

# Hot Topics: What Employers Need to Know in 2011

Labor & Employment Law Seminar  
June 9, 2011

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# EEOC Issues Final Regulations Under ADAAA

- ADAAA took effect in 2009
  - Purpose of Act: to make it easier for individuals to show they have disabilities under ADA
- ADAAA and Regs don't alter the ADA's definition of disability
  - Definition : a physical or mental impairment that substantially limits one or more major life activities, a record or past history of such an impairment, or being "regarded as" having a disability

# EEOC Issues Final Regulations Under ADAAA

- Regulations change how "disability" should be interpreted
  - The term "substantially limits" is to be construed broadly in favor of expansive coverage;
  - An impairment does not need to prevent or severely or significantly restrict a major life activity to be considered substantially limiting;
  - The determination of whether an impairment substantially limits a major life activity compels an individualized assessment and must be made without mitigating measures (except for ordinary eyeglasses and contact lenses);

# EEOC Issues Final Regulations Under ADAAA

- The individualized assessment need not require an extensive analysis and will not typically require statistical, medical, or scientific evidence;
- An episodic impairment or one that is in remission is a disability if it would substantially limit a major life activity when active;

# EEOC Issues Final Regulations Under ADAAA

- There is no minimum time period required before an impairment may be considered substantially limiting; and
- The "regarded as" prong of the ADA prohibits discrimination based on the employer's perception of an employee's physical or mental impairment, *whether or not* the employer perceives the impairment as an actual disability. The employer, however, is under no obligation to provide reasonable accommodation to those people "regarded as" having a disability.

# EEOC Issues Final Regulations Under ADAAA

- Regulations include a list of conditions that will be considered disabilities "in virtually all cases":
  - deafness, blindness, intellectual disability, mobility impairment requiring the use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia.

# EEOC Issues Final Regulations Implementing GINA

- GINA – Genetic Information Nondiscrimination Act of 2008
  - prohibits the use of genetic information in employment decisions and restricts employers from seeking or disclosing genetic data
- Regulations recognize harassment claim – a person can be harassed based on genetic information

# EEOC Issues Final Regulations Implementing GINA

- Prohibition on seeking genetic information, with exceptions:
  1. Inadvertent request for genetic info
  2. Request in context of voluntary wellness program
  3. Family medical history for FMLA or state laws
  4. Info acquired from public documents, i.e., newspapers



# DOL and OPM Extend "In Loco Parentis" Interpretation Under FMLA, Allowing More Employees to Qualify for FMLA Leave

- In loco parentis relationship includes anyone who intends to:
  - Provide day-to-day care
  - And/or provide financial support
- Includes unmarried partners, stepparents, same-sex parents, grandparents, etc.

# DOL Issues Guidance on Requirements That Employers Provide Nursing Mothers With Breaks and Places to Store Breast Milk

- Patient Protection and Affordable Care Act amended FLSA
- Provision requiring employers to provide nursing mothers with reasonable break time to express breast milk for 1 year after child's birth

# DOL Issues Guidance on Requirements That Employers Provide Nursing Mothers With Breaks and Places to Store Breast Milk

- Break time
  - Each time employee needs to express breast milk
  - Place shielded from view and free from intrusion
- Employers with fewer than 50 employees exempt, if they can show undue hardship
- Only applies to hourly, nonsalaried employees
- Law does not preempt state laws that may provide more protection

# President Obama Signs Telework Act of 2010

- Government's reasons: to keep government operations running during inclement weather, reduce costs associated with employee turnover and absenteeism, reduce environmental impacts and transit costs, and allow employees to better manage their family and work obligations
- Swine flu scare, high cost of gasoline, cost cutting during the recession and the developments in technology also have all contributed to more employers allowing employees to work remotely on a regular basis
- Employer confidentiality and employee privacy concerns

# President Obama Signs Telework Act of 2010

- Monitoring the time worked by non-exempt employees to avoid overtime or other wage-and-hour problems
- Workers compensation, workplace safety issues
- Accommodation and performance issues
- Entering telecommuter agreements

# Employer Accused of Violating Labor Law by Discharging Employee for Bashing Boss on Facebook

- May 2011 – NLRB issued two complaints against two employers for terminating employees who criticized their employers on Facebook
- Another highly-publicized case settled, where employee was fired for badmouthing her boss on Facebook
  - Employer agreed to revise blogging and Internet posting rules in company handbook

# Employer Accused of Violating Labor Law by Discharging Employee for Bashing Boss on Facebook

- Employees have extensive protections under federal law, even if they aren't members of a union
- NLRA protects all nonsupervisory employees engaged in "concerted activities"
  - Activities intended to address workplace issues

# Federal Labor Law Protects Nonunion Employees

- NLRA protects nonunion employees in the same ways as union employees
- Recent case –
  - Nonunion employees refused to work voluntary overtime to protest employer giving overtime to part-time employees
  - Ringleader discharged, other employees disciplined



# Federal Labor Law Protects Nonunion Employees

- Same case addressed "confidentiality" provision
  - Board found confidentiality rule in nondiscrimination policy unlawful
  - Reasonable employee would read it as prohibiting discussing complaints about harassment/discrimination with other employees or to third parties

# DOL Launches Timekeeping App for Workers

- Easier for employees to independently track hours worked for purpose of calculating wage claim damages
- In English and Spanish
- Employee can track regular work hours, break time and overtime
- Currently only iPhone and iTouch

# Franken Amendment

- Prohibits awarding contracts over \$1m unless contractors agree not to enter into or enforce a contract requiring employees/independent contractors to arbitrate claims under Title VII or tort claims related to sexual assault/harassment

# Franken Amendment

- Contractor – does not include parent company or subsidiary
- Subcontractors must also agree not to enforce such arbitration agreements
- Secretary of Defense has discretion to waive provision in interest of national security

# Supreme Court Holds California Consumer Class Action Waiver Enforceable

- *AT&T Mobility v. Concepcion*
- Supreme Court – disfavors consumer class action arbitration
- Court held that the Federal Arbitration Act (FAA) prohibited states from conditioning enforceability of arbitration agreements on availability of class arbitration procedures

# Complaining Employee's Fiancé Protected from Retaliation

- *Thompson v. North American Stainless LP*
- Man who said he was fired because his fiancée filed a sex discrimination case against mutual employer had Title VII retaliation claim
- Sixth Circuit Court of Appeals:
  - Found man could not have retaliation claim because he had not engaged in protected activity himself (i.e. filing a discrimination claim)

# Complaining Employee's Fiancé Protected From Retaliation

- Supreme Court:
  - Firing violated Title VII
  - Retaliation provision meant to prohibit employer action that “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination ”
  - "person aggrieved" under Title VII
    - Adopted intermediate "zone of interests" test
    - Fiancé had standing to sue

# Supreme Court Holds FLSA Retaliation Claim Can Be Based on Oral Complaint

- *Kasten v. Saint-Gorbain Performance Plastics Corp.*
- Employee complaint about FLSA violations could be oral
  - Not necessary to be written
  - Complaint must be sufficiently clear and detailed
- Case did NOT decide whether complaint to private employer was "filing complaint" under FLSA



# Supreme Court's Cat's Paw Decision Leaves Employers in the Dark

- *Staub v. Proctor Hospital*
- Employers can be liable for "cat's paw" discrimination
  - Cat's paw theory – when a biased supervisor/manager influences, but does not personally make, an employment decision
- USERRA case – plaintiff said firing was motivated by his military service

# Supreme Court's Cat's Paw Decision Leaves Employers in the Dark

- "motivating factor in the employer's action"
- Employer's independent investigation does not automatically insulate employer from liability

# Ninth Circuit Holds Engineer Fired for Denial of Security Clearance May Have Discrimination Claim

- *Zeinali v. Raytheon Co.*
- Iranian engineer who was terminated after being denied security clearance could go to trial on discrimination claim
- Ninth Circuit overruled trial court, and considered:
  - Whether security clearance was truly job requirement
  - Whether it applied policy consistently

# Ninth Circuit Holds Engineer Fired for Denial of Security Clearance May Have Discrimination Claim

- Two other engineers who were not Middle Eastern/Iranian were not fired after having security clearance revoked
- Enough evidence that Zeinali could show firing decision motivated by discrimination

# Ninth Circuit Upholds Employer's Rule Disqualifying Applicant Who Failed Drug Test Years Earlier

- *Lopez v. Pacific Maritime Assn.*
- Employee did not have ADA claim against employer for "one-strike" rule
  - Did not disproportionately screen out addicts (protected class under ADA)
  - Plaintiff did not statistically show that policy disproportionate share of "clean" former addicts

# Washington Appellate Court Explains Trial-and-Error Approach to Disability Accommodation

- *Frisino v. Seattle School District No. 1*
- Teacher had respiratory sensitivity to environmental factors
- School tried cleaning up school, then concluded the schools weren't "clean enough"
- Refused to transfer teacher and fired her
- Court ruled against District
  - Required to try accommodation
  - District failed to demonstrate that transfer would be undue hardship

# Washington Appellate Court Says Antinepotism Policy May Violate WLAD

- *Andrews v. Harrison Medical Center*
- Court held company's antinepotism policy may be discriminatory if applied only to married couples (but not unmarried couples)
- OR tech and OR nurse not allowed to work on same team or schedule
- Policy not applied when couple lived together; only once they were married
- WLAD – protects marital status