

Employment & Labor Law Newsletter

March 2009

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Expanding the Meaning of Who is Disabled

Title I of The Americans with Disabilities Act of 1990 (ADA), prohibits discrimination on the basis of disability in the terms and conditions of employment. On January 1, 2009, sweeping amendments to the ADA, the ADA Amendments Act of 2008 (ADAAA) went into effect. The amended ADA retains the original basic definition of "disability" as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment.

The following are the key areas of the ADA that the ADAAA has modified:

Substantially Limits: Directs the EEOC to redefine "substantially limits" in its regulations.

Major Life Activities: Expands "major life activities," by offering two lists, comprised of major life activities and major bodily functions, which are meant to be non-exhaustive.

§ **Major Life activities:** Working walking, reading, bending, communicating, etc.

§ **Major Bodily Functions:** Immune system, digestive, bowel, respiratory system, circulatory, reproductive system.

Mitigating Measures: No longer allows an employer to consider mitigating measures outside of ordinary eyeglasses and contact lenses in determining disability.

Episodic or In-Remission Impairments: Clarifies that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

Regarded as Disabled: Provides that an individual subject to an action prohibited by the ADA (i.e.,

failure to hire) because of an actual or perceived impairment will meet the “regarded as” definition unless the impairment is transitory and minor but provides that individuals covered only under the “regarded as” prong are not entitled to reasonable accommodation.

Broad Interpretation: Emphasizes that the definition of “disability” should be interpreted broadly.

Is there any good news for employers? The good news for employers is that the EEOC reports that it made a finding of probable cause (i.e. violation of the ADA) in only 5.3% of all cases filed with the agency in 2007. The EEOC also reports that it was successful in prosecuting only 2.0% of the probable cause cases. *The bottom-line:* have a strong compliance program, thorough and accurate job descriptions, and consult closely with experienced employment counsel.

Changes to the Family Medical Leave Act

The Department of Labor (DOL), recently issued long-awaited new regulations clarifying the Family Medical Leave Act (FMLA). Additionally, recent legislation, the National Defense Authorization Act (NDAA), expanded the FMLA to allow employee leave for certain situations arising out of a covered military member.

The FMLA applies to all employers who employed 50 or more employees in 20 or more workweeks in the current or preceding calendar year within a 75 mile radius. For headcount purposes, part-time employees are included.

The new regulations retain the FMLA’s eligibility criteria that provides an eligible employee must have worked for the covered employer for at least 1,250 hours in the last twelve months.

The following are highlights from the NDAA:

Military Exigency Leave: Allows employees who are family members of covered service members to

take up to 12 weeks leave for qualifying exigencies arising out of the fact that the service member is on active duty or call to active duty status as a member of the National Guard or Reserves in support of a contingency operation.

Military Caregiver Leave: Allows employees who are family members of covered service members to take up to 26 workweeks of leave in a “single 12-month period” to care for a covered service member with a serious illness or injury incurred in the line of duty on active duty.

The following are the highlights from the newly adopted DOL regulations to the FMLA:

Ragsdale Penalties: The new regulations do away with the judicially-created categorical penalty for not immediately designating an employee’s leave as FMLA leave. The penalty has resulted in employees being able to take protected leave beyond what the FMLA provides, if the employer delayed in designating the leave as FMLA leave. The penalty remains in cases where an employee can show individualized harm due to the delay in designation of the leave.

Light Duty: Light duty assignments cannot be counted against an employee’s FMLA allotment.

Waiver of Rights: The regulations expressly permit individual settlements of FMLA controversies between parties without DOL or court approval. Prospective waivers, however, continue to be prohibited.

Serious Health Condition: A serious health condition under the FMLA is an injury, illness, impairment, or physical mental condition that involves either inpatient care or continuing treatment. One of the most vexing issues for employers has been determining when a health condition was an FMLA-qualifying “serious health condition.”

The new regulations appear to retain the previous definition of “serious health condition.” They

provide that "continuing treatment" for establishing a "serious health condition" requires that the employee have 2 or more visits to a healthcare provider within 30 days of the first day of incapacity and specify that the first visit to a healthcare provider must occur within 7 days of the first day of incapacity. The period of time to establish "incapacity" is three consecutive full calendar days.

For a chronic condition to be deemed a "serious health condition," the employee is required to make periodic visits to a healthcare provider for treatment. "Periodic" is defined as at least twice a year.

Substitution of Paid Leave: Under the new regulations, all forms of paid leave offered by an employer will be treated the same. An employee electing to use any type of paid leave concurrently with FMLA leave must follow the same terms and conditions of the employer's policy that apply to other employees for the use of such leave. The employee is always entitled to unpaid FMLA leave if he or she does not meet the employer's conditions for taking paid leave and the employer may waive any procedural requirements for the taking of any type of paid leave.

Perfect Attendance Awards: Employers may now deny perfect attendance awards to employees who do not have perfect attendance because of FMLA leave so long as the employer treats employees not taking FMLA leave in an identical way.

Employee Notice: Unforeseeable leave has been one of the most disruptive aspects of the FMLA for business. The old rule allowed employees up to two days to give notice in instances of unforeseeable leave. The new rule now provides that absent unusual circumstances, the employee must comply with the employer's call-in policies and procedures.

Employer Notice: The new regulations consolidate all the employer notice requirements into a "one-stop" section of the regulations and reconcile some conflicting provisions and time periods under the current regulations. Employers will be required to

provide employees with a general notice about the FMLA (through a poster, and either an employee handbook or upon hire); an eligibility notice; a rights and responsibilities notice; and a designation notice. In order to ensure employers are able to better inform employees under the new notice provisions, the final rule extends the time for employers to provide various notices from two business days to five business days.

Medical Certification: The new regulations provide that an employer's representative—but not the employee's direct supervisor—may have contact with the employee's health care provider in order to authenticate and/ or clarify a medical certification. If an employer deems a medical certification incomplete or insufficient, the employer must specify in writing what information is lacking and must give the employee 7 calendar days to cure the deficiency. With respect to conditions that are "lifetime" or whose duration is "unknown," the new regulations expressly permit an employer to ask for recertification of an ongoing condition every six months in conjunction with an absence.

Fitness-for-Duty Certification: The final regulations make two changes to the fitness-for-duty certification process. First, an employer may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job. Second, where reasonable job safety concerns exist, an employer may require a fitness-for-duty certification before an employee may return to work when the employee takes intermittent leave.

Practice Pointer: Employers should disseminate updated information to their employees on the FMLA and revise their internal practices accordingly to minimize liability associated with administering the new law. Employers should also update employee handbooks and adopt new forms to reflect the changes in the law. Sample forms can be obtained at the USDOL website at <http://www.dol.gov/esa/whd/fmla/>, Forms section.

Sidebar Newsflash: In a case of first impression for the 7th Circuit, a federal judge in the Northern District of Illinois in *Reynolds v. Inter-Indus. Conf. on Auto Collision Repair*, 2009 WL 104329 (N.D. Ill.) (Jan. 23, 2009) recently ruled that FMLA protection should be extended to employees who have almost met eligibility criteria for FMLA leave. In *Reynolds*, the former employee claimed that he requested FMLA leave and then was terminated. Reynolds was terminated nine days before he was eligible for FMLA leave. I-CAR filed a motion to dismiss Reynolds' FMLA interference claim on the basis that he was not eligible for leave. Judge Coar denied the motion holding that the FMLA protected employees who were not yet eligible but had made a request for FMLA leave.

Supreme Court Rules That Witnesses in Internal Harassment Investigations May Claim Retaliation

In *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee* 555 U.S. ____, 129 S.Ct. 846 (2009), the U.S. Supreme Court held for the first time that federal law protects employees from retaliation for cooperating in an employer's internal investigation of another employee's harassment complaint. The court ruled that Title VII's anti-retaliation provisions protect employees in this situation, even where they have never made a harassment complaint or even reported inappropriate conduct.

The case began when the employer ("Metro"), a local government, initiated an internal investigation into rumors of sexual harassment by Hughes, a school district employee relations director. As part of the investigation, a Metro official interviewed Vicky Crawford, a 30-year employee who had made no harassment complaint against Hughes or anyone else. In response to the interviewer's questions, Crawford described past instances where Hughes had acted inappropriately towards her. Metro ended up taking no action against Hughes, but soon fired Crawford for alleged embezzlement. Crawford sued under Title VII, claiming she had been discharged in retaliation for reporting Hughes' behavior in response to questions during the sexual harassment investigation.

The lower courts dismissed Crawford's claim on the grounds that she did not meet the requirement of Title VII's anti-retaliation provisions that she had either "opposed" an unlawful employment practice or "participated" in an official Title VII proceeding. These courts reasoned that Crawford had not opposed unlawful harassment because she had not made her own internal complaint, and she had not participated in an investigation of any charge pending before the EEOC. The Supreme Court disagreed, holding that an employee can oppose unlawful discrimination by responding to someone else's question just as surely as by reporting the discrimination through initiation of a complaint. The court commented that it would be a "freakish rule" that protects an employee who "reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks the question."

The *Crawford* decision significantly expands the scope of Title VII's anti-retaliation protections. The case creates avenues for retaliation claims by terminated employees who claim they previously mentioned harassment or discrimination to the employer, even though they never made any complaint.

Practice Tip: In light of *Crawford*, employers investigating complaints of harassment or other discrimination should keep accurate and complete records of what is said by those interviewed. Also, the case serves as a reminder that an employer cannot ignore any report of discrimination or harassment, regardless of whether the employee has made a formal complaint.

Seventh Circuit Holds That Pregnancy Discrimination Act Protects Gender-Specific Infertility Treatments

The 1978 Pregnancy Discrimination Act ("PDA") amended Title VII's definition of sex discrimination by including adverse employment actions based on "pregnancy, childbirth, or related medical conditions." It was unclear how, if at all, the PDA was intended to apply to employees undergoing

fertility treatments. Since the PDA's passage, courts have generally found that differential treatment of employees based on infertility alone does not violate the law because both men and woman can be infertile. For example, courts have held that an employer does not violate the PDA by excluding all infertility treatments from its health care plan. But, what if an employer terminates an employee because she is undergoing infertility treatments? The Seventh Circuit Court of Appeals recently became the first court to face that issue, in *Hall v. Nalco Co.*, 534 F.3d 644 (7th Cir. 2008).

Cheryl Hall was a sales secretary who had been unable to become pregnant. Hall requested and received a leave of absence from work to receive in vitro fertilization treatments. These treatments involved fertility drugs, extraction of Hall's eggs, fertilization of the eggs in a laboratory, and implantation of the embryos in Hall's womb. When the first round of treatments was unsuccessful, Hall requested a second leave of absence to try again. Shortly after Hall's request, her company went through a reorganization which resulted in Hall's termination and the retention of a second sales secretary who had been incapable of becoming pregnant. When Hall's boss informed her of her termination, she told Hall that it was in Hall's best interest due to her "health condition." Hall's boss also had discussed Hall with an employee relations manager whose notes of the meeting included "missed a lot of work due to health," and "absenteeism –infertility treatments."

Hall brought a Title VII suit against her former employer, alleging that she was discharged because she was a "female with a pregnancy-related condition, infertility." The lower court dismissed Hall's case, holding that the PDA does not protect infertile women because both man and women can be infertile. The Seventh Circuit reversed the lower court, ruling that Hall was protected because employees taking time off work specifically for in vitro fertilization can only be women. Therefore, Hall's claim was that she was terminated "not for the gender-neutral condition

of infertility, but rather for the gender-specific quality of childbearing capacity."

Practice Tip: The *Hall* case offers two lessons to employers. First, employers must be careful not to base employment decisions on the childbearing capacity of employees or applicants. Second, while a policy or practice may not expressly apply to employees of one gender, it may nevertheless raise tricky questions of gender neutrality.

Wage & Hour Issues: Why It's Important to Get it Right

The Fair Labor Standards Act (FLSA) establishes minimum wages, overtime pay, necessary record keeping, and child labor standards for private sector and government employers. The FLSA is administered and regulated by the U.S. Department of Labor (DOL) which is empowered by federal law to conduct workplace investigations with or without notice to determine whether an employer has violated the law.

In recent years, the DOL and plaintiff lawyers have hotly pursued employers for non-compliance in two areas: misclassification of non-exempt employees as exempt and improper timekeeping practices. The DOL imputes a certain degree of knowledge upon employers that they have the resources to understand the law and properly comply with FLSA.

Consequently, these mistakes have cost employers millions of dollars in back wages, fines, liquidated damages, court costs, and attorney fees. The mistakes have also cost employers negative publicity.

The trigger for a DOL investigation can be as simple as an unfounded complaint, but the fallout can be devastating since the DOL investigator has the authority to inspect more than just a complaining party's records. The DOL investigator has the authority to conduct a wide reaching investigation into topics that are outside the scope of the complaint, which is why getting it right from the beginning is so important. The investigator also

has the authority to inspect the worksite for additional violations and can conduct extensive employee interviews.

Practice Tip: The best way to deal with a DOL investigation is to be in compliance. Regular review of your company's wage and hour practices, record-keeping practices, FMLA leave administration, and child labor practices is essential. DOL investigates employers based upon specific complaints or by industry. Where necessary consult with your employment counsel to ensure your company's practices are in line with the FLSA and retain your attorneys to represent you during a DOL investigation.

NLRB Rules That Employer Lawfully Changed Rule Where Union Failed to Request Bargaining After Opportunity to Do So

A frequent question for unionized employers is the nature of their obligations to the union when the employer wants to change a policy or past practice that affects union employees. The National Labor Relations Board recently revisited this issue in *Alcoa, Inc.* (August 29, 2008), and provided some timely guidance for employers in this sometimes unclear area.

For a number of years, Alcoa had allowed first shift union employees to clock out up to two hours early to attend a monthly union meeting. In early 2005, Alcoa was experiencing high demand for its products and determined that over 2100-man hours of production were being lost due to employees leaving early to attend the monthly meeting. The company informed the union leadership in March that this policy was costing the plant valuable man hours and asked the union to submit alternatives to the current practice, such as changing union meeting times. The union said it did not want to bargain about the issue at that time. The union then requested information from Alcoa regarding lost man hours due to union meetings, and the company promptly responded. Alcoa then asked the union twice more to submit a proposal regarding the union meetings. The union responded that its proposal was to leave the union

meeting practice as it was. On May 18, Alcoa advised the union that effective June 1, the company would discontinue its practice of excusing employees to attend monthly union meetings. The union then filed an unfair labor practice charge with the NLRB, claiming that Alcoa had violated its legal duty to bargain by unilaterally changing its policy.

The NLRB ruled that Alcoa had not violated its duty to bargain. The Board found that Alcoa's past practice of allowing employees to leave early to attend monthly union meetings had indeed become part of their terms and conditions of employment, and that the company's change was "material, substantial, and significant," thus creating a duty to bargain over the change. However, Alcoa had met its obligation by timely notifying the union of its desire to change the leave policy and offering the union an opportunity to bargain. The Board explained that where an employer notifies the union of a desire to change a condition of employment sufficiently in advance of the change to allow "a reasonable and meaningful opportunity to bargain," the union "must promptly request that the employer bargain over the matter." In this case, Alcoa had notified the union of the proposed change over two months in advance of its implementation. The union had made it clear that it did not intend to bargain over the issue and said its proposal was to leave the union meeting practice alone. The NLRB also noted that Alcoa had no obligation to offer the union anything in exchange for agreeing to change the policy; the company's only duty was to give the union adequate notice and an opportunity to bargain.

Retaliatory Discharge Action Available Against Borrowing Employer

In a case of first impression the Illinois Appellate court in *Hester v. Gilster – Mary Lee Corporation*, No. 5-07-0283 (Ill. 5th Dist. 12/18/08), held that an employee can bring a retaliatory discharge action against her borrowing employer when she claimed she was terminated because of testifying at a fellow employee's workers' compensation hearing. The

plaintiff had been loaned by her direct employer, Manpower, a temporary employment agency, to work for the borrowing employer, Gilster-Mary Lee Corporation.

The appellate court overturned the trial court's dismissal of plaintiff's complaint and noted that a borrowing employer is subject to the same prohibition against retaliatory discharge as was the lending employer.

Practice Tip: As a borrowing employer, such companies must ensure that they do not treat employees in a manner that is contrary to the laws applied to non-borrowed employees.

EEOC Regulations On Genetic Nondiscrimination

The Genetic Information Nondiscrimination Act of 2008 (GINA) becomes effective on November 21, 2009. On May 21, 2009, the EEOC will issue regulations implementing GINA.

Title II of GINA applies to private and state and local government employers with 15 or more employees as well as employment agencies, labor unions, and joint labor-management training programs.

GINA prohibits the use of genetic information in making decisions related to any terms, conditions, or privileges of employment, prohibits covered entities from intentionally acquiring genetic information, requires confidentiality with respect to genetic information (with limited exceptions), and prohibits retaliation.

"Genetic Information" may include:

- § The individual's genetic tests;
- § The genetic tests of a family member of the individual; or
- § The manifestation of a disease or disorder in the individual's family members.

Some exceptions to acquiring genetic information include information acquired pursuant to the FMLA and ADA. We will provide further updates on GINA as they become available.

WARN Act:

Please refer to our upcoming commercial Newsletter for a detailed discussion of the Federal Worker Adjustment and Retraining (WARN) Act.

Recent Successful Results

Our attorneys had some very interesting and successful case results in 2008.

Cary Schwimmer was successful before the Eighth Circuit U.S. Court of Appeals in *Tjernagel v. Gates Corp.*, 533 F.3d 666 (8th Cir. 2008), a case brought under the Americans With Disabilities Act. A former employee with multiple sclerosis was fired from her manufacturing job because her medical work restrictions rendered her unable to perform the essential functions of her position, including mandatory overtime. Affirming summary judgment granted by the lower court for the company, the Court of Appeals found that overtime was an essential function of her job and that a full medical release by the employee's doctor shortly after her discharge indicated she was not disabled in any event.

Storrs Downey defended a restaurant in an Indiana EEOC claim in which the employee filed suit for alleged discrimination about and disclosure of information about his HIV status. The case was resolved for a nominal amount.

Terry Madden of our medical malpractice department, after another successful trial earlier this month, has a string of three not guilty verdicts before Cook County juries over the year.

Seminars and Speaking Ongoing

Storrs Downey and **Justin Nestor** presented “Disciplining or Terminating Workers’ Compensation and Non-occupationally Disabled Claimants: Your Rights And Obligations Under The Law,” before Allergan, Inc., in 2008.

Betty Tsamis will be speaking at the “Running Your Business in a Difficulty Economy” on March 27. For more information, please go to <http://brycedowney.com/events/> page at www.brycedowney.com.

Our firm will be hosting a seminar on the topic of the important changes to the ADA and FMLA in the near future.

Bryce Downey & Lenkov is a firm of experienced business counselors and accomplished trial lawyers who deliver service, success and satisfaction. We exceed clients’ expectations while providing the highest caliber of service in a wide range of practice areas. With offices in Chicago, Oak Brook, Merrillville, IN, Memphis and Atlanta and attorneys licensed in multiple states, Bryce Downey & Lenkov is able to serve its clients’ needs with a regional concentration while maintaining a national practice. Our practice areas include:

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