Employment Law Matters

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ADA Amendments Act of 2008 Becomes Law

On September 25, 2008, President Bush signed the ADA Amendments Act of 2008 (ADAAA) into law. The new law is purportedly designed to restore the "intent and protections of the Americans with Disabilities Act (ADA) of 1990." The most significant changes to the ADA involve the definition of a "disability" and how courts are meant to interpret it. The practical effect of these changes will be to make the ADA closer to the New York State Human Rights Law in terms of its scope and coverage.

Under the new law, a "disability" will still be defined as:

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
(B) a record of such an impairment; or
(C) being regarded as having such an impairment .... (42 U.S.C. §12102.)

However, the new law will include an extensive list of the tasks and functions which constitute "major life activities." Specifically, these activities include physical tasks such as walking, standing, and lifting; mental tasks such as learning, reading, and thinking; and the operation of major bodily functions, such as immune system functions, cell growth, and reproductive functions.

In addition, the ADAAA added a broad definition of "being regarded as having such an impairment". According to the new law:

> An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment ***whether or not the impairment limits or is perceived to limit a major life activity***. (Emphasis added.)

When a court applies this modified definition to cases in the future, it must construe the term as follows: (1) the term "disability" must be construed in favor of "broad coverage" of individuals under the Act; (2) an impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability; (3) an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active; and (4) the determination of whether an impairment substantially limits a major life activity must be made without regard to the ameliorative effects of specified mitigating measures (such as medications, prosthetics, etc.).

The new law also redefines who is protected by the ADA. Under the old law, only a "qualified individual with a disability" was protected The new law removes the phrase "with a disability", expanding the law's protections to "qualified individuals". The new definition of "qualified individuals" will read as follows:

> Qualified individual
>
> The term "qualified individual" means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

This change was primarily intended to overturn the U.S. Supreme Court decision in *Toyota Motor Mfg. Ky Inc. v. Williams,* 534 U.S. 184 (2002). In that case, the Court held that a person with carpal tunnel syndrome is only covered by the ADA if her impair-

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ments affect central activities of daily living and not just her ability to perform a class of tasks on the job. In that case, Ms. Williams worked using vibrating pneumatic tools on an assembly-line. Over time, she developed carpal tunnel syndrome in both wrists, and back and neck pain. As a accommodation, Toyota moved her to a less physically demanding job. But when her job responsibilities were expanded and her pain recurred, the company refused to return her to her previous tasks. Ms. Williams brought suit under the ADA. Ruling in favor of Toyota, the Court noted:

> "When addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with her particular job ....The impairment's impact must also be permanent or long term."

The Court found that repetitive work with arms extended at shoulder height (as Ms. Williams was required to do for the paint inspections on car bodies) was not an important part of most people's daily lives. Tasks such as brushing your teeth, face washing, bathing, fixing breakfast and doing laundry are manual tasks which are central to daily living. Since Ms. Williams could still perform these tasks, she was not a "qualified individual with a disability" and therefore not entitled to protection under the Act.

Under the new law, Ms. Williams would have been considered a "qualified individual" as long as she could have performed the "essential functions of the job either with or without a reasonable accommodation." In other words, if the Court were to determine that repetitive work with arms extended at shoulder height was not an essential function of her job, she would have been protected against adverse employment actions on the "basis of disability" despite the fact that her impairment may not have significantly impacted a major life activity.

For employers in New York, this change will have little practical effect given the fact that the New York State Executive Law (also known as the "Human Rights law") has always had a much broader definition of "disability." Under the Human Rights Law, "disability" is defined as "a physical, mental or medical impairment... which prevents the exercise of a normal bodily function **or is demonstrable by medically accepted clinical or laboratory diagnostic techniques** ..." New York's highest court has explained the breadth of New York's definition as follows:

> The statute provides that disabilities are not limited to physical or mental impairments, but may also include "medical" impairments. In addition, to qualify as a disability, the condition may manifest itself in one of two ways: (1) by preventing the exercise of a normal bodily function or (2) by being "demonstrable by medically accepted clinical or laboratory diagnostic techniques" (Executive Law §§ 292[20] [now 21]). Fairly read, the statute covers a range of conditions ***varying in degree from those involving the loss of a bodily function to those which are merely diagnosable medical anomalies which impair bodily integrity and thus may lead to more serious conditions in the future***. Disabilities, particularly those resulting from disease, often develop gradually and, under the statutory definition, an employer cannot deny employment simply because the condition has been detected before it has actually begun to produce deleterious effects. *State Division of Human Rights v. Xerox Corp.*, 65 N.Y.2d 213 at 218-19 (1985) (emphasis added).

Thus, the broader definition – and construction – of the term "disability" under the ADA will be similar to how it is defined under the Human Rights Law. Consequently, the new law will have little practical effect on employers located in New York.

The ADA Amendments Act of 2008 becomes effective January 1, 2009.

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On September 2, 2008, Governor Paterson signed a new law known as the New York State Worker Adjustment and Retraining Notification Act. This new law, which is provides broader coverage than the federal WARN Act, requires private employers to notify their employees, the Department of Labor and other state and local officials prior to certain plant closings, mass layoffs and/or relocations. There are stiff penalties for New York businesses that fail to comply with the new law, including a provision that gives the Commissioner of Labor authority to order relief, including back wages and unpaid medical benefits, for employees who do not receive the required notice. The following is a quick comparison of the key provisions of the new State WARN Act and the existing Federal WARN Act.

New York State WARN Act **(takes effect February 9, 2009)**	**Federal WARN Act**
Applies to private sector employers who employ 50 or more full-time employees	Applies to employers who employ 100 or more full-time employees
Requires 90-days advance written notice of mass layoffs, plant closings or relocations to affected employees, their representatives, the N.Y.S. Dept. of Labor and local workforce partners	60 days of advance written notice
Requires advance written notice if the mass layoff or relocation which results in 25 or more full-time employees who represent at least 33% of the workforce losing their jobs over any 30-day period	Requires advance written notice if 50 full-time employees are losing their jobs and they constitute at least 33% of the workforce at a single site
Requires an employer to provide 90-days advance written notice if the plant closing results in 25 employees losing their jobs over any 30-day period	Requires advance written notice if a minimum of 50 employees lose their jobs due to a plant closing
Requires 90-days advance written notice in the event of an employer's relocation of all or substantially all of its operations to a location 50 or more miles from current location.	No corresponding provision in Federal WARN Act
Provides the following exceptions to the notice requirement: • need for notice was not reasonably foreseeable at the time the notice was required; • employer was actively seeking capital or business at the time the notice was required and if obtained would have enabled the employer to avoid or postpone the layoff, relocation or closing; or • plant closing or layoff was due to a natural disaster	Same
Provides for enforcement by the N.Y.S. Dept. of Labor and a private lawsuits	Provides only for a private lawsuits
Employers violating law liable for back pay and employee benefits capped at 60 days	Similar to Federal WARN Act
Imposes a civil penalty of $500 per day of violation to employers who violate the law	Similar to Federal WARN Act

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Have You Modified Your FMLA Policies and Notices Yet?

Earlier this year, President Bush signed into law the National Defense Authorization Act (NDAA). Among other things, the NDAA amended the Family and Medical Leave Act (FMLA) to permit a "spouse, son, daughter, parent, or next of kin" to take up to 26 workweeks of leave to care for a "member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness. The provisions in the NDAA are already in effect.

The U. S. Department of Labor (DOL) is currently working to prepare guidance regarding rights and responsibilities under this new legislation. In the interim, the DOL is requiring employers to “act in good faith” in providing leave under the new legislation. Because the NDAA amends the FMLA, FMLA-type procedures should be used as may be appropriate (for example, procedures regarding substitution of paid leave and notice).

The NDAA also permits an employee to take FMLA leave for "any qualifying exigency (as the Secretary [of Labor] shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation." By its express terms, this provision of the NDAA is not effective until the Secretary of Labor issues final regulations defining "any qualifying exigency." In the interim, DOL is encouraging employers to provide this type of leave to qualifying employees.

Employers covered by the FMLA are required to have: 1) an FMLA poster, 2) policies explaining employee rights and obligations under the law (if they have any kind of written policies/handbook, and 3) to notify employees of their rights and obligation when they request leave. All three documents should be amended to be consistent with the provisions of the NDAA. A new poster insert can be found at the following site: http://www.dol.gov/esa/whd/fmla/NDAAAmndmnts.pdf. If you need assistance modifying your policies or notices, please feel free to contact us at 315-437-7600.

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