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RAISING THE PRACTICE OF LAW TO A WHOLE NEW LEVEL

AMERICANS WITH DISABILITIES ACT AMENDMENTS of 2008

BREAKFAST BRIEFING
NOVEMBER 18, 2008

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Agenda

- Background
- What Has Changed?
 - Definition of Disability
 - Mitigating Measures
 - "Regarded As" Prong
 - Episodic Impairments/Remission
- What Has Stayed the Same?
- Impact with FEPA, FMLA/PFLA, Workers' Compensation
- Compliance
- Questions

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Background

- ADA - Adopted in 1990
- A "national mandate for the elimination of discrimination against individuals with disabilities"
- Applies to employers of 15 or more employees
- Implemented by the EEOC

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Background

- Statutory Definition of Disability
 - A physical or mental impairment that substantially limits one or more major life activities;
 - A record of such an impairment; or
 - Being "regarded as" having such an impairment

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Background

- Narrowed by judicial interpretations
 - *Sutton v. United Airlines* (1999) - Mitigating Measures
 - *Toyota v. Williams* (2002) - Strictly interpreted the terms "Major Life Activity" & "Substantially Limits"
- Lower courts followed these decisions making it much harder for people to prove they were disabled

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The Amendments


- Broad bipartisan support in Congress
- Signed into law by President Bush
- Support of diverse groups, including the U.S. Chamber of Commerce and NAM
- Purpose: "to restore the intent and protections of the ADA as originally envisioned"
- Amendments greatly expand the definition of disability

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Definition of Disability – “Substantially Limits”


- Out With The Old:
 - *Toyota Motor Manufacturing*
 - Strict interpretation
 - Demanding standard
 - Impairment prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives
 - EEOC definition – “significantly restricted”




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Definition of Disability – “Substantially Limits”


- In With The New:
 - ADAAA rejects both Supreme Court’s interpretation and EEOC’s definition
 - EEOC directed to re-define the phrase in accordance with Congress’s intent for broad application



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Definition of Disability – “Substantially Limits”


- Impact on Employers:
 - More employees will be considered disabled
 - Focus will shift to reasonable accommodation process



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Definition of Disability – “Major Life Activities”


- Out with the Old:
 - ADA did not previously include any examples of such activities



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Definition of Disability – “Major Life Activities”


- In With The New:
 - Non-exhaustive list of major life activities
 - Examples: eating, sleeping, standing, lifting, bending, breathing, learning, reading, concentrating, thinking and communicating
 - Includes the operation of major bodily function, i.e. immune system, digestive, bladder, neurological, respiratory, circulatory, reproductive
 - Clarifies that only one major life activity need be limited



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Definition of Disability – “Major Life Activities”

- Impact on Employers:
 - More medical conditions likely to be deemed disabilities
 - Insomnia, ADD, high blood pressure, asthma, HIV, cancer, dyslexia, learning disabilities, epilepsy
 - Focus will shift to reasonable accommodation process



Mitigating Measures

- Out with the Old : Sutton v. United Airlines
- People with a broad range of impairments were determined not to be disabled:
- Diabetes, epilepsy, heart conditions, mental disabilities

In with the new:

- "THE DETERMINATION OF WHETHER AN IMPAIRMENT SUBSTANTIALLY LIMITS A MAJOR LIFE ACTIVITY SHALL BE MADE WITHOUT REGARD TO THE AMELIORATIVE EFFECTS OF MITIGATION MEASURES"
- MEDICATION, MEDICAL SUPPLIES, EQUIPMENT OR APPLIANCES PROSTHETIC LIMBS, HEARING AIDS, MOBILITY DEVICES, OXYGEN THERAPY EQUIPMENT
- ASSISTIVE TECHNOLOGY
- REASONABLE ACCOMMODATIONS
- LEARNED BEHAVIOR OR ADAPTIVE NEUROLOGICAL MODIFICATIONS

Mitigating measures

- The act explicitly excepts "ordinary eyeglasses or contact lenses"
- Vision impairment that is corrected with ordinary eyeglasses is not considered to be disabling.

Mitigating measures

- If the untreated unmitigated impairment substantially limits a major life activity the employee is disabled,
- Even if he or she could mitigate or even eliminate entirely the impact of the impairment
- -- Ignore it!

Simple rule for employers

- Disabled or not?
- Ignore all measures that the employee does or could utilize to reduce the impact of their impairment –
- Don't consider anything except eyeglasses or contact lenses
- Accept the disability
- Move on to the next step –

"Regarded as disabled"

- ADA always prohibited discrimination against someone who was 'regarded as disabled,' whether or not the person actually had a disability.
- The perennial question then, was: must the employer provide reasonable accommodation to an employee who is not actually disabled, but whom the employer regarded as disabled?

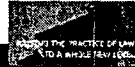
New definitions

- ADAAA does not change the prohibition against discrimination against an employee who is "regarded as" disabled, but clarifies it – or *attempts* to clarify it.
- A perceived impairment now does not have to (be perceived to) limit a major life activity (i.e., be a "qualified ADA disability") to invoke the "regarded as" protection.
- So do you have to allow an employee you know has a bad back to perform a job that requires heavy lifting (and thus insure that a worker's comp claim will result)??



Some relief for employers

- An employee is not now entitled to protection if the perceived disability or impairment is transitory or temporary – i.e., with an actual or expected duration of six months or less.
- And employers are NOT required to provide reasonable accommodations to employees who meet only the "regarded as" definition.



Episodic/In Remission Impairments

- Former law: Focused on whether employee was substantially limited at time of alleged discrimination
 - Older EEOC guidance: episodic impairments may be substantially limiting "when active"
- New law: "An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."
- Examples of episodic/in remission impairments
- Application of new standards to your ADA process and workplace



What Has Stayed the Same?

- Reasonable Accommodation
 - Interactive Dialogue
 - Undue Hardship
 - Medical Documentation
- Exclusions
 - Examples: Sexual Behavior Disorders, Compulsive Gambling, Kleptomania
- Medical Inquiries



FEPA

- Vermont courts, in deciding FEPA cases, routinely review and follow federal case law and regulations interpreting the ADA
- Position of the Vermont Office of the Attorney General – Civil Rights Division
 - Awaiting EEOC revised regulations and/or guidance
 - Recommend employer comply with new amendments



FMLA/PFLA

- A "serious illness"/"serious health condition" may also qualify as a disability under the ADA
- "Reasonable accommodation" can include leave beyond the 12 weeks of unpaid leave provided by FMLA/PFLA



Workers' Compensation

- An injury sustained in the workplace may rise to the level of a disability under the ADA
- Return to work issues may include consideration of "reasonable accommodations"

Policies and Procedures

- Revise as necessary to conform to the new law, and anticipate shifting focus:
 - Handbooks
 - Reasonable Accommodation Procedures
 - Medical certifications (if not obvious)
 - Job Advertisements, Internal/Internet postings

Job descriptions

- Carefully worded job descriptions are more important than ever.

The best defense

- Good job descriptions are the focus of and best defense to disability discrimination claims.
- Fairness to employees/prospective employees
- The standard against which both the employee's and your conduct will be measured.
- Courts read job descriptions!

Supervisor Training regarding ADA and ADAAA

Top 10 Reasons NOT to do ADAAA Training

10. Training costs money
9. Training sessions take time

Top 10 Reasons NOT to do ADAAA Training

8. You're pretty sure you did "diversity" training a couple years ago
7. *Your company's culture is so enlightened, you don't need it*



Top 10 Reasons NOT to do ADAAA Training

6. Getting sued gives you first-hand experience with the exciting legal process
5. *Your company could be famous for being one of the first sued under the new law*



Top 10 Reasons NOT to do ADAAA Training

4. Jury trials get less scary after your third or fourth one
3. Punitive damages are really no big deal



Top 10 Reasons NOT to do ADAAA Training

2. When the AG's Office concludes that you mis-applied the new definition of "disability", it will make you do training anyway



Top 10 Reasons NOT to do ADAAA Training

1. Ignorance is bliss!



Lessons Learned from "Training"-Related Cases

- the training defense can work to avoid liability for supervisor harassment and punitive damages
- to be effective, training must cover all areas of discrimination law, including the ADA, and retaliation
- Failure to train on ADA issues may make liability and punitive damages more likely



ADA/ADAAA Training for Supervisors

- Goal is to sensitize, not memorize: training should help supervisors spot issues and give appropriate initial responses to requests for accommodation
- supervisors don't need to master intricacies of ADA or be diagnosticians (especially under ADAAA)
- Training should emphasize importance of following employer's ADA procedures



ADA/ADAAA Training for Supervisors

Demystify the basics by answering:

- what is a disability (under ADAAA)?
- what are essential functions (and why are job descriptions so important)?
- what does "otherwise qualified" mean?
- what are some example reasonable accommodations?
- More important than ever: what is the "accommodation dialogue"?



ADA/ADAAA Training for Supervisors

- explain the concept of "undue hardship," and why financial cost of accommodations is not a supervisor's concern
- emphasize confidentiality of medical information, and strict "need to know" status of accommodation information
- explain do's and don'ts of interviewing, and need to provide accommodations in application process



Questions?

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