RECENT DEVELOPMENTS UNDER THE AMERICANS WITH DISABILITIES ACT

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David Comeaux is a shareholder and practices in the area of employment law and litigation. He represents management in the full range of issues related to the employment relationship and has represented clients in numerous cases involving sex, race, age and disability discrimination claims, as well as wage and hour, tort and retaliation matters.

Mr. Comeaux also assists clients in identifying and managing risks that arise in the workplace. He has been involved in the creation and review of employment policies and handbooks, and consults with employers regarding employee rights and benefits and employer obligations and policies.

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THE ADA AMENDMENTS ACT

The Americans with Disabilities Act (ADA) is divided into three general categories, two of which directly affect hoteliers. Title I of the ADA prohibits employment discrimination against qualified individuals with disabilities. Title III prohibits discrimination in places of public accommodation, including hotels, against individuals with disabilities. This paper addresses recent developments under Title I.

The ADA Amendments Act of 2008 ("ADAAA") significantly changed the employment protections afforded to applicants and employees with physical and mental impairments. The law became effective January 1, 2009. The stated purpose of the ADA Amendments Act (ADAAA) is to "restore the intent and protections of the Americans With Disabilities Act of 1990." Just how will the ADAAA achieve this objective?

I. Overturn Supreme Court Decisions.

The bill mentions two particular Supreme Court decisions that it intends to limit, restrict, reject or overturn. The two decisions mentioned in the bill are Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002).

The bill states Sutton v. United Air Lines "narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect; held that "whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures;" and "with regard to coverage under the third prong of the definition of disability," provided a narrow view. The bill seeks to reinstate the reasoning in School Board of Nassau County v. Airline, 480 U.S. 273 (1987) which broadly defines handicap under the Rehabilitation Act of 1973.

Toyota Motor v. Williams "narrowed the broad scope of protection intended to be afforded by the ADA"; interpreted "substantially limits" to require a greater degree of limitation than was intended by Congress; and created "an inappropriately high level of limitation necessary to obtain coverage under the ADA." The bill also rejected standards in Toyota Motors v. Williams, which held that the ADA needed to be interpreted strictly to create a demanding standard for qualifying as disabled. The ADAAA also rejects the standard that to be substantially limited in performing a major life activity "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."

II. Expand List of Major Life Activities and Major Bodily Functions.

The ADAAA includes new definitions for these two terms. "Major life activities" is defined as including, but not being limited to "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working." Similarly, the definition of "major bodily function" includes but is not limited to "functions of the immune system, normal cell growth, digestive, bowl, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions."

III. Direct the EEOC to Revise Current Regulations.

The bill directs the Equal Employment Opportunity Commission (EEOC) to revise current regulations that define "substantially limits" as "significantly restricted." The new definition is to a have a meaning that is consistent with the ADAAA. The current EEOC-ADA regulations define the terms "substantially limits" as "significantly restrictive." This definition is inconsistent with Congress's intent by expressing too high a standard. A new definition was not provided in the Act.

IV. What are the specifics?

A. Mitigating Measures Not Considered.

1. The determination of whether an individual has an impairment which substantially limits a major life activity is to be made "without regard to the ameliorative effects of mitigating measures" other than ordinary eye glasses or contact lenses.

2. Mitigating measures which are not to be considered include medication, medical supplies, equipment, prosthesis, hearing aides, mobility devices, use of assistive technology and auxiliary aides or services.

3. Qualification standards and tests related to uncorrected vision must be shown to be job related and consistent with business necessity.

4. These changes overturn key holdings in Sutton v. United Air Lines.

B. Substantially Limits Definition Is Broader.

1. The term "substantially limits" is to be interpreted consistent with the findings and purposes of the ADAAA.

2. "Materially restricts" was proposed as a definition for "substantially limits" but was not included in the bill sent to the President.

3. The EEOC will issue regulations defining "substantially limits."

4. An impairment which substantially limits one major life activity need not limit other major life activities to be considered a disability.

5. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

C. Major Life Activities Include Major Bodily Functions.

1. Major life activities are those such as caring for oneself, performing manual tasks, seeing, walking and hearing.

2. Major bodily functions such as immune system, digestive, bowl and bladder functions, respiratory, circulatory and reproductive functions are included within the definition of major life activity.

D. Regarded as Impaired.

1. A person bringing a "regarded as" claim need not show she has a substantial limitation to a major life activity.

2. Rather, an individual meets the requirement of being "regarded as" if the individual establishes she 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.

3. "Regarded as" does not apply to impairments that are transitory (with an actual expected duration of 6 months or less) and minor.

4. A person claiming under the "regarded as" prong is required to show only that she had an impairment (perceived or actual) and that she was subjected to acts prohibited under the Act.

V. What do the changes mean to me?

A. More Individuals Will Meet The Broader Definition Of "Disability" Under The ADAAA.

B. More Coverage And Protection Is Provided.

C. Employer Defenses Are More Limited.

D. Employers Will Still Engage In The Interactive Process.

E. Regarded As Disabled Claims Will Be More Popular For Plaintiffs.

VI. The Current ADA – What is not changing?

The ADA requires a covered employer (15 or more employees) to provide a "reasonable accommodation" to qualified applicants and employees with a disability, where such an accommodation would enable the individual to perform the essential functions of the job unless to do so would create an undue hardship. Accommodations are unique and specific to the individual and are not necessarily standard for any particular type of disability. The primary goal is for employers to offer accommodations that effectively assist and allow "disabled" individuals to perform essential job functions.

In addition to the ADA, several states, including California, New York and Illinois, have their own unique disability discrimination laws that may, and generally do, provide their states' disabled workforce significantly broader protections than are mandated by the ADA. Indeed, in California, the state's Fair Employment and Housing Act (FEHA) requires that employers with five or more employees provide reasonable accommodations to qualified workers with disabilities and even those individuals who are not, by law, disabled, but who are regarded or perceived as disabled by their employers. The FEHA also protects persons who are not currently disabled, but who may become disabled in the future. Furthermore, an employer in California who does not engage in a good faith interactive process to determine a reasonable accommodation for an individual with a disability, or an individual who an employer regards or perceives as being disabled, is subject to being charged with an independent violation of the FEHA that may expose the employer to liability.

VII. Who is Entitled to a Reasonable Accommodation?

Under the ADA, an employer is required to provide a reasonable accommodation to qualified individuals with a disability. The ADA does not require an employer to hire job applicants or retain employees merely because they are disabled if they cannot perform the job. A "qualified individual with a disability" under the ADA is an individual who meets the skill, experience, education, and other job-related requirements of a position held or sought, and who, with or without reasonable accommodation, can perform the essential functions of the job. Under the ADA, the plaintiff must prove that he is "qualified" for the position that he seeks.

An individual is disabled under the ADA if he or she:

- Has a physical or mental impairment that substantially limits one or more of his or her major life activities;

- Has a record of such an impairment; or

- Is regarded as having such an impairment.

The determination of whether or not an individual is disabled must be made on a case-by-case basis. An employee may not simply argue that he suffers from a particular condition that renders him disabled as a matter of law and is therefore entitled to the protections afforded by the ADA. Rather, the employee must establish that his individual condition "substantially limits" a "major life activity" for him.

The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

- The nature and severity of the impairment;

- The duration or expected duration of the impairment;

- The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

Accordingly, temporary, non-chronic conditions or impairments that have little or no long-term effects such as a broken arm generally do not qualify as a "disability" under federal law.

Those individuals who have a "record of" a disability include individuals who have a history of, or who have been either classified or misclassified as having a disability. Nonetheless, in order to be protected under the ADA, the individual must have a record of an impairment that substantially limits a major life activity.

VIII. When Does the Duty to Provide A Reasonable Accommodation Arise?

Under federal law, an employer must provide reasonable accommodations to qualified individuals with disabilities, unless to do so would be an undue hardship or pose a direct threat to the health and safety of others. Under the ADA, an employer is only required to accommodate known disabilities.

While it is the employee's responsibility to inform the employer that an accommodation is needed, there is no one specific method that is required under the ADA to notify an employer of a need for an accommodation. For instance, there is no requirement that the request for accommodation be made in writing, orally, through e-mail or by any other form of communication. Furthermore, it is clear that the individual who is in need of an accommodation need not use any particular "magic words" in requesting an accommodation or even identify a specific accommodation. The individual (or someone acting on his behalf such as his union representative or attorney) need only

indicate to the employer that he is in need of assistance in order to perform the job given his condition to trigger an employer's duty to offer and/or provide an accommodation.

Even if the individual does not provide notice to the employer or request an accommodation, the employer may still be required to provide a reasonable accommodation if knowledge of the disability is imparted to the employer. Some courts have held that an employer's knowledge of a disability alone may be sufficient to impose a duty on an employer to affirmatively offer an accommodation to an individual whose condition may present challenges in performing essential job functions. However, to guarantee a right to accommodation, an employee should explicitly disclose to his employer his need for an accommodation.

In addition, an individual is not required to release or disclose his particular disability or medical condition before he is entitled to accommodation under the ADA. If an individual's disability or need for an accommodation is not obvious, an employer may request that the employee provide it with reasonable medical documentation confirming that he is disabled. The documentation, however, should be limited to a doctor's note or other medical documents reflecting that the individual has a disability (although the doctor is not obligated to disclose the particular disability) and that the employee requires accommodation. Such documentation must be kept confidential by the employer and maintained in a file separate from the employee's personnel file. The employer is not permitted to require the employee to disclose his entire medical or mental health history.

IX. What Must an Employer Do Once A Duty to Provide A Reasonable Accommodation Arises?

Once an employer is on notice of an individual's need for an accommodation, the employer must engage in a timely, good faith interactive process with the individual with a disability (or who is regarded as having a disability in some jurisdictions including California) to determine whether a reasonable accommodation is possible.

A. When is the Duty to Engage in the Interactive Process Triggered?

Under the ADA the employer must timely, in good faith, engage in a meaningful, interactive discussion with the applicant or employee in an effort to determine if a reasonable accommodation is possible upon request. The interactive process is triggered when an applicant or employee notifies the employer that he is in need of an accommodation. As referenced above, the individual requesting the accommodation is not required to use any magical phrase or even identify a specific accommodation. However, once the employer has received notice of the individual's need for an accommodation, the employer has a duty to engage in the interactive process.

Even if the employee does not provide notice to the employer of his disability or condition or request an accommodation, some courts have held that the employer may still be required to initiate the interactive process where the employee's symptoms are so

obvious that the employer should have known that the employee was in need of accommodation or where the employer regards the employee as disabled.

Generally, the applicant or employee who needs an accommodation is obligated to engage personally in the interactive process in good faith. However, in some situations, courts have permitted the applicant or employee who needs the accommodation to withdraw from the process and have forced the employer to engage in the interactive process through the applicant or employee's attorney where the court found that the employee was justifiably intimidated by the process.

B. How Do Employers Satisfy Their Obligation to Engage in a Timely, Good Faith, Interactive Process?

The interactive process is an informal open discussion between the employer and the disabled worker for purposes of ascertaining the precise limitations imposed by the worker's disability and how those limitations can be overcome by a reasonable accommodation. Parties to the interactive process should include, at a minimum, the employee and a representative of the employer who is knowledgeable about the ADA and state disability discrimination and/or workers' compensation laws.

Even if an employer's ability to accommodate the worker's disability seems doubtful, the employer nevertheless must conduct a good faith interactive process including:

- A review of the disabled worker's current job description and any available physical job analysis for the position in question;

- An identification of the essential and non-essential functions of the job duties and purpose for which the job exists;

- Input from the disabled worker about his or her limitations and a review of any medical documentation concerning the worker's condition and work restrictions; and

- An identification of potential accommodations and an assessment of how effective each would be in enabling the disabled worker to perform the essential functions of the job in question.

When faced with a situation where an employer is aware that one of its employees or a candidate for employment may have a condition or limitation that may impact his ability to perform his position or the position for which he seeks employment, the employer should take steps to:

- Explore Alternatives

  – Modify job so employee may continue to perform it

- Reassign employee to another vacant position for which he is qualified

- Contact Job Accommodation Network (anonymous 1-800 service provided by the federal government to assist employers in determining possible accommodations for disabled workers) to consult about possible work modifications

- Look for Open Positions

  - If a disabled worker cannot be accommodated in his existing position, thoroughly search for other positions within the company for which the worker is qualified to perform with or without reasonable accommodation

- Document Your Efforts to Accommodate

  - If no accommodation is available and the employee claims you did not engage in the interactive process, documentation will be key to convincing a jury that you made a good faith effort to attempt to reasonably accommodate the worker

C. What Are the Common Mistakes Made by Employers in Engaging in the Interactive Process?

Employers often make the following mistakes in engaging in the interactive process and preparing for possible litigation concerning their obligation to engage in the interactive process to determine potential reasonable accommodations for disabled workers:

- Conclude that no accommodation is possible before discussing the matter with the employee;

- Fail to engage in a dialogue with the disabled worker when it is aware that there is a possibility that the worker is in need of an accommodation;

- Fail to explore potential modifications of a worker's position;

- Place burden on the disabled worker to locate and identify possible open positions for which he is qualified and able to perform given his limitations;

- Rely exclusively on conclusions reached in the workers' compensation arena with respect to a disabled worker's ability to perform his job without exploring potential accommodations (e.g., an employee injured on the job is declared permanent and stationary and "permanently disabled" by his workers' compensation doctor or company physician and the employer fails to engage in a dialogue with the worker to determine if the worker is able to return to his former

job with or without accommodation or reassign him to another position for which he is qualified and able to perform);

- Fail to document its efforts to engage in the interactive process so that by the time that litigation ensues, the witnesses involved have no recollection of what efforts were made to have a dialogue with the worker to explore potential accommodations;

- Fail to maintain documents or logs of positions that were available when accommodations were explored so that it can demonstrate in subsequent litigation that there were no open positions for which the worker was qualified to perform with or without accommodation; and

- Unreasonably conclude that any accommodation will result in an "undue hardship" to the organization without actually assessing the "cost" to the organization by making the accommodation in terms of actual dollars vs. revenues of the company or impact on company operations.

D. What Are the Legal Consequences to an Employer Who Fails to Engage in the Interactive Process?

Under the ADA and other state disability discrimination laws, an employer is statutorily obligated to engage in a good faith interactive process. While a failure to engage in the interactive process is not an independent violation of the ADA, several courts have held an employer's failure to engage in the interactive process results in liability to the employer for failure to reasonably accommodate a disabled worker.

X. What Type of Accommodation Must Be Provided By an Employer?

The ADA provides the following examples of reasonable accommodations:

- Making existing facilities used by employees accessible to, and useable by, individuals with disabilities;

- Job restructuring;

- Part-time or modified work schedules;

- Reassignment to vacant positions;

- Acquisition or modification of equipment or devices;

- Adjustment or modifications of examinations, training materials, or policies;

- The provision of qualified readers or interpreters; and

- Other similar accommodations for individuals with disabilities.

An employer is not required to choose the best accommodation or the accommodation desired or requested by the applicant or employee.

Some of the various accommodations that courts have held employers are required to consider as possible reasonable accommodations under the ADA and state disability discrimination laws are as follows:

A. Reassigning a Disabled Worker to an Open and Equivalent Position.

Reassignment to a vacant position is among the reasonable accommodations that should be considered by an employer under the ADA. There is a split of authority in the federal circuits, however, concerning the issue of whether an employer must automatically reassign a disabled employee to an open and equivalent position or merely must allow the disabled worker to compete for the new position to meet its statutory duty to reasonably accommodate a disabled worker under the ADA.

In February 2008, the U.S. Supreme Court agreed to hear oral argument on this important issue in Huber v. Wal-Mart Stores, to decide if Wal-Mart violated the ADA by not automatically transferring the plaintiff, a disabled employee, to a vacant position for which she was qualified. Unfortunately, the case was dismissed before oral argument took place based on the parties' decision to settle their dispute and dismiss the appeal.

The plaintiff in the case, Pam Huber, injured her right arm and hand while working as an order filler in a Wal-Mart distribution center. Huber's injury prevented her from performing her regular job duties. As a reasonable accommodation, Huber sought reassignment to a router position, a desk job which was vacant and for which she was qualified and able to perform given her work restrictions necessitated by her disability.

Wal-Mart declined to transfer Huber to the router position on the grounds that she was not the most qualified candidate for the position. The employee who Wal-Mart selected for the router position was not disabled and had higher evaluation scores and greater longevity of service than Huber. Instead of transferring Huber to the router position, Wal-Mart transferred her to a janitorial position at an hourly wage less than half of what she was making as an order filler.

Huber sued Wal-Mart asserting that it failed to reasonably accommodate her in violation of the ADA. The trial court granted summary judgment in favor of Huber. Wal-Mart appealed to the United States Court of Appeals for the Eighth Circuit, which reversed the trial court's order granting summary judgment and rejected Huber's argument that Wal-Mart was obligated to automatically reassign her to the router position without requiring her to compete with other candidates for the position.

The decision by the Eighth Circuit in Huber conflicts with the decision reached by the federal courts in other circuits, which have held that an employer is required under the

ADA to automatically reassign a disabled employee to an open and equivalent position for which he is qualified even though there may be other more qualified candidates for the position.

Because the parties in the Huber case settled their dispute, the Supreme Court will have to wait for another case before it addresses the issue and resolves the conflict among the circuits on the issue of whether automatic reassignment to an open and equivalent position for which the disabled worker is qualified is required under the ADA.

The EEOC's Interpretative Guidelines state that the employer should reassign an individual with a disability in need of an accommodation to an equivalent position in terms of pay, status, benefits, and the like, if the individual is qualified and if the position is vacant within a reasonable amount of time after the individual seeks an accommodation. The EEOC also has stated that an individual with a disability need only be "qualified" for a new position and that the employee need not "be the best qualified individual for the position in order to obtain it as a reassignment."

At the present time, the Tenth and D.C. Circuits follow the rule that forcing a qualified, disabled employee to compete with other candidates for a vacant position in order to be provided a reassignment as a reasonable accommodation violates the ADA. Furthermore, the Second, Third, Sixth and Ninth Circuits have described the reassignment duty in mandatory terms.

On the other hand, the Eighth Circuit follows the view of the Seventh Circuit, that the ADA only requires that the employer allow the disabled employee to compete for the open position and it does not require the employer to turn away a superior applicant for the position.

Accordingly, until the Supreme Court decides the issue, employers should abide by the rule followed in their respective circuit court and/or their state's disability discrimination laws to the extent it is more restrictive or stringent than the standard for reassignment set by their respective circuit court.

B. Requirement to Make Temporary Light Duty Assignments Permanent.

Under the ADA an employer is not required to convert a temporary light duty accommodation position to which an employee has been assigned as an accommodation while the employee is recuperating to a permanent position.

C. Leaves of Absences.

A leave of absence may be a form of reasonable accommodation. An employer may be required to hold a job open for a disabled employee who needs time to recuperate if it appears reasonably likely that the employee will be able to return to his former position in the foreseeable future. Further, a personal leave of absence to undergo medical treatment may be a reasonable accommodation if it is reasonably likely that the

employee will be able to return to his former job and perform the essential functions of his job.

Both the ADA and various state disability discrimination laws including the Washington Law Against Discrimination (WLAD) and the California FEHA require that an employer consider an unpaid leave of absence as a reasonable accommodation; the employer may, however, be excused from doing so if it can show it would cause the employer an undue hardship. Providing an employee who does not provide a fixed return date an unpaid leave may be a reasonable accommodation unless the employer shows that it will cause an undue hardship to its operations. However, the mere fact that the disabled worker is unable to provide a fixed return date is not sufficient to constitute an undue hardship on its own.

Indeed, the Ninth Circuit Court of Appeals has explained that whether or not an extended leave of absence presents an undue hardship depends on the amount of leave sought, the business realities, and the job duties of the position in question. It also suggested that the employer's leave policies may be a factor in determining whether an extended leave will constitute an undue hardship. For example, if an employer's own policies allow an employee to take up to a one year leave of absence, it may not be an undue hardship to require an employer to hold the position open for the employee for up to a year or longer.

Whether or not the timing or length of the leave is reasonable depends on multiple factors including the job duties, nature of the job, and the disability. Each situation must be addressed on a case-by-case basis to determine whether or not the leave is reasonable and what amount of time is reasonable. An employer is not required to guarantee a leave when an alternative, effective accommodation is available.

D. Intermittent Leave.

The ADA provides that part-time and modified work schedules may be a reasonable accommodation that an employer should consider when determining whether the individual with a disability is able to perform the essential functions of the job, with or without accommodation.

E. Telecommuting or Working from Home.

Both the EEOC and several federal courts have suggested that, in some instances, telecommuting or working from home may constitute a reasonable accommodation.

F. Violating Seniority Rights of Others.

Generally, an employer is not required to reassign an individual with a disability if doing so would violate the seniority rights of other employees, including the rights provided to other employees pursuant to a well-established seniority system consistently adhered to and uniformly applied in making reasonable accommodation decisions. This

applies equally to collectively-bargained for seniority systems and those unilaterally imposed by management.

G. Assignment to Alternative Supervisor.

Under the ADA and various other state disability discrimination laws, including the WLAD, an employer is not required to provide a new supervisor as a reasonable accommodation. The ADA, however, may require that supervisory methods be altered as a form of reasonable accommodation.

XI. Are There Other Issues to Consider In Determining Reasonable Accommodations?

The following is a list of other considerations that should be taken into account when considering possible reasonable accommodations for disabled workers:

A. Amount of Leave An Employee Is Entitled to Take.

An employee generally is entitled to an amount of leave that is reasonable under the circumstances, i.e., limited only by an employer's defense of undue hardship.

B. Use of Sick/Vacation Benefits During a Leave.

Under the ADA employers must treat all employees on leave the same. An employer may require an employee to take sick benefits but not vacation benefits.

C. Maintenance of Health Benefits.

Employers are not obligated under the ADA to maintain health benefits during the course of a disability leave, but must not discriminate against employees with disabilities as compared to any other individuals on leave.

D. Requests for Recertification.

Employers may request recertification of a disability from a disabled worker. However, employers must be reasonable in making requests for recertification and take into consideration the type of disability, any change in conditions, the time elapsed since the last certification, and the like.

E. Fitness For Duty Examinations.

The ADA allows employers to require a fitness for duty examination if it is "job related and consistent with business necessity." To meet this standard, an employer must have a reasonable belief, based on objective evidence, that the employee's ability to perform essential job functions will be impaired by a medical condition or the employee will pose a direct threat to himself or others due to the medical condition.

XII. When is an Employer Excused From Providing an Accommodation?

An employer is only required to provide a "reasonable" accommodation under the ADA. Consequently, if the accommodation would disrupt operations or prove to be too costly, the employer is not required to make such an accommodation for the disabled worker or applicant. An accommodation that causes the employer "undue hardship" is not a "reasonable" accommodation under the law. However, the employer has the burden of proving that a particular accommodation poses an "undue hardship" for the employer in order to avoid liability.

Likewise, an accommodation that constitutes a "direct threat" to the health and safety of co-workers or to the employee is not a "reasonable" accommodation. Once again, the employer generally has the burden of proving that a specific accommodation poses a "direct threat" to the health and safety of co-workers or the employee.

An employer who believes that an accommodation may pose a "direct threat" to the health and safety of co-workers or the employee may require a fitness for duty examination if it is "job related and consistent with business necessity." The employer's belief of a risk of danger to health and safety of co-workers or the employee must be real – not based on pure speculation but on current, objective evidence.

An employer is not required to lower production or performance standards in order to meet its obligation to provide a reasonable accommodation. Furthermore, an employer is not required to excuse violations of conduct rules necessary for the operations of the business.