American Public Transportation Association

Legal Update

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OVERVIEW

- ADAAA regulations
- GINA regulations
- Confidentiality issues
- ADA revised regulations: Title II and Title III
- FLSA regulations
- New case law
  - U.S. Supreme Court, 2010-2011 term, employment cases
  - *Ricci* fall-out and reverse discrimination
  - Religious accommodation
  - Family and Medical Leave Act
  - Effect of local laws
  - Free speech

ADAAA Regulations

- Effective date May 24, 2011
- Key concepts
  - Broad coverage
    - "Substantially limits"
  - Episodic or in remission impairments
    - Disability if impairment would substantially limit a major life activity when active
  - Mitigating measures not considered
  - "Regarded as"

ADAAA Regulations

9 Rules of Construction for "Substantially Limits"

1. "Substantially limits" is construed broadly, in favor of expansive coverage, and is not a demanding standard.
2. An impairment need not prevent or significantly or severely restrict the individual from engaging in a major life activity.
3. The main issue should be whether covered entities have complied, not whether an impairment substantially limits a major life activity. Whether an impairment is substantially limiting "should not demand extensive analysis."
4. While an individualized assessment is needed, the standard is lower than prior to ADAAA.

ADAAA Regulations

5. Comparison of the individual to most people in the general population usually will not require scientific, medical or statistical analysis.
6. Whether an impairment is substantially limiting is assessed without regard to mitigating measures (though ordinary eyeglasses and contact lenses are considered).
7. An episodic or in remission impairment is a disability if it would substantially limit a major life activity when active.
8. Limit on one major life activity is sufficient.
9. An impairment can last fewer than six months and still be substantially limiting.

ADAAA Regulations

- "Regarded As"

  –"[T]he individual has been subjected to an action prohibited by the ADA as amended because of an actual or perceived impairment that is not both 'transitory and minor.'"

  –"Where an individual is not challenging a covered entity's failure to make reasonable accommodations and does not require a reasonable accommodation, it is generally unnecessary to proceed under the 'actual disability' or 'record of' prongs . . . . In these cases, the evaluation of coverage can be made solely under the 'regarded as' prong of the definition of disability, which does not require a showing of an impairment that substantially limits a major life activity or a record of such an impairment."

  29 C.F.R. § 1630.2(g)

GINA Regulations

- Genetic Information Nondiscrimination Act
  - Effective May 2008
  - Remedies are same as under Title VII
- Regulations effective January 10, 2011
- Key provisions of Title II of GINA
  - Prohibits use of/discrimination based on genetic information in the employment context
  - Restricts covered entities from requesting, requiring, or purchasing genetic information
  - Strictly limits covered entities from disclosing genetic information

GINA: Critical Features

- "Genetic information" includes family medical history
  - Dependents related through marriage, birth, adoption, or placement for adoption
  - Persons related from the first to the fourth degree
- "Requesting" genetic information
  - Internet search on an individual likely to result in obtaining genetic information
  - Active listening to third-party conversations

GINA: Inadvertent vs. Intentional Acquisition

- Co-workers talk at "water cooler," and supervisor walks by and overhears
- Supervisor asks how employee is feeling
- Supervisor receives unsolicited e-mail with genetic information
- Supervisor asks how employee is feeling. Employee says "not well," and explains about breast cancer diagnosis. Supervisor asks if it runs in the family.

GINA: Permissive or Mandatory Notice?

- Safe Harbor Notice
  - When covered entity requests health-related information, covered entity may/must warn not to provide genetic information
  - EEOC Sample Language:
    - "The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of employees or their family members. In order to comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. 'Genetic information,' as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services."

GINA: Permissive or Mandatory Notice?

- Mandatory Notice
  - When covered entity requests a health care professional to conduct an employment-related medical examination on the employer's behalf, covered entity **must** give notice
    - Fitness for duty
    - Post-offer

Confidentiality of Medical Information: What is a "Court Order"

- GINA:
  - must keep genetic information confidential, and separate from personnel file
    - Limited exceptions allow disclosure, including compliance with a court order
- ADA:
  - must keep medical information confidential, and separate from personnel file
    - Limited exceptions allow disclosure, including compliance with a court order
- Discovery requests and subpoenas are NOT court orders
  - Preamble to GINA regulations, 20 C.F.R. § 1635.9(b)
  - *Bennet v. U.S. Postal Serv.*, 2011 WL 244217, E.E.O.C., Jan. 11, 2011

ADA Revised Regulations: Title II and Title III

- Effective Date: March 15, 2011
  - Conflict with ADAAA
- Service Animals
  - Dog that has been individually trained to do work or perform tasks for the benefit of an individual with a disability
    - *Stamm v. New York City Transit Authority,* E.D.N.Y., March 30, 2011
  - Emotional support vs. psychiatric service animal
  - Most other animals do not qualify as "service animals"
  - Trained miniature horses may be used as alternatives to dogs, subject to certain limitations
  - Covered entity may ask only two questions, and only if answers are not readily apparent
    - Whether the animal is required because of a disability
    - What work or task the animal has been trained to perform

ADA Revised Regulations: Title II and Title III

- Wheelchairs and Other Power Driven Mobility Devices
  - Covered entity must permit individuals with mobility disabilities to use wheelchairs and manually powered mobility aids
    - A Segway is NOT a wheelchair
  - Covered entity must permit use of other power-driven mobility devices unless the class of device cannot be operated in accordance with legitimate safety requirements adopted by the entity

FLSA Regulations

- Effective May 5, 2011
- Section 7(o) of FLSA
  - Compensatory time for public sector employees, under certain conditions
  - Section 7(o)(5) requires public employer to permit employee who has accrued compensatory time to use the time "within a reasonable period" after making the request as long as it does not "unduly disrupt" operations
- Cases in conflict
- Competing regulatory proposals, published July 2008
  - Bush DOL regulatory proposal, published July 2008
  - Obama DOL withdraws Bush proposal, effective May 5, 2011

U.S. Supreme Court 2010-2011 term Employment Cases

- *Thompson v. North American Stainless*, Jan. 24, 2011
  - Title VII retaliation: zone of interests
- *Staub v. Proctor Hospital*, March 1, 2011
  - Discrimination by non-decisionmaker may taint adverse action
- *Kasten v. Saint-Gobain Performance Plastics Corp.*, March 22, 2011
  - Anti-retaliation FLSA provision protects oral and written complaints

Ricci Fall-out and Reverse Discrimination

- Rule from *Ricci v. DeStefano*, Supreme Court, 2009
- Rule from *United States v. Brennan*, Second Circuit, May 2011
  - Defenses to Title VII claim of disparate treatment
    - Valid affirmative action plan, or
    - Strong basis in evidence to believe it will be subject to disparate impact liability in absence of action
- Effect of Equal Protection Clause on public employers

Religious Accommodation

- *United States v. New York City Transit Authority*, E.D.N.Y.
  - Claims:
    - Religious discrimination against employees whose religious beliefs require them to wear certain headwear, such as turbans and khimars, unsullied by any logos
    - Religious discrimination due to selective enforcement of uniform policy
  - Motion for summary judgment by NYCTA, denied Sept. 2010
  - Ongoing settlement discussions

Family and Medical Leave Act

- Clarification of "son or daughter" definition
  - "In loco parentis" does not require both day-to-day care and financial support
  - "In loco parentis" is not limited to two individuals
  - Administrator's Interpretation No. 2010-3 (June 22, 2010)
- Recent cases
  - *Sanders v. City of Newport*, 9th Cir., March 17, 2011
    - Ultimate burden of proof on employer in denial of reinstatement claim
  - *Tayag v. Lahey Clinic Hospital, Inc.*, 1st Cir., Jan. 27, 2011
    - FMLA not applicable to spiritual healing pilgrimage

Effect of Local Laws

- *Bumpus v. New York City Transit Authority*, N.Y. Sup. Ct., Feb. 1, 2011
  - Gender identity discrimination prohibited
  - Summary judgment denied for NYCTA
  - Two claims for the jury:
    - Mental and emotional distress caused by NYCTA employee as a result of NYCTA's negligent training, supervision and retention of employee
    - NYCTA employee made Bumpus feel her patronage was unwelcome at subway station

Free Speech

- *Anemone v. Metropolitan Transp. Authority*, 2nd Circuit, Jan. 4, 2011
  - Employee terminated
    - Claimed firing was due to alleged protected speech to District Attorney's office, NY State Assembly, and New York Times concerning alleged corruption at MTA
    - Summary judgment granted to MTA
- *Fenton v. New Jersey Transit Corp.,* D.N.J., filed Nov. 2010
  - Employee terminated for burning pages of the Koran at an off-duty protest
  - April 2011 settlement
    - Reinstatement
    - Backpay
    - Pain and suffering
    - Legal fees for employee

Questions?

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