

Labor & Employment Inner Workings



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THE ADA AMENDMENTS ACT OF 2008: BACK TO THE FUTURE?

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Housekeeping

- We will answer questions at the end of the program
 - Live questions
 - Q&A drop-down box
- Today's program is being recorded and will be available on our web site
- For audio assistance please press *0
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Agenda

- The Americans With Disabilities Amendments Act ("ADAAA") – An Overview
 - Overview of the ADA
 - Why Is ADAAA Being Adopted?
 - How Does ADAAA Change the ADA?
- Practical Compliance Implications
 - Expanded Reasonable Accommodation Obligations
 - Best Practices for Interactive Process
 - Transfers and Leaves



The ADA – Quick Historical Overview

- 1973 Rehabilitation Act
 - Sec. 503
 - Applies to government contractors only
 - Sec. 504
 - Applies to recipients of federal financial assistance
- Limited coverage of private employers



The Americans With Disabilities Act

- Passed and signed into law by President G.H.W. Bush in 1990 in midst of AIDS crisis
- Adopts the same definition of disability as in the Rehabilitation Act:
 - A physical or mental impairment that ***substantially*** limits one or more of the ***major life activities*** of such individual;
 - A record of such an impairment; or
 - Regarded as having such an impairment



ADA Coverage

- Title I – Prohibits employment discrimination against
 - An “otherwise qualified individual” based on disability
 - By private employers with 15 or more employees
- Imposes reasonable accommodation obligation
 - Employer must engage in interactive process and provide “reasonable” accommodation that will allow employee to perform essential functions of position
 - Accommodations not “reasonable” if *employer* can demonstrate undue hardship
- Enforced by EEOC and through private litigation



ADA – Additional Coverage

- The Act regulates much more than employment
 - Title II - State and local government
 - Title III - Places of public accommodation
 - Title IV - Telecommunications
 - Title V - Transportation



Why has ADAAA been Adopted?

- Through a series of decisions, the U.S. Supreme Court effectively narrowed the definition of disability
 - 1999 cases (3) finding that mitigating measures must be taken into account
 - 2002 case setting higher bar for what it means to have a “substantial” limitation on “major life activity”



Sutton v. United Airlines **527 U.S. 471 (1999)**

- Petitioners were severely myopic twin sisters who had uncorrected visual acuity of 20/200 or worse, but with corrective measures, both functioned identically to individuals without similar impairments.
- They applied to United Airlines for jobs as pilots but were rejected because they did not meet the airline’s minimum requirement of uncorrected vision of 20/100 or better



Sutton v. UAL (cont.)

- The Supreme Court held that the Petitioners did not state claim that they had an actual physical impairment that substantially limits them in one or more major life activities
 - The determination of whether an individual is disabled should be made with reference to measures - such as eyeglasses and contact lenses - that mitigate the effects of the individual's impairment
- No ability to get into the “reasonable accommodation” process



Murphy v. UPS, Inc. **527 U.S. 516 (1999)**

- Mechanic with medically-controlled high blood pressure was not an individual with a disability
- As long as Murphy continued to take medication for his high blood pressure, he was not substantially limited in any major life activity
- Eliminates ability to request / require reasonable accommodation



Albertsons, Inc. V. Kirkingburg,
527 U.S. 555 (1999)

- Plaintiff was a truck driver who was legally blind in his left eye
- Although his condition could not be corrected with glasses or contact lenses, his right eye compensated fairly well for the weakness.
- To the Court, the manner in which Kirkingburg saw was not particularly important, as long as his overall vision was not substantially limited compared to the average person's



Toyota Motor Manufacturing,
Kentucky, Inc. v. Williams,
534 U.S. 184 (2002)

- Williams was an auto assembly line worker who developed carpal tunnel and tendinitis and as a result had permanent work restrictions place upon her
- After 6 years, she was placed under a no-work-of-any-kind restriction by her treating physicians. A request for accommodation was denied and she was terminated for poor attendance



Toyota v. Williams (cont.)

- Williams claimed was she “disabled” under the ADA because her physical impairments substantially limited her in: (1) manual tasks; (2) housework; (3) gardening; (4) playing with her children; (5) lifting; and (6) working
- Williams also argue that she was disabled under the ADA because she had a record of a substantially limiting impairment and because she was regarded as having such an impairment.



Toyota v. Williams (cont.)

- The Supreme Court held Williams did not meet the definition of a Disabled Individual.
- To be ***substantially*** limited in performing manual tasks, an individual must have an impairment that ***prevents*** or ***severely restricts*** the individual from doing activities that are of ***central importance*** to most people’s daily lives.



Toyota v. Williams (cont.)

- The impairment's impact must also be permanent or long-term.
- “The central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people’s daily lives, not whether the claimant is unable to perform the tasks associated with her specific job.”



ADAAA – How does it change the law?

- Effective January 1, 2009
- Redefines the term “Disability”
 - Rejects Supreme Court decisions and makes clear that the term should be construed in favor of broad coverage
 - Includes impairments that are episodic or in remission



THE ADA AMENDMENTS ACT OF 2008

- Redefines the term “Disability”
 - The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of specified mitigating measures.
 - **“Take your glasses off and tell me what you see”**
 - **Prohibits the use of qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be related to the position and is consistent with business necessity**



THE ADA AMENDMENTS ACT OF 2008

- States that nothing in the Act:
 - alters the standards for determining eligibility for benefits under state worker's compensation laws or under state and federal disability benefit programs
 - alters the requirement to make reasonable modifications in policies or procedures, unless such modifications would fundamentally alter the nature of the goods, services, facilities, or accommodations involved



THE ADA AMENDMENTS ACT OF 2008

- Does not change the duty to make reasonable accommodations but does state that an individual who is “regarded as” disabled need not be accommodated
 - Does not apply to a transitory impairment of actual or expected impairment of 6 months or less
- Directs the EEOC to issue new regulations
- Directs the Attorney General and Secretary of Transportation to issue new regulations



ADAAA Practical Implications

- More people will qualify as disabled due to disregard of mitigating measures
- The “California-tion” of the ADA due to lowered bar for “substantial” limitation on major life activities
 - Safe assumption – everyone is disabled
 - Dealing with the worker with an industrial injury
 - What you can and should do to get ready



Disregard of Mitigating Measures - Significance

- Individuals with impairments that are completely mitigated will now have ability to require reasonable accommodation
- For example, individuals with controlled diabetes or other conditions (e.g. high blood pressure) controlled by medication may be entitled to reasonable accommodation such as schedule changes
- But, as noted above, need for normal eyeglasses does not make one disabled – although selection criteria based on uncorrected vision prohibited unless job related and consistent with business necessity



Disregard of Current Abilities – Significance

- Individuals with histories of impairments that do not currently limit major life activities can be entitled to accommodations
 - Cancer in remission
- More opportunities for people to claim singled out for unfavorable treatment because disabled



More Expansive Interpretation of “Substantial” Limitation on MLA

- Expanded coverage for individuals with industrial injuries preventing them from performing their particular job
 - Carpal tunnel
 - Bending restrictions
 - Lifting restrictions
- If restrictions preclude continued safe performance of the position, cannot terminate – may still be entitled to accommodation
- Potential accommodations include elimination of non-essential functions and/or transfer



Expanded Definition of “Major Life Activities” – Significance

- Current regulatory definition:
 - “Caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.” 29 C.F.R. § 1630.2(i)
- New statutory definition:
 - “Caring for oneself, performing manual tasks, seeing, hearing, **eating, sleeping**, walking, **standing, lifting, bending, speaking**, breathing, learning, **reading, concentrating, thinking, communicating** and working”



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Expanded Reasonable Accommodation Obligation

- Supervisors and HR Personnel need to understand expanded class of disabled individuals will result in expanded reasonable accommodation obligations
- Clear lines of responsibility and means of coordination need to be established as between workers' compensation managers and:
 - HR Managers
 - Plant Managers
 - Labor Relations Managers

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Interactive Process – Best Practices

- Create a policy on how to request an accommodation if you do not have one already
 - Policy should make clear that obligation to request accommodation and provide adequate supporting medical documentation *is the employee's*
 - Make clear that discipline cannot be avoided by belatedly requesting accommodation
 - Require requests be made in writing - create a form
 - Place the burden of demonstrating medical rationale and effectiveness on the employee
 - Make sure employee authorizes employee's physician to communicate directly with HR and that employee consents to be examined by employer's physician if necessary (functional analysis more important than diagnosis)
- If no request has been made and status is in doubt, limit inquiry to whether or not employee believes he or she can perform the essential functions of the position
- If employee answers "No" – then steer the employee to the policy
- Document, Document, Document!

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Expanded Reasonable Accommodation Obligation

- Increasing Importance of Determining “Essential Functions”
 - Make sure essential functions are identified in writing in job descriptions
 - Include
 - All physical requirements (functional analysis) and environmental demands
 - Attendance (and overtime) requirements
 - Appropriate and professional interpersonal interaction and communication requirements

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Reasonable Accommodation Obligations

- Formulate a transfer policy and set protocols
 - Identify who is responsible for identifying open positions and how is it done?
 - Party with easiest access to information should take lead
 - Multi-plant operations?
 - Identify how it is determined which positions employee is qualified for?
 - Make sure that minimum qualifications are clear
 - Ensure that protocols are uniformly enforced
 - Cooperative process is the best
 - Preference to the disabled or simply non-discrimination?
 - Generally, preference, with possible exception of union environments

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Reasonable Accommodation Obligation – Union Environments

- Employees are entitled to union representation during interactive process if requested
- Need not displace more senior employees in order to accommodate disabled employees
- Employer can only depart from bona fide seniority system with union's consent
- Automatic loss of seniority provisions may be problematic



Reasonable Accommodation – Unpaid Leaves

- Compliance with
 - FMLA – 12 weeks (including intermittent)
 - Workers' compensation laws – e.g., in California, generally should not terminate until and unless employee has reached MMI ("P & S")
 - ADA – flexible but not open ended
 - Split of authority on blanket leave maximums
 - Best policies always preserve some "wiggle room" – e.g., leaves presumptively limited to one year unless employee can demonstrate that he or she can return within a reasonable date certain shortly after the presumptive limit



Written “Modified Duty” Policy – Increased Importance

- Adopt written modified duty policy if you do not already have one
- Make sure that modified duty is temporary and not “bargaining unit” work or work customarily performed by employees without industrial injuries
- No permanent light duty!
- Non-industrially injured employees now entitled to separate “light” duty as matter of disability law



Questions and Answers

- Now is your time to ask questions



- Thank you for your interest
- Please do not hesitate to call or write with questions
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