What do Will & Kate, "birthers," and ADAAA/FMLA coordination have in common? Nothing, really.

By **Robin E. Shea** on April 29, 2011

Whew - what a week! Try as I might, I could not think of a way to tie in the Royal Wedding and the release of President Obama's long-form birth certificate with employment law.

(But, aren't the bride and groom adorable? I love Kate's dress!)

(And, you know that birth certificate is a big fake. I'm kidding, *I'M KIDDING!*)

OK, enough of that -- back to work.

I actually have a serious topic today, which is the effect that the Americans with Disabilities Act Amendments Act will have on the Family and Medical Leave Act.

In subsequent posts, I'll talk about the effect of the ADAAA on the Genetic Information Non-Discrimination Act, the Occupational Safety and Health Act, the HIPAA privacy rule, and workers' compensation laws, and then I'll try to sum up with a comprehensive recommended approach to all of these laws.

As most of you already know, the ADAAA has dramatically expanded the class of people who are considered "disabled" within the meaning of the Americans with Disbilities Act. And, as most of you also know, Congress keeps passing laws affecting employees with medical conditions with very little apparent regard for already-existing laws and very little effort to coordinate. As a result, employers are continually having to learn the new laws, while trying their best to figure out for themselves how to comply with new Law E without simultaneously violating existing Laws A, B, C, and D.

(Remember the good old days when all we had to worry about was coordinating the "old" ADA, the FMLA, and workers' comp? And we thought that was hard! If we'd only known . . .)

The overwhelming majority of the workforce was not "disabled" within the meaning of the "old" ADA. On the other hand, the Wage and Hour Division of the U.S. Department of Labor, which enforces the FMLA, determined that "serious health condition" for purposes of FMLA leave could include conditions that were anything but -- in addition to covering truly serious conditions like heart disease, cancer, and multiple sclerosis, it also covered things like morning sickness, substance abuse treatment, and a sore throat if accompanied by one visit to a doc-in-the-box and a 10-day course of antibiotics.

This used to infuriate me because the FMLA statute doesn't require this expansive a view, but I have been beaten into submission and don't think about it any more.

When advising employers about FMLA issues, I would normally first ask whether the ADA might be implicated as well. It almost never was, which meant that the employer could give the employee his 12 weeks of FMLA leave per 12-month period -- if necessary, running concurrently with workers' compensation or short-term disability leave, let him come back to work or not, and be done with it, with no lingering ADA issues. It really was not that big a deal most of the time.

I am sorry to say that this is about to change.

Because of the vastly-broadened definition of who is "disabled" within the meaning of the ADA, I predict that we will rarely be able to rule out ADA issues when considering FMLA leaves. In other words, the expanded definition of "disability" in the "new," amended ADA is much more like the inflated definition of "serious" health condition in the FMLA. Here is what that means (at least, I *think* this is what it means -- because the ADAAA is so new, this is a work in progress):

*"Old" ADA guidelines, which have not been changed by the ADAAA, provided that an extension of FMLA leave might be required as a reasonable accommodation to an employee with a disability. So, now, employers "might" have to extend FMLA leaves beyond the 12 weeks as reasonable accommodations in many cases. I don't think it's clear whether these reasonable accommodation "extensions" of FMLA leave have to include job protection, but until we get some clarification I would err on the side of continuing the job protection as well as the leave.

*Assuming an employee is unable to return to a "substantially equivalent" job at the end of the 12-week FMLA leave period because of her medical condition, the employer will have to examine the possibility of reasonable accommodation (including, possibly, alteration to the "substantially equivalent" job, or restoration to a job that is not "substantially equivalent") rather than simply extending the leave or terminating the employee.

*It will be very dangerous for smaller employers to terminate employees whose 12-week FMLA leave expires, even though the employers may not be able to offer any other types of medical leave. Before terminating an employee in this situation, the employer should make sure that all reasonable accommodation options (including, possibly, an extension of FMLA leave) have been considered. (*Remember that if you already meet the 50-employee threshold for FMLA coverage, you automatically also meet the 15-employee threshold for ADA coverage*.)

*Likewise, it will be very dangerous for employers of any size to terminate employees who are not yet eligible for FMLA leave, or who have exhausted their FMLA leave, because of absences due to non-work-related injuries or illnesses. (*Just about every employer I know allows employees to stay out with some level of job protection if the injury is work-related.*) The ADA, unlike the FMLA, applies to all employees, regardless of length of service. Again, no employee should be terminated for a medical-related reason unless the employer has fully considered all reasonable accommodation options first.

*One ray of sunshine: although it is illegal to *discriminate* against someone based on her "association" with a person with a disability, there is no right to *reasonable accommodation* under these circumstances. What this means is that all of the points I've made above apply only when the employee needs FMLA leave for his or her own serious health condition. If the FMLA leave is for the serious health condition of the employee's spouse,

parent, or child, or (in the case of the 26-week "military" FMLA leave) for the serious injury or illness of the employee's covered family member, only the FMLA would apply and not the ADA. (With the exception of adult children, discussed below.)

*This is an esoteric point, but some clients have raised it over the years, so I think it's worth addressing. Because many, if not most, people with "serious health conditions" will now also be "disabled" within the meaning of the ADA, employers will have to grant FMLA leave to more parents who seek the leave to care for adult children.

Let me explain. The FMLA generally does not allow employees to take leave "to care for" a child over the age of 18 who has a serious health condition. The only time an employee is entitled to FMLA leave in such circumstances is when the adult child has *both* a serious health condition as defined in the FMLA regulations, and a "disability" within the meaning of the ADA. (I am oversimplifying the standard, but this is the gist of it.)

What this meant under the old ADA was that parents were almost never allowed to take FMLA leave for the serious health conditions of their adult children. (*For what it's worth, I have always recommended that employers allow leaves for this reason, even though the leaves would not be FMLA-covered*.)

For example, an employee's 35-year-old daughter might have a complicated pregnancy and childbirth. The complications would qualify as a serious health condition under the FMLA, but almost never as a "disability" under the "old" ADA unless the effects were long-term as well as severe. Under the amended ADA, it is very possible that this 35-year-old daughter would be considered "disabled," and therefore the mother would be entitled to take FMLA leave to care for her.

Those are all of the ADAAA/FMLA coordination issues I've been able to think of. If you have more, or if you disagree with mine, please comment. Next week, I'll talk about the ADAAA and GINA, unless more pressing news intervenes.