

Recent ADA and FMLA Changes:

What Employers Need to Know

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Americans with Disabilities Act – Key Concepts

- Prohibits discrimination against a “qualified individual with a disability”
- Disability means:
 - physical or mental impairment
 - that substantially limits
 - a major life activity of an individual
- Disability also means:
 - Having a record of such an impairment
 - Being regarded as having such an impairment

ADA – Key Concepts (cont.)

Qualified means being able to:

- Satisfy skill, experience, education and other job-related requirements
- Perform the “essential functions” of the job with or without “reasonable accommodation”

ADA – Key Concepts (cont.)

- “Essential functions” are the most important job duties. If removed, they would fundamentally change the job.
- “Reasonable accommodations” are changes in the job or the work environment to assist employees in performing essential functions.

ADA – Key Concepts (cont.)

Addressing Reasonable Accommodations

- In general, it is up to the employee to request a reasonable accommodation.
- If not accepted, the employer must engage in a dialogue – the “interactive process.”
- Accommodations are “reasonable” if they are “reasonable in the run of cases.” However, even if reasonable, the employer may show that providing an accommodation would be an undue hardship.

Case Law Developments Leading to the ADAAA

- Impairments Affecting Work Were Not Necessarily Disabling: Impairments must prevent or severely restrict activity of central importance to most people's daily lives.
- Permanence of Condition: An impairment's impact must be "permanent or long term."
- Mitigating Measures: Determination if an individual is disabled is made after taking into account "mitigating measures," e.g., medication.

Results of the Case Law

- Substantial number of ADA cases were being lost by plaintiffs on the threshold issue of “disability.”
- Plaintiffs struggled with establishing severe restrictions to satisfy the definition of disability while simultaneously showing that they were still qualified to perform the essential functions of the position.

Changes Implemented by the ADAAA – Major Life Activities

- Expansion of definition of “Major Life Activities” to include a broad list of every day tasks like caring for oneself, walking, seeing, standing, lifting, bending, thinking and working.
- Major Life Activities also expanded within the statute to include the operation of major bodily functions, including functions of the immune system, normal cell growth and reproductive functions.

Changes Implemented by the ADAAA – Refinement of Definition of “Substantially Limited”

- Congress specifically rejected the definition of “substantially limited” that had been developed in the Supreme Court case law (impairment must prevent or severely restrict the performance of a major life activity).
- Congress directed the EEOC to develop a new definition, which we anticipate will be released within the next few months.
- Impairment need not be long term: impairments that are episodic or in remission will be considered disabilities if they would substantially limit a major life activity when active.

Changes Implemented by the ADAAA – Mitigating Measures

- Determination of disability must be made without regard to the effect of mitigating measures like medication, prosthetics, etc.
- The effect of ordinary eyeglasses and contact lenses should, however, be considered.

Changes Implemented by the ADAAA – “Regarded As”

- Individual can satisfy the “regarded as” test because he or she has been subjected to an illegal action regardless of whether or not the impairment limits or is perceived to limit a major life activity.
- Employers do not need to provide reasonable accommodations to employees who are “regarded as” disabled.
- Impairments that are transitory and minor cannot support a “regarded as” claim. Impairments are “transitory” if they last or are expected to last six months or less.

What hasn't Changed – Some Examples

- The question of disability still needs to be considered on a case-by-case basis.
- Employer must still engage in the interactive process with an employee in an effort to determine if a requested accommodation is reasonable.
- Employee may not insist on the creation of a new position as a reasonable accommodation.

Enforcement Guidance on Performance Standards under the ADA

- Employer is not required to lower quantitative or qualitative standards as a reasonable accommodation.
- Employee who first requests accommodation during discipline remains subject to discipline.
- Request for accommodation should lead to interactive process even if request is made in response to discipline.

Enforcement Guidance on Performance Standards (cont.)

- Conduct standards can be enforced if “job related and consistent with business necessity” and applied consistently.
- To be job related and consistent with business necessity, a standard must be a “legitimate measure of an individual’s ability to perform an essential function.”

Enforcement Guidance on Performance Standards (cont.)

- Employer should generally not raise disability in discussing a performance problem, but may initiate discussion about reasonable accommodation.
- Employer may make a medical inquiry if there is objective evidence suggesting that a medical reason is a likely cause of a performance problem.

Enforcement Guidance on Performance Standards (cont.)

- Providing a leave of absence may be a reasonable accommodation, but an employer need not provide an indefinite leave.
- Attending a treatment program is typically a reasonable accommodation for an alcoholic. However, excusing tardiness or other conduct that results from excessive drinking is not.
- Even if an employer is concerned that coworkers will believe that a disabled employee receives special treatment, the employer should not explain that the treatment is a reasonable accommodation due to a disability.

California Distinctions

- CA Law does not require “substantial” limitation on major life activity, just a limitation
- CA Law has long held working is a “major life activity” and has ignored impact of mitigating measures
- Failure to engage in interactive process is separate violation of the law
- Employers with 25+ employees must accommodate employee wishing to enter a drug or alcohol rehabilitation program

Family and Medical Leave Act – Key Concepts

- Under the original FMLA, eligible employees may take up to 12 weeks of leave over a 12-month period due to:
 - Birth, adoption or foster care placement of a child
 - Care of a child, spouse or parent with a serious health condition
 - Employee's own serious health condition
- New legislation and regulations established two new military-related leave rights – Qualifying Exigency Leave and Military Caregiver Leave

Changes Under the New FMLA Regulations – Qualifying Exigency Leave

- Eligible employees may take up to 12 weeks of leave over a 12-month period due to “qualifying exigencies” arising out of a family member’s call to active duty
 - Applies to service in National Guard, Reserves, or as retired member of Regular Armed Forces or Reserve
 - Applies to call in support of “contingency operations”

Changes Under the New FMLA Regulations – Military Caregiver Leave

- Eligible employees may take up to 26 weeks of leave over a “single 12-month period” to care for a family member who suffers a serious illness or injury in the line of active military duty
 - “Single 12-month period” is different from 12-month period used to track leave entitlement for other FMLA purposes

Changes Under the New FMLA Regulations – Substantive

- Clarification of employees who are “eligible” for FMLA leave
- Revised definition of “serious health condition”
- Changes in circumstances under which employees can substitute paid leave for otherwise unpaid FMLA leave

Changes Under the New FMLA Regulations – Substantive (cont.)

- Clarification of circumstances under which employer can require employee to take more leave than the employee requests
- Permissible disqualification of employees who take FMLA leave from perfect attendance awards or bonuses
- Permissibility of waivers of FMLA claims

Changes Under the New FMLA Regulations – Notices

- Revised requirements for general information notice
 - Electronic posting
 - Revised content
- Revised requirements for notices to employees who request leave
 - Notice of ineligibility
 - New “Notice of Eligibility and Rights & Responsibilities”
 - New “Designation Notice”
 - Timing

Changes Under the New FMLA Regulations – Notices (cont.)

- Revised obligations for employees requesting leave
 - Reference to qualifying reason or need for leave
 - Compliance with employer leave notice policies

Changes Under the New FMLA Regulations – Certification

- New medical certification form
- Revised procedures if medical certification form is incomplete
 - Written notification
 - 7-day cure period
- Revised procedures for clarification and authentication of medical certification form
 - Employee consent
 - Clarification by HR, leave administrator or management official

Changes Under the New FMLA Regulations – Certification (cont.)

- Revised procedures for recertification
- Permissibility of certification of fitness to perform essential functions

Action Steps

- Revise policies
 - FMLA policies
 - Paid leave policies
- Revise FMLA notices
 - General notice
 - Eligibility notice and rights and responsibilities notice
 - Designation notice

Action Steps (cont.)

- Revise medical certification form
- Implement procedural changes
 - Timing of eligibility notice
 - Timing of individual rights and responsibilities notice
 - Timing of designation notice
 - Clarification or authentication of medical certification form
 - Dual tracking of FMLA entitlement for employees who take Military Caregiver Leave

Action Steps (cont.)

Consider the following:

- Electronic posting of general notice
- Draft essential functions of employee positions
- Modifications to bonus or award programs
- Establish procedures for requesting leave

California Issues

- CA Family Rights Act
 - Includes leave to care for domestic partner
 - Excludes pregnancy disability
- CA Pregnancy Disability Act
 - 4 months of unpaid leave if disabled
 - Since excluded from CFRA, up to 4 months pregnancy disability is in addition to 12 weeks for baby-bonding

California Issues (cont.)

- CA Labor Code 233(a): Employee right to use ½ annual paid sick leave accrual for employee or family member illness (includes domestic partner)
- CA Paid Family Leave: up to 6 weeks of benefits (max. near \$1,000 per week)
- San Francisco Paid Sick Leave Law

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