



ADA / FMLA Update

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by
Frank Waite
(214) 969-2122

999200.000004 DALLAS 2493269.1



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 impairment that substantially limits 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)

7 Biggest Changes

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



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 not extend to an employee who is covered only by the regarded-as provision of the ADA.

7: Vision Testing

New rule: No uncorrected vision tests.



Exception: Uncorrected vision tests OK, if job related and consistent with business necessity.

ADAAA: What Hasn't Changed?

- Reasonable accommodation
- Undue hardship
- Interactive process



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**