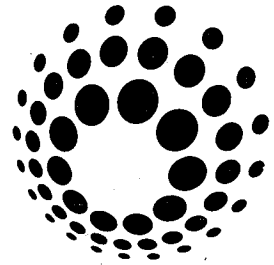


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New Amendments to the Americans with Disabilities Act

By: Paul Rajkowski, Attorney and Managing Partner

Effective January 1, 2009, the Americans with Disabilities Act will have new amendments which substantially expand the scope of medical conditions which will be protected by law. In a bill signed by President Bush on September 25, 2008, the ADA Amendments Act of 2008 (ADAA) rolls back years of judicial decisions interpreting the intent of the ADA and directs the Equal Employment Opportunity Commission (EEOC) and other regulatory agencies to issue new regulations consistent with the amendments' intent to provide "a clear and comprehensive national mandate for the elimination of discrimination" and "clear, strong, consistent, enforceable standards addressing discrimination" by reinstating a broad scope of protection to be available under the ADA.

The amendment states that determination of whether an impairment substantially impairs a major life activity shall be made without regard to the ameliorative effect of mitigating measures. What this means is that employees who have diseases that may be controlled by the use of medication, medical supplies, equipment, or appliances may still be covered under the ADA because the determination of impairment is made without the mitigating measures. The end result is that many more employees may be covered for conditions not readily apparent to employers.

Another section of the amendment states that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. Examples would include Multiple Sclerosis, seizure disorders, cancer or epilepsy. Employers need to interact with employees to make certain they are aware of the employee's condition.

Employers may not use qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless

the standard, test, or other selection criteria is shown to be job related for the position and is consistent with business necessity.

These amendments greatly expand the number of persons who may be covered under the ADA. Employers need to be aware of the impact these amendments will have on their business. Policies should be revised to be consistent with these amendments. Procedures should be established to respond to requests for reasonable accommodations. Job descriptions should be reviewed to ensure that essential job functions are clearly set out. Supervisors and managers need to be trained on the new amendments. Please contact the employment attorneys at Rajkowski Hansmeier for assistance in complying with these amendments.

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**DOL ISSUES REGULATIONS FOR THE
NEW MILITARY LEAVE AND CLARIFIES
REGULATIONS FOR SERIOUS HEALTH CONDITION LEAVE**

By: Thomas Jovanovich, Attorney

New regulations for the Family and Medical Leave Act (FMLA) have been released by the Department of Labor and will take effect on January 16, 2009. The new regulations affect two areas. First, the regulations provide guidance on implementation of the new military leave law. Second, the regulations clarify various issues of concern that arose with FMLA leave for serious health conditions.

MILITARY LEAVE

The new regulations clarify the military family leave provisions recently enacted under the National Defense Authorization Act. This Act extended FMLA coverage to allow the spouse, child or parent of a service member called to active duty to take FMLA leave for a “qualifying exigency” arising from military service.

There are two types of military leaves. The first is a “qualifying exigency” leave and the second is the “serious injury or illness” leave. The “qualifying exigency” leave counts against the employee’s 12-week per 12-month total allotment of FMLA leave. The “serious injury or illness” military leave is available for a maximum of 26 weeks “in a single 12-month period.”

Qualifying Exigency Leave

The “qualifying exigency” leave provides the opportunity to an employee to handle affairs related to the call of a spouse, parent or child to a contingency operation. It extends only to the families of members of Reserve components or the National Guard when engaged in federal service and not to members of the Regular Armed Forces or to National Guard members called to state service.

A “qualifying exigency” leave is defined to include any (1) short-notice deployment; (2) military events and related activities; (3) childcare and school activities; (4) financial and legal arrangements; (5) counseling; (6) rest and recuperation; (7) post-deployment activities; or (8) additional activities where the employer and employee agree to the leave.

The rest and recuperation leave (R&R) can be used to spend time with the service member and does not require that any “affairs” be handled. However, R&R leave is limited to five days per R&R leave.

Serious Injury or Illness Leave

The second type of “military” FMLA leave is available when an employee needs time off to care for a covered relative with a serious injury or illness incurred in the line of duty “while on
(Cont’d Page 3)

Rajkowski Hansmeier Ltd.'s Quarterly Employment Law Newsletter is intended to be informational and not to solve individual legal problems. Some of this information involves significant changes which could impact your organization. If you have further questions about this information, please contact us for an attorney’s opinion. If you would prefer to receive this newsletter via e-mail, just let us know at jphillips@rajhan.com.

FMLA Regulations (Cont'd from Page 2)

active duty” that “may render the service member medically unfit to perform the duties of his or her office, grade, rank or rating.” This type of leave is available for a maximum of 26 weeks “in a single 12-month period”. The leave is available in only one 12-month period, but per covered service member and per injury or illness. This means that additional leaves in subsequent 12-month periods are available for different covered service members, or for the same covered service member if he or she contracts a new qualifying injury or illness. Aggravations of pre-existing injuries or illnesses do not count as new injuries or illnesses.

“Serious injury or illness” leave is available for a total of 26 weeks in a 12-month period. The “leave year” for this type of leave is measured differently from the “leave year” for all other types of FMLA leave. The leave year for “serious injury or illness” leave must begin on the first day that the employee begins this type of leave, even if the employer uses another type of leave year for other types of FMLA purposes.

CHANGES TO THE OLD FMLA

There are a number of clarifications in the new regulations dealing with the “old” FMLA on serious health conditions. This section will provide a summary of the more important clarifications.

FMLA Eligibility

Eligible employees must be employed for at least a cumulative of 12 months and have worked at least 1,250 hours during the 12-month period immediately preceding the leave. The cumulative 12-month work period for the employer does not need to be consecutive. Service during the last seven years must be counted.

The new regulations also provide that, for employees returning from military Reserves or National Guard service, the employer must count hours that the employee would have worked but for the military service in order to calculate the 1,250-hour requirement during the past 12 months.

Serious Health Condition

A qualifying reason for FMLA leave is the “serious health condition” of the employee or of certain family members. The FMLA regulations include six individual definitions of “serious health condition”. One of the definitions of “serious health condition” involves more than three consecutive, full-calendar days of incapacity, plus “two visits to a healthcare provider.” Under the new regulations, where there are more than three days of incapacity, (1) the two healthcare provider visits must occur within 30 days of the beginning of the period of incapacity and (2) the first visit to the healthcare provider must take place within seven days of the first day of incapacity.

Another way to satisfy the definition of serious health condition under the current regulations involves more than three consecutive, full calendar days of incapacity plus a “regimen of continuing treatment.” Again, the first visit to the healthcare provider must take place within seven days of the first day of incapacity.

Lastly, “chronic conditions” which require periodic visits to a healthcare provider qualify for FMLA leave. The new regulations define “periodic visits” as at least two visits to a healthcare provider per year.

Employer Notice Obligations

The FMLA requires employers to provide notice to employees regarding their FMLA rights. The new regulations consolidate all the employer notice requirements into one section.

(Cont'd Page 4)

FMLA Regulations (Cont'd from Page 3)

Eligibility Notice - When an employee requests FMLA leave, the employer must notify the employee of the employee's eligibility to take FMLA leave within five business days. The eligibility notice must state whether the employee is or is not eligible for FMLA leave. If not eligible, the notice must state at least one reason why the employee is not eligible.

Notice of Rights and Responsibilities - The employer must also provide notice of the rights and responsibilities associated with the leave. For example, if medical certification, fitness for duty certification or use of paid leave are required by the employer, the notice of these requirements must be provided to the employee at the time leave begins.

Designation Notice - In addition to the past requirement of notifying the employee that the leave will count against the employee's FMLA leave, the new regulations require that the amount of leave time to be counted be included in the notice.

Deadline for Notice - The new rules extend the time for employers to provide various notices from two business days to five business days.

Medical Certifications

The employer may require an employee to provide medical certification from his or her healthcare provider which verifies the need for leave because of qualifying serious health conditions. The new regulations deal with incomplete certifications by the employee's healthcare provider. Employers may, in writing, identify deficiencies in an incomplete certification, specify what additional information is needed, and require employees to resubmit certifications within seven days. If the employee fails to comply, the employer may deny FMLA leave.

Under certain limitations, the employer may contact the healthcare provider to obtain clarification. The new regulations add a requirement that the employer's representative contacting the healthcare provider must be a healthcare provider, human resource professional, a leave administrator, or a management official, but in no case may it be the employee's direct supervisor. Employers may not ask healthcare providers for additional information beyond that required by the certification form.

Fitness for Duty Certification

"Fitness-for-duty" certifications are currently allowed, so long as the certifications are uniformly applied to all similarly-situated employees who take leave. Under the new regulations, employers may now require that the certification specifically address the employee's ability to perform the essential functions of the job. The new regulations also allow a fitness-for-duty certification for intermittent leave if there are legitimate, reasonable job safety concerns.

Light Duty Not FMLA Leave

Light duty does not count against an employee's FMLA leave entitlement. If an employee returns from FMLA leave and is put on light duty, the employer remains obligated to restore the employee to the same or equivalent position upon the conclusion of light duty.

Substitution of Paid Leave

The old regulations applied different requirements to the use of vacation or personal leave than to medical or sick leave. Under the new regulations, all forms of paid leave which are substituted will be treated the same. This would include paid time off or "PTO".

Employers may not require substitution of paid leave where the employee on FMLA leave is also receiving workers' compensation benefits or other disability benefits. Substitution of paid leave is only allowed if the employee is not receiving disability benefits.

(Cont'd Page 5)

FMLA Regulations (Cont'd from Page 4)

CONCLUSION

Employers should review their employment manuals to insure that their leave policies are in compliance with the new rules. Additionally, employers should update their leave forms with the new forms issued by the Department of Labor. **These comments do not address the interface between Minnesota leave acts and FMLA.**

When Was the Last Time You Reviewed Your Personnel Policies?

We would be happy to conduct a complimentary audit of your human resource policies and practices. To schedule your complimentary audit, contact Jan Phillips at 320-251-1055 or jphillips@rajhan.com

EEOC Offers Assistance for Preventing Religious Discrimination in the Workplace

By: Jessie Becker, Attorney

Due to an increase in religious discrimination claims, the Equal Employment Opportunity Commission (EEOC) has recently provided some guidance to employers when presented with issues in the workplace that are religious in nature. Religious beliefs include theistic beliefs as well as non-theistic beliefs. The EEOC provides a broad definition of "religion" to include not only traditional, organized religions but also religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or that seem illogical or unreasonable to others. Because this definition is so broad, the EEOC states that the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely-held religious belief. If, however, an employer has an objective basis for questioning an employee's request for a religious accommodation, the employer would be justified in seeking additional supporting information.

Title VII of the Civil Rights Act of 1964 prohibits employers with at least 15 employees as well as employment agencies and unions from discriminating in employment based on race, color, religion, sex and national origin. It also prohibits retaliation against persons who complain of discrimination or participate in an EEOC investigation. With respect to religion, Title VII prohibits:

- Treating applicants or employees differently based on their religious beliefs or practices – or lack thereof – in any aspect of employment;

- Subjecting employees to harassment because of their religious beliefs or practices – or lack thereof – or because of the religious practices or beliefs of people with whom they associate;
- Denying a requested reasonable accommodation of an applicant's or employee's sincerely held religious beliefs or practices – or lack thereof – if an accommodation will not impose more than a *de minimis* cost or burden on business operations; and
- Retaliating against an applicant or employee who has engaged in protected activity, including participation, or opposition to religious discrimination.

According to the EEOC, religious harassment in violation of Title VII occurs when employees are: (1) required or coerced to abandon, alter, or adopt a religious practice as a condition of employment; or (2) subjected to unwelcome statements or conduct that are based on religion and so severe or pervasive that the individual being harassed reasonably finds the work environment to be hostile or abusive, and there is a basis for holding the employer liable.

It should be noted that unwelcome religiously motivated conduct is not unlawful unless the victim subjectively perceives the environment to be abusive and the conduct is severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive. However, religious expression that is repeatedly directed at an employee can become severe or pervasive, whether or not the content is intended to be insulting or abusive. The extent to which the expression is directed at a particular employee is also relevant to determining whether or when it could reasonably be perceived to be severe or pervasive by that employee. Similarly, workplace displays of religious artifacts or posters that do not demean other religious views generally would not constitute religious harassment. All surrounding circumstances will be considered when determining whether or not particular conduct or remarks are unwelcome.

Employers have a need to keep an eye on their employees to prevent such harassment. An informational meeting or posters reminding employees not to discriminate against others on the basis of religion may be helpful. Employees should also watch their surroundings for any unwelcome conduct and report any blatant or even questionable conduct to their employer.

As mentioned above, the EEOC has recently provided some guidance to employers when presented with these issues. They have identified a number of "best practices" that focus on the areas of individual religious discrimination, religious harassment, reasonable accommodation and retaliation. Watch for these "best practices" in an upcoming edition of this newsletter.

**MINNESOTA SUPREME COURT ADOPTS
NEW STANDARD FOR SUPERVISOR HARASSMENT LIABILITY**

By: Thomas Jovanovich

In our September, 2008, Employment Law Newsletter, I discussed the recent Minnesota Supreme Court case which adopted new rules for imposing liability on employers for harassment by supervisors.

This decision highlights the need for employers to implement an effective harassment program at the worksite. As a follow up to last month's article, I would like to share the following actions which will assist employers in avoiding liability for harassment by supervisors:

1. Establish a clear and understandable harassment policy which includes provisions that deal with retaliatory behavior against persons complaining or participating in a harassment investigation.
2. Insure that all employees and supervisors are familiar with and understand the policy.
3. Conduct training for employees and supervisors on harassment which includes information on employees' rights to seek assistance if they feel victimized by harassment.
4. Address all complaints of harassment in a timely and appropriate manner.
5. Maintain a confidential harassment investigation file which contains all complaints of harassment (both minor and serious) and the manner in which they were handled.

2009 PAYROLL UPDATE

The new year is almost upon us and it's time to update your payroll data. Please note the following when doing so:

- Limits on employee contributions to 401(k) plans are increasing to \$16,500 with a \$5,500 catch up contribution for those aged 50 and older.
 - Health Savings Accounts will have an increase in employee contribution limits to \$3,000 for single coverage and \$5,950 for family coverage under a high deductible plan. There is a catch up contribution of \$1,000 for those aged 55 and older under either coverage.
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