More Employees Covered Under New ADA Definition of 'Disability'

ADA, FMLA changes need your attention

by Kathryn M. Vanden Berk

If you are feeling somewhat befuddled by the 2009 changes in two important employment-related laws, join the crowd. Individually, each is worth an essay of its own. As that is not a luxury I have, I will summarize the main points of each and suggest ways that you can use them in tandem to get your human resource (HR) needs met.

First, Congress toughened the Americans with Disabilities Act (ADA) by passing amendments that essentially nullify a number of judicial decisions that had restricted the number of people who could avail themselves of it. As one Equal Employment Opportunity Commission (EEOC) official put it: "We are tired of having ADA cases rise and fall on the question of whether or not the person is 'disabled.' It's like having every case having to do with racial discrimination get hung up on whether or not the person alleging discrimination is actually part of a racial minority."[1]

Second, the U.S. Department of Labor issued final regulations for the Family and Medical Leave Act (FMLA) that became effective in January 2009. The regulations reinforce a number of important court decisions and longstanding informal practices. A number of the regulations are employer-friendly, so I want you to know how to take advantage of these regulations to improve your overall HR practices.

The Americans with Disabilities Act

What you need to know about the new definition of "disability" is that the definition is intended to be construed in favor of coverage. An employee can claim protection under the ADA if he or she has a physical or mental condition that limits any of the following activities (and this list is not intended to be exhaustive):

- **Major Life Activities.** These include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
- **Major Bodily Functions.** These include immune system, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, reproductive, and normal cell growth functions.

An employee can also claim protection under the ADA if he or she has:

- **Episodic Impairments or Illnesses in Remission.** The ADA applies when the impairment or illness is active rather than dormant.
- **Mitigating Measures.** A person with high blood pressure, diabetes, epilepsy, or asthma is disabled for purposes of the ADA even if the condition is being treated with medication. That's because medicines, prosthetics, hearing aids, mobility devices, etc., *cannot be considered* when determining whether the person is disabled. The only exception is that ordinary eyeglasses and contact lenses can be considered when determining whether the individual has a disability.

More than one commentator has noted that, with these open-ended definitions, nearly any employee who wishes to file an ADA claim—or request an accommodation—will be able to do so. A diabetic person whose diabetes is controlled by insulin must be considered disabled under the law. A person who is hard of hearing will be considered disabled and entitled to ADA protection even if he or she wears a hearing aid while at work.

Given all of the above, be aware that while some "new disabilities" will be obvious, many will not. **Be ready to offer accommodations and err on the side of caution.** If it appears that there is an impairment of any kind, assume that the person is "disabled" and begin an accommodation dialog in order to determine whether you can or must provide accommodations.

As before, however, the ADA does not require you to make accommodations that are not reasonable. A person who must interact with co-workers cannot demand to work from home. A person who finds travel difficult cannot demand to be given shorter work hours in order to accommodate a long commute. You, as employer, have a right to establish which functions are the essential functions of the job. The courts have said that they will not stand as a "super personnel department" and second guess your business judgments under the ADA.[2]

The Family and Medical Leave Act

The Department of Labor engaged in an extensive multiyear fact-finding process before proposing the changes to the FMLA, which took effect this year. That process resulted in new regulations that offer you, as an employer, a significant

amount of help in meeting your obligations under the FMLA. They also put a greater burden on the employee who seeks to qualify for leave. For example:

- Your employee (or sick family member) must visit a health care provider within seven days of the first day of claiming incapacity under the FMLA, and they must have a second visit during the first 30 days of the period of incapacity.
- You have five business days (rather than two) to notify the employee of his or her eligibility for FMLA leave.
- You may assign a member of your staff (other than the direct supervisor) to call the health care provider directly to confirm the seriousness of the health concern.
- You may delay or deny FMLA leave if your employee fails to follow your process for requesting FMLA leave, or if he or she fails to provide you with sufficient information to process the request, or has altered the paperwork.[3]
- You may require your employee to take accrued paid vacation, sick leave, personal leave, or other leave benefits (if he or she qualifies to take it) concurrently with the FMLA leave. This is called "substitution of paid leave."

Of these new regulations, the one that may prove the most useful, for both FMLA and ADA matters, is the rule that allows you to speak with your employee's health care provider directly. Prior to this, it was illegal for you to do so.

In a recent Illinois case, the employer contacted an employee's physician when it suspected that she had fraudulently altered her doctor's certification for FMLA leave. The employer's hunch proved correct. She had added "plus previous depression" to the certification form, whereas the physician had never diagnosed her or treated her for that condition. The court held that the employee did not qualify for FMLA leave *even though the physician's certification would have qualified her for FMLA leave had it not been altered.* The employee was subsequently fired for taking leave to which she was not entitled and thus being absent without excuse.[4]

Putting the FMLA and ADA Together

First, keep in mind that a "serious health condition" under the FMLA may not necessarily become a "disability" under the ADA. Thus, don't assume that someone taking FMLA leave will be "disabled" on return. However, because you are now allowed to call the employee's physician to confirm his or her request for FMLA leave, you can use this interaction to help get a baseline understanding of what may be a disability needing to be accommodated under the ADA when the employee returns to work.

Second, you are allowed to keep a single confidential file for each employee, separate from the personnel files, for medical documentation under both the ADA and FMLA. And you may give an employee's supervisors and managers information concerning necessary work restrictions and accommodations.

Third, if a returning employee needs to be on light duty status, you may, as before, make this accommodation if necessitated by an ADA-qualified disability. The FMLA now considers this to be work, not leave, for purposes of the FMLA leave period. Thus, the 12-weeks of FMLA leave will be suspended during the light duty stint.

Fourth, if an employee requests time off for a reason that is possibly related to a disability (e.g. "I need six weeks off to get treated for a back problem."), you should consider this a request for reasonable accommodation under the ADA as well as for FMLA leave. Thus, you may require the employee to get FMLA certification and make additional disability-related inquiries if necessary to decide whether the employee is entitled to leave under the FMLA *and* reasonable accommodation of the disability under the ADA.

These two laws are very complex individually, and they are even more complex when they are applied together. Both the Department of Labor[5] and the EEOC[6] offer extensive materials about the FMLA and ADA, respectively, on their websites. Be sure you take advantage of these resources and consult with competent counsel if you have questions about the application of either law. ■

The FMLA and the Military

The Family and Medical Leave Act (FMLA) is now extended to military families under the National Defense Authorization Act.[7] There are two ways that the FMLA will now support military obligations: military caregiver leave and qualifying exigency leave. Learn more by reading the full article at magazine.alliance1.org.

The Department of Labor also provides a fact sheet on its website that explains these requirements in detail.[8]

ENDNOTES

1. Comment by John C. Hendrickson, regional attorney, Chicago District, U.S. Equal Employment Opportunity Commission.
2. In *Mason v. Avaya Communications* 357 F.3d 1114 (U.S. Ct. of App. 10th Cir. 2004), a service coordinator asked to work from home because she claimed that a traumatic incident in the workplace caused her to feel unsafe. The employer refused on grounds that an essential element of the job was to interact with workers at the job site. The court held that the ADA did not require this kind of accommodation.
3. *Smith v. The Hope School*, (U.S. Dist. Ct. Central Dist. IL, Case No. 08-2176, decided March 30, 2009).
4. See *Smith v. The Hope School*, supra. Until the new FMLA rules came out, it was illegal for employers to contact health care providers to confirm an employee's medical condition. The court overlooked this illegality because it was more concerned with the employee's fraudulent conduct in altering her physician's certification form.
5. Find the Department of Labor's fact sheet at dol.gov/esa/whd/fmla/finalrule/factsheet.pdf.
6. Find the Equal Employment Opportunity Commission's fact sheet at eeoc.gov/types/ada.html.
7. The relevant provisions are found in Section 585(a) of the National Defense Authorization Act. Public Law 110-181.
8. See dol.gov/esa/whd/regs/compliance/whdfs28a.pdf for FMLA requirements related to the military.

Kathryn Vanden Berk practiced law for nine years before serving as the president of two residential treatment centers for children. Now practicing in Chicago, she focuses on nonprofit start-ups, corporate and tax law, and employment issues. She serves as adjunct faculty at several Chicago universities, and is a member of the Advisory Board of the Axelson Center for Nonprofit Management at North Park University. She authored a handbook on starting nonprofits that is available from the Nonprofit Financial Center, Chicago, and a chapter in the Illinois attorney's handbook Not-for-Profit Corporations, *2004 Ed., Illinois Institute of Continuing Legal Education. In 2004 she authored* Retooling Employment Standards for the Future, *a publication of the First Nonprofit Educational Foundation, Chicago. She can be reached at 312-442-9076 or at info@beavandenberk.com.*