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Recent Developments in ADA Law

ADA AMENDMENTS ACT OF 2008

On September 25, 2008, President Bush signed the Americans with Disabilities Act Amendments Act of 2008 (“ADAAA”) into law. The ADAAA, which took effect on January 1, 2009, implements considerable and meaningful changes to the current interpretation and application of the Americans with Disabilities Act (“ADA”).

Background

Congress enacted the ADA in 1990 to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” The ADA defines a “disability” as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. Beginning in the late 1990’s, the U.S. Supreme Court, concerned that the ADA’s coverage would be broader than Congress had intended, decided a series of cases that narrowly construed the scope of the ADA’s definition of disability and limited the range of impairments that qualified for ADA protection. The focus of most litigation under the ADA then became whether an individual’s impairment was limiting enough to meet the narrow definition of “disability” as interpreted by the Supreme Court. As a result, it became increasingly difficult for individuals to invoke the ADA.

The ADAAA was spurred by Congress’ determination that the Supreme Court decisions and the corresponding ADA regulations issued by Equal Employment Opportunity Commission, which define “substantially limits” as “significantly restricted,” established “too high a standard” and are “inconsistent with congressional intent.” Thus, in order to carry out the original mandate of the ADA, Congress passed the ADAAA with an eye toward ensuring “a broad scope of protection [is] available under the ADA.” With the enactment of the ADAAA, Congress has conveyed the message that the “primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations” and deemphasized the question of whether an individual’s impairment is a disability under the ADA. Thus, it is likely that ADA coverage will no longer be the central factor in ADA litigation as more individuals will be able to meet the statutory definition of disability.

The Amendments

The significance of the ADAAA is its expansion of the ADA’s definition of “disability,” an objective that Congress accomplished through several provisions. First, the ADAAA directs that the definition of “disability” “shall be construed in favor of broad coverage of individuals ... to the maximum extent

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permitted” by the ADA. Second, the ADAAA expands the definition of “major life activity” through two illustrative, but non-exhaustive lists of impairments that for the most part have not previously been expressly recognized by courts as major life activities. The first list includes physical and expressive activities such as bending and communicating. The second includes “major bodily functions,” such as normal cell growth, and digestive, neurological and reproductive functions. Third, the ADAAA states that an impairment that is “episodic or in remission is a disability if it would substantially limit a major life activity when active.” Fourth, Congress has mandated that the ameliorative effects of mitigating measures, other than ordinary eyeglasses or contact lenses, shall not be considered when determining whether an impairment substantially limits a major life activity.

Also of significance, the ADAAA substantially expands the “regarded as” prong of the ADA’s definition of a disability by eliminating the requirement of proving that an employer mistakenly regarded the claimant as having an impairment that substantially limits a major life activity. Now, employers may be found liable for violating the ADA by regarding an individual as having an actual or perceived impairment regardless of whether such impairment would be a disability under the ADA had it truly existed.

On the bright side for employers, the ADAAA expressly states that “regarded as” claims may not be based on impairments that are “transitory and minor” where the impairment is expected to last no longer than six months. Also, entities are not required to provide a reasonable accommodation to individuals who are only “regarded as” having a disability.

Impact on Employers

With the lower standard plaintiffs have to meet to show they are disabled under the ADA, and the legislative directive that the focus now must be on employer compliance, the prospects of eliminating ADA claims at the threshold “disability” phase of the analysis have been dimmed. Rather than litigating the often straightforward legal issue of whether an individual is disabled under the ADA, employers will be forced to address more complex factual issues, such as whether a disabled employee has been, or can be, reasonably accommodated, what are the essential functions of a particular job, and whether the employer will suffer an undue hardship by virtue of implementing a particular accommodation. Most likely, employers will also be faced with an increase in “regarded as” claims now that the ADAAA has lowered that evidentiary standard.

What to Do

Employers should review all existing policies and procedures now to ensure compliance with the ADAAA provisions, which took effect January 1, 2009. Such a review must include procedures for hiring, termination, discipline, medical testing, leave requests, and accommodations. All job descriptions should also be reviewed and updated.

Additionally, employers would be wise to implement formal procedures for conducting individualized assessments of employee requests for a reasonable accommodation that do not focus heavily on determining whether an individual is disabled. That is now primarily a litigation issue upon which employers are less likely to prevail. In addition, establishing internal guidelines, providing training to supervisors, creating templates for correspondence with employees and their healthcare providers all will facilitate compliance with the amended ADA requirements.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S GUIDANCE ON APPLYING PERFORMANCE AND CONDUCT STANDARDS TO EMPLOYEES WITH DISABILITIES

In September 2008, the EEOC published a new enforcement guidance regarding the relevant ADA implications when employers address performance and conduct issues and the corresponding role of reasonable accommodations.

The ADA generally prohibits discrimination against applicants and employees who meet the definition of a “qualified individual with a disability.” Under the ADA, a “qualified” individual with a disability is one who can “(1) satisfy the requisite skill, experience, education and other job-related requirements and (2) perform the essential functions of a position with or without reasonable accommodation.” The EEOC defines “job-related requirements” or “qualification standards” as including: “possessing specific training, possessing specific licenses or certificates, possessing certain physical or mental abilities, meeting health or safety requirements, and demonstrating certain attributes such as the ability to work with other people or to work under pressure.”

Employers may define jobs and evaluate all employees, including those with disabilities, according to consistently applied standards of performance and conduct. As the EEOC notes in its guidance: an employer’s use of “explicit

performance expectations, clear performance standards, accurate measures, and reliable performance feedback, and the consistent application of these standards to all employees, help to reduce the chances” of discrimination on the basis of an employee’s disability.

Obviously, the consistent application of quantitative and qualitative performance standards and the consistent enforcement of conduct standards with all employees is the key to ensuring that an employer does not engage, or appear to engage, in discriminatory treatment of individuals with disabilities.

Performance Standards

An employer is not required to lower or change production standards for an employee who is unable to meet the applicable requirements due to a disability, but an employer may be required to provide such an employee with a reasonable accommodation to assist the employee in meeting a standard that is job-related and consistent with business necessity or so that the employee may perform the essential functions of the position. A “reasonable accommodation” is “any change in the work environment or in the way things are customarily done that enables an applicant or employee with a disability to enjoy equal employment opportunities.” The reasonable accommodation mandate is not without limits: an employer need not provide an accommodation that would cause undue hardship nor must an employer modify or eliminate an essential job function. *continued next page*

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Although employers should use the same evaluation criteria of job performance for all employees, adjustments to evaluation criteria may be necessary when an employee with a disability must use an alternative means of performing an essential function. When an employee's performance deserves a low rating, an employer does not have to excuse the poor performance even if a disability played some role. Nor is the employer required to rescind or alter a negative evaluation if an employee reveals that the performance problem is due to a disability and asks for a reasonable accommodation. In such circumstances, however, the employer must initiate the "interactive process" by engaging the employee in a dialogue concerning possible means of accommodating his/her disability to maximize performance.

Conduct Standards

An employer may discipline an employee with a disability even if the disability caused a violation of a conduct rule provided the "rule is job-related and consistent with business necessity and all other employees are held to the same standards." This is true for rules contained in written policies and handbooks as well as unwritten rules, such as a prohibition on insubordination and a requirement that employees treat customers, clients, and coworkers with respect. Several factors are considered when determining whether a conduct rule is job-related and consistent with business necessity, "including the manifestation or

symptom of a disability affecting an employee's conduct, the frequency of occurrences, the nature of the job, the specific conduct at issue, and the working environment."

It is the employee's responsibility to request a reasonable accommodation to address any conduct problems in which a disability may play a role. An employer does not have to rescind discipline, including termination, for misconduct caused by a disability even if the employee attributes the misfeasance or malfeasance to an alleged disability. However, if the discipline imposed is less than termination and the employee requests a reasonable accommodation, the employer should begin the interactive process to determine whether an accommodation may correct the conduct problem, and if so, what accommodation would be effective.

Most important for employers is to avoid imposing discipline on an *ad hoc* basis. All conduct rules should be enforced uniformly. When *ad hoc* rules are used or an employee with a disability appears to be singled-out for harsher treatment, an employer will have greater difficulty showing that the rules are job-related and consistent with business necessity.

General Issues

When addressing performance and/or conduct problems, including attendance, an employer may seek medical information if there is objective evidence giving rise to a reasonable belief that the

employee is unable to perform an essential function of the job or poses a “direct threat” because of a medical condition. An employer may not seek medical information when an employee’s behavior is simply annoying or inefficient. A prudent employer will determine whether addressing the problem without seeking medical information would be effective.

With regard to attendance, an employer may impose disciplinary action to address attendance problems that occurred before an employee requested a reasonable accommodation. Once an employee with a disability makes a request for a reasonable accommodation, the employer may have to modify its time and attendance requirements, provided doing so would not cause an undue hardship for the employer. However, employers are not obliged to completely exempt disabled employees from such requirements, grant open-ended schedules or leaves of absence, or accept irregular and unreliable attendance. According to the EEOC Guidance, when an employee is chronically, frequently and unpredictably absent, that employee “may not be able to perform one or more essential functions of the job or the employer may be able to demonstrate that any accommodation would impose an undue hardship, thus rendering the employee unqualified.”

When an attendance or other performance or conduct problem is caused by an employee’s use of alcohol or illegal drugs, an employer may hold the employee to

the same performance and conduct standards as all employees. Although the ADA does not protect employees currently using illegal drugs, a recovering drug addict who is no longer using illegal drugs or an alcoholic may be entitled to a reasonable accommodation provided the employee meets the ADA’s definition of “a qualified individual with a disability.”

Employers should focus all discussions about performance or conduct on the specific performance deficiencies and/or misconduct and corrective measures, not an employee’s disability. That subject is only an appropriate topic of discussion when an affected employee attributes any failings to a disabling condition or seeks a reasonable accommodation. When such circumstances present, the EEOC’s Guidance suggests asking whether “some step(s) can be taken to enable the employee to improve his performance or conduct.” This approach allows the employee to initiate the request for a reasonable accommodation without putting the employer in the position of appearing to treat or “regard” the employee as having a disability.

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