

MILLER & MARTIN PLLC

MT-SHRM Semi-Annual Legal & Legislative Update



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CHATTANOOGA



NASHVILLE

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ADA Amended

- Effective January 2009

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ADA Amendments Act of 2008

Definition of “Disability”:

- Courts directed to interpret the term “disability” “to the maximum extent permitted.”
- Effect: more individuals considered “disabled” and thereby subject to the interactive process and reasonable accommodation assessments.

ADA Amendments Act of 2008

“Substantially Limits”:

- Episodic conditions --“An impairment that is episodic or in remission is a ‘disability’ if it would substantially limit a major life activity if/when active.”

ADA Amendments Act of 2008

“Major Life Activities”:

- General: caring for one’s self, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, **bending**, speaking, breathing, learning, reading, concentrating, thinking, communicating, and **working**;
- Major Bodily Functions: immune system, **normal cell growth**, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, **endocrine**, and **reproductive**.

ADA Amendments Act of 2008

“Regarded as” Disabled:

- *Only* consider if the employee was “regarded as” having a physical or mental impairment
- *No* inquiry into *actual* substantial limitation of a major life activity
- *But . . .* still no need to accommodate if employee has been “regarded as” disabled

ADA Amendments Act of 2008

Mitigating Measures:

- Former rule -- Sutton v. United Airlines
- Now -- do *not* take into account possible mitigating measures
- Exception: eyeglasses, contact lenses

Recently Enacted ADA Guidelines

1. **Essential elements of a job are still “essential.”**

- Employers are not required to eliminate essential job functions in order to accommodate a disabled employee.

2. There are no “reasonable accommodations” for the effects of some disabilities.

- Violence, permanent leave, permanent erratic tardiness or attendance issues, intermittent and unpredictable sleeping on the job.
- Employers still need to use the interactive process to confirm the presence and nature of these effects (except in the case of employee violence), before simply refusing to accommodate the employee.

3. Employee “revelations” of potential disabilities during a disciplinary action or termination meeting have no effect on the proposed disciplinary action or termination.

4. However, in the case of disciplinary action (other than termination) meetings, such “revelations” can give rise to the need to CONSIDER whether the employee is “disabled” for the purpose of engaging in the interactive process and possibly offering future accommodations.

- Past or current disciplinary action remains unchanged.

5. Employers are not required to ASSUME that all bad performance or misconduct is “linked to” or “caused by” even a known disability.

- It remains the employee’s obligation to articulate such “link” - - again, prior to being disciplined.
- Obvious links of course should be acknowledged and the interactive process begun.

6. Employers also are not required or even advised to ASK whether either a “known” or an “unknown” disability is the cause of performance or misconduct issues.

- Asking “open ended” questions such as “what is causing this issue?” or “do you have an explanation for this issue?” are fine. However, employers should not suggest an answer when discussing attendance or other performance issues by asking “is this because of your condition?” or “do you have some type of medical condition we need to discuss?”

7. Employers cannot request or require that employees begin or continue a particular treatment or medication which appears to assist them in performing the essential functions of their jobs.

- Employers should engage in the interactive process to see if reasonable accommodations can be offered which would allow the employee to perform the essential functions of his/her job even without the preferred medication or treatment.
- To the extent such reasonable accommodations are not available, the employer can discipline and even terminate the employee for performance and/or misconduct issues which arise from the failure to take or stay on the treatment or medication.

8. The interactive process is ongoing.

- Accommodations which at first on paper appear “reasonable” can be withdrawn or modified if in practice they do not allow the employee to perform the essential functions of his/her job or become an undue burden to the employer.

9. It needs to be clearly expressed (in writing) to those who are offered accommodations what specific conditions (“business needs allow it at the present time”) and expectations (define which performance standards are being modified and which are not) accompany the accommodation.



***10. Modification* of a job performance or conduct standard can be a “reasonable” accommodation.**

- Complete and permanent exemption usually is not.

FMLA Regulations Amended

- Effective January 16, 2009

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Qualifying exigency leave

- Up to 12 weeks for a “qualifying exigency” arising from spouse, child or parent’s military service obligations
- Applies only to family members of National Guard and Reserves and retired military
- NOT active members of regular armed services

Examples of qualifying exigencies

- Short-notice deployment (no more than 7 calendar days)
- Military events/ceremonies/activities
- Urgent child-care and school activities
- Financial and legal tasks
- Counseling
- R&R time

Certifying QE leave

- May require copy of active-duty orders
- Optional DOL form (WH-384)
- Verification with third party permitted
- Recertification not permitted

Military caregiver leave

- Up to 26 workweeks during a 12-month period
- To care for a covered service member
- Spouse, parent, child, or “next of kin”
- Regular armed forces, Reserves, National Guard (or on temporary disability retired list)

Requirements

- Must have serious illness or injury incurred in the line of duty
- As determined by the U.S. Department of Defense
- Medically unfit to perform the roles of his office, grade, rank, or rating
- Undergoing medical treatment, recuperation, therapy, outpatient treatment, or on TDRL

Certification requirements

- Certification may be required
- Optional DOL form WH-385
- Invitational travel orders/authorizations issued by the DOD must be accepted
- Clarification may be sought, but no second or third opinions or recertification

Qualified family members

- Broadly defined
- Documentation of relationship may be requested
- Does not include in-laws



Additional FMLA changes

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Notice by Employees

- Employees face stricter rules on notice.
 - Must follow employers' notice procedures, unless “unusual or emergency circumstances justify the failure to comply”
 - Just “calling in sick,” without more, will not count for notice of FMLA-qualifying reason.
 - If previously approved for leave, must specifically reference the qualifying reason for leave or the need for FMLA leave

Notice by Employers

- Employers get a few breaks on notice.
 - Online notice rule added.
 - Revised form available.
 - “Due diligence” still required re: employee leave requests [cooperation required now!]
 - 5 business days to designate leave [was 2]
 - Employer liable only for actual harm to employee who was not given notice.

Past Service and Eligibility

- Employer must count service prior to break in service if break was less than 7 years. [was “forever”]
- Exception: All past service counts if
 - break was due to military service OR
 - mutual agreement otherwise

Medical Certification

- Revised forms are available.
- Employer may contact health care providers directly -- but certain conditions apply
 - Prior 7-day opportunity to fix, no direct supervisor contact, HIPAA compliance
- Six-month automatic recertification request

Bonuses v. Raises

- All awards, incentives, bonuses are treated the same now – no distinction between “attendance” and “production.”
- However, employee raises (or evaluations on which they are based) still cannot be delayed based on period of FMLA leave.

Other Key Provisions

- Employee must follow employer's rules to substitute paid leave for FMLA leave.
- Intermittent leave – increment can be the same as for other leaves – but cannot be larger than one hour. It can be smaller.
- Light duty is not FMLA leave – but it can be used for a serious health condition subject to a 12-month job restoration limit.
- Employee may waive FMLA rights to settle past claims, but may not waive future FMLA rights/claims.

No Change

- Self-care still permitted for chronic serious health conditions.
- Psychological care for covered family members still permitted.
- Holidays are only counted toward FMLA leave if they are part of a full week of leave – unless the employee was supposed to work on the holiday.
- Employer cannot make employee sign medical release as condition of FMLA leave (employee may “clarify” form himself) – but if he does not do either of these, leave may be denied!

Crawford v. Metro Government

- Metro School's employee filed retaliation lawsuit after participating in sexual harassment investigation
- No EEOC charge filed
- District Court dismissed case; Sixth Circuit affirmed
- U.S. Supreme Court reversed; held that Title VII's prohibition against retaliation extends to employees who participate in an employer's internal investigation
 - The reporting of alleged discriminatory acts was sufficient evidence to evoke the opposition clause.

The Ledbetter Fair Pay Act

- Overturns a 2007 U.S. Supreme Court ruling in Ledbetter v. Goodyear Tire & Rubber Co., (2007)
- Unlawful employment practice now occurs when:
 1. An employer makes a discriminatory compensation decision;
 2. An employee becomes subject to that decision; and
 3. An employee is affected by application of the decision, including each time wages, benefits, or other compensation are paid.

ARRA--COBRA Changes

- The American Recovery and Reinvestment Act of 2009 (ARRA) provides for a 65% reduction in COBRA premiums for certain assistance eligible individuals for up to 9 months. An assistance eligible individual is a COBRA “qualified beneficiary” who meets all of the following requirements:
- Is eligible for COBRA continuation coverage at any time during the period beginning September 1, 2008 and ending December 31, 2009;
- Elects COBRA coverage (when first offered or during the additional election period), and
- Has a qualifying event for COBRA coverage that is the employee’s involuntary termination during the period beginning September 1, 2008 and ending December 31, 2009.

COBRA Changes (continued)

- Extended election period provided for those who previously declined COBRA coverage (60 days from notice)
- Maximum continuation coverage period not expanded—coverage still runs from date of qualifying event
- Employers must locate employees who previously declined COBRA and provide notice

Cobra Changes--Impact on Employers

- Must locate employees and provide notices
- Must make sure notices being used are amended to include pertinent info
- DOL should issue model notice shortly
- Must advance 65% to employees, then seek reimbursement through offset from federal payroll tax payments

Recent Pro-Labor Executive Orders

- 1) Executive Order 13201. Federal contractors required to notify employees covered by NLRA of their rights to join a labor union. Also includes new required contract clauses.
- 2) Federal contractors not entitled to reimbursement for costs incurred in persuading employees to exercise or not exercise their rights to organize or bargain collectively.
- 3) Executive Order 13204. Federal contractors taking over a service contract required to give non-managerial employees of the predecessor company the right of first refusal of job they are qualified to perform.
- 4) Project Labor Agreements can be mandated for federal contractors.

Immigration Law Update

- Modified E-Verify/Basic pilot program postponed until May 21, 2009
- Implementation of new I-9 form delayed to April 3, 2009 (continue to use Form I-9 (Rev. 06/05/07) N” until then
- ARRA places limits on certain employers with H-1B workers (applicable to TARP recipients)

The Employee Free Choice Act

Legislation would amend the National Labor Relations Act (NLRA) in the following ways:

- New method of certifying bargaining representative (Card Check)
- New procedures for collective bargaining (first contract mediation/arbitration)
- Stronger penalties for unfair labor practices during organization or negotiation of first contract (treble damages and civil fines)

Certification on the Basis of Signed Authorization Cards (Card Check)

- Certification of union as bargaining representative when majority of employees in appropriate unit signs authorization cards
- Elimination of secret ballot election for representation cases
- NLRB to develop model authorization language and procedures for establishing the validity of signatures

First Contract Mediation/Arbitration

- Parties shall meet and commence bargaining with 10 days of written request for bargaining.
- If unable to reach first contract after 90 days of bargaining, either party may request mediation by the Federal Mediation and Conciliation Service
- If no agreement with 30 days of the request for mediation, an arbitration panel will resolve the dispute with the decision binding for two years.

Stronger Penalties during Organizing and First Contract

- NLRB must seek federal court injunction when it has reasonable cause to believe that employer has discharged or discriminated against employees, threatened to do so or significantly interfered with employee rights.
- Three times back pay, and civil fines up to \$20,000 for willful/repeated conduct

Focus on What You *Can* Do

“The expressing of any views, arguments, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.”

Independent Contractors

- Employee Misclassification Prevention Act (would amend FLSA to add IC recordkeeping requirements)
- Independent Contractor Proper Classification Act (would restrict ability to classify workers as independent contractors, increase exposure for back taxes for misclassified workers, establish procedure for contractors to challenge status)

Family and Medical Leave

- Family and Medical Leave Enhancement Act--time off for kids', grandkids' activities
- Health Families Act—paid sick leave
- Working Families Flexibility Act—accommodation of flexible work arrangements.

Discrimination Law

- Civil Rights Act of 2008—would remove Title VII caps/add compensatory and punitive damages to FLSA/limit arbitration
- Employment Non-Discrimination Act-- would prohibit sexual orientation discrimination

Tennessee Changes?

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