



HUMAN RESOURCES UPDATE

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EEOC'S NEW GUIDELINES ON ADA

Approximately one year after former President Bush signed the ADA Amendments Act (ADAAA), the EEOC has finally issued proposed regulations and guidelines for public comment. As expected, the new regulations make significant changes in how certain terms under the ADA are defined, which most likely will give rise to more disability claims. Here is a summary of the most significant changes and guidance to the regulations. Please remember that the ADA and ADAAA apply to companies with fifteen or more employees.

Disability The term “disability” continues to mean either 1) physical or mental impairment that substantially limits one or more major life activities, 2) a record of such impairment, or 3) being regarded as having such an impairment.

Actual Disability The new regulations primarily affect what constitutes a “major life activity.” Specifically, major life activities are those that “most people in the general population can perform with little or no difficulty.” The ADAAA provides a non-exhaustive list of activities and major bodily functions that are examples of major life activities, adding a number of major bodily functions covered such as special sense organs, skin, and musculoskeletal, among others.

In redefining “substantially limits” the EEOC essentially states what it is *not* rather than what it is. Specifically, the EEOC states “an impairment is a disability ... if it ‘substantially limits’ the ability of an individual to perform a major life activity as compared to most people in the general population.” The new regulations then provide that the impairment does not have to *prevent or significantly or severely restrict the individual from performing a major life activity*, but must be more than a temporary, non-chronic impairment of a short duration that has little or no residual effects.

The EEOC goes on to define “sometimes,” “never,” “substantially limited,” and “perceived as” groups of disabilities. (Details on these definitions can be found on the EEOC’s website at http://www.eeoc.gov/policy/docs/qanda_adaaa_nprm.pdf.)

Reasonable Accommodation The EEOC now specifically states that employers must accommodate not only individuals with actual disabilities, but individuals with *records* of disabilities, although employers are not required to accommodate “perceived-as” disabilities. Importantly, the positive and negative effects of mitigating measures may be considered when evaluating whether an individual needs an accommodation and whether an individual is a direct threat to co-workers’ safety.

Qualification Standards The EEOC has added a provision stating that qualification standards, employment tests, or other selection criteria based on a person’s uncorrected vision is prohibited unless the employer can show that the standard, test or criteria is job related to the position for which it is required, and is consistent with business necessity.

What Employers Need To Do Now These new regulations are now open for public comment and may change. Nevertheless they point clearly to an era of heightened scrutiny in the area of disability claims and requests for reasonable accommodation under the ADA. It remains to be seen how much of this new approach will be endorsed by courts, but we recommend a cautious approach. Employers should review their current policies on non-discrimination and reasonable accommodation, and ensure that supervisors are well trained to handle all potential disability claims or requests for accommodation in an appropriate manner.

Please contact your Senior Associate at The Hopkins Group for further assistance on your company’s ADAAA policy revision.

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REMEMBER AS YOU'RE PREPPING FOR YEAR-END PAYROLL, THAT GIFTS, AWARDS, BONUSES, AND CAR ALLOWANCES ARE MOST LIKELY TAXABLE TO YOUR EMPLOYEES

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**THE HOPKINS GROUP, LLC
214-597-2444
WWW.HOPKINSHR.COM**

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RACE DISCRIMINATION COSTS

Area Erectors, Inc., a construction company headquartered in Rockford, IL, will pay \$630,000 and provide significant remedial relief to settle a race discrimination class lawsuit brought by the U.S. Equal Employment Opportunity Commission (EEOC).

The EEOC's suit, filed under Title VII of the Civil Rights Act (*EEOC v. Area Erectors, Inc.*, No. 1:07-CV-02339), charged that Area Erectors terminated Giles Jefferson and a class of 23 other black employees because of their race. In addition, the EEOC alleged that Area Erectors fired Jefferson as a retaliatory measure after it discovered he had filed a lawsuit against another employer for race discrimination. "No group of employees should ever be targeted for layoffs based on race, and the EEOC will vigorously prosecute systemic race discrimination cases," said EEOC Acting Chairman Stuart J. Ishimaru. "This substantial settlement sends a clear signal that we will insist on meaningful and significant relief in order to resolve these cases."

"We found in this case that Area Erectors had a practice of laying off black employees after they had worked for the company for short periods of time, but retained white employees for long-term employment," explained EEOC Trial Attorney Ann Henry, who led the government's litigation effort. "We are optimistic that the consent decree will correct this practice and lead to equal employment opportunities for black workers."

EEOC Regional Attorney John Hendrickson of the Chicago District Office added, "We are very satisfied with both the monetary and extensive non-monetary relief provided for in the consent decree. In this economic climate, we're especially pleased that Area Erectors will be required to offer the claimants reinstatement at the company."

During Fiscal Year 2008, the EEOC received 33,937 race discrimination charge filings, up 11 percent from the prior year. Race discrimination continues to be the most frequent allegation in annual charge filings with the EEOC nationwide.

YOUR EMPLOYEES' HEALTH

An unfortunate side effect of the economy is that many people are foregoing preventative health measures to save money. They are also cutting down on exercise and not eating as well. While this may not come as a surprise, it can ultimately affect not just your renewal rates, but absenteeism and morale. Look to your company's group health carrier for low-cost ideas to share with your employees – any preventative measure is better than none.

- Does your plan provide annual exams or physicals at 100% with no co-pay or at a basic co-pay? Remind employees that obtaining those annual exams is vital to early detection of serious problems.
- Are there counselors or coaches as an adjunct to your plan to help with diet or exercise?
- What about your Employee Assistance Program? Many employees are stressed about their personal and financial situation and even three to six sessions with a counselor can do wonders for their well-being.

SOCIAL NETWORKING RECRUITING

As more and more companies develop their own pages on LinkedIn, Facebook, Twitter, and similar sites, these social networking sites are becoming common sources for recruiting new employees. As always, a company should not use simply one method, be it job boards, employee referrals, or job fairs. The concern with exclusively using social networking sites is that the users are primarily Caucasians age 20-40. For example, on LinkedIn, only 4% of users are African-American, and just 2% are Hispanic, according to the latest data from Quantcast.

So use these sites, just use them in conjunction with other recruiting methods.