing with an employee suffering from a mental disability – ¬for example, clinical depression. When working with your employer clients on disability issues, make sure they understand disability issues include both physical and mental impairments.

In order to be "disabled," an individual must have a physical or mental impairment that "substantially limits one or more major life activities." 42 U.S.C. § 12102(1). In its proposed regulations, the EEOC has radically revamped how we are to determine whether an individual is "disabled."

The new EEOC regulations include a list of medical conditions that will invariably be held to constitute a "disability." These medical conditions include deafness, blindness, intellectual disability, missing limbs, mobility impairments, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV or AIDS, multiple sclerosis, muscular dystrophy, major depression, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder or schizophrenia. Proposed 29 CFR § 1630.2(j)(5). According to the EEOC, these categories of impairments are not considered exclusive and will consistently be found to be a "disability."

The EEOC offers a second category of impairments, which may constitute a "disability" for some individuals, but not for others. This second list includes, but is not limited to, asthma, high blood pressure, learning disabilities, back or leg impairments, psychiatric disabilities, such as panic disorder, anxiety disorder, or depression short of major depression, carpal tunnel syndrome and hyperthyroidism. Proposed 29 CFR § 1630(j)(6). Again, this list is not intended to be exclusive. For this second group of impairment examples, the focus is on the individual involved and whether the impairment substantially limits a major life activity for the individual.

As part of its effort to broaden the definition of "disabled," the EEOC has also expanded the definition of what constitutes a "major life activity." Proposed 29 CFR § 1630(i). Under previous law, in order to be found "disabled," an individual was required to show their impairment limited their ability to perform an entire class or range of jobs. Under the new EEOC regulations, the question asked is whether an individual's impairment limits their ability to perform the particular type of work or job at issue, in comparison to other individuals. This approach will cause

employers to look at specific job requirements and each individual's limitations or impairments.

With an expanded definition of "disabled" under the Amendments and the proposed new regulations, employers should realize they are potentially dealing with disability issues when addressing a FMLA leave, short term or long term disability applications, or workers' compensation issues. From a practical standpoint, this expanded coverage will result in more employees being found to be "disabled" under the ADA and associated state laws. This means the lionshare of an employer's ADA responsibilities will shift from determining whether someone is "disabled" and move to the issue of whether the employer may "reasonably accommodate" a disabled individual in employment.

Reasonably Accommodating Employees

An employer must provide a disabled individual a reasonable accommodation for their impairment. 42 U.S.C. § 12112(b)(5). Reasonable accommodation means changes to assist disabled individuals, so they are on an equal footing with a non-disabled employee in similar circumstances. Examples of reasonable accommodation include: modifying a job or duties, providing assistive devices, modifying the physical aspects of the work environment, restructuring a job to shift non-essential functions to another position, reassignment to a vacant position or allowing the employee to take paid or unpaid leave.

An employer's duty of reasonable accommodation is not without its limits. Any accommodation has to be "reasonable" and cannot inflict an undue hardship upon the employer. In determining whether a particular accommodation is reasonable and would not impose an undue hardship, the employer is entitled to take into account the nature and cost of a proposed accommodation, its resources (number of persons employed and expenses in resources), and the operational impact of the accommodation on the business. The employer is entitled to consider whether an accommodation would adversely and significantly impact other employees' abilities to perform their job or significantly and adversely impact the business' operations.

A Guide to the "Interactive Process"

The ADA, its regulations and case law direct employers to engage in a "interactive process," when faced with determining if there is a reasonable accommodation that does not impose undue hardship upon the employer. 29 CFR § 1630.2(o)(3). The employer must begin this interactive process with the disabled employee if the employee requests accommodation, if someone else requests the accommodation on the employee's behalf (including a supervisor or co¬worker), or if the employer is alerted to an employee's potential need for accommodation (again, the alert may come from the employee, a co-worker or supervisor). From the employer's standpoint, the participants in an accommodation discussion with the disabled employee should be a supervisor or manager who is familiar with the essential job requirements and operational issues, as well as someone from human resources, who is knowledgeable and sensitive to the ADA's requirements and obligations. As the phrase suggests, the interactive process is intended to be a two-way street, in terms of communication between the employee and the employer. The discussion should cover the employee's particular limitations or restrictions and the actual job's requirements. It should be an ongoing and open-ended process, with free discussion about alternatives in the form of reassignment or job modification that would facilitate the employee continuing to work the position. The process should also include a frank discussion between the employee and employer

about the cost, difficulties and problems any proposed accommodation might pose.

At some point, the employer will have to make a decision whether and how it can accommodate the employee's medical limitations. The employer and employee do not have to agree on the outcome of the discussions regarding possible accommodations. Also an accommodation offered by the employer may not be one preferred or suggested by the employee. What is crucial is that the employer be capable of demonstrating it went through this process in an open-minded, good faith manner and is able to explain why it reached the decision it did – i.e., a way to accommodate a disability or an inability to accommodate a particular disability.

What Does All This Mean?

The ADA Amendments and the proposed EEOC enforcement regulations unquestionably and dramatically enlarge the number of individuals who will be treated as "disabled" and covered by the ADA. For that reason, the employer's attention and efforts would be best spent in identifying an individual's particular impairments and engaging in an interactive process to determine whether the employer is capable of reasonably accommodating those impairments without undue hardship. Having gone through that process – and making sure to document those steps – will enable an employer and the legal professionals who represent an employer to better address and defend against any accusations they have somehow failed to satisfy their obligation to address a disability issue and consider reasonable accommodation.

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