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EEOC Finalizes Updates To Disability Regulations In Response to ADA Amendments Act

Employers Should Tighten Disability Related Discrimination Risk Management

Employers should review and update their existing employment and employee benefit practices in response to updated regulations (Final Regulations) governing the disability discrimination rules of the Americans With Disabilities Act as amended by the ADA Amendments Act (ADAAA) that the Equal Employment Opportunity Commission (EEOC) will publish in the Friday, March 25, 2011 Federal Register.

On Thursday, March 24, 2011, the EEOC released an advance copy of the Final Regulations along with two Question-and-Answer documents about the Final Regulations to aid the public and employers – including small business – in understanding the law and new regulations. The Final Regulations, accompanying Question and Answer documents and a fact sheet are available on the EEOC website **here** .

The changes contained in the updated Final Regulations update the EEOC's disability regulations in response to amendments made to the ADA by Congress as part of the ADAAA. Like the ADAAA they implement, the Final regulations are designed to simplify the determination of who has a "disability" and make it easier for people to establish that they are protected by the Americans with Disabilities Act (ADA).

The Final Regulations and the ADAAA amendments they implement make it likely that businesses generally will face more disability claims from a broader range of employees and will possess fewer legal shields to defend themselves against these claims. Since these changes make it easier for certain employees to qualify as disabled under the ADA, businesses should act strategically to mitigate their ADA exposures in response to the Final Regulations.

ADAAA Broadens ADA Disability Definition

As signed into law on September 25, 2008, the ADAAA amended the definition of "disability" effective January 1, 20009 for purposes of the disability discrimination prohibitions of the ADA to make it easier for an individual seeking protection under the ADA to establish that that has a disability within the meaning of the ADA. Congress enacted these changes to overturn several Supreme Court decisions that a majority of Congress agreed interpreted the definition of "disability" too narrowly, resulting in a denial of protection for many individuals with impairments such as cancer, diabetes or epilepsy.

To address this concern, the ADAAA retains the ADA's basic definition of "disability" as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. However, provisions of the ADAAA that took effect January 1, 2009 change the way that these statutory terms should be interpreted in several ways. Most significantly, the ADAAA:

- Directed the EEOC to revise that portion of its regulations defining the term "substantially limits;"
- Expanded the definition of "major life activities" by including two non-exhaustive lists: (1) The first list includes many activities that the EEOC has recognized (e.g., walking) as well as activities that EEOC has not specifically recognized (e.g., reading, bending, and communicating); and (2) The second list includes major bodily functions (e.g., "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions");
- Specified that mitigating measures other than "ordinary eyeglasses or contact lenses" are not to be considered in assessing whether an individual has a disability; and Clarified that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active;
- Revised the definition of "regarded as" so that it no longer requires a showing that the employer perceived the individual to be substantially limited in a major life activity, and instead says that an applicant or employee is "regarded as" disabled if he or she is subject to an action prohibited by the ADA (e.g., failure to hire or termination) based on an impairment that is not transitory and minor; and
- Provided that individuals covered only under the "regarded as" prong are not entitled to reasonable accommodation.

The ADAAA also emphasized that the definition of disability should be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA and generally shall not require extensive analysis.

Congress enacted these changes with the intent to make it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the ADA.

Final Regulations Respond to ADAAA Mandates

The Final Regulations to be published Friday finalize and implement updates to the existing ADA regulations in response to direction from Congress that the EEOC update its regulations in conformity with the direction provided by the ADAAA.

The ADAAA and the Final Regulations keep the ADA's definition of the term "disability" as a physical or mental impairment that substantially limits one or more major life activities; a record (or past history) of such an impairment; or being regarded as having a disability. But the law made significant changes in how those terms are interpreted, and the Final Regulations implement those changes.

Based on the statutory requirements of the ADAAA, the Final Regulations set forth a list of principles to guide the determination of whether a person has a disability in a manner that makes it easier for employees to qualify as disabled for purposes of the ADA. For example, the principles provide that an impairment need not prevent or severely or significantly restrict performance of a major life activity to be considered a disability. Additionally, whether an impairment is a disability should be construed broadly, to the maximum extent allowable under the law. The principles also provide that, with one exception (ordinary eyeglasses or contact lenses), "mitigating measures," such as medication and assistive devices like hearing aids, must not be considered when determining whether someone has a disability. Furthermore, impairments that are episodic (such as epilepsy) or in remission (such as cancer) are disabilities if they would be substantially limiting when active.

The Final Regulations also clarify that the term "major life activities" includes "major bodily functions," such as functions of the immune system, normal cell growth, and brain, neurological, and endocrine functions. The Final Regulations also make clear that, as under the old ADA, not every impairment will constitute a disability. The Final Regulations include examples of impairments that should easily be concluded to be disabilities, such as HIV infection, diabetes, epilepsy, and bipolar disorder.

Following the dictates of the ADAAA, the Final Regulations also make it easier for individuals to establish coverage under the "regarded as" part of the definition of "disability." Establishing such coverage used to pose significant hurdles, but under the new law, the focus is on how the person was treated rather than on what an employer believes about the nature of the person's impairment.

Employers Urged To Act To Manage Expanded Disability Discrimination Exposures

Businesses should prepare to meet new challenges in defending ADA claims arising from actions taken after December 31, 2008 as a result of the ADAAA amendments of the ADA and the Obama Administration's heavy emphasis on enforcing, and promoting awareness of ADA and other federal disability discrimination laws.

To help mitigate the expanded employment liability risks created by the ADAAA amendments, businesses generally should act cautiously when dealing with applicants or employees with actual, perceived, or claimed physical or mental impairments to minimize exposures under the ADA. Management should exercise caution appropriately and carefully to evaluate the potential legal significance of physical or mental impairments or conditions that on the surface might not seem like that big of a deal. Management must keep in mind that many conditions of less significant in severity or scope, or relatively easily correctable through the daily medications or other adaptive devices, or that otherwise have been assumed by management to fall outside the ADA's scope may qualify as disabilities under the new standard.]

Likewise, businesses should be prepared for the EEOC and the courts to treat a broader range of disabilities, including those much more limited in severity and life activity restriction, to qualify as disabling for purposes of the Act. Businesses should assume that a greater number of employees with such conditions are likely to seek to use the ADA as a basis for challenging hiring, promotion and other employment decisions. For this reason, businesses generally should tighten job performance and other employment recordkeeping to enhance their ability to demonstrate nondiscriminatory business justifications for the employment decisions made by the businesses.

Businesses also should consider tightening their documentation regarding their procedures and processes governing the collection and handling records and communications that may contain information regarding an applicant's physical or mental impairment, such as medical absences, worker's compensation claims, emergency information, or other records containing health status or condition related information. The ADA generally requires that these records be maintained in separate confidential files and disclosed only to individuals with a need to know under circumstances allowed by the ADA.

As part of this process, businesses also should carefully review their employment records, group health plan, family leave, disability accommodation, and other existing policies and practices to comply with, and manage exposure under the federal genetic information nondiscrimination and privacy rules enacted as part of the Genetic Information and Nondiscrimination Act (GINA) signed into law by President Bush on May 21, 2008. Effective November 21, 2009, Title VII of GINA amended the Civil Rights Act to prohibit employment discrimination based on genetic

information and restricts the ability of employers and their health plans to require, collect or retain certain genetic information. Under GINA, employers, employment agencies, labor organizations and joint labor-management committees face significant liability for violating the sweeping nondiscrimination and confidentiality requirements of GINA concerning their use, maintenance and disclosure of genetic information. Employees can sue for damages and other relief like currently available under Title VII of the Civil Rights Act of 1964 and other nondiscrimination laws. For instance, GINA's employment related provisions include rules that:

- Prohibit employers and employment agencies from discriminating based on genetic information in hiring, termination or referral decisions or in other decisions regarding compensation, terms, conditions or privileges of employment;
- Prohibit employers and employment agencies from limiting, segregating or classifying employees so as to deny employment opportunities to an employee based on genetic information;
- Bar labor organizations from excluding, expelling or otherwise discriminating against individuals based on genetic information;
- Prohibit employers, employment agencies and labor organizations from requesting, requiring or purchasing genetic information of an employee or an employee's family member except as allowed by GINA to satisfy certification requirements of family and medical leave laws, to monitor the biological effects of toxic substances in the workplace or other conditions specifically allowed by GINA;
- Prohibit employers, labor organizations and joint labor-management committees from discriminating in any decisions related to admission or employment in training or retraining programs, including apprenticeships based on genetic information;
- Mandate that in the narrow situations where limited cases where genetic information is obtained by a covered entity, it maintain the information on separate forms in separate medical files, treat the information as a confidential medical record, and not disclosure the genetic information except in those situations specifically allowed by GINA;
- Prohibit any person from retaliating against an individual for opposing an act or practice made unlawful by GINA; and
- Regulate the collection, use, access and disclosure of genetic information by employer sponsored and certain other health plans.

These employment provisions of GINA are in addition to amendments to the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the Employee Retirement Income Security Act of 1974 (ERISA), the Public Health Service Act, the Internal Revenue Code of 1986, and Title XVIII (Medicare) of the Social Security Act that are effective for group health plan for plan years beginning after May 20, 2009.

Because of the potentially significant liability exposure, employers generally will want to consult with qualified legal counsel prior to the commencement of their assessment and to conduct the assessment within the scope of attorney-client privilege to minimize risks that might arise out of communications made in the course of conducting this sensitive investigation.

For Help With Investigations, Policy Updates Or Other Needs

I If you have any questions or need help reviewing and updating your organization's employment and/or employee practices in response to the ADAAA, GINA or other applicable laws, or if we may be of assistance with regard to any other workforce management, employee

benefits, compensation or other internal control concerns, please do not hesitate to contact the author of this update, Board Certified Labor and Employment attorney and management consultant Cynthia Marcotte Stamer **here** or at (469)767-8872.

Ms. Stamer helps businesses, employee benefit plans and other organizations solve problems, develop and implement strategies to manage people, processes, and regulatory exposures to achieve their business and operational objectives and manage legal, operational and other risks. Board certified in labor and employment law by the Texas Board of Legal Specialization, with more than 23 years management-focused human resource and employee benefits experience, Ms. Stamer helps businesses manage their people-related risks and the performance of their internal and external workforce though appropriate human resources, employee benefit, worker's compensation, insurance, outsourcing and risk management strategies domestically and internationally.

Recognized in the International Who's Who of Professionals and bearing the Martindale Hubble AV-Rating, Ms. Stamer also is a highly regarded author and speaker, who regularly conducts management and other training on a wide range of labor and employment, employee benefit, human resources, internal controls and other related risk management matters. Her writings frequently are published by the American Bar Association (ABA), Aspen Publishers, Bureau of National Affairs, the American Health Lawyers Association, SHRM, World At Work, Government Institutes, Inc., Atlantic Information Services, Employee Benefit News, and many others. For a listing of some of these publications and programs, see here. Her insights on human resources risk management matters also have been quoted in The Wall Street Journal, various publications of The Bureau of National Affairs and Aspen Publishing, the Dallas Morning News, Spencer Publications, Health Leaders, Business Insurance, the Dallas and Houston Business Journals and a host of other publications. Chair of the ABA RPTE Employee Benefit and Other Compensation Committee, a council member of the ABA Joint Committee on Employee Benefits, and the Legislative Chair of the Dallas Human Resources Management Association Government Affairs Committee, she also serves in leadership positions in numerous human resources, corporate compliance, and other professional and civic organizations. Her insights on these and other matters appear in the Bureau of National Affairs, Spencer Publications, the Wall Street Journal, the Dallas Business Journal, the Houston Business Journal, World At Work, the ICEBS, SHRM and many other national and local publications. For additional information about Ms. Stamer and her experience or to access other publications by Ms. Stamer see **here** or contact Ms. Stamer directly.

Other Helpful Resources & Information

If you found this article of interest, you also may be interested in reviewing other Breaking News, articles and other resources available **here** including:

- **Stamer Speaks 4/29 On "Welcome to the Jungle - Health Care Reform Bootcamp" At ABA RPTE**
- **Stamer Speaks 4/28 On "Lean On Me" - Group Health and Disability Claims and Appeals At ABA RPTE 3/7/2011Speak Up On The 1st Anniversary of Health Care Reform**
- **Employer Pays $754,578 To Settle Charges Workers Misclassified & Underpaid In Violation of FLSA**
- **Avoiding Liability For Another's Health Plan Fraud**
- **$1 Million + FLSA Overtime Settlement Shows Employers Should Tighten On-Call, Other Wage & Hour Practices**

- **CMS Publishes Proposed Consumer Disclosure Notices Detailing Required Health Insurer Rate Increase Justification Disclosures**
- **$4.3 Million HIPAA Penalty Signals Health Plans, Sponsors & Service Providers**
- **HHS Imposes 1st HIPAA Privacy Civil Penalty of $4.3 Million**
- **NLRB Settlement Shows Care Necessary When Employers Use Social Networking & Other Policies Restricting Employee Communications**
- **Attorney Cynthia Stamer Shares Best Practices for Protecting Plan Participant & Other Employee Information At SBWA/IRS Plan Administrator Skills Workshops**
- **Supreme Court Medical Resident Stipend Ruling Highlights Advisability of Worker Classification & Payroll Practice Review Advisable For Health Care, Other Employers**
- **IRS, HHS & DOL To Delay Enforcement of New Insured Group Health Plan Non-Discrimination Rules Pending Guidance; Seek Public Input on Rules**
- **IRS Expands When HFSAs & HRAS May Allow Over-The-Counter Drug Purchases With Drug Cards**
- **Holiday Season Celebration Reminder To Manage Intoxication Risks**
- **Avoiding Post-Holiday Season HR Liability Hangover**
- **2011 Standard Mileage Rates Announced**
- **Proposed New DOL Defined Benefit Plan Annual Funding Notice Rule**
- **Affordable Care Act Grandfathered Plan Rules Loosened To Allow Insured Plans Making Some Insurance Changes To Qualify**
- **Managed Care Executive Quotes Stamer On Implications Of Affordable Care Act Claims & Appeals Rules**
- **DOL Proposes To Expand Investment Related Services Giving Rise to ERISA**
- **EEOC Charges Employers With Violating ADA By Denying Medical Leave**
- **Annual Benefit Limitation Waiver & Anticipated HHS Medical Loss Ratio Guidance Offer Quick Acting Employers, Insurers New Mini-Med, Health Plan Design Options**
- **New Insured Group Health Plan Non-Discrimination Rules Create Significant Liability For Employers & Insurers; Prompt IRS Also To Review Self-Insured Group Health Plan Rules**
- **Tighten & Update of Health & Other Plan Claims & Appeals Procedures & Documentation In Response To New Regulations, Tightening Court Review**
- **Small Employers Sponsoring Health Coverage May Qualify For New Tax Credit, Must Act Quickly To Comply With Other New Federal Health Plan Mandates**
- **Rite Aid Agrees to Pay $1 Million to Settle HIPAA Privacy Case As Office of Civil Rights Proposes Tighter HIPAA Privacy & Security Regulations**
- **New Affordable Care Act Mandated High Risk Pre-Existing Condition Insurance Pool Program Regulations Prohibit Plan Dumping of High Risk Members, Set Other Rules**
- **Review Of Worker Classifications Needed As Classification Scrutiny Rises**
- **Businesses Employing Children Should Review & Tighten Practices in Light of Tightened Rules & Increased Penalties**
- **Labor Department FMLA Guidance Adopts Broad Interpretation, Employer Care Needed Determining Who Qualifies As Child**
- **Agencies Release Regulations Implementing Affordable Care Act Health Plan Preventative Care Mandates**
- **Office of Civil Rights Proposes Changes To HIPAA Privacy, Security & Civil Sanctions Rules**

If you or someone else you know would like to receive future updates about developments on these and other concerns, please be sure that we have your current contact information – including your preferred e-mail – by creating or updating your profile **here**. For important information concerning this communication click **here.** If you do not wish to receive these updates in the future, unsubscribe by updating your profile **here.**