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Newsletters

Employment Practices Newsletter - April 2011

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EEOC Issues Final Regulations Implementing the ADA Amendment Act

On March 24, 2011, the U.S. Equal Employment Opportunity Commission (EEOC) released long-awaited final regulations implementing the ADA Amendments Act (ADAAA). The ADAAA became effective on January 1, 2009. The final regulations implement the legislative intent of the ADAAA to make it easier for individuals with disabilities to obtain protection under the Americans with Disabilities Act (ADA). The ADAAA emphasizes that the primary focus in ADA cases should be on whether employers complied with their obligations under the statute and whether discrimination occurred, not whether individuals are disabled under the law. The regulations maintain this focus by retaining the broad definition of "disability."

The term "substantially limits" is to be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. An impairment need not prevent or severely or significantly limit a major life activity to be "substantially limiting." Nonetheless, not every impairment will constitute a disability. To determine whether an individual has a substantially limiting impairment, the individual's ability to carry out a major life activity should be compared to "most people in the general population." This standard requires a lower degree of functional limitation than the standard previously applied by the courts and should not require extensive analysis.

Except in cases of ordinary eyeglasses or contact lenses, the determination of whether an impairment substantially limits a major life activity is to be made without regard to the ameliorative (beneficial) effects of mitigating measures. Moreover, an impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment. The new regulations also provide that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. Accordingly, the effects of an impairment lasting or expected to last fewer than six months can be substantially limiting.

The new regulations provide that all impairments require an individualized assessment to determine whether they rise to the level of "disability." Unlike the 2009 proposed regulations, which often were criticized for creating a series of "categorical" disabilities that would automatically qualify under the ADA, the final regulations eliminate these while acknowledging that certain obvious impairments "consistently" qualify—deafness, blindness, missing limbs, cancer, diabetes, human immunodeficiency virus (HIV), multiple sclerosis and a number of other impairments.

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The final regulations clarify that an individual is "regarded as" having a substantially limiting impairment if he or she is subjected to a prohibited action because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity. Individuals proceeding under the "regarded as" prong need only show that they were treated adversely because of a perceived impairment. Plaintiffs need not show how severe the covered entity thought the impairment was. The regulations state that the only kind of impairment that cannot form the basis of a "regarded as" claim is one that is "transitory and minor." A condition is considered transitory if the impairment lasts or is expected to last less than six months. Moreover, a subjective belief that the impairment was minor is not enough. Individuals covered only under the "regarded as" prong of the definition of disability are not entitled to reasonable accommodation.

The final regulations will become effective on May 24, 2011. Employers should operate under the assumption that most employees with physical or mental impairments are now covered under the ADA, and always err on the side of caution by engaging in a good faith and well-documented interactive process with impacted employees.

Supreme Court Holds FLSA Retaliation Provision Protects Oral Complaints

An employee verbally complained to his employer about the location of the employer's time clock. He contended that the employer unlawfully denied employees compensation for time spent donning protective gear required for the job by placing the time clock away from the dressing area. The employee "raised a concern" with his supervisor and expressed that "it was illegal for the time clocks to be where they were." He further asserted that he "was thinking about starting a lawsuit about the placement of the time clocks." The employee was subsequently terminated. The employee sued, arguing that he was terminated in retaliation for "filing a complaint," in violation of the Fair Labor Standards Act's (FLSA) anti-retaliation provision. The employer argued that the anti-retaliation provision, which covers employees who have "filed any complaint," only protects employees who have made a written complaint relating to the FLSA. The U.S. Supreme Court rejected the employer's argument, holding that the FLSA's anti-retaliation provision extends to oral complaints, such as those made by the employee. The Court found that the anti-retaliation's purpose is to prevent "fear of economic retaliation from inducing workers quietly to accept substandard conditions." That purpose would be inhibited if the FLSA only protected written complaints because some workers may be unable to reduce their complaints to writing. Furthermore, oral methods of receiving complaints, such as hotlines, would be ineffective and the use of informal workplace grievance procedures would be discouraged. Accordingly, the Court construed the "filed any complaint" provision broadly to cover oral as well as written complaints. Employers should note the Supreme Court's ruling that the FLSA's anti-retaliation provision affords the same protections as to oral complaints concerning alleged FLSA violations as it does for written complaints, and ensure that employees are not subject to adverse employment actions for making such complaints by either mode of communication.

Kasten v. Saint-Gobain Performance Plastics, Corp., Case No. 09-834 (U.S., Oct. 13, 2010)

Employer's Statements During Title VII Conciliation Process Cannot Create Oral Contract

A group of employees filed charges with the U.S. Equal Employment Opportunity Commission (EEOC), alleging that their employer violated Title VII of the Civil Rights Act of 1964, as amended (Title VII), by discriminating against them because of their race. The EEOC initiated an informal "conciliation process" to attempt to resolve the dispute between the employer and the employees. After two weeks of negotiations, the employer withdrew from the process. The EEOC sued, alleging that the employer had verbally agreed to settlement terms before it withdrew. The agency argued that "[w]hat was 'said or done' during conciliation must be revealed to determine the existence of an oral agreement." The U.S. Court of Appeals for the Fifth Circuit rejected the EEOC's argument and held that disclosure of what the employer said during conciliation would be contrary to the plain language of Title VII's confidentiality provision, which provides that "[n]othing said or done during and as a part of [the conciliation process] may be made public by the [EEOC]." Moreover, revealing the employer's statements would conflict with the purpose of the confidentiality provision, which is to encourage employers to participate in voluntary settlements. Employers should be aware that any statements made during a Title VII "conciliation process" will remain confidential and cannot be disclosed in a subsequent action.

Equal Employment Opportunity Commission v. Philip Services Corporation, Case No. 10-20291 (5th Cir. Mar. 4, 2011)

Forum-Selection Clause in Employment Agreement Enforced in Title VII Case

An employee signed an employment agreement with her employer. The agreement set the terms and conditions of the employee's employment and included the following forum-selection clause: "The parties agree that all claims or causes of action relating to or arising from this Agreement shall be brought in a court in the City of Richmond, Virginia." The agreement also included a choice of law provision designating Virginia law as controlling. Subsequently, the employee was terminated and she sued in Florida. The employee alleged that the employer unlawfully terminated her after she announced that she was pregnant, and that she was fired in retaliation for objecting to her employer's unlawful conduct. The U.S. Court of Appeals for the Eleventh Circuit dismissed the employee's claims because they were brought in an improper venue. The court held that all claims arising directly or indirectly from the employee's employment relationship with the employer had to be brought in a court in Richmond due to the forum-selection clause in the employment agreement. This case exemplifies how forum-selection clauses allow employers to defend against potential lawsuits in the state they prefer.

Slater v. Energy Services Group Intern., Inc., Case No. 09-13794 (11th Cir. Mar. 8, 2011)

Employers Bear Burden of Proving a Legitimate Business Reason Existed for Denying Employee Reinstatement Following FMLA Leave

A city employee took Family and Medical Leave Act (FMLA) leave as a result of suffering from multiple chemical sensitivity. When the employee was medically cleared to return to work, the employer refused to reinstate her because it could not guarantee that the workplace was safe in light of the employee's chemical sensitivity. A few months later, the employee was terminated. The employee sued, alleging that the employer violated the FMLA when it failed to reinstate her following her FMLA leave. Under the FMLA, an employee has a "limited right to reinstatement." Specifically, the regulations implementing the FMLA provide that "if an employee is unable to perform an essential function of the position because of a physical or mental condition . . . the employee has no right to restoration. . . ." The trial court held that in order to prevail, the employee had to prove that she was denied reinstatement without reasonable cause. The U.S. Court of Appeals for the Ninth Circuit rejected that holding and found that under the FMLA, the burden is on the employer to prove that it had a legitimate reason for failing to reinstate the employee. Employers should always be able to articulate a legitimate business reason for denying reinstatement to employees who take FMLA leave. By ensuring that such a reason exists, employers will be able to defend against any subsequently filed lawsuit.

Sanders v. Newport, Case No. 08-35996 (9th Cir. Mar. 17, 2011)

Employee's Sleep Apnea Not a Qualifying Disability Under the ADA

A registered nurse suffered from sleep apnea and was repeatedly late for work as a result. The employee allegedly informed his employer that he was having difficulty sleeping and disclosed his suspicions regarding the possibility of having sleep apnea. The employee was subsequently given a verbal warning for excessive tardiness. The employee continued to arrive late, resulting in a suspension without pay and a threat of termination. These measures remedied the employee's tardiness issue. However, months later, the employee had a verbal altercation with another co-worker and mentioned fatigue due to sleep apnea as one of several reasons. After being asked if he needed some time off to deal with his sleep apnea issues, the employee informed the employer that his "heart and soul were not in this job anymore." The following day he was terminated. Subsequently, the employee received medical confirmation that he suffered from severe obstructive sleep apnea syndrome. He sued the employer under the Americans with Disabilities Act of 1990 (ADA) and the Pennsylvania Human Relations Act. The employer argued that the employee was not disabled under the ADA. The U.S. Court of Appeals for the Third Circuit agreed, and held that the employee was not a "qualified individual with a disability." The court ruled that the employee's sleep apnea did not "substantially limit" a major life activity because there was little evidence that the employee's sleep was severely disrupted and the employee conceded that his sleep apnea did not impair his ability to do his job. Employers may take adverse action against employees who are performing inadequately, but must ensure that adverse action is never based on an employee's disability. Additionally, with the recent issuance of the final regulations implementing the ADA Amendments Act (ADAAA), employers should be mindful that many conditions not previously considered "disabilities" under the ADA may now qualify and in most situations, employers should proceed cautiously by engaging in a good faith interactive process with their employees.

Keyes v. Catholic Charities of Archdiocese of Philadelphia, (3d Cir. Mar. 2, 2011)

Private Employer May Consider Bankruptcy Status in Hiring

An applicant sued her employer, alleging that it discriminated against her when it refused to hire her because of her bankruptcy status. The U.S. Court of Appeals for the Fifth Circuit dismissed the applicant's claim, holding that Section 525 (b) of the Bankruptcy Code does not prohibit private entities from engaging in discrimination in hiring on the basis of bankruptcy status. The court held that the standard set forth for private employers in Section 525(b) differs from that set out for public employers in Section 525(a) of the Bankruptcy Code. Section 525(a) provides that the government is not permitted to "deny employment to, terminate the employment of, or discriminate with respect to employment against" any individual on the basis of his or her bankruptcy status. However, Section 525(b) of the Bankruptcy Code states only that "no private employer may terminate the employment of, or discriminate with respect to employment against" any individual on the basis of his or her bankruptcy status. The court explained that Congress' exclusion of the words "deny employment to" in Section 525(b) for private employers was intentional and purposeful. Private employers must remember that they may consider bankruptcy status in hiring decisions, but not when terminating employees. However, public employers should be aware that considering bankruptcy status in any employment decision will impose liability on the employer.

Burnett v. Stewart Title Inc., No. 10-20250 (5th Cir. Mar. 4, 2011)

City May Require Physician's Note From Employees Upon Return From Leave or Restricted Duty

A city directive required employees from the division of police returning to regular duty following sick leave, injury leave or restricted duty, to submit a copy of their physician's note, stating the "nature of the illness" and whether the employee was capable of returning to regular duty, "to [his or her] immediate supervisor." Upset by the mandatory disclosure and funneling of confidential medical information through immediate supervisors, the division of police employees brought a class action lawsuit against the city, alleging that the directive violated the American with Disabilities Act, the Rehabilitation Act, and the privacy provisions of the First, Fifth, and Fourteenth Amendments. The U.S. Court of Appeals for the Sixth Circuit held that the employer's request for a returning employee to provide information about his or her general diagnosis was not necessarily a question about potential disability, and fell far short of the requisite proof of the employer engaging in discrimination solely on the basis of disability. The court stated that based on the ADA's definition of "disability" the city's directive was not a prohibited inquiry as to whether an employee is an individual with a disability because there was no evidence that this inquiry was intended to reveal or necessitated revealing a disability. Therefore, the directive did not trigger the ADA's protections. The court also rejected the employees' privacy rights claims, concluding that the directive did not raise an informational privacy concern of a constitutional dimension. This case demonstrates that an employer may institute a carefully crafted policy requiring a returning employee to provide information about his or her general diagnosis and ability to return to work, so long as the policy does not require the employee to reveal (or necessitate an employee revealing) that he or she is an individual with a disability as defined by the ADA.

Lee v. Columbus, No. 09-3899 (6th Cir. Feb. 23, 2011)

No Constructive Discharge Under USERRA Where Working Conditions Not Objectively Intolerable and Plaintiff Failed to Show Veteran Status Was a Motivating Factor

An employee who was a paramedic joined the Marines and served three tours of duty in Iraq before being discharged from active duty. The employer allowed the employee to return to work at the same position and rate of pay as before he joined the Marines. Subsequently, the employee and his supervisor got into a verbal confrontation not relating to military service and the employee believed the supervisor treated him "dismissively." The employee claimed to fear that the supervisor would attack him or find some pretext to fire him, but never reported this fear to anyone. The employee later requested time off pursuant to the Family and Medical Leave Act (FMLA) for treatment of his self-reported post-traumatic stress disorder (PTSD), and his employer granted the request. During his time off, the employee also filed a claim for long-term disability benefits for PTSD, which was denied on the basis that the plan did not cover disabilities caused by acts of war. The employee never returned to work, formally resigning more than a year after requesting time off under the FMLA. The employee later sued his employer and supervisor, alleging workplace discrimination and constructive discharge on the basis of veteran status, in violation of the Uniformed Services Employment and Reemployment Act of 1994 (USERRA). The U.S. Court of Appeals for the Eighth Circuit affirmed the dismissal of the employee's constructive

discharge claims because the employee failed to present a *prima facie* case of constructive discharge. Under USERRA, constructive discharge occurs when an employer deliberately renders an employee's working conditions intolerable with the intent of forcing the employee to leave the employment. The employee failed to show that the conditions were objectively intolerable or that his status as a veteran was a motivating factor in any constructive discharge. Further, he never gave the employer any opportunity to correct the claimed intolerable condition before he quit; thus, the claim failed as a matter of law. Employers should be mindful that USERRA prohibits discrimination against veterans with respect to any benefit of employment on the basis of their application for membership or their service in the uniformed services, and they should take immediate action to affirmatively address acts of discrimination in the workplace to prevent potential liability under USERRA.

Lisdahl v. Mayo Foundation, Case No. 10-1477 (8th Cir. 2011)