Holme Roberts & Owen LLP

Advertising Material

Employment Law Newsletter

by Nicole D. Gomes

edited by **K. Preston Oade**

In This Issue

EEOC PROPOSES NEW ADA REGULATIONS
Page 1

FMLA AMENDED (AGAIN)
Page 2

Labor Look
PAST PRACTICE NOT ALWAYS BINDING ON EMPLOYERS
Page 3

California Corner
2010 CALIFORNIA AND FEDERAL EMPLOYMENT LAW POSTERS
Page 4

Holme Roberts & Owen LLP
Attorneys at Law

Experience Listens. Be Heard.®

November/December 2009

EEOC PROPOSES NEW ADA REGULATIONS

The ADA Amendments Act of 2008 substantially expanded the reach of the Americans with Disabilities Act ("ADA") and directed the Equal Employment Opportunity Commission ("EEOC") to amend its regulations accordingly. On September 23, 2009, the EEOC issued proposed new ADA regulations. Under the proposed regulations, the term disability is defined as:

- a physical or mental impairment that substantially limits one or more major life activities; or
- a record of such impairment; or
- being regarding as having such an impairment.

The proposed regulations provide that the term "disability" must "be construed in favor of broad coverage" and "should not require extensive analysis."

Major Life Activity

Major life activities are basic activities that most people in the general population can perform with little or no difficulty. The proposed rules list the following as examples of major life activities: "major bodily functions," such as functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, circulatory, respiratory, endocrine, and reproductive functions, hemic, lymphatic, musculoskeletal, special sense organs and skin, genitourinary, and cardiovascular. In addition, major life activities include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working, sitting, reaching, and interacting with others.

Impairment

An "impairment" previously needed to prevent, or significantly or severely restrict, performance of a major life activity in order to be "substantially limiting." That no longer is the case. In addition, according to the proposed regulations, if an "impairment" substantially limits one of the above major life activities, it need not limit other major life activities to be considered a disability. Also, the ability to perform a major life activity now is to be compared to "most people in the general population."

The proposed regulations specifically provide that an impairment that is "episodic" or "in remission" is considered a "disability" if it would substantially limit a major life activity when active, for example: epilepsy, hypertension, multiple sclerosis, asthma, diabetes, major depression, bipolar disorder, and schizophrenia. Cancer also could fall under this example. Note, however, that the proposed regulations also provide that a temporary, non-chronic impairment of a short duration with little or no residual effects usually will not be considered a disability. This would include, but is not limited to, the common cold, seasonal or common influenza, a sprained joint, minor and non-chronic gastrointestinal disorders, or a broken bone that is expected to heal completely. Such things as appendicitis and seasonal allergies, that do not substantially limit an employee's major activities even when active are not disabilities. Also, if it does not otherwise substantially limit a major life activity, an impairment that is permanent or of a long duration or chronic in nature would not automatically be considered a disability.

Substantially Limiting

Mitigating measures eliminate or reduce the symptoms or impact of an impairment. The positive effects of mitigating measures are now ignored when determining whether an impairment is substantially limiting. That is, if a mitigating measure eliminates or reduces the symptoms or impact of an impairment, it cannot be used when determining whether there is a "disability." Instead, the focus is on whether the employee would be substantially limited in performing a major life activity without the mitigating measure. The proposed regulations consider the following as mitigating measures: medications, medical equipment and devices, prosthetics, hearing aids, cochlear implants and other implantable hearing devices, low vision devices, mobility devices, oxygen therapy, use of assistive technology, and auxiliary aids or services, behavioral or neurological

CONTACTS

DENVER/BOULDER
1700 Lincoln Street
Suite 4100
Denver, CO 80203-4541
ph 303.861.7000
fax 303.866.0200

Tracy L. Ashmore

David R. Ball

Carrie A. Brantley

Eve G. Burton

Sven C. Collins

Shane R. Cross

L. Anthony George

Ashley W. Jordaan

Donald J. Kelso

Andrew B. Mohraz

Bobbee J. Musgrave

K. Preston Oade, Jr.

Timothy M. Reynolds

Donald L. Samuels

Sheldon H. Smith

David B. Wilson

COLORADO SPRINGS
90 South Cascade Avenue
Suite 1300
Colorado Springs, CO 80903-1615
ph 719.473.3800
fax 719.633.1518

Jennifer Sloan Bielak

Susan D. Campbell

C. Onye Ikwuakor

Richard L. Nagl

Brent E. Rychener

modifications, and even reasonable accommodations. It also includes surgical interventions that do not permanently eliminate an impairment. Two things that are not ignored when determining whether an impairment is substantially limiting are ordinary eyeglasses and contact lenses since they are "intended to fully correct visual acuity or eliminate refractive error." Thus, they are considered when determining whether someone has a disability.

The negative effects from using mitigating measures also are considered when determining whether the employee is substantially limited in a major activity. For example, the side effects of a particular medication would be considered when determining if an employee meets the definition of disability.

Substantially Limited in Working

An individual with a disability usually will be substantially limited in a major activity other than working, therefore it generally will be unnecessary to consider whether the individual is substantially limited in working. The proposed regulations provide that an impairment substantially limits working if it substantially limits the employee's ability to perform or meet the qualifications for a "type of work."

The use of the term "type of work" replaces "class" or "broad range" of jobs that are used in the current, unrevised regulations. A type of work may be identified by the nature of the work (e.g., commercial truck driving, assembly line jobs, food service jobs, clerical jobs, or law enforcement jobs). A type of work may also be defined by reference to job-related requirements (e.g., jobs requiring repetitive bending, reaching or manual tasks; jobs requiring frequent or heavy lifting; and jobs requiring prolonged sitting or standing).

"Regarded As"

Pursuant to the proposed regulations, an employer "regards" an employee as having a disability if it takes an action prohibited by the ADA (such as discriminatory failure to hire, demotion or termination) based on an actual or perceived impairment, unless the impairment is minor and lasting or expected to last for six months or less (i.e. transitory). An employee no longer has to show that the employer believed or perceived the impairment to substantially limit the performance of a major life activity. Note that if an employer asks whether an employee needs a reasonable accommodation, it will not be considered to have "regarded" the employee as having a disability. The "regarded as" prong will be triggered only by actions prohibited by the ADA. An employer need not provide reasonable accommodation to someone covered only under the "regarded as" prong of the definition of "disability."

"Record of Disability"

Under the proposed regulations, an applicant or employee has a record of a disability if he/she, currently or at any time in the past, has had or been misclassified as having a physical or mental impairment that substantially limits a major life activity as compared to most people in the general population. For the individual to be covered under this prong, it is not necessary that the employer actually relied on the record or even knew of the record's existence. However, the proposed regulations caution that not all records of "disability" for other purposes, such as qualifying for a disability pension, will establish that the person had a record of a "disability" for purposes of the ADA.

Uncorrected Vision Standards

The proposed regulations provide that an employer must show that an uncorrected vision qualification standard that is challenged is job-related and consistent with business necessity, regardless of whether the employee challenging the standard has a disability.

What's Next?

From September 23, 2009 to November 23, 2009, the public had an opportunity to submit comments about the proposed regulations to the EEOC. The EEOC now will evaluate all of the comments and make corresponding revisions to the regulations. A proposed, final set of regulations then will be coordinated with certain federal agencies before the final regulations are published. Stay tuned!

FMLA AMENDED (AGAIN) *by L. Anthony George*

The Family and Medical Leave Act ("FMLA") has been amended yet again. On October 30, 2009, President Obama signed into law House Resolution 2647, the National Defense Authorization Act for Fiscal Year 2010, which expands FMLA coverage in three ways.

First, Qualifying Exigency Leave is now available when the employee's parent, spouse, or child is *serving* in the *Regular Armed Forces* and is deployed to a foreign country. Previously, such leave was available

CONTACTS

LOS ANGELES
800 West Olympic Blvd.
4th Floor
Los Angeles, CA 90015
ph 213.572.4300
fax 213.572.4400

Lawrence P. Ebiner

Nicole D. Gomes

MUNICH
Leomax
Rosental 4
D-80331 Munich
GERMANY
ph (US):
011.49.89.383980.0
fax (US):
011.49.89.383980.99

Ulrich Fülbier

Peter Katko

SALT LAKE CITY
299 South Main Street
Suite 1800
Salt Lake City, UT
84111-2263
ph 801.521.5800
fax 801.521.9639

Blaine J. Benard

Carolyn Cox

Elizabeth T. Dunning

SAN FRANCISCO
560 Mission Street,
25th Floor
San Francisco, CA
94105-2994
ph 415.268.2000
fax 415.268.1999

Laurie J. Rust

Donald L. Samuels

only when the parent, spouse, or child was called up to active duty while serving in the National Guard or Reserves or while retired from the Regular Armed Forces, the National Guard, or Reserves.

Second, Military Caregiver Leave will soon be available when the employee is the parent, spouse, child, or next-of-kin of a *veteran* who is undergoing treatment, recuperation or therapy for a qualifying "serious injury or illness" and who was a member of the Regular Armed Forces, National Guard, or Reserves within the past five years. Previously, such leave was available only for family members who were current members of the military or on the temporary disability retired list. This provision will not take effect until the Department of Labor defines which injuries or illnesses suffered by a veteran qualify for Military Caregiver Leave.

Finally, the term "serious injury or illness" has been expanded to include conditions that existed before the service member's active duty began and were *aggravated* by service in the line of duty while on active duty. Previously, Military Caregiver Leave was available only for injuries or illness incurred in the line of duty while on active duty. Employers should modify their policies and practices in light of these most recent changes to the FMLA.

Labor Look *by L. Anthony George*

PAST PRACTICE NOT ALWAYS BINDING ON EMPLOYERS

The relevant past practice of the parties can always be used in labor arbitration to help the arbitrator interpret ambiguous language in the collective bargaining agreement. However, unions often try to go much further and use "past practice" as the binding equivalent of express contract language, either to override unfavorable contract provisions or to add new terms not found in the contract. Fortunately for employers, there are significant limits to the binding effect of past practice.

As a threshold matter, the existence and scope of the practice must be clearly shown. "In the absence of a written agreement, 'past practice,' to be binding on both Parties, must be: (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both Parties." *Celanese Corp. of America*, 24 LA 168, 172 (Justin, 1954). A showing of occasional conduct by the employer, or even frequent conduct by lower-level employer representatives, will not suffice to establish a "past practice," much less demonstrate that the employer should be bound by it. *See, e.g., Weyerhauser Co.*, 105 LA 273,276 (Nathan, 1995) (frequency required); *Sperry Rand Corp.*, 54 LA 48, 52 (Volz, 1971) (leniency by individual supervisors not sufficient).

Furthermore, not every past practice is binding. Where a practice was adopted by management unilaterally, in the exercise of management discretion, that practice may normally be changed by management at its discretion. As arbitrator Harry Shulman explained in his widely-followed opinion, many management practices are "mere happenstance" and develop without conscious design or deliberation. "[T]hey may be choices by Management . . . as to the convenient methods at the time[, with] no thought of obligation or commitment for the future. Such practices are merely present ways, not prescribed ways, of doing things." *See Ford Motor Co.*, 19 LA 237, 241-242 (Shulman, 1952). For a past practice to be binding, it must be supported by the mutual agreement of the parties and not merely the unilateral action of the employer for its own convenience. *See, e.g., Wyandotte Chem. Corp.*, 39 LA 65, 66-67 (Mittenthal, 1962).

Finally, even where a past practice is well established and supported by mutual agreement, attempts to bind the employer with that practice might be prohibited by other provisions of the contract. For example, the "management rights clause" may reserve to the employer certain prerogatives of management "except as expressly provided otherwise *in this Agreement*" (or similar words), thus precluding any attempt to curtail those prerogatives by use of a practice that exists outside the written agreement. *See, e.g., Sealy Mattress Co.*, 121 LA 883 (Paolucci, 2005). Similarly, reliance on a past practice that predates the term of the contract may be contrary to the "zipper clause," which will typically state that the written contract represents the complete agreement of the parties regarding the subjects addressed therein. *See, e.g., Bassick Co.*, 26 LA 627, 630 (Kheel, 1956); *Phoenix Mgmt.*, 123 LA 1515 (Jennings, 2007). Use of past practice may also be barred by a common contract provision prohibiting the arbitrator from "adding to, subtracting from, or otherwise modifying the provisions of this Agreement." *See, e.g., Cuyahoga Comm. Coll.*, 109 LA 268 (Klein, 1997).

In this holiday season, employers who are often maligned as "Scrooges" by their labor unions may at least draw some comfort from knowing that they will not always be haunted by the Ghost of Practice Past.

California Corner *by Nicole D. Gomes*

2010 CALIFORNIA AND FEDERAL EMPLOYMENT LAW POSTERS

Don't forget that all California employers, regardless of size, must post a current employment poster in a conspicuous place in the workplace where all employees and applicants can see it. California law is strict with regard to these required postings. Failure to comply can result in severe penalties and fines by the State of California. And remember, if any of your employees are Spanish speaking, you will need to order and post the Spanish version.

This newsletter is a periodic publication of Holme Roberts & Owen LLP and should not be used or relied upon as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational and educational purposes only, and you are urged to consult your own lawyer concerning your situation and/or any specific legal question you may have. For further information about the contents of this newsletter, please contact one of the attorneys listed under "contacts."

HRO's Going Green

In an effort to help save the Earth's natural resources, HRO would like to extend to you the opportunity to receive the Employment Law Newsletter electronically. HRO keeps archival copies of the newsletter on our website under the Publications section: http://www.hro.com/publications.

If you would like to opt into the electronic distribution group, please send an email to justin.knight@hro.com.

OFFICES IN:
Denver
Boulder
Colorado Springs
Dublin
London
Los Angeles
Munich
Phoenix
Salt Lake City
San Francisco

Holme Roberts & Owen LLP
Attorneys at Law

Experience Listens. Be Heard.®

1700 Lincoln Street, Suite 4100
Denver, Colorado 80203-4541