

Session 116

2009 Labor & Employment Law Update: Best Practices & Key Strategies

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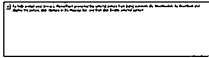
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EMPLOYMENT LAW DEVELOPMENTS – BEST PRACTICES

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Overview

- ADA Amendments
- Family Medical Leave Act
- Genetic Information Non-Discrimination Act ("GINA")
- Fair Pay Act
- Paycheck Fairness Act
- Employment Non-Discrimination Act
- Family Leave Insurance Act
- Healthy Families Act

FMLA Introduction

- The Department of Labor adopted new regulations for the Family and Medical Leave Act ("FMLA")
- Effective January 16, 2009

Employee Eligibility

- **Previously**
 - Employee must have been employed at least 12 months by employer and work 1250 hours 12 months prior to leave request.
- **Now**
 - Any prior employment counts to 12 month total - exception for prior employment followed by gap of 7 years or more.

Serious Health Condition

- **Serious Health Condition means**
 - illness, injury, impairment that involves inpatient care (i.e. overnight stay and inability to work for 3 days); or,
 - continuing treatment by a health care provider
 - Incapacity for three or more days; and,
 - Treatment two or more times within 30 days; or,
 - Treatment on one occasion with regimen of treatment supervised by healthcare provider.

Continuing Treatment Cont.

- **Key rules of eligibility:**
 - First visit for treatment must be within 7 days of initial incapacity, i.e., employee can not wait more than one week to visit doctor.
 - "Two or more treatments" must take place within 30 days of first incapacity (absent extenuating circumstances).
 - Healthcare provider must decide whether second visit is necessary.

Intermittent Leave

- **Key Changes:**
 - Employee required to make "reasonable effort" to schedule intermittent leave because treatment so as not to disrupt business.
- **§ 825.205 Clarification:**
 - Must calculate leave in increments no greater than smallest period of time used for other forms of leave or the actual amount taken.
 - Example: If vacation and sick time calculated on ½ hour, then FMLA must be tracked on ½ hour or less.
 - Note: not required to use smaller increments because payroll for example can track to ¼ hour.
 - Regulations: FMLA Leave = Leave Actually Taken

Equivalent Pay/Bonus Entitlement

- Remember employees on FMLA leave are entitled to same treatment regarding pay as non-FMLA employees.
 - Pay increases based on cost of living, seniority, etc... must be provided to FMLA employees.
- Bonuses similar – FMLA employee entitled to bonuses on non-discriminatory fashion.
 - If employee on non-FMLA leave would receive attendance bonus/hours worked bonus FMLA employee must receive.

Light Duty

- Employers no longer allowed to charge light-duty assignments against FMLA leave entitlement.
- Employee's right to job restoration "tolled" during light duty.
 - i.e. employee performing light-duty instead of taking leave is entitled to be restored to position after light-duty no longer necessary.
- Thus, employee may use 12 FMLA weeks and light-duty work if employer allows.

Employer Notice Requirements

- General
 - Employer must post general notice in workplace.
 - Must be in handbook, or given to employees upon hire.
- Employee Eligibility/Employee Rights and Responsibilities
- Designation

Eligibility Notice

- Upon notice employee may have need for FMLA leave employer must:
 1. Provide "eligibility notice" stating whether employee is eligible for leave within 5 business days.
- New rule: for unforeseeable leave employee must generally notify employer same day or day after need for leave is realized.
 1. Can require employee to follow normal call in procedures unless unusual circumstances.

Employee Rights & Responsibilities Notice

- Must be given to employee regarding his/her rights/responsibilities related to FMLA leave.
- Key Notices, among others:
 1. That leave may be counted against FMLA entitlement; and method of calculation;
 2. Certification requirements and consequences for failing to provide medical certification;
 3. Right to substitute unpaid leave, and any requirement that paid leave must be substituted;
 4. Requirements for maintaining health coverage; and,
 5. Right to benefits and restoration.

Designation Notice

- Within 5 business days of receipt of information sufficient to determine employee needs FMLA leave employer must:
 1. Notify employee whether leave will be designated as FMLA leave. If not then why not.
 2. Also required:
 - If paid leave will be substituted;
 - Fitness-for-duty certification requirement;
 - If leave is known, then how it will be counted against 12 weeks; and, if
 - Leave is unknown how much leave employee has upon request.

Medical Certification

- New rule: employer must request medical certification within 5 days of request for leave.
- Employee generally has 15 days to return.
- Returned certification must be complete.
 - Upon written request employee has 7 days to cure incomplete certification.
- Employer may now include a statement of essential functions in request for medical certification.
- Certification may be insufficient if healthcare provider does not identify essential functions employee cannot perform.

Medical Certification Clarification

- Employer right to clarify medical cert.
 - Employer may now authenticate and clarify information on medical certification after employee given opportunity to cure.
 - Note: contact must be made by HR or management. May not be done by employee's direct supervisor.
 - Limited to clarifying handwriting or understand healthcare provider's response.

Fitness For Duty Certificates

- Under prior rules employer could request fitness-for duty certificate.
- Under new rules the certificate may also contain a list of essential functions which the certification must address.
 - Key – employee must have been given notice of this requirement in Designation Notice. Otherwise it is a violation.

ADA Amendments - Definition of Disability

- Disability still defined as:
 1. A physical or mental impairment that "substantially limits" one or more "major life activities" of such individual; or,
 2. A record of such impairment; or,
 3. Being "regarded as" having such an impairment.

Major Life Activities

- The new list says that "major life activities" include:

- | | |
|-----------------|---------------------------|
| • Communicating | • Working |
| • Concentrating | • Walking |
| • Thinking | • Standing |
| • Learning | • Eating |
| • Reading | • Sleeping |
| • Speaking | • Seeing |
| • Breathing | • Hearing |
| • Lifting | • Caring for oneself |
| • Bending | • Performing manual tasks |

New Definition Cont.

● Also includes "major bodily functions" as "major life activities," including but not limited to, functions of:

- Immune system
- Digestive system
- Neurological
- Respiratory
- Circulatory
- Endocrine
- Reproductive, and
- Normal cell growth

Broadening "Major life Activities"

● ADA Amendments reject Supreme Courts "demanding" standard of interpretation:

- that to be substantially limited in performing a major life activity under the ADA "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." (*Toyota v. Williams*, 2002).

Substantially Limits

● A showing of a "substantial limitation" still required to prove disability under the first prong.

● Amendments provide "substantially limits" should be applied less stringently than under *Toyota v. Williams* and its progeny.

- EEOC charged with re-defining "substantial limits" in regulations.

Rejection of Mitigating Measures

- The ADA Amendments specifically reject any consideration of "mitigating measures" when analyzing whether a person is disabled.
 - Examples: medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics, hearing aids/hearing devices, mobility devices, or oxygen therapy equipment and supplies
 - Exception for ordinary eyeglasses and contact lenses.

Other Changes to Substantially Limits

- An impairment only needs to substantially limit **one** major life activity.
- Impairments that are episodic in nature or in remission can constitute disabilities:
 - Episodic impairment = disability if it would substantially limit major life activity when active.
 - Prime example – cancer. All cancer survivors likely disabled under the Act, regardless of whether person currently is being treated.

Regarded As – Perceived Disability

- Changes will certainly cause increase of claims on "perceived disabilities".
- ADA allows for claims by persons not actually disabled, but regarded as by their employers.
 - Intent – prevent employers from discriminating against person's perceived disability then avoiding liability using argument employee not actually disabled.

Regarded As – Perceived Disability

- ADA Amendments:
 - No longer will person need to show employer perceived impairment to "substantially limit" a major life activity.
 - New "regarded as" analysis:
 - Whether the employee has a mental or physical impairment or was perceived by the employer as having an impairment;
 - Whether the employer took "adverse action" against the employee; and,
 - Whether that adverse action was based in whole or in part on the employee's real or perceived impairment.
 - Exception – impairments typically lasting less than 6 months.

Regarded As – Reasonable Accommodation

- Amendments explicitly state that an employee is **not** entitled to a reasonable accommodation **unless** he or she meets the "substantially limited in a major life activity" standard.
 - No requirement to accommodate an individual "regarded as" disabled who is not actually disabled.
 - "Regarded as" plaintiffs will not be able to recover claims they were not reasonably accommodated.

Best Practices

- Employers must do two things:
 - Refrain from making snap judgments or taking action regarding an employee's alleged disability.
 - May trigger "regarded" as claim.
 - Be ready to engage in interactive process and provide accommodations for those actually disabled.
 - Don't jump the gun and offer accommodation.
 - Employee has to request.
 - Always document interactive process.

GINA Overview

- Designed to prohibit discrimination by employers and health insurers based on genetic information.
- Effective in November 2009.
- Applies to employers with 15 or more employees.

Genetic Information

- Genetic information is defined as:
 1. an individual's own genetic tests;
 2. genetic tests of family members; and
 3. the manifestation of a disease or disorder among family members.
- A genetic test means an analysis of human DNA, etc...
- Information on a person's sex and age is excluded from the definition of genetic information.

GINA Prohibitions

- Taking action adverse or otherwise because of the employee or his or her family members' genetic information.
- Employers may also not limit, segregate or classify employees because of genetic information in a way that would deprive them of employment opportunities or otherwise adversely affect their status as employees.

Safe Harbor Exceptions

- Employers are prohibited from **obtaining** any genetic information, unless:
 - the employer obtains the information inadvertently when requesting or requiring a family medical history;
 - the employer offers health or genetic services (including as part of a wellness program), obtains proper consent and does not receive individually identifiable information unless in aggregate terms where the individuals identities are not disclosed;
 - the information is necessary to comply with FMLA or similar state laws;
 - the employer purchases commercially and publicly available documents that include family medical history (e.g., newspapers, magazines, but not medical databases or court records);
 - the information is used for genetic monitoring of the biological effects of toxic substances in the workplace; and,
 - the employer conducts DNA analysis for law enforcement purposes as a forensic laboratory.

GINA & Medical Records

- Genetic Information must be maintained in separate medical files and treated as confidential.
- Employer may not disclose, unless one of limited exceptions applies:
 - Employee requests;
 - Court order;
 - Investigation of GINA complaint;
 - FMLA purposes; or,
 - To Public Health Agency.

Penalties/Claims

- No disparate impact claims based on neutral policies.
- Intentional discrimination
 - Back pay, and other equitable relief
 - Maximum penalty per individual \$300,000 in compensatory and punitive damages.

Fair Pay Act

- Overturns *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S.Ct. 2162 (2007).
- Expands time frame for filing suit on discriminatory pay action.
- Employee must file with EEOC within 180 days of receipt of compensation affected by discrimination.
- Effective as of May 28, 2007, and applies to all claims after that date.

Fair Pay Act Impact

- Allows employees to file claims based on discriminatory pay allegations (even if the discriminatory decision was say 10 years ago) as long as employee still receiving pay affected by discrimination.
- Damages:
 - Employee can only receive back pay for 2 years prior to claim.

Paycheck Fairness Act

- Companion Legislation to Fair Pay Act.
- Currently Equal Pact Act allows: employers to make pay distinctions based on:
 - Seniority, merit, quantity and quality of production, and any factor not based on sex.

Paycheck Fairness Changes

- Eliminates affirmative defense of “any factor not related to sex” and replaces with:
 - “a bona fide factor other than sex, such as education, training, or experience.”
- Eliminates use of intangible/subjective factors for objective/tangible.
 - No more argument that males are better negotiators and/or that female employees failed to ask for raises.

Consequences

- Employers need to re-evaluate current employee compensation and internal compensation policies.
 - Eliminate use of subjective factors for objective tangible merit based factors:
 - Seniority, performance evaluation, sales, education, training, etc..
- Documentation of pay disparity is essential.
- Re-evaluate record retention policies.

Employment Non-Discrimination Act

- Proposed legislation to prohibit discrimination on the basis of sexual orientation and gender identity.
- Modeled on Title VII:
 - Applies to employers with more than 15 employees.
 - Does not require preferential treatment.

Healthy Families Act

- Would provide 7 paid days of sick leave to employees.
 - Employer – 15 or more employees.
 - 7 days for employees working 30 hours/week.
 - Pro rata amount for employees more than 20 less than 30 hours/week.

Sick Leave Uses

- Sick leave may be used by absences related to:
 1. Illness, injury, or medical condition of the employee;
 2. Medical care; or,
 3. Caring for a child, a parent, a spouse, or any other individual related by blood ...

Other Key Provisions

- Medical certification allowed when employee misses three consecutive days.
- Employers with more generous programs on date of enactment will not be able to reduce leave at later date.
- Employers with PTO programs providing at least 7 days should be compliant.

Family Leave Insurance Act

- To supplement the Family and Medical Leave Act ("FMLA").
- Provide the ability for eligible employees to receive wage replacement payments during FMLA Leave through the Family and Medical Insurance Program ("FMI").

Who is Covered

- The FLI covers "eligible employees"
 - Earned wages from a covered employer,
 - Minimum of 6 months prior to the leave request, Worked over 625 hours during that time frame.
- Under the FLI, a "covered employer" is one that is:
 - An employer under the definitions of the FMLA; or,
 - A small employer who employs 2-19 employees for more than 20 calendar work weeks and that has elected to participate in the program.

Funding Mechanism

- In general, Employers and Employees will pay a 2% payroll tax.
 - Small employers and employees only pay 1%.

Cases

- *Bryant v. Dollar General*, 538 F.3d 394 (6th Cir. 2008)
 - FMLA prohibits employer for retaliating against employee.
- *Milholland v. Sumner County Bd. Of Educ.*, 569 F.3d 562, 565 (6th Cir. 2009)
 - ADA Amendments Act does not apply retroactively to actions occurring before January 1, 2009.
- *Lafata v. Church of Christ Home for Aged*, 2009 WL 1421104 (6th Cir. 2009)
 - Employer's adoption of take it or leave it approach to request for accommodation violated duty to engage in interactive process.

Cases

- *Conti v. American Axle & Mfg., Inc.*, 2009 WL 1424371 (6th Cir. 2009)
 - Female employee stated *prima facie* case of pay discrimination under Equal Pay Act where immediate male predecessor paid significantly higher salary.
- *Crawford v. Metropolitan Gov't of Nashville*, 129 S.Ct. 846 (2009).
 - Employee disclosing discrimination during investigation of another employee's complaints protected against retaliation.
- *Hamilton v. General Elec. Co.*, 556 F.3d 428 (6th Cir. 2009)
 - Employer's heightened scrutiny of employee after charge, and close temporal proximity of termination stated claim of retaliation.

Conclusion

- Questions?

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