New Americans with Disabilities Regulations

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New regulations under the Americans with Disabilities Act (ADA) were issued by the Equal Employment Opportunity Commission (EEOC) on March 25, 2011.[1] The effective date of the regulations is 60 days from publication, which was May 24, 2011. Also included with the regulations is an appendix with interpretive guidance that provides examples and commentary on the regulations.

These regulations were needed because the Americans with Disabilities Act Amendments Act of 2008 (ADAAA), which took effect as of January 1, 2009, expanded the meaning of "disability" and explicitly overturned the holdings of certain prior case law on the meaning of "disability" under the ADA. It should be noted that the ADA applies to employers with 15 or more employees. States may impose their own disability requirements that have a different threshold.

What has changed is how "major life activity" and "substantially limits" are interpreted.

While the definition of a disability remains the same, namely a "physical or mental impairment that substantially limits one or more of the major life activities of such individual, a record of such impairment or being regarded as having such an impairment," what has changed is how "major life activity" and "substantially limits" are interpreted. A noteworthy expansion of a major life activity is the addition of the phrase "interacting with others." It would appear that the EEOC is attempting to provide more legal protection for those employees whose mental disabilities cause them to be disruptive in the workplace. Another new addition to major life activity is any major bodily function. This is defined as "functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions."

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The new regulations address in considerable detail the meaning of an impairment that "substantially limits" a major life activity. It now is construed as compared to most people in the general population whereas under prior law the major life activity was viewed as meaning the ability to work. "Substantially limits" is to be broadly construed, and the emphasis is to be on whether the employer engages in a process to accommodate the impairment, not on the issue of whether a disability substantially limits a major life activity. While the regulations require an individualized assessment of whether the impairment substantially limits a major life activity, the EEOC has listed certain impairments that will almost always be considered a disability:

> *It should be easily concluded that the following types of impairments will, at a minimum, substantially limit the major life activities indicated: Deafness substantially limits hearing; blindness substantially limits seeing; an intellectual disability (formerly termed mental retardation) substantially limits brain function; partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function; autism substantially limits brain function; cancer substantially limits normal cell growth; cerebral palsy substantially limits brain function; diabetes substantially limits endocrine function; epilepsy substantially limits neurological function; Human Immunodeficiency Virus (HIV) infection substantially limits immune function; multiple sclerosis substantially limits neurological function; muscular dystrophy substantially limits neurological function; and major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia substantially limit brain function.*

Another change in the interpretation of the ADA concerns mitigating measures. In the past, for example, if a diabetic could control his or her diabetes with insulin, the individual was not considered to be disabled. Under these new regulations, mitigation is ignored even though it permits the employee to control his or her disability. In addition, if the mitigation causes any of its own side effects that must be considered in making the analysis of the disability and reasonable accommodation. A failure of an employee

to mitigate his or her condition (for example, refusing to take anti-seizure medication) can be considered in deciding whether the employee is qualified to perform his or her job or is a safety risk to self or others. From the preamble to the regulations:

> *Several employer groups asked the Commission to identify legal consequences that follow from an individual's failure to use mitigating measures that would alleviate the effects of an impairment. For example, some commenters suggested that such individuals would not be entitled to reasonable accommodation. The Commission has included a statement in the appendix pointing out that the determination of whether or not an individual's impairment substantially limits a major life activity is unaffected by whether the individual chooses to forgo mitigating measures. For individuals who do not use a mitigating measure (including, for example, medication or reasonable accommodation that could alleviate the effects of an impairment), the availability of such measures has no bearing on whether the impairment substantially limits a major life activity. The limitations imposed by the impairment on the individual, and any negative (non-ameliorative) effects of mitigating measures used, determine whether an impairment is substantially limiting. The origin of the impairment, whether its effects can be mitigated, and any ameliorative effects of mitigating measures in fact used may not be considered in determining if the impairment is substantially limiting. However, the use or non-use of mitigating measures, and any consequences thereof, including any ameliorative and non-ameliorative effects, may be relevant in determining whether the individual is qualified or poses a direct threat to safety.*

The takeaway from these regulations is that the EEOC makes it clear that employers should not spend a great deal of time analyzing whether or not an impairment is a disability, but rather should initiate the interactive process in accommodating the disability as soon as possible in the process. As the regulations state in the appendix to the regulations:

> *The ADAAA and the EEOC's regulations also make clear 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, not whether the individual meets the definition of disability. This means, for example, examining whether an employer has discriminated against an employee, including whether an employer has fulfilled its obligations with respect to providing a ''reasonable accommodation'' to an individual with a disability; or whether an employee has met his or her responsibilities under the ADA with respect to engaging in the reasonable accommodation ''interactive process."*

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In essence, these regulations mean an employer is unlikely to get an employee's complaint dismissed by just arguing the employee was not disabled. Instead, most cases will proceed to trial with the court examining the employer's engagement in interacting with the employee to find a reasonable accommodation for the employee's disability. Defenses still available to an employer include the employee failing to negotiate in good faith, the only reasonable accommodation constitutes an undue hardship on the employer (is too costly or disruptive), the employee even with an accommodation is not qualified for the job (he or she cannot perform the essential functions of the job), or the disability renders the workplace unsafe for the employee in question or his or her coworkers.

U.S. SUPREME COURT EXPANDS EMPLOYEE RIGHTS UNDER THE FAIR LABOR STANDARDS ACT

On March 22, 2011, the U.S. Supreme Court issued an important decision on employee rights under the Fair Labor Standards Act (FLSA), a law that mandates standards for the minimum wage and overtime compensation. In the case of *Kasten v. Saint-Gobain Performance Plastics Corp.* (No. 09-834, March 22, 2011), an employee complained orally to his employer that the employer's location of the timeclock was illegal because it did not permit employees to be paid for the time it took to put on and take off protective clothing. The employee was then fired. He claimed he was retaliated against for making his complaint. The FLSA protects employees against retaliation for filing complaints.

The lower court dismissed the employee's charge because it said he made it only orally, not in writing, and the FLSA protects only written complaints. The Seventh Circuit Court of Appeals agreed with the lower court. The Supreme Court reversed the holdings of the lower courts concluding an oral complaint was entitled to protection under the FLSA.

> *We agree with Saint-Gobain that the statute requires fair notice. Although the dictionary definitions, statutes, regulations, and judicial opinions we considered do not distinguish between writings and oral statements, they do suggest that a "filing" is a serious occasion, rather than a triviality. As such, the phrase "filed*

any complaint" contemplates some degree of formality, certainly to the point where the recipient has been given fair notice that a grievance has been lodged and does, or should, reasonably understand the matter as part of its business concerns. Moreover, the statute prohibits employers from discriminating against an employee "because such employee has filed any complaint." And it is difficult to see how an employer who does not (or should not) know an employee has made a complaint could discriminate because of that complaint. But we also believe that a fair notice requirement does not necessarily mean that notice must be in writing. At oral argument, the Government said that a complaint is "filed" when "a reasonable, objective person would have understood the employee" to have "put the employer on notice that [the] employee is asserting statutory rights under the [Act]." We agree. To fall within the scope of the anti-retaliation provision, a complaint must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection. This standard can be met, however, by oral complaints, as well as by written ones.

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While it is helpful for employers to know that an oral complaint by an employee under the FLSA serves as appropriate notice of a complaint, the court did not address the equally important issue of whether this holding that an oral complaint is sufficient applies just to the government or whether it applies to private sector employers as well.

Saint-Gobain claims that it should prevail because Kasten complained to a private employer, not to the Government; and, in Saint-Gobain's view, the anti-retaliation provision applies only to complaints filed with the Government. . . . But Saint-Gobain said nothing about it in response to Kasten's petition for certiorari. Indeed, it did not mention the claim in this Court until it filed its brief on the merits. We do not normally consider a separate legal question not raised in the certiorari briefs. . . . We see no reason to make an exception here. Resolution of the Government/private employer question is not a "predicate to an intelligent resolution" of the oral/written question that we granted certiorari to decide. That is to say, we can decide the oral/written question separately—on its own. And we have done so. Thus, we state no view on the merits of Saint-Gobain's alternative claim.

While the Supreme Court did not rule at this time on whether an employer can be found legally liable for FLSA retaliation based on just an oral complaint, employers would be wise to set up a system where any wage/hour complaints made by employees are brought to the attention of management.

POSTPONED EFFECTIVE DATE FOR HEALTH REFORM CLAIMS RULES

As readers of this column may recall, new claims rules under the Patient Protection and Affordable Care Act were to take effect January 1, 2011. The purpose of the rules is to impose much stricter and quicker claims review requirements on insurance companies and self-insured health plans. Examples of the new requirements that would be imposed are in an urgent case a review of a denied claim must occur within 24 hours, and the diagnostic codes used by healthcare providers would have to be provided to the patient.

Interim regulations were issued in July of 2010. In response, hundreds of comments were submitted. In light of these comments, The Department of Labor in a statement made on March 18, 2011, has now officially delayed until January 1, 2012, the enforcement of the rules since it envisions making further modifications to the regulations based on the comments it has received.

The above discussion is intended to briefly summarize certain recent legal developments in employee benefits, but iot intended to be legal advice and must not be relied upon as such. All readers are urged to raise any concerns they may have based on matters discussed in this column with experienced benefits legal counsel.

REFERENCE

1. Regulations to implement the equal employment provisions of the Americans with Disabilities Act, as Amended. *Federal Register.* 2011;76(58):16978-17017.