ADAAA FALL OUT: WHAT SHOULD EMPLOYERS DO NOW?

7 STEPS TO PREVENT LAWSUIT RISK AND EXPOSURE

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Signed into law by President Bush on September 25, 2008, the ADA Amendments Act ("ADAAA") becomes effective January 1, 2009. With the expanded scope and reach of federal disability law under the ADAAA, there are a number of prudent steps employers can take now to mitigate their risk, and protect themselves and their company from lawsuits stemming from this recent legislative change.

In light of the legal changes, employers can reasonably expect:

- Increased numbers of employees for whom reasonable accommodation must be offered;
- Increased numbers of ADA-based lawsuits;
- Increased difficulty obtaining the summary dismissal of claims by marginally-impaired employees.

While some experts believe the ADAAA will not cause a general increase in litigation, it is likely there will be some rise in the number of cases filed because of the relative ease in stating a claim. As is often the case with new legislation, workers may also seek to test the new statutory provisions. Potentially, there may be more trials in ADA cases, as many cases which were previously dismissed due to the narrow interpretation of the term "disabled" may now find an easier path to a jury.

As a net positive for employers, the ADAAA does not radically alter the duty to accommodate. It only modifies the definition of disabled, meaning most employers will not have to make radical and costly changes to ensure compliance. There are however, some practical steps employers can take to reflect the statutory changes and minimize their risk of a lawsuit, including:

1. Ensure all documents are up to date. Review all internal policies and procedures to make sure any definitions of disability track the new law. Employee handbook or employment manual changes made should be republished and clearly communicated to all employees. Because the changes at issue are mostly definitional, it is unlikely that employers will need to completely rewrite or make major policy revisions.

2. Job descriptions matter more. Audit existing job descriptions for accuracy, paying particular attention to the definition of essential functions for each position. Because the focus of court review in ADA litigation will now hinge on the issue of reasonable accommodation, job descriptions will play an increased role in defending employment decisions.

3. Educate on definitional changes. Retrain all supervisory, management and human resource personnel on the duty to accommodate, and particularly, the duty to engage in an interactive process with all employees who claim disability. Individual decision makers must understand the comparative ease under which many additional people who were not previously covered may now be considered "disabled" under the ADAAA.

4. Create protocols and procedures before they are needed. If concerns about a wave of accommodation requests in response to the ADA changes exist, consider creating both a protocol and a task force to deal with the requests. Protocols can place both the duty to engage in the interactive process and the decision to offer accommodation in the hands of specially trained employees, and thereby limit the likelihood that decisions will be made that don't reflect the requirements of the new law.

5. Train to avoid. Train supervisors, managers, human resources personnel and anyone else who makes decisions about accommodation about the ADAAA. Employees in these positions should understand the implications of the change in the definition of disability, and they should be highly aware of the "regarded as disabled" source of liability, so they avoid behaviors that might fall into this category. Working with outside counsel to make sure training is completely accurate in light of the subtleties of the ADAAA is crucial.

6. Be prepared. Expect more lawsuits to be filed and place a renewed emphasis on documentation. The ADAAA makes it easier for employees to bring claims of disability discrimination. The defense of these suits will be more difficult for employers; as the new expanded definition of term disability will limit some frequently used defenses available to employers. Creating a clear and straightforward paper trial regarding any accommodation decision, and bona fide non-discriminatory reasons for any adverse employment decision will be more essential than ever. Human resources, managers and supervisors must keep precise records and document all employment decisions thoroughly.

7. Engage all relevant departments. Discussions between internal legal departments and outside counsel about potential coverage issues will be helpful when facing requests for accommodation by marginally-disabled employees whose requests would have been rejected under the prior version of the ADA.

Given that the ADAAA requires covered employers to accommodate a broader spectrum of disabled employees and will likely result in an increased number of disability-based discrimination claims, employers should take practical steps now to mitigate these risks and limit their exposure. Wise and thoughtful policies and procedures today can prevent an onslaught of lawsuits tomorrow.

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