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EMPLOYER LIABILITY EXPANDS UNDER THE ADA AMENDMENTS ACT

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The newly enacted ADA Amendments Act of 2008 becomes effective on January 1, 2009. Congress' express purpose is to expand the scope of protection provided by the Americans with Disabilities Act of 1990 (ADA) and to provide "clear, strong, consistent, enforceable standards addressing discrimination." The Act overturns several Supreme Court decisions favorable to employers and broadens the scope of protections available under the ADA. The Act expands the scope of the ADA to provide coverage for disabled individuals not currently covered.

Many more potential plaintiffs are empowered to file administrative complaints and lawsuits against employers, schools, and places of public accommodation alleging discrimination on the basis of disability or a perceived disability. The only good news for employers is the explicit clarification that reasonable accommodations are not required if an individual is merely "regarded as" having a disability.

Currently, the ADA defines disability as: (1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment. However, the ADA does not explicitly define the terms "impairment," "substantially limits," or "major life activity."

Several U.S. Supreme Court decisions interpreted the ADA as setting a high standard in order to qualify as a disabled individual. For example, in Toyota Motor Manufacturing v. Williams, 534 U.S. 184 (2002), the Court interpreted "substantially limits" to mean preventing or severely restricting an individual from doing activities that are of central importance to most people's daily lives. In Sutton v. United Air Lines, 527 U.S. 471 (1999), it required that measures taken or devices used to mitigate physical and mental impairments must be considered when deciding whether an individual is substantially limited in a major life activity.

The new law rejects the Supreme Court's statutory interpretation as too restrictive and specifically overturns these and other decisions. The definition of disability is expanded to be read broadly and to cover more plaintiffs. The Act, though, still does not define the term "substantially limits." Instead, the issue is punted to the Equal Employment Opportunity Commission, the Attorney General, and the Secretary of Transportation to draft regulations compliant with the purpose of the amendments.

The Act widens the definition of "impairment." An impairment need only limit one major life activity and an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. This provision is intended to clarify that the ADA applies to individuals suffering from illnesses such as diabetes, cancer or epilepsy who, in some cases,

were previously denied protection because their conditions could be treated with medication or were in remission.

The new law now specifies certain activities that qualify under the Act as a "major life activity", including, but are not 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.

Also included are major bodily functions, such as:

- functions of the immune system;
- normal cell growth;
- digestive;
- bowel;
- bladder;
- neurological;
- brain;
- respiratory;
- circulatory;
- endocrine; and
- reproductive.

With the exception of "ordinary eyeglasses and contact lenses," the amendments eliminate consideration of mitigating measures in determining whether a person is substantially limited in a major life activity. The proposed language explicitly forbids consideration of the following:

- medication;
- medical supplies, equipment or appliances;
- low vision devices;
- prosthetics;
- hearing aids and other implanted hearing devices;
- mobility devices;
- oxygen therapy equipment and supplies;
- the use of assistive technology;

• reasonable accommodations or auxiliary aids or services; and
• learned behavioral or adaptive neurological modifications.

An entity covered by the ADA also may not use qualification standards, employment tests or other selection criteria based upon an individual's uncorrected vision unless the entity can show job-relatedness or business necessity. To prove that an individual is regarded as having an impairment, the amendments only require that an individual prove that he or she has been subjected to a prohibited action because of an actual or perceived physical or mental impairment. But if an individual has a transitory or minor impairment with an actual or expected duration of 6 months or less, he or she will not be regarded as having an impairment. The exclusion of transitory and minor impairments is designed to prevent individuals with the flu and other similar illnesses from coverage.

Employers may see increased costs in providing accommodations because the number of workers and job applicants entitled to accommodations will be greater. Employers will be subjected to increased costs defending against a larger number of charges and lawsuits filed by employees and job applicants. The Act makes it less likely that an employer will succeed on a summary judgment motion, which enables a case to be resolved before a trial by jury. An employer's defenses to claims will be more limited. To reduce liability exposure, employers should review internal procedures to ensure they comply with the protections provided by the ADA, as amended. An employer should focus less on determining who is disabled because the coverage is very broad. Instead, an employer should focus its efforts more on engaging in interactive discussion with employees to provide them with the necessary, reasonable accommodations to perform the essential functions of their jobs. As a result, employers are well advised to keep detailed records of these interactions and decisions made regarding the provision of accommodations. Where an employer has questions as to whether the ADA, as amended, covers an employee it should consult with counsel. Editor's note: and, the magic number is: 42 U.S.C. §12111(5)(A), defines an employer as one who "has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." For the purposes of the ADA, an elected official is not an employee. A public employer with 4 or more employees would be subject to the State's Human Rights Law which prohibits disability discrimination. Interestingly, the amendment was supported by disability advocates and employer associations. The bill which was overwhelmingly adopted by both branches of Congress was S. 3406.

PERB DECISIONS

The following decisions have been issued by the Public Employment Relations Board or its staff. Any summary that might be of interest should be reviewed as to the facts and circumstances of the case to assure the decision might be applicable to circumstances in which you may have an interest. In addition, any decision should be researched to ascertain its subsequent disposition, if in fact an appeal to the Board was made, and, if it was, further researched to determine if a court appeal followed. Email your editor John Galligan at galli14@earthlink.net for a copy of any decision summarized. Use the PERB web site (www.perb.state.ny.us) where summaries of recent decisions appear and the agency's forms can be downloaded.

• an employee who formulates policy on behalf of a public employer will be designated as managerial. Policy formulation is not limited to labor relations. Those who formulate policy would be responsible for addressing problems confronting the public employer and addressing matters of concern in their particular area of responsibility, acting to resolve and deal with such problems to further the employer's mission. The fact that an employee might have responsibilities to formulate policy in only a single aspect of a public employer's mission will not serve to defeat a

managerial designation. And managerial employee is not only a person with the authority or responsibility to select among options and to put a proposed policy into effect, but also one who participates with regularity in the essential process which results in a policy proposal and the decision to put a proposal into effect. Such a responsibility, combined with the authority to act independently to devise and implement employer-wide policy, warrants the designation of such an employee as managerial. September 25, 2007 Board decision in Fashion Institute of Technology, 40 PERB ¶3018;

• unless a statute were to prohibit it, an issue which is a mandatory subject of negotiation can be pursued before a compulsory arbitration panel. Included would be a demand seeking an increase in the co-pay that should apply to prescription drug purchases; and a demand to require that certain positions have flexible hours of work; a demand that overtime assignments made without regard to seniority. December 18 ALJ decision in City of Albany;

• the Board will approve the decision of an ALJ to grant a motion to dismiss an improper practice charge at the close of the charging party's case where the evidence introduced by the charging party, after granting all reasonable inferences, is insufficient to warrant a finding that the charge should be upheld. January 23 Board decision in Lake Mohegan Fire District;

• the Board has long held that the policies set forth in the Taylor Law are best served by the creation of the largest possible bargaining unit which allows for effective and meaningful negotiations and the avoidance of the proliferation of bargaining units. In applying the statutory criteria set forth in §207 of the Civil Service Law, a determination must be made as to what constitutes "the most appropriate bargaining unit" and not "an appropriate unit." A general community of interest among employees with different occupational interests in terms and conditions of employment will be sufficient to override distinctions among them, when the potential for conflict is unlikely. January 10 ALJ decision in Greater Southern Tier BOCES;

• pursuant to §210.1 (a) of the Board's rules permits any person, employee organization, or employer to file a petition for a declaratory ruling with respect to either 1) the application of the Taylor Law to it or to any other person, employee organization, or employer or 2) the scope of negotiations. Consequently, the subject matter that can be resolved by filing a petition for a declaratory ruling is limited to whether an individual or entity is subject to the Taylor Law or whether a particular issue in negotiations is a mandatory, nonmandatory, or prohibited subject of negotiation The purpose of the declaratory ruling process is to provide a less adversarial means than the use of an improper practice charge regarding the above-noted issues. January 23 Board decision in Niagara Charter School;

• the Board is not bound by an unreviewed decision of either its Director of Representation Practices and Employment or one of its administrative law judges. January 23 Board decision in Niagara Charter School;

• a past practice of allowing bargaining unit members the use of departmental grounds and facilities to wash and wax their personal cars involves a mandatory subject of negotiation and consequently is not subject to a unilateral change. The head of a department having ultimate authority and responsibility over all department operations has the authority to bind a municipality to continue a practice by virtue of the department head's awareness and acceptance of the practice for several years. May 20 Board decision in City of Oswego, 41 PERB ¶3011;

• the engagement of employees in activities unrelated to work during a work day constitutes the use of free time which is a mandatory subject of negotiation. May 20 Board decision in City of Oswego, 41 PERB ¶3011;

• one potential defense to an improper practice charge alleging a unilateral change in a mandatory subject of negotiation is a claim of contract waiver or duty satisfaction, namely that a provision in the underlying negotiated labor agreement or department regulations allows the unilateral employer change. However, such a defense must be raised in the answer filed in response to the improper practice charge. Should it not be, it will be deemed to be waived. May 20 Board decision in City of Oswego, 41 PERB ¶3011;

• the length of a workday and when employees will be released from work represent mandatory subjects of negotiation. February 15 ALJ decision in Norwich CSD;

• where an employer and the union have bargained a specific subject and have reached an agreement regarding the issue, the employer has satisfied its duty to negotiate and therefore can unilaterally take action permitted under the negotiated provision of the labor agreement. July 3 Board decision in NYC Transit Authority, 41 PERB ¶3014; and

• a charging party that files and improper practice charge, alleging a unilateral change in a past practice involving a mandatory subject of negotiation, is not required to demonstrate knowledge of or acquiescence to the practice by a managerial or high-level supervisory employee. Under normal circumstances, a practice of long duration represents circumstantial evidence sufficient to establish a prima fascie case regarding the existence of the practice, sufficient to establish that bargaining unit members had a reasonable expectation that the practice would continue and to create a rebuttable presumption that, during that time that the practice was in existence, the public employer involved had acquiesced in or condoned the practice. That showing would be subject to an employer defense that it lacked actual or constructive knowledge of the practice. Constructive knowledge of a practice may be found when it is reasonably subject to an employee's managerial and/or supervisory responsibilities and duties. Included would be instances involving an employer decision to delegate such duties and responsibilities to a department head. May 20 Board decision in City of Oswego, 41 PERB ¶3011.