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We help our clients achieve their goals of preventing or resolving (as the case may be) employment-related disputes. But if litigation becomes necessary, we advocate for our clients in virtually any employment-related claim that may arise. Our Employment and Labor Practice draws upon the experience and knowledge of our litigation, corporate, finance, intellectual property, privacy, healthcare and ERISA practitioners to ensure that our clients receive comprehensive representation in all aspects of employment issues.

### **Amended Disability Law Makes Employers More Vulnerable to Disability Claims**

On September 25, 2008, President Bush signed into law the ADA Amendments Act of 2008 ("ADAAA" or the "Act"), which amends the Americans with Disabilities Act of 1990 ("ADA"). The ADAAA will significantly broaden the definition of what constitutes a disability and most likely will result in increased litigation for employers. The Act applies to employers with 15 or more employees.

In enacting the ADAAA, which became effective January 1, 2009, the President and Congress made clear that the ADA as interpreted in its current form was not protecting people with disabilities as intended. Believing that the U.S. Supreme Court had narrowed the protections afforded under the ADA, the Act overturns several Supreme Court rulings dating back to 1999.

The ADAAA broadens the definition of disability and makes clear that the determination of whether an impairment is a disability "should not demand extensive analysis." Federal law defines an individual with a disability 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.

The following highlights some of the amendments:

**Mitigating Measure:** As previously interpreted, an impairment that could be mitigated with proper measures was not considered a disability. For example, people with diabetes who could control the illness with medication, were not disabled under the ADA. The ADAAA clarifies that an impairment, even if controlled, is still a disability. Other ameliorative effects that no longer can play a role in determining whether an impairment is a disability include medical supplies, equipment, appliances, low-vision devices (other than ordinary eyeglasses or contact lenses), prosthetics, hearing aids and mobility devices. Similarly, impairments that are episodic or in remission would be considered a disability if they would substantially limit a major life activity when active.

**Substantially Limits:** "Substantially limits," currently defined as "significantly restricting a major life activity," is "too high a standard." The ADAAA mandates that the Equal Employment Opportunity Commission (EEOC), the agency that promulgates regulations in connection with the Act, redefine the term to be consistent with the intention of the amendment.

**Major Life Activities:** The ADAAA rejects the interpretation of "major life activities" currently defined as preventing or severely restricting an individual from doing activities that "are of central importance to most people's daily lives." Although courts and the EEOC have defined "major life activities," the Act now also includes a non-exclusive list of such activities, including:

Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, working, operation of a major bodily function (i.e. immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions).

An impairment that limits one major life activity need not limit other major life activities to be a disability.

**Regarded As:** Under the ADA an individual who was "regarded as" having a physical or mental impairment also had to show that the perceived or actual impairment substantially limited a major life activity. Under the ADAAA, an individual does not have to show that the impairment limits, or is perceived to limit, a major life activity. The definition does not include impairments that have an actual or expected duration of six months or less.

An employee with a disability still must be a qualified individual who, with or without a reasonable accommodation, can perform the essential functions of a job. It is prudent for employers to define what those essential functions are, especially in light of ADAAA which will make it easier for employees to claim a disability and request accommodations.

### Revised FMLA Poster and FMLA Forms

Eligible employers are required to post the revised Family and Medical Leave Act ("FMLA") poster in a conspicuous place where employees are employed. The poster, which becomes effective on January 16, 2009 can be found at: <http://www.dol.gov/esa/whd/fmla/finalrule/FMLAPoster.pdf>.

The United States Department of Labor also has revised its optional forms and added new forms that employers can use in connection with the FMLA process. These forms can be found by clicking on the links below:

- Employee's Serious Health Condition (WH-380E) - <http://www.dol.gov/esa/whd/forms/WH-380-E.pdf>;
- Family Member's Serious Health Condition (WH-380F) - <http://www.dol.gov/esa/whd/forms/WH-380-F.pdf>
- Notice of Eligibility and Rights and Responsibilities form (WH-381) - <http://www.dol.gov/esa/whd/fmla/finalrule/WH381.pdf>
- Designation Notice to Employee of FMLA Leave (WH-382) - <http://www.dol.gov/esa/whd/forms/WH-382.pdf>
- Certification of Qualifying Exigency for Military Family Leave (WH-384) - <http://www.dol.gov/esa/whd/forms/WH-384.pdf>
- Certification for Serious Injury or Illness of Covered Servicemember for Military Family Leave (WH-385) - <http://www.dol.gov/esa/whd/forms/WH-385.pdf>

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