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EMPLOYMENT LAW OUTLOOK

NEW REGULATIONS EXPAND ADA PROTECTIONS

Susan R. Blackman

On September 23, 2009, the EEOC published proposed regulations concerning the Americans with Disabilities Act Amendments Act of 2008 (ADAAA). The regulations, if adopted, will dramatically expand ADA protection.

The ADAAA maintains the prior definition of a covered disability as a physical or mental impairment that substantially limits a major life activity. However, the ADAAA directed the EEOC to develop an interpretation of "substantially limits" that would be broader than the previous interpretation, resulting in greater application of the ADA's protections: the term "substantially limits" shall be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA.

The EEOC's new regulations answer this charge, stating that an impairment "need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered a disability." The regulations state that the determination of whether an individual is experiencing a substantial limitation is a common sense assessment based on comparing an individual's ability to perform a specific major activity with that of most people in the general population. The proposed regulations note that temporary, non-chronic impairments of short duration with little or no residual effects usually will not be considered disabilities.

The ADAAA also expanded ADA coverage under the "regarded as" provision. The ADAAA expanded the definition of "regarded as" to apply to an individual who has been subjected to an action prohibited under the Act "because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." The Act clarifies that "regarded as" protection "shall not apply to impairments that are transitory and minor. . . . A transitory impairment is an impairment with an actual or expected duration of six months or less." The proposed regulations provide: "An impairment may substantially limit a major life activity even if it lasts, or is expected to last, for fewer than six months."

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ASSOCIATIONAL DISCRIMINATION DESERVES ATTENTION

William E. Rachels, Jr.

Associational discrimination is discrimination against job applicants and employees based on their association with friends, spouses or relatives of a protected class. The EEOC has increased its focus on associational discrimination as a new front for enforcement actions, and individual employees have recently brought cases alleging associational discrimination.

The Americans with Disability Act, the only statutory law on the subject, specifically prevents employers from taking adverse actions based on unfounded stereotypes and assumptions about individuals who associate with people who have disabilities. The EEOC asserts that the closeness of the relationship between the employee and the disabled individual is not relevant; the key is whether the employer is motivated by the individual's relationship or association with a person who has a disability. The EEOC notes that unlawful actions include refusing to hire an individual who has a child with a disability (based on an assumption that the applicant will be away from work excessively or be otherwise unreliable), firing an employee who associates with people who are HIV-positive or have AIDS (based on the assumption that the employee will contract the disease), or denying an employee health care coverage because of the disability of an employee's dependent.

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William E. Rachels, Jr. Receives Chair Award

William E. Rachels, Jr. recently received the Virginia Bar Association's Labor Relations and Employment Law Chair Award. This award recognizes attorneys who have dedicated themselves to the Section and its Council, demonstrated a commitment to professionalism, and have a long history of mentoring employment attorneys.

VIRGINIA'S "MINI-COBRA" EXTENDS COVERAGE TO EMPLOYEES OF SMALL BUSINESSES

Cher E. Wynkoop and Ruby W. Lee

On February 17, 2009, the American Recovery and Reinvestment Act of 2009 (ARRA) became law. Among other things, the ARRA provides a federal subsidy for certain individuals who qualify for group health insurance continuation coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA).

COBRA is the federal law that provides workers who lose their health insurance benefits under certain circumstances (e.g., involuntary termination) the right to continue their coverage for a limited period of time, generally 18 months, if they pay the entire premium for the cost of the plan. The ARRA, however, changes the premium requirement with respect to involuntary employment terminations occurring between September 1, 2008 and December 31, 2009, by providing that eligible individuals will be responsible for paying only 35 percent of the COBRA premium amount for up to nine months. Employers that provide group health insurance coverage are responsible for the remaining 65 percent, but are reimbursed through a payroll tax credit.

In general, COBRA only applies to businesses with 20 or more employees; however, the premium reduction is also available for group health insurance continuation coverage under comparable state law "mini-COBRA" programs. Until recently, the premium reduction was not available for Virginia small businesses (less than 20 employees) because Virginia law (Va. Code § 38.2-3541) did not constitute a comparable mini-COBRA program. Instead, employees of small Virginia businesses were required to pay the full amount of the premium and the coverage was only available for a period of 90 days.

On April 8, 2009, the Virginia General Assembly enacted a comparable mini-COBRA program (Section 38.2-3541.1), which makes Virginia small business employees eligible for the federal subsidy. The new law requires that employees who are involuntarily terminated between September 1, 2008 and December 31, 2009, be offered the option to continue their existing group health insurance coverage with the 65 percent premium reduction for up to 9 months following the date of (i) involuntary termination for those terminated on or after April 8, 2009, or (ii) following the date of notification required by the section, contingent upon the involuntarily terminated employee's eligibility for premium assistance under the ARRA.

Section 38.2-3541.1 requires employers to notify employees of the availability of health insurance continuation as follows:

- For employees terminated between September 1, 2008 and February 17, 2009, notify in accordance with Section 3001 of the ARRA;
- For employees terminated between February 17, 2009 and April

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CONGRESS COVERS ITS FMLA BACK

Samuel J. Webster

Congress enacted the Family and Medical Leave Act (FMLA) in 1993. Fifteen years later, in January, 2008, Congress amended FMLA for the first time, adding two military-related provisions: qualifying exigency leave and service member caregiver leave. In doing so, Congress, through contorted definitional provisions and unbeknownst to the general public, limited exigency leave and, arguably, service member caregiver leave, solely to families of service members in the National Guard and Reserves. Following the amendment, as part of its comprehensive overhaul of the FMLA regulations, the Department of Labor (DOL) clarified that qualifying exigency leave was available only to families of National Guard or Reserve service members. Congress' clandestine exclusion of the regular Armed Forces from these FMLA provisions has finally come home to roost. In the National Defense Authorization Act for Fiscal Year 2010 (PL 111-84), effective October 28, 2009, Congress covered itself by again amending the FMLA military leave provisions to include the regular Armed Services and veterans under certain circumstances.

The FMLA's first amendment created qualified exigency leave and service member caregiver leave. Qualified exigency leave was available for 12 weeks in any 12-month period when a family member was called or notified of an impending call to duty as a member of the National Guard or Reserves, thus providing for leave to attend to matters brought on by the relatively sudden call to active duty. Service member caregiver leave allowed 26 weeks during a single 12-month period for the family member to care for a service member who had suffered an injury or illness while on active duty.

Congress has now expanded qualified exigency leave to include not only National Guard and Reserve-related families, but also regular Armed Forces families, notwithstanding Congress' earlier comments that regular Armed Forces were deemed to have accepted the exigencies associated with a deployment as part of their military service.

The greater expansion occurred regarding the service member caregiver provisions. Originally, the service member caregiver leave provision provided 26 weeks of leave during a single 12-month period to care for that service member injured while on active duty. Now, the law extends military caregiver leave to families of veterans undergoing medical treatment, recuperation or therapy for a serious injury or an illness incurred while on active duty for up to five years after the service member leaves the military.

In the past, notwithstanding the earlier amendment's restriction to National Guard and Reserve members, we counseled employers on the inadvisability of so limiting the coverage. Now, the FMLA

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ASSOCIATIONAL DISCRIMINATION DESERVES ATTENTION

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Applying Title VII, but with no specific statutory provision, several U.S. Circuit Courts of Appeals have upheld discrimination claims based upon the employee's association with members of another race, particularly involving interracial marriage. Courts have concluded that to discriminate against an employee of one race being married to a person of another race is race discrimination against the employee's race. The courts are divided, however, where the interracial relationship, not a marriage, is between co-workers in the workplace.

In the absence of a direct relationship outside of the workplace, potential exists for a hostile environment claim within the workplace. An employee could be the victim of a hostile environment because of comments made by co-workers in reaction to interracial relationships at work as well as outside. As with a basic hostile environment claim, such comments must rise to the level of severe or pervasive circumstances.

The Employment Non-Discrimination Act (ENDA), pending before Congress, would ban employment discrimination based on sexual orientation; it also contains a provision banning associational discrimination. ENDA would prohibit discrimination based on the actual or perceived sexual identity of an individual or group with whom an employee associates. For instance, employees could not be subject to adverse employment action for marching in a parade in support of gay marriage, or because a family member or friend is gay, lesbian, transsexual or transgendered.

A related subject is associational retaliation claims. The majority of the Circuit Courts of Appeals have rejected such claims under Title VII where an employee claimed an adverse employment action because of his association with an employee who filed discrimination claims against their shared employer. These courts have concluded that Title VII's anti-retaliation provision requires employees to engage personally in protected activity on their own behalf by individually opposing an unlawful practice or participating in an investigation of one. A minority of the Courts of Appeals have adopted the EEOC's position that Title VII should be construed to include "claimants who are 'closely related [to] or associated [with]' a person who has engaged in protected activity." Nonetheless, under the above-referenced analysis of basic associational discrimination, the employee who filed the basic employment discrimination claim could also file a Title VII retaliation claim alleging that the adverse action against the other employee in response to the protected activity of the first employee was an adverse action against him.

These recent developments suggest that associational discrimination, whether direct or retaliatory, is receiving more attention, requiring employers to be alert. We recommend that employee associational discrimination complaints be treated like any other discrimination claim and investigated, and we recommend that discrimination training sessions include this topic. Finally, base all employment decisions only on legitimate business concerns.■

VIRGINIA'S "MINI-COBRA" EXTENDS COVERAGE TO EMPLOYEES OF SMALL BUSINESSES

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8, 2009, notify no later than June 8, 2009 or the employee's termination, whichever is later; and
- For employees terminated after April 8, 2009, no later than 30 days following the date of the employee's termination.

The employee must elect the continuation of coverage within 60 days following notice of the plan enrollment options. In addition, all other provisions, restrictions and limitations contained in the ARRA apply.

In December of 2009, Congress extended the federal subsidy to employees who were involuntarily terminated from December 31, 2009 through February 28, 2010 and extends the period of coverage for an additional six months (15 months in total). This may result in an extension of Virginia COBRA subsidies.

Small Virginia employers should act immediately to ensure compliance with these new laws. At a minimum, employers must review their records to determine the eligibility of any former employees so they can send the necessary notifications. Plan materials should also be reviewed and updated to comply with the new requirements. Additionally, severance policies and agreements should be reviewed to revisit the issue of any employer continuation premium contributions.■

CONGRESS COVERS ITS FMLA BACK

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military leave provisions apply across the board for qualified exigency leave and create a window for service member caregiver leave five years after discharge.

DOL will likely act quickly to conform its regulations to these most recent amendments, but we anticipate no substantive changes other than those necessary for the clarifying of the broader coverage. Employers should promptly update their FMLA policies.■

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The ADAAA added the following activities to the previously recognized list of major life activities: eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, communicating, and "major bodily functions." The statute lists a number of human body systems that will count as "major bodily functions": the immune system, normal cell growth, digestive, bladder, bowel, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. The EEOC's proposed regulations add lymphatic, musculoskeletal, special sense organs, skin, genitourinary, and cardiovascular systems. The proposed regulations also add sitting, reaching, and interacting with others as major life activities. In addition, they state that working will be a major life activity if the impairment limits the person's ability to perform "the type of work" at issue. The type of work may be identified by specific jobs, e.g., commercial truck driving, or by reference to job-related requirements, e.g., jobs requiring repetitive bending.

The proposed regulations also provide a non-exhaustive list of examples of impairments that will consistently meet the definition of disability: deafness, blindness, missing limbs, cancer, cerebral palsy, diabetes, epilepsy, HIV/AIDS, multiple sclerosis, muscular dystrophy, mobility impairments requiring a wheelchair, intellectual disability, autism, major depression, bipolar disorder, post traumatic stress disorder, obsessive compulsive disorder, and schizophrenia. The regulations further provide examples of impairments that may be disabling for some people, but not others: asthma, high blood pressure, learning disability, back impairment, leg impairment, panic disorder, anxiety disorder, non-major depression, carpal tunnel syndrome, and hyperthyroidism. With respect to back impairments and leg impairments, the regulations note that a 20-pound lifting restriction will be considered a disability if it lasts, or is expected to last, several months or more.

The regulations offer examples of conditions that usually will not constitute disabilities. These may include, but are not limited to, common cold, seasonal or common influenza, sprained joint, seasonal allergies, appendicitis, minor, non-chronic gastrointestinal disorders, and broken bones that are expected to heal.

Persons who would be substantially limited in a major life activity without medical treatment will be protected under the ADAAA. The determination of whether someone is "substantially limited" will be made without considering how medical treatments or ameliorative measures would affect the condition (except for ordinary eyeglasses).

As a result of this enormous expansion of ADA protections, employers must prepare to accommodate more employees and applicants. Employers should train managers on how to honor the rights of employees and applicants with disabilities and how to conduct the interactive process that may now be required with greater frequency to determine a reasonable accommodation. In addition, the focus of EEOC Charges of Discrimination and ADA litigation will shift away from the determination of whether an individual has a covered disability, concentrating instead on whether the disability was the cause of a challenged decision, whether the employer provided a reasonable accommodation, and whether the employee was otherwise qualified to perform the essential duties of the position.■

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