

ADA / FMLA Update

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ADA Amendments Act of 2008 "ADAAA"



ADA Basics

- Prohibits discrimination by employers against a "qualified individual with a disability"
 - Prohibits discrimination in the context of hiring, firing, advancement, training, compensation, and other terms and conditions of employment
- A "qualified individual with a disability" = a person with a disability who, with or without an accommodation, can perform the job's essential functions



ADA Basics (con't)

- "Disability" is defined as:
 - (a) a physical or mental <u>impairment that substantially limits</u> one or more of the major life activities;
 - (b) a record of such an impairment;
 - (c) being regarded as having such an impairment.

ADAAA: Purpose

- To restore the original intent and scope of the ADA by reinstating a broad scope of protection
- To overturn two "overly restrictive" Supreme Court decisions: Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002)





1: Mitigating Measures Out

- New Rule: Employee may still be disabled even if his condition is fully controlled by using
 - Medication
 - Hearing aids
 - Prosthetic limbs
 - Mobility devices
 - Learned behavior
- Exception: Eyeglasses and contact lenses still relevant

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2: "Major Life Activities" Defined & Expanded

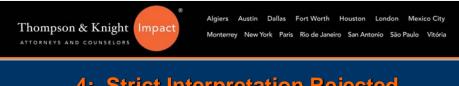
- New definition includes new activities:
 - Lifting,
 - Reading,
 - Communicating, and
 - Operating a Major Bodily Function
 - Immune system,
 - Normal cell growth
 - Digestive,
 - Respiratory,
 - Circulatory, and
 - Reproductive functions



3: Episodic Conditions Covered

- New Rule: Employees who suffer from impairments that are episodic or in remission are now covered by the ADA, even if their medical conditions are not active.
- Example: Asthma or Cancer





4: Strict Interpretation Rejected

• New Rule: Broad interpretation of ADA in favor of coverage



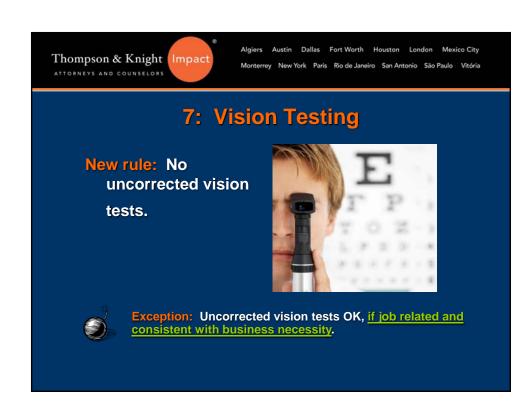
5: "Regarded-as" Disabilities

- New Rule: An employee is "regarded as disabled"
 if he or she has an actual or perceived mental or
 physical impairment whether or not the impairment
 limits or is perceived to limit a major life activity.
- Exception: Impairments that are transitory (lasting 6 months or less) and "minor"



6: Accommodation and Regarded-As

 New rule: Duty of reasonable accommodation does <u>not</u> extend to an employee who is covered only by the regarded-as provision of the ADA.







FMLA Changes

- National Defense Authorization Act of 2008 (NDAA) created two new types of leave related to a family member's military service
- Department of Labor issued new regulations effective January 16, 2009 requiring immediate action by employers



New Types of Leave

- Caregiver Leave eligible employees may take up to 26 weeks of leave during a single 12-month period to care for a "covered service member"
- Exigency Leave eligible employees may use up to 12 weeks of leave to take care of certain qualified exigencies related to a specified family member's active duty or call to active military service (Only applies to National Guard or Reserves)



Regulatory Changes – FMLA

- Serious Health Conditions
 - More guidance on what is a covered condition

Examples:

- Generally, SHC requires employees to see a doctor twice within 30 days of start of condition
- Chronic SHC requires two visits per year to health care provider



Regulatory Changes – FMLA (cont.)

- Substitution of Paid Leave
 - Employee and employer may agree to allow paid leave to be used against FMLA leave allocations: when employee elects use of paid leave he or she must meet employer rules for use of such leave, or the leave will not be paid



Regulatory Changes – FMLA (cont.)

- Employee Notice
 - Requires employees to comply with employer's usual sick leave notice requirements, but regulations allow more flexibility than employers might apply outside FMLA (excuses)



Regulatory Changes – FMLA (cont.)

- Medical Certifications
 - Employers must provide three different types of leave notices to all employees:
 - 1. An eligible notice
 - 2. Employee rights and responsibilities
 - 3. A decision on the request
 - Detailed guidance on handling communications with medical providers – LOTS OF TRAPS



Regulatory Changes – FMLA (cont.)

- Medical Recertifications of Conditions of Indefinite Duration
 - Authorizes employer to make recertification requests every 6 months



Practice Alert - FMLA

- Revise policy provisions that conflict with regulations; add additional required information to policies
- Use the new poster
- Get the new forms
- Train HR staff and managers on FMLA changes