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EMPLOYMENT PRACTICES UPDATE

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NEW AMERICANS WITH DISABILITIES AMENDMENTS ACT REGULATIONS

The Americans with Disabilities Act ("ADA") was enacted in 1990 and serves to protect disabled individual and provide accommodations in the workplace. On January 1, 2009 the ADA Amendments Act of 2008 took effect and recently the Equal Employment Opportunity Commission ("EEOC") issued regulations in order to implement the ADAAA. These regulations will become effective on May 24, 2011.

The regulations provided changes in several areas, and have redefined what constitutes a "disability". It is now easier for individuals to establish that they have a "disability". As was the case previously an individual can be considered disabled if he or she: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having an impairment.

The definition of disability, however, has been expanded as the concepts of "substantially limits", "major life activity" and "regarded as" have each been redefined to allow broader protection.

Substantially Limits

The regulations provide rules to use when determining whether an individual is substantially limited in performing a major life activity. These rules expand the concept of "substantially limits" in various ways, for instance:

An individual no longer has to demonstrate his or her impairment prevents or severely or significantly limit a major life activity to be considered "substantially limiting".

The determination of whether an impairment substantially limits a major life activity now requires an individualized assessment.

The determination whether an impairment substantially limits a major life activity will no longer take into account the effect of any mitigating factors. With the exception of ordinary eyeglasses and contact lenses, impairments must

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be examined in their unmitigated state. Therefore even if an person's impairment could be controlled with medication, the rule require for the person to be assessed without considering the how the person would be on medication.

An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. A person who is in remission from cancer could therefore be considered disabled.

An impairment needs only to substantially limit one major life activity to be considered a disability under the ADA.

Short term impairments (less than six months) may be considered can be substantially limiting.

The regulations identify examples of specific impairments that should easily be concluded to be disabilities including: deafness, blindness, intellectual disability, partially or completely missing limbs, mobility impairments requiring use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder, and schizophrenia.

Major Life Activity

The regulations include a non-exhaustive list of major life activities and also clarify that major life activities include major bodily functions. The operation of a major bodily function may include the operation of an individual organ within a body system and would include, for example, the operation of the kidney, liver, pancreas or other organs.

In determining other examples of other major life activities, the term "major" is not be interpreted strictly to create a demanding standard for disability. The regulations also reject the notion that to be substantially limited in performing a major life activity, 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 lives.

"Regarded As" Disabled

The original ADA required an individual seeking coverage under the ADA to show that an employer believed the individual's impairment or perceived impairment substantially limited performance of a major life activity. The ADAAA makes it easier for individuals to establish that they are "regarded as" as disabled by focusing on how the person was treated rather than on what an employer believes about the nature of the person's impairment.

In accordance with the regulations, an employer "regards" an individual as having a disability if it takes an action prohibited by the ADA based on the individual's impairment or an impairment that employer believes the individual has, unless the impairment is transitory (with an actual or expected duration of six months or less) and minor.

A claim under the "regarded as" prong may be challenged by showing that the impairment in question, whether actual or perceived, is both transitory and minor. A covered entity, however, may not defeat a claim by asserting it believed an impairment was transitory and minor when objectively this is not the case (e.g. bipolar disorder is not objectively transitory and minor).

Fortunately, the ADAAA specifically states that those individuals covered under only the "regarded as" definition are not entitled to reasonable accommodation.

Advice

Under the new regulations, employers must look more carefully when making decisions as to what constitutes a "disability". Medical conditions or injuries which would not have risen to the level of a "disability" may now do so. Be cautious when considering whether to grant a request for reasonable accommodation.

EMPLOYER LIABILITY FOR DISCRIMINATORY MOTIVES OF NON-DECISION MAKERS

On March 1, 2011, the Supreme Court of the United States, in Staub v. Proctor Hospital, No. 09-400, issued an opinion that an employer can, in certain circumstances, be held liable for employment discrimination based upon the bias of a supervisor who influenced, but did not make, the ultimate employment decision.

Mr. Staub was an angiography technician employed by Procter Hospital and was also a member of the United States Army Reserve. He claims that his supervisors were hostile to his military obligations. During his employment, he received a Corrective Action disciplinary warning allegedly violating a company rule requiring him to stay in his work area whenever he was not working with a patient. His supervisor then told Procter's Vice-President of Human Resources that Staub had violated his Corrective Action warning. The Vice-President of Human Resources relied on this

accusation and fired Mr. Staub for ignoring the directive set forth in the Corrective Action.

Mr. Staub challenged his termination and claimed that his supervisor had fabricated the allegations in the Corrective Action based on his hostility towards Staub's military obligations. He sued Procter Hospital under the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"). Under USERRA liability is established if the person's membership in the armed forces… is a motivating factor in the employer's action. Mr. Staub alleged that Proctor Hospital should be held accountable for the animus of his supervisors, even if those supervisors only influenced but did not make the actual decision to fire him.

A jury found that Mr. Staub's military status was a motivating factor in Procter Hospital's decision to discharge him in violation of USERRA. The United States Court of Appeals for the Seventh Circuit reversed and thereafter the case was brought to the Supreme Court.

The Supreme Court reversed the opinion of the Seventh Circuit and held that if a supervisor performs an act motivated by bias against the military that the supervisor intends to cause an adverse employment action, and if that act is the proximate cause of the ultimate employment action, then the employer can be held liable under the USERRA. The Supreme Court found that the evidence suggested that a reasonable jury could have inferred that the actions of Staub's supervisors actions were motivated by hostility toward Staub's military obligations and that these actions were causal factors underlying the Vice-President of Human Resource's decision to fire Staub. In a footnote, the Supreme Court stated that it expressed no view as to whether the employer would be held liable if a co-worker rather than a supervisor committed a discriminatory act that motivated the ultimate adverse employment decision.

While the Staub decision was determined under USERRA, employers should be aware that this holding allowing the cat's paw liability will likely be applicable to other cases discussing employment discrimination. In Staub, the Supreme Court noted that USERRA is very similar to Title VII in that it states that the discrimination prohibited under Title VII is established when one of those factors "was a motivating factor for an employment practice, even though other factors also motivated the practice." This case also leaves employers uncertain as to whether they can be open to liable for employment discrimination based upon the bias of low-level employees who influenced adverse employment action.

Advice

Make sure to provide annual sensitivity training to your employees and consider providing separate and more in depth training to all supervisory employees. As responsible employers you need to promote tolerance of differences in the workplace. Make certain to seek corroborating documentation when making decisions to terminate based on the recommendations of supervisory staff.

CORPORATIONS DO NOT HAVE PERSONAL PRIVACY INTERESTS UNDER EXEMPTION 7(C) OF THE FREEDOM OF INFORMATION ACT

On March 1, 2011, the Supreme Court of the United States held that corporations do not have personal privacy interests for the purposes of Exemption 7(C) under the Freedom of Information Act ("FOIA").

In FCC v. AT&T Inc., 562 U.S.______ (2011), CompTel, a trade association, representing some competitors of AT&T, submitted a FOIA request for documents AT&T had provided to the Federal Communications Commission ("FCC") Enforcement Bureau during an internal investigation of AT&T. AT&T opposed this request. Under FOIA, federal agencies are required to make records and documents publicly available upon request unless the requests fall within one of several statutory exemptions. Exemption 7(C) of FOIA covers the disclosure of law enforcement records that "could reasonably be expected to constitute an unwarranted invasion of personal privacy." The Enforcement Bureau concluded that Exemption 7(C) did not apply to the corporation because businesses do not possess personal privacy interests. The FCC agreed with the Enforcement Bureau. Upon review, the United States Court of Appeals for the Third Circuit rejected the FCC's reasoning and ruled that "FOIA's text unambiguously indicates that a corporation may have a 'personal privacy' interest within the meaning of Exemption 7(C).

The FCC petitioned the Supreme Court of the United States for review of the Third Circuit's decision. The Supreme Court observed that "person" is defined in FOIA but "personal" is not. When a statute does not define a term, the Court generally gives the term or phrase its ordinary meaning, and the Supreme Court concluded that

"personal" ordinarily refers to individuals. The Supreme Court also looked to other FOIA exemptions to support its finding that the term "personal privacy" does not apply to corporations. The Supreme Court concluded that the "protection in FOIA against disclosure of law enforcement information on the ground that it would constitute an unwarranted invasion of personal privacy does not extend to corporation."

Although this case does not deal directly with employment issues, the holding has relevance to employers. As part of employment discrimination cases, federal agencies, such as the EEOC, conduct investigations into claims of discrimination and require that employers submit various documents relevant to an employee's allegations. FOIA requires that the EEOC disclose records upon receiving a written request for them unless those records are protected from disclosure by any of the nine exemptions and three exclusions of the FOIA. Employers must be mindful that under FCC v. AT&T Inc., corporations do not have a personal privacy interest and therefore must look for other exemptions to prevent disclosure of certain records that could lead to potential litigation.

ORAL COMPLAINTS ARE COVERED UNDER THE ANTI-RETALIATION PROVISION OF THE FAIR LABOR STANDARDS ACT

On March 22, 2011, the Supreme Court of the United States concluded that the anti-retaliation provision of the Fair Labor Standards Act ("FLSA") includes both written and oral complaints within its scope of protection.

In Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. _____ (2011), Mr. Kasten, a former employee of Saint-Gobain, brought a lawsuit against Saint-Gobain for violating the anti-retaliation provision of the FLSA. The FLSA provides rules about minimum wages, maximum hours and overtime pay. The FLSA also contains an anti-retaliation provision, which prohibits employers to discharge or otherwise discriminate against any employee who filed a complaint, instituted, or caused to be instituted any proceeding related to the FLSA, has testified about it or serves on an industry committee. Mr. Kasten claimed that Saint-Gobain discharged him in retaliation for making oral complaints to his superiors that the employer's placement of time clocks violated the FLSA.

The District Court entered summary judgment in Saint-Gobain's favor on the grounds that the FLSA did not protect oral complaints. The United States Court of Appeals for the Seventh Circuit agreed with the District Court that the FLSA's anti-retaliation provision did not cover oral complaints. The Supreme Court observed that the Circuit Courts were split as to whether an oral complaint is protected under the FLSA and granted Kasten's petition for writ of certiorari.

In a 6-2 decision, the Supreme Court determined that the Seventh Circuit erred in its holding. The Supreme Court concluded that the scope of the statutory term "filed any complaint" includes oral, as well as written, complaints.

Saint-Gobain raised a concern that the FLSA requires fair notice to employers and that allowing oral complaints to be sufficient under the anti-retaliation provision, employers will be left unsure of whether an employee is making a complaint or letting off steam. The Supreme Court agreed that an employer must have fair notice of a complaint and concluded that "[t]o fall within the scope of the anti-retaliation provision, a complaint must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute…" The Supreme Court held, however, that this standard can be met by oral complaints.

Advice

When it comes to complaints, remember there is no such thing as an employee "just letting off steam". When you receive an oral complaint make sure to contemporaneously document the nature of the complaint and request that the employee sign to acknowledge the complaint. If the employee refuses to sign, note that on the documentation.

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