New Americans With Disabilities Act Developments

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Practice Area: Health Industry Labor, Employment and Immigration & Labor and Employment

Employers must now follow the EEOC rules implementing the ADA Amendments Act because they have now been published in final form. The rules shift the focus of the ADA from whether an individual is disabled to whether an employer has discriminated or failed to reasonably accommodate an employee. The commentary to the rules estimates that 12 to 38 million people who were not covered by the ADA before will now be covered. There has been a notable increase in disability claims since the ADA Amendments Act was passed.

Some important things to remember about the amended ADA include:

Definition of "disability" is interpreted more broadly. The definition of "disability" is still an impairment that substantially limits a major life activity, a record of such an impairment, or being regarded as having such an impairment, however, the bar for coverage is much lower than it was before.

- To "substantially effect" a major life activity does not require a "significant" or "severe" restriction.
- Impairments that are episodic or in remission may still be covered disabilities (and thus warrant reasonable accommodation) if they would substantially limit a major life activity when active (examples: epilepsy, post-traumatic stress disorder ("PTSD"), cancer).
- The regulations provide a list of impairments that will in "virtually all cases" result in coverage under the ADA, including: deafness, blindness, intellectual disability, partially or completely missing limb or mobility impairment requiring the use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, PTSD, obsessive compulsive disorder, and schizophrenia.

List of "major life activities"expanded. The list of "major life activities" has been expanded to include dozens of physical and mental functions, including performing manual tasks, walking, sitting, concentrating, interacting with others, and working.

- Whether an activity is a major life activity is not determined by reference to whether it is of central importance to daily life (as was previously the standard).
- Major life activities include body functions, whether or not life activities are outwardly affected. For example, the regulations say that HIV affects the immune system (even if it does not affect a daily life).
- The EEOC takes the position that under the new rules obesity, in and of itself, affects bodily functions and systems and therefore constitutes a disability.

Mitigating measures are now considered only when they trigger a need for accommodation. The benefits of mitigating measures (other than ordinary eyeglasses or contact lenses) are not considered in determining whether someone is disabled, but the negative side effects are considered.

- If someone's otherwise qualifying impairment is controlled by medication he would still be considered disabled under the law.
- Employees may ask for reasonable accommodation due to the side-effect of treatment for a disability, even if the symptoms of their disability are under control.

A "regarded as" claim need not establish substantial limit on major life activity. An individual who is claiming discrimination but not seeking a reasonable accommodation (for example, someone claiming disability discrimination in hiring, termination, harassment, placement on involuntary leave, etc.) may proceed under the "regarded as" prong of the law and need not establish that the impairment in question substantially limits a major life activity.

- Under the "regarded as" prong, however, the impairment must not be "transitory and minor." Transitory is defined to mean lasting less than six months. This exclusion for transitory impairments applies only to the "regarded as" prong of the law. Actual disabilities that last less than six months may still trigger coverage under the ADA.
- This test is an objective one, so it looks at what people in general would consider transitory and minor, not necessarily what the employer actually believed.

Under the amended ADA, disability is much easier to establish. Ultimately, that likely means more accommodations will be required in the workplace. Employers will need to carefully consider all options for reasonable accommodation.

Increasing Focus on Inflexible Leave Policies
The EEOC is continuing to focus enforcement efforts on inflexible leave policies under which employees are automatically terminated after they have been on leave for a certain period of time. The ADA requires that employers engage in a cooperative interactive process with each disabled employee to identify reasonable accommodations to allow them to return to work. One reasonable accommodation might include continued medical leave. While the law does not require an employer to grant an indefinite medical leave, it does require that the employer consider continued medical leave if the employee's physician provides information suggesting that a continued period of leave would allow the employee to return to work. The EEOC has filed class action lawsuits and secured multi-million dollar settlements fromlarge companies on this issue.

While having a policy identifying the "maximum" unpaid leave allowed for employees may be acceptable, in practice, the employer must provide for exceptions to accommodate disabilities. Before terminating any employee for reaching the maximum period of leave, the employer should consider whether the employee is covered by the ADA and reach out to the employee to determine if a reasonable accommodation is available. Because these situations pose a significant risk of not only an individual claim of discrimination but the potential for broader action by the EEOC, we recommend that legal counsel be consulted before an employee is terminated for exceeding the allowable period of medical leave.

If you encounter challenging requests for medical leave or other accommodations, please contact counsel to apply the law to the facts of your situation. We are also available to help craft leave policies and procedures to help proactive employers apply the state and federal law efficiently and consistently.

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