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Briefly

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ARE YOU READY FOR THE "NEW" ADA JANUARY 1?

Howard Jackson

"The bipartisan sponsors of the legislation felt that the ADA was not fulfilling its original intent, as too many plaintiffs were losing cases on the basis they could not establish that their condition was serious enough to constitute a "disability" under the ADA."

The amended Americans With Disabilities Act (ADAA), effective January 1, 2009, basically shifts the focus from whether or not the plaintiff has a disability, to what the employer can do to help someone perform the job. The bipartisan sponsors of the legislation felt that the ADA was not fulfilling its original intent, as too many plaintiffs were losing cases on the basis they could not establish that their condition was serious enough to constitute a "disability" under the ADA. The sponsors believed that focus and result were not appropriate. Instead, the focus should be on how an employer can reasonably accommodate a worker with a mental or physical impairment, provided the worker is otherwise qualified, and there is no undue hardship on the employer. The new legislation directs the Equal Employment Opportunity Commission (EEOC) to interpret the legislation consistently with its broad purposes.

Most importantly, the ADAA makes clear that a person with an impairment is entitled to protection if the impairment "materially restricts" their ability to engage in a major life activity. While the restriction must be important and more than moderate, it need not be severe or significant. In addition to expanding the concept of what "substantially limited" in a "major life activity" means, the new ADAA makes clear that an impairment need only limit one major life activity to fall within the definition of disability. Further, the determination of whether an impairment substantially limits a major life activity shall be made without regard to the effects of mitigating measures, the one exception being corrective or contact lenses. Additionally, the ADAA makes clear that episodic impairments and impairments that are in remission, such as epilepsy and cancer, are disabling if they would be disabling when in their active state.

Interpretation of the "regarded as" prong of the definition of "disability" under the ADAA also has been changed. Under the ADAA, any individual who alleges that they were regarded as having an impairment need only show that they were regarded as having an impairment, and that an employment decision was made based on the perception that the employee has an impairment. The employee no longer has to prove that the employer regarded the employee as being substantially limited in a major life activity because of the impairment. There is, however, a provision stating that employers who view individuals as having minor and transitory conditions do not regard such individuals as disabled.

The ADAA does not change the concept of reasonable accommodation and undue hardship. However, with the expanded definition of disability, there will be more emphasis on the employer's obligation to engage in the interactive process. The ADAA does state that employees who are regarded as being disabled or who have a record of a disability are not entitled to a reasonable accommodation, contrary to the ruling of some courts.

Questions remain regarding how these changes in the ADAA affect many of the concepts employers have been using, and how policies and procedures need to be revised in accordance with the ADAA. In general, and as in the past, an employee must inform the employer of a physical or mental impairment to initiate the interactive process. In some cases, however, the condition may be so obvious that an employer may have an obligation to initiate the process without being informed of the employee's disability. Certainly, employers should ensure that their policies inform employees of who to contact if an accommodation is needed, and should train their supervisors to be mindful of the ADAA's obligations.

Employers who are aware that an employee has an impairment should be very cautious about concluding that an

Continued on page 4

KNOW YOUR ATTORNEY

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J. Brent Wilkins is an associate in the Nashville, Tennessee office of the firm, which he joined in 2008. His law practice includes an emphasis in workers' compensation and general civil defense litigation. Mr. Wilkins received his Bachelor of Arts degree in History and Government from Western Kentucky University, and his law degree, magna cum laude, from Southern Illinois University. Prior to joining the firm, he spent two years with a general civil defense firm in Nashville, Tennessee. Additionally, he spent a year with the Tennessee Department of Labor and Workforce Development, litigating workers' compensation cases for the Second Injury Fund. Prior to entering the law profession, Mr. Wilkins was employed for 15 years by Alcan Aluminum, with his employment focused on production and technical support.

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ANTI-DISCRIMINATION LAWS DO NOT REQUIRE QUESTIONS AND PROCESSES BE THE SAME FOR ALL APPLICANTS

Patty Wheeler

"With regard to the ADAA, the EEOC noted that employers cannot ask any disability-related questions or conduct medical examinations before making a conditional job offer, even if such questions or examinations are applied to all applicants."

An interesting opinion letter was issued by the EEOC on July 15, 2008, concluding that federal anti-discrimination laws do not require an employer to ask all applicants the same questions or route them through the same application process. However, the letter cautioned that differences in treatment of applicants with the same or similar qualifications cannot be based on race, color, sex, national origin, religion, age, disability, or prior protected activity. But the letter indicates that the selection of qualified applicants over those not qualified "necessarily contemplates differentiating" among applicants, including inviting only some of them for face-to-face interviews.

With regard to the ADAA, the EEOC noted that employers cannot ask any disability-related questions or conduct medical examinations before making a conditional job offer, even if such questions or examinations are applied to all applicants. In addition, it said, that the ADAA prohibits asking particular applicants how they would perform the job in question unless all applicants are asked to do so.

The ADAA does not, however, prohibit the practice of asking applicants different follow-up questions or seeking face-to-face interviews of some, but not all, applicants, as long as the general prohibition against disability-related questions/medical examinations is followed, the letter says.

The letter concludes that the best business practice an employer could adopt in terms of hiring the applicants with the best qualifications is one that routes all applicants through a written questionnaire and a face-to-face interview with a trained professional. The letter further states that "such a practice is not, however, a requirement under federal EEO law."

NEW PRESIDENTIAL ADMINISTRATION: "WHAT DOES IT MEAN?"

Let there be no mistake about it, President-Elect Obama's win was historic, and big! However, not since the election of Franklin Roosevelt in 1932 was the stage so set for change by the party not currently controlling the presidency. That is, only once since World War II has the current party in power retained the nation's highest power after eight years in control. The Democrats had the advantage of an unpopular war, an unpopular President, and most importantly, the greatest financial crisis to hit the country since the Great Depression.

Gary Wright

"During 2008 virtually all Democrats in Congress voted to support pro-labor legislation, such as the Employee Free Choice Act (the card-check bill), but only one Republican Senator supported the measure."

This is not to downplay the significance of the victory, and certainly the President-Elect ran an outstanding campaign. It was the first time since 1964 that a Democratic candidate for president has won with more than 50% of the vote.

As of the date of this publication, the Democrats appear to have increased their majority in the Senate from 51 to at least 57. Three seats are still unresolved, but Republicans lead in all three. Similarly, the Democrats increased their majority in the House of Representatives from 235 to at least 254, with several races undecided. Among the nation's governors, the Democrats apparently increased their majority from 28 to 29. While the Democratic majorities in both houses of Congress are similar to that enjoyed by President Clinton during his first term, they are not yet the "filibuster-proof" 60 vote majority necessary to invoke closure and shut off debate of bills to pass the Senate. During 2008 virtually all Democrats in Congress voted to support pro-labor legislation, such as the Employee Free Choice Act (the card-check bill), but only one Republican Senator supported the measure.

The early word from Washington is somewhat encouraging. Although strains are already starting to develop between the liberals in the Democratic party and some of the moderates, House Speaker Pelosi, a California liberal, announced that the majority party intended to govern from the "middle," an encouraging statement. The new Administration is moving to fill important financial positions with well-established and respected officials, some from the Clinton Administration.

The bottom line, however, is that business faces a more challenging environment with the heavy Democratic majorities. The country apparently supports a more active government, with increased regulation.

It will be interesting to see whether President-Elect Obama pushes for the card check bill in the first 100 days of his Administration, which could signal how strongly he has aligned himself with the left wing of the Democratic party. Some commentators believe that he will concentrate on the broader economic issues initially, rather than certain controversial issues similar to those that plagued the first portion of the Clinton Administration. Further, some of the new Democrats elected were recruited by the party as moderates, and are sometimes known as "Blue Dog" Democrats who may vote with Republicans on some issues. Indeed, between the mid-50's and the mid-80's, majorities in Congress were basically determined by a coalition of Republicans and southern Democrats.

On the immigration front, President-Elect Obama has said he would crack down on employers who hire illegal immigrants (a view shared by the Bush Administration), but he has also said he would bring the 12 million people who are currently in the country "out of the shadows" and get them to the back of the line to become U.S. citizens. Current Assistant Secretary Julie Myers has announced that she will depart Immigration and Customs Enforcement (ICE) effective November 15, and her assistant, John Torres, will likely continue her policies through the end of the term. Obama's transition team includes an immigration policy expert who may not be as dedicated to worksite enforcement, but who also understands that enforcement enables legalization. Some suggest that in the future there will be more emphasis on aggressive I-9 audits rather than an emphasis on raids.

"THE NEW ADA" continued from page 1

employee does not have a disability within the meaning of the Act, since the interpretation "disability," "substantially limited," "regarded as," and other terms is now greatly expanded.

The question of disciplining or terminating an employee with a disability who does not meet production or conduct standards remains of concern. In general, employers do not have to justify either quantitative or qualitative standards, and do not have to lower their standards as a reasonable accommodation. However, a reasonable accommodation may be necessary to help the employee meet those standards.

Regarding conduct standards, sometimes plaintiffs allege that their disability is the cause of the misconduct. As long as the employer's conduct rules are job-related and consistent with business necessity, and are applied equally to all employees, it should not matter whether or not the employee's disability affected their misconduct. In most cases, an employee's disability is irrelevant to appropriate discipline under an employer's legitimate conduct rules or policies. The exception is that if an employee needs a reasonable accommodation to help them achieve the required standards, and if they request the accommodation before discipline is imposed, they should be provided with the reasonable accommodation unless doing so would be an undue hardship.

Employers are reminded, however, that it is always helpful to provide employees with clear guidance on performance and conduct, and except in very serious circumstances it is generally a mistake to fail to give prior warnings to employees, including those known to have disabilities. Employees with disabilities are entitled to the same type of prior warnings as are given others.

Employers must remember that they may request disability-related information or order medical examinations for current employees only when job-related and consistent with business necessity. This generally means that there must be objective evidence suggesting that a medical reason exists which warrants a medical review. Therefore, medical examinations should only be ordered where there is "probable cause" to do so. And in some cases, the employer should consider whether the wiser choice may be to deal with an issue in the same way as any other employment action, including administering appropriate discipline, rather than treating the situation one that implicates the ADAA.

Many issues are not resolved by the ADAA and will continue to cause confusion. An example is the effect of absences caused by a disability on attendance and leave of absence rules. In the past, the EEOC has taken the position that absences caused by a disability may require an employer to make some type of reasonable accommodation to its normal absenteeism and leave rules. However, the courts generally have concluded that in many, but not all, cases a person who is excessively absent is not otherwise qualified and that such an accommodation would be an undue hardship. This is especially true if the absences were unplanned. In this regard, publishing an attendance policy and including attendance in job descriptions will help show that attendance is an essential job function.

Similarly, as in the past, it will be hard to contend that an activity is an essential function if it is not included in whatever written job descriptions exist. Thus, job descriptions should be reviewed to ensure that the job's essential functions are included and properly described, including physical requirements, attendance requirements, and other factors that are important to the position, such as the ability to cooperate with co-workers, for example.

Employers in the future are going to have to increasingly defend their personnel actions regarding an employee with a disability on the basis of the processes or protocols used in handling such situations. Therefore, not only is it helpful to have published policies as to whom an employee should report a disability and/or need for accommodation, but it also would be helpful for employers to have written protocols on how such requests will be handled. Procedures need not be complicated, but should include an opportunity for an employee to meet with an appropriate company manager who will analyze the job's functions, what the employee can and cannot do, and the employee's ideas or suggestions as to what type of accommodation is desired. An employee is not entitled to demand a particular accommodation, but suggestions should be considered.

In conclusion, inasmuch as employees in the future are going to have a rather easy time establishing they are "disabled," the focus is going to shift to whether employers can defend their decisions as having been made on a nondiscriminatory basis and to whether reasonable accommodations were provided. Decisions relating to an employee with a disability are going to be much easier to defend if the employer has published policies in effect that assist its handling the situations as they arise, and protocols as to how such requests should be handled. Obviously, training is also necessary to ensure that first line supervisors are aware of these new requirements.