The Employment Brief

Updates in Labor and Employment Law to Help Your Business Succeed

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ADA

ADA Amendments Become Law

By Darrell VanDeusen

Like his father before him, it is possible that President George W. Bush may be remembered, in part, for his decision to protect individuals from disability discrimination. On September 25 the President signed the ADA Amendments Act of 2008 (P.L. 110325) into law. The legislation overturns Supreme Court decisions that had restricted the availability of the ADA. It is prospective only, and takes effect on January 1, 2009.

The bill (S. 3406) that became Public Law 110-325 found wide spread bipartisan support in Congress, as well as support from both employers and disability advocates. The Act overturns *Sutton v. United Air Lines Inc.*, 527 U.S. 471 (1999)(and two companion cases), and *Toyota Motor Mfg. Ky. Inc. v. Williams*, 534 U.S. 184 (2002). *Sutton* held that courts must consider "mitigating measures" used to overcome or manage impairments in deciding whether an individual has an ADA covered disability. *Williams* made it more difficult for ADA plaintiffs to prove they are "substantially limited" in a "major life activity."

As a result of *Sutton* and *Williams*, many individuals with impairments were not considered disabled under the ADA. For example, someone whose cancer was in remission, or whose epilepsy was under control, was excluded from ADA coverage. The language of the Act provides that courts are to read the ADA's definition of disability "in favor of broad coverage under the Act, to the maximum extent permitted by the Act." Now, an impairment that is "episodic or in remission" is a disability "if it would substantially limit a major life activity when active."

What does substantially limits mean now? The Act provides that in determining whether an impairment substantially limits a major life activity, courts should not consider "the ameliorative effects of mitigating measures," including medication, prostheses, use of assistive technology, reasonable accommodations or auxiliary aids or services, or "learned behavior or adaptive neurological modifications." But, in recognition of the millions of Americans who wear glasses or contact lenses, the law states that courts shall consider the effects of "ordinary eyeglasses or contact lenses" in deciding whether someone with vision issues is disabled.

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Flexible Leave

Maryland's Flexible Leave Act Takes Effect

By Eric Paltell

On October 1, 2008, Maryland's new Flexible Leave Act went into effect. The law, which applies to employers with 15 or more employees, requires businesses that provide employees with any form of paid leave to permit employees to use such leave for the illness of an immediate family member.

If employers have not done so already, they need to take immediate steps to revise their leave policies. Under the new law, employees must be given the option of using any type of accrued, paid leave available to them (such as sick leave, vacation leave, compensatory time, personal time, paid time off, or other leave time) to use the leave when an immediate family member is ill.

The law states that immediate family includes a child, spouse, or parent. However, the definition of child is not limited to persons under the age of 18, so it presumably includes adult children. Additionally, it is not clear if the definition of immediate family is limited to these persons, so it is possible that it extends to grandparents, domestic partners, and perhaps even aunts and uncles.

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The lack of a definition of illness is even more troubling. There is no indication in the legislation as to what conditions were intended to be covered; therefore, it is quite possible that any illness, no matter how minor, may be covered by the law.

The Flexible Leave Act does allow an employer to require employees taking paid leave for a family member's illness to comply with the employer's workplace policies. Therefore, if an employee taking sick leave for their own illness must give at least two hours advance notice of their absence, the employer can similarly require the employee taking leave for a sick child to give two hours advance notice.

So what should a Maryland employer do to comply with the law? The following pointers should help:

1. Reconsider no fault absenteeism policies that impose disciplinary points or occurrences whenever leave is taken. Although it is not clear under the new law that such policies are illegal if they are applied consistently, an employer will be hard pressed to defend the termination or suspension of an employee who took leave for a sick child, even if that absence is the occurrence that puts them over the limit under a no fault absenteeism policy. Moreover, the Family and Medical Leave Act prohibits an employer from counting leave taken under that statute as an occurrence under a no fault absenteeism policy, so it is quite possible that a Maryland court would follow the FMLA in interpreting the intent of the Flexible Leave Act.

2. Give serious thought to requiring employees who use sick leave for their own illness to produce a healthcare provider certification after a certain number of days off. Because the Flexible Leave Act permits employers to require employees to comply with attendance policies, an employer could impose a similar obligation on someone taking sick leave for an ill family member. However, it is not clear that the certification obligation could be imposed where the employee takes vacation, personal, or other leave.

3. If not already doing so, employers should impose notice requirements for the use of leave. Employees should be required to give a certain number of hours of advance notice before using sick leave, and should be required to contact a designated individual. Likewise, employees using vacation or personal leave should be required to give advance notice and get pre-approval from a supervisor. This should reduce the opportunity for employees to spontaneously decide to take the day off under the guise of having an ill family member.

4. Make sure you have a system in place to track the reasons taken for employee leave. Like absences taken for FMLA purposes, an employer cannot discipline an employee for absences taken for reasons covered by the Flexible Leave Act. Therefore, an employer must ensure that it has accurate records of the reasons why an employee is absent, especially if the absences are held against the employee in a performance evaluation or in disciplinary action.

Unfortunately, the Flexible Leave Act left a lot of questions unanswered. Just as a few examples, there is no definition of illness, the definition of immediate family member is vague, it not clear if the Act applies to employers with more than 15 employees total but less than 15 in Maryland, and it is not clear if short term disability leave may be used for a family member's illness. The good news, to the extent there is any, is that the Maryland Chamber of Commerce and the Society for Human Resources Management are already working on corrective legislation to introduce in the General Assembly to resolve some of these uncertainties. The author will be working with other members of these organizations to draft this legislation, and we will keep our readers apprised of developments in this area.

Labor Arbitration

Public Safety in the Buckeye State

By Peter Saucier

State Troopers and Toll Booth Collectors in Ohio have a true friend in Arbitrator Marvin J. Feldman. Earlier this year, Arbitrator Feldman decided a termination arbitration in favor of the Teamsters in the toll collectors case. Briefly, the Toll Collector was an employee who experienced migraine headaches. He had already received a 3 day suspension for poor attendance three months before his request for a vacation day was denied, apparently because of work load. The Toll Collector then called in sick with a migraine on the very day that he had asked to be away from work.

On the afternoon of the day that the Toll Collector was off with his migraine, and just after his 3 day suspension for attendance violations, the Toll Collector was observed with his girlfriend at a shopping mall. The State of Ohio terminated his employment. Arbitrator Feldman described these undisputed facts as straightforward, before ruling that the discipline was not remotely justified. The Toll Collector was reinstated with full back pay and benefits because, according to Arbitrator Feldman, the evidence fails to prove by any stretch anything more than a coincidence.

Arbitrator Feldman's ruling in the State Trooper case establishes that his reasoning in the Toll Collector case is not anomalous. The Ohio State Trooper lied about his on-duty activities during a police investigation. His employment history included that he had a preventable patrol car crash; that he was suspended for three days for refusal to comply with a direct order; that he failed to utilize car-mounted video unit policies; that he failed to timely file citations and reports; that he was guilty of negligence in an investigation on one occasion; and that he on a further occasion failed to show up for duty claiming that he misread the schedule. When he lied about his actions, the State of Ohio fired him. The State Troopers union dutifully moved the case to arbitration.

The Trooper had a son with autism, and worked in a stressful job. Arbitrator Feldman ordered reinstatement with placement of the Trooper on retirement. According to Arbitrator Feldman, [t]he stress at work buttressed by the stress at home, simply appeared to be too much for the Trooper. That excused the Trooper's lie to protect his employment. Interestingly, throughout his written decision, Arbitrator Feldman took care to describe what was a stone-cold lie as an untruthfulness or untruth.

Those of my clients with years of experience in mandatory arbitration under labor agreements do not even consider asking their nonunion employees to sign arbitration agreements. Arbitrators like Mr. Feldman evidence why that is so.

Discrimination Update

Family Responsibilities Discrimination

By Kelly Hoelzer

As everyone should recognize by now, the makeup of the U.S. workforce has changed dramatically in the past few decades. Given the substantial number of working parents, as well as baby boomers who must now care for their aging parents, there has been increasing attention

paid to the work-family conflict facing employees trying to balance their job responsibilities with the needs of their families.

No federal statute specifically prohibits discrimination against employees with such caregiving obligations. Federal and state courts, however, have seen a growing number of lawsuits alleging discrimination related to employees' family care responsibilities, now commonly described as Family Responsibilities Discrimination ("FRD"). In the past decade, in fact, cases alleging FRD have increased by an estimated 400%.

FRD lawsuits take several different forms. Women have sued for Title VII gender discrimination alleging disparate treatment because of their childcare responsibilities or because of their employer's stereotypical attitudes towards working mothers. Employees also have sued employers for associational discrimination in violation of the ADA, where they believe they have been treated adversely because of their caregiving responsibilities for disabled children or family members. Still other employees sue for violations of the Family and Medical Leave Act ("FMLA") claiming their employer treated them poorly after using FMLA leave to care for an ailing family member.

Last year, the EEOC recognized the concept of FRD by issuing new guidelines on how to spot instances of FRD. The agency's new Enforcement Guidance does not purport to create a new protected category, but instead describes a variety of situations in which an employer's stereotyping or other forms of disparate treatment may violate Title VII or the ADA's prohibition against associational discrimination. The EEOC intends to "assist investigators, employees, and employers in assessing whether a particular employment decision affecting a caregiver might unlawfully discriminate" under those statutes.

State governments have also tried to legislate increased protection for workers with caregiving responsibilities and have gone about doing so in a variety of ways. Many states prohibit discrimination based on an employee's family or marital status, and the District of Columbia now explicitly bans FRD. Two states – California and Washington – have enacted paid family and medical leave laws providing temporary disability insurance style coverage.

Some jurisdictions have expanded coverage to employers that would not meet the 50-employee threshold required by the FMLA, while others require employers to offer more than the twelve weeks of unpaid leave mandated by the FMLA. Several states and the District of Columbia require employers to allow employees to take a certain amount of unpaid leave to take children to doctor's appointments or to participate in a child's school activities, such as parent/teacher conferences.

To avoid liability for FRD, employers should minimize involvement in employees' personal obligations and refrain from making any decisions regarding employees based on what they perceive as best for the employee. Instead, consistent and fair application of workplace policies, including any policies governing leave, flexible schedules, telecommuting, and others, for all employees, regardless of their status as a family caregiver, continues to be a best practice for employers.

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The EEOC will have some work to do as a result of the new law, as the Act states that the Commission's ADA regulations are "inconsistent with Congressional intent, by expressing too high a standard." The law specifically states that Congress expects the EEOC to revise the regulations to make it easier for individuals with impairments to show they are "substantially limited" in one or more major life activities.

What are major life activities now? The Act provides that "major life activities" now include, but are not limited to, "caring for oneself, performing manual tasks, seeing, hearing, eating, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." Major life activities also include the "operation of a major bodily function," such as "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."

What about regarded as disabled claims? Courts have held that, to pursue a "regarded as" claim, plaintiffs must show an employer incorrectly perceived them as "substantially limited" in a major life activity. The Act now provides that a person can prove he or she is regarded as disabled "if the individual establishes that he or she has been subjected to an action prohibited by this 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." But, the regarded as prong does not cover people with "impairments that are transitory and minor." A "transitory" impairment is one with an "actual or expected duration of 6 months or less."

Employers will need to review their policies and procedures regarding handling disability issues, and prepare for a resurgence of ADA claims in the coming months and years. An integral part of this review will be the need to provide training to supervisors and managers. K&S attorneys can help your business prepare for these changes.

Supreme Court

Employment Law Docket for 2008-09

Earlier this month, the Supreme Court opened its 2008-09 term with six labor and employment law cases on its docket. Here is a summary:

1. **Agency Fees**: On the first day of the term the Court heard *Locke v. Karass* (No. 07-610), which asks whether a public sector union may charge nonmembers who pay an agency fee costs for litigation incurred by the international union on behalf of bargaining units not related to the employees' unit. The First Circuit said that a Maine union could do just that without violating nonmembers' First Amendment freedom of association rights. *See* 498 F.3d 49 (1st Cir. 2007)

2. **ERISA Pensions**: On October 7, the court heard argument in *Kennedy v. Plan Administrator for DuPont Savings & Investment Plan* (No. 07-636), which asks whether a qualified domestic relations order (QDRO) is the only valid way under ERISA for a divorcing spouse to waive the right to the other spouse's pension benefits. ERISA requires that pension plan benefits may not be assigned or alienated, but states that the anti-alienation provision does not apply to a QDRO, which must specify the identity of beneficiaries, the particular plans affected, and the exact manner of calculating benefits. In this case, an employee died with a QDRO that had not been filed with the employer. The Fifth Circuit held that ERISA's anti-alienation provision, not federal common law, controls and that because the QDRO was not submitted to the plan, the wife had not given up her interest in the benefits. *See* 497 F.3d 426 (5th Cir. 2007).

3. **Title VII Retaliation**: On October 8 the court heard another retaliation case, this one involving the scope of Title VII retaliation. In *Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.* (No. 06-1595), the question is whether an employee interviewed in an internal EEO investigation involving other employees is protected from retaliation under either the opposition or participation clause. The Sixth Circuit held that there is no such protection. *See* 211 Fed. Appx. 373 (6th Cir. 2006).

4. **Idaho Campaign Finance Law**: On November 3, the Court will consider whether an Idaho statute that prohibits local government employers from allowing employee payroll deductions for political activities violates the First Amendment free speech rights of unions and their members. *Ysursa v. Pocatello Education Ass'n* (No. 07-869). The Ninth Circuit said that the prohibition on payroll deductions, as applied to local governments, violates the First Amendment because it is a content-based restriction for which the state has no compelling justification. *See* 504 F.3d 1053 (9th Cir. 2007).

5. **Arbitration, Labor and EEO Law**: On December 1, the Court will consider whether employees covered by a collective bargaining agreement providing that statutory employment discrimination claims must be pursued through the contractual grievance/arbitration procedures have a right for a court to decide their age discrimination claims. *14 Penn Plaza LLC v. Pyett* (No. 07-581). Relying on *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), the Second Circuit held that "a union-mandated arbitration agreement purporting to waive a covered worker's rights to a federal forum with respect to statutory rights is unenforceable." *See* 498 F.3d 88 (2d Cir. 2007).

6. **Pregnancy Discrimination**: On December 10, the Court will consider whether the Pregnancy Discrimination Act of 1978 (PDA) is retroactive when it decides whether an employer must give full service credit for purposes of calculating retirement benefits for pregnancy leaves taken before the PDA took effect, if the plan gave full credit for other types of temporary disability leaves. *AT&T Corp. v. Hulteen* (No. 07-543). The Ninth Circuit held that the PDA is not retroactive and that there is no new act of discrimination when pension benefits are calculated. *See* 498 F.3d 1001 (9th Cir. 2007).

Kollman's Corner

A Management Medley

By Frank L. Kollman

Songwriters like John Lennon and Paul McCartney wrote a lot of song fragments. There often was not enough material to put together a complete song, but the fragment was quite good. A couple of times, the Beatles put these fragments together and came up with a hit song. I find that I have the same experience with my articles. I have good ideas for one or two paragraphs, but not for the 500 to 750 words I shoot for each month. For this month, I decided to string some of those paragraphs into a single column. If it sounds like one of those Beatles' songs (A Day in the Life, for example), please accept my apologies.

The Termination Interview. Employers are rightly concerned about the legal consequences of terminating an employee. If a termination is not based on solid evidence of misconduct or poor performance, the likelihood of being sued for discrimination increases. Unfortunately, employers can build a solid case and completely ruin it at the termination interview.

One of the most common mistakes is to attempt to soften the blow. Don't. Firing an employee is miserable, and there is no "nice" way to do it, only a civil way. Never tell the employee you feel bad, that it wasn't your idea (if you have a partner or boss who made the actual decision), or that his termination is a less severe employment action like a layoff or corporate reorganization. If you do, you could find a plaintiff's lawyer saying you "felt bad" because you were aware of your violation of the law, that you disagreed with your partner or manager's discriminatory decision, or you are a liar trying to disguise an unlawful termination as a layoff.

The termination interview should be a recital of the facts. "You are being terminated today for poor work performance. You have cost the company $500 in careless mistakes in the past week, and you have a history of such careless mistakes." If the reason for termination is misconduct, describe the misconduct. "You are being fired for hitting your supervisor with a baseball bat."

Never tell an employee a vague, non-reason for the termination. For example, "you don't fit in," or "the company feels it needs to make a change" are not helpful. Give the reasons for those conclusions, no matter how uncomfortable it is to do so.

The termination interview is not a debate. If the employee wants to argue, tell him that the time for argument is over. The decision is final. If the employee offers new evidence, listen, and say that the termination still stands, but you will investigate the new evidence.

Wage and Hour Reminders. The wage and hour laws are horribly complicated and horribly pro-employee. For example, rules requiring overtime to be approved before it is paid are illegal. Employees who violate such rules should be paid, though they can be disciplined for violating the approval rule. Employee agreements to take less than they are entitled to receive under the wage and hour laws are not valid, even if the employee suggested the terms of the agreement for selfish reasons. The wage and hour policies of your business should be audited regularly to insure that you are not sitting on a three-year back pay time bomb.

Political Correctness. On my blog recently, I asked whether humor in the workplace was dead. Jokes relating to race, sex, age, national origin, disability, and the like are regularly used as evidence to prove discrimination. What used to be gentle kidding is now a weapon that can be used against the employer. Further, comments between employees can come back to haunt an employer in a discrimination suit in the context of testimony that the company "tolerated an atmosphere of hate" by allowing employees to comment about each other's age, hair, accent, or other characteristics.

The Politics of Big Labor. The Wall Street Journal reports that if the Democrats capture the White House, the labor laws of the country will change in a big way. Big Labor, which supports the Democrats, is fighting for its life. Labor union membership is down, except in the government sector, and the payback for union support are laws to increase union membership. We will know who the next president will be when I sit down to write my next column. I wonder what I will be writing about then.

For more thoughts and comments by Frank Kollman, visit his blog at http://kollmanlaw.com/blogs