

**OSC 12**  
Ohio Safety Congress & Expo

**WELL AT HOME. SAFE AT WORK.**

**425 The Regulated Workplace - Addressing Issues of the Sick, Injured and Disabled Worker, Part 2**

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Wednesday, March 28, 2:30 to 3:30 p.m.

**Ohio** Bureau of Workers' Compensation

The Regulated Workplace –  
Addressing Issues of the Sick, Injured,  
and Disabled Worker.  
Part II

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The ADA, FMLA, And Workers' Compensation

	ADA	FMLA	WC
Purpose	Prohibits Discrimination	Sets minimum leave standards	Provides for payment of compensation; rehabilitation
Who is subject to law	Employers with 15 or more employees	Employers with 50 or more employees	All employers
Who is protected	Qualified employee or applicant	Employee who has worked one year and 1,250 hours	Employee
What triggers protection	Disability-having an impairment, having had same, or being regarded as having had the same	A serious health condition, birth or adoption	Sustaining an injury or occupational disease
Protection	Reasonable accommodation vs. undue hardship	12 weeks of leave	None

	ADA	FMLA	WC
Medical leave – continuous or intermittent	Reasonable accommodation v. undue hardship	12 weeks of leave if qualifies	None
Family leave	No	Family member with serious health condition	No – nursing services?
Medical certification of disability or condition	Employer can obtain if job-related or consistent with business necessity	Employer "may" require	No prohibition – but employee must submit medical proof to receive benefits
Time limit	None – reasonable accommodation and undue hardship	12 weeks per year	Temporary total and wage loss issues
Light duty or restricted duty	May be reasonable accommodation	Focus is on position at time of request for leave	Loss of total disability benefits – but may be eligible for wage loss

**ADA AMENDMENTS 2009:**

EXPANDING THE SCOPE OF THE ADA



**ADA Amendments Act (ADAAA)**

- Passed September 17, 2008, by Congress, later signed by the President.
- Takes effect January 1, 2009.
- Makes significant revisions to the ADA that are intended to broaden the scope of the ADA.
- Overturns several U. S. Supreme Court decisions that favored employers.



New ADA Amendments:  
4 Major Areas of Change

1. “Mitigating Measures” no longer relevant (with one exception)
2. “Major Life Activities” defined by a new list which is both specific and broad
3. “Substantially Limited” - may be modified?
4. “Regarded as Disabled” definition substantially expanded

“New” ADA Rule: Don’t Consider Mitigating Measures

- “Ameliorative effects of mitigating measures “are not to be examined in determining whether someone is “substantially limited.”
- Direct effort to overturn *Sutton* case
- Exception: eyeglasses and contact lenses.
- Impact on employers — More employees will be covered and in many cases, conditions will be covered disabilities that are not readily apparent to employers.

ADA Definition of Disability – 3 Groups Protected in the Statute

- Actual: A physical or mental impairment that substantially limits one or more major life activities;
- Record: A record of such an impairment; or
- Regarded: Being regarded as having such an impairment.

What’s An Actual Disability?

- Impairment
- That substantially limits
- A major life activity



What is An Impairment?

- Includes a wide variety of disorders or conditions affecting any number of body systems, including neurological, musculoskeletal, sensory organs, respiratory system, cardiovascular, reproductive, digestive, genitourinary, hemic, lymphatic, endocrine systems, and the skin.
- Mental, physical, and emotional conditions are covered.
- Bottom line: almost any disorder is an “impairment.”

If It’s Not a “Disorder” It’s Not An “Impairment”

- Physical characteristics (left-handedness, for example), and common personality traits are not “impairment”
- Same is true for homosexuality, bisexuality, pregnancy, and normal deviations in height, weight, and strength
- EEOC has suggested that obesity may be an impairment

### Certain Conditions are Expressly NOT Impairments

- Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, many gender identity disorders, compulsive gambling, kleptomania, pyromania, and substance abuse disorders related to the current use of illegal drugs.



### Episodic Impairments and Remission

- If an employee has an impairment that when active would substantially limit a major life activity, then he or she is disabled and protected under the new ADA even when in remission or when not suffering from an episode.
- This might include diseases such as cancer, multiple sclerosis, lupus, epilepsy or a seizure disorder.

### What Does It Mean To “Substantially Limit” A Major Life Activity Under the New Law?

- ADAAA sponsors: *Toyota* and *Williams* cases went too far in creating a narrow definition of “substantially limits”
- “The term 'substantially limits' shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.”

### Substantially Limits (cont’d)

- The new law explicitly rejects the strict standard created by the Supreme Court in *Williams* that to be substantially limited in 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 daily lives.”
- Term “substantially limits” is retained in the new law but is to be a less demanding standard that is to be read “broadly.”
- EEOC is to adopt regulations more clearly defining “substantially limits.”

### Major Life Activities

- EEOC Regs: major life activities are caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working
- EEOC Compliance Manual: adds “sleeping” as well as mental and emotional processes (thinking, concentrating, interacting with others)
- EEOC has listed others in court filings



### Regarded As Disabled

- “Regarded as disabled” may be the biggest landmine of the legislation



### New Definition Of “Regarded As” And Why It Matters

- Old law: employee had to prove that he was regarded as being substantially limited in a major life activity because of a qualified impairment.
- New law: employee only has to show that the employer believed he or she had a mental or physical **impairment** – neither major life activity nor substantial limitation are now required.



### Miscellaneous provisions

#### Workers’ Compensation

- The standards for determining eligibility for benefits under state workers’ compensation laws and/or disability benefits programs are not affected by the ADA amendments.

#### No Reverse Discrimination

- Amendments prohibit “reverse discrimination” claims by explaining that claims based on a *lack* of disability are not actionable.

### What Impact Will The ADAAA Have On The Workplace?

- Increased number of individuals in the workplace who are protected by the federal law.
- Range of coverage and protections afforded under the amended ADA will expand significantly.
- Likely to be an uptick in litigation concerning:
  - Individuals claiming to be “regarded as” disabled; and
  - Definition of “disability” itself, in the event employers resist the broad coverage envisioned by Congress as incorporated in the ADAAA.
- The ADAAA’s broad coverage and protections remove the focus from a “disability” inquiry, and place it squarely on the interactive process.



### FMLA Expanded

The FMLA now provides two new types of leave:

- Military Caregiver Leave; and
- Qualifying Exigency Leave



### FMLA Expanded

To qualify for “Qualifying Exigency Leave,” an employee must be:

- Eligible to take FMLA leave;
- Family member of a Servicemember who is on active duty or who is called to active duty in the National Guard or Reserves in support of a “contingency operation;” and
- Requesting the leave because of a “qualifying exigency.”

If the above requirements are met, the employee is entitled to 12 weeks of FMLA leave, which can be taken intermittently.

### Highlights Of The New FMLA Regulations

- Issued by DOL
- Complete re-write of existing FMLA regulations
- Took effect 1/16/09



### New FMLA Regulations

- **New regulation:** An employer will not be penalized for failing to advise an employee that he or she is on an approved FMLA leave, which will expire in 12 weeks, unless the employee suffers individualized harm because of the employer's failure to follow the notification rules.



### New FMLA Regulations

#### Waivers Not Subject To DOL Approval

- **New regulation:** Employers may voluntarily settle their FMLA claims without Court or Department approval. However, prospective waivers of FMLA rights will continue to be prohibited.



### New FMLA Regulations

#### "Serious Health Condition" Further Defined

- Currently, there are six individual definitions of serious health conditions under the regulations. One of the most common serious health conditions involves any incapacity of more than three consecutive calendar days combined with two visits to a health care provider. However, the regulations do not state when the two visits must occur.
- **New regulation:** The two visits must occur within 30 days of the beginning of the period of incapacity and the first visit must take place within 7 days of the first day of incapacity. Also, "periodic visits" to a health care provider to treat a chronic serious health condition must occur at least two times per year.

### New FMLA Regulations

#### Perfect Attendance Awards Permitted

- Under the current regulations, employers could not count FMLA-protected absences against an employee for purposes of "perfect attendance" awards.
- **New regulation:** Employers can count FMLA absences against employees when calculating perfect attendance as long as the employer treats employees taking non-FMLA leave in an identical way.



### New FMLA Regulations

- Some court interpretations of the current regulations have allowed employees to provide notice to an employer of the need for FMLA leave up to two full business days after an absence, even if the employee could have provided notice sooner.
- **New regulation:** Clarifies that, in most cases, an employee needing FMLA leave must follow the employer's usual and customary call-in procedures for reporting an absence, absent unusual circumstances.



### New FMLA Regulations

#### Direct Contact Between Employers and Health Care Providers Permitted

- Under the current regulations, employers are not permitted to have direct contact with the health care providers of their employees.
- **New regulation:** In a significant concession to employers, the new regulations allow direct contact between an employer and the employee's health care provider for purposes of clarification of a medical certification form so long as the requirements of the HIPAA medical privacy regulations are met. But, the employer's representative contacting the health care provider must be a health care provider, human resource professional, leave administrator or a management official, but **NOT** the employee's direct supervisor. Employers may not ask health care providers for additional information beyond that required by the employee's certification form.

### New FMLA Regulations

**Medical Re-Certifications Clarified**

- Under the current FMLA regulations, employers may generally request a re-certification no more often than every 30 days in conjunction with the FMLA absence, unless a minimum duration of an incapacity has already been specified in the initial medical certification, in which case re-certification generally may not be required until the full duration specified has passed.
- **New regulation:** An employer may request re-certification of an ongoing condition at least every six months in conjunction with an absence.

### New FMLA Regulations

**Fitness For Duty Certifications**

- The current FMLA regulations allow employers to require all employees who take a FMLA leave to provide certification that they are able to return to work.
- **New regulation:** Makes two changes to the fitness for duty certification process: (1) An employer could require that the certification address the employee's ability to perform the essential functions of the employee's job; and (2) where a reasonable job safety concern exists, an employer may require a fitness-for-duty certification before an employee may return to work when the employee takes intermittent leave. Previously, employers could not require certifications of fitness-for-duty when the employee was on intermittent leave.

### New FMLA Regulations

**Light-Duty Does Not Constitute FMLA Leave**

- The existing FMLA regulations, as interpreted by at least two federal courts, provide that an employer may consider an employee's time on light-duty as counting against an employee's 12 weeks of maximum leave entitlement.
- **New regulation:** An employee is not obligated to accept a light-duty assignment, and if the employee voluntarily does so, it does not count against his or her FMLA entitlement.

### Merchandiser

ESSENTIAL FUNCTIONS:	Repetitive Bend / Lift
PMH:	L4-5 Discectomy
ON THE JOB INJURY:	Substantial Aggravation
TREATMENT:	Fusion
DISABILITY:	Off 6 Months
	Light Duty 2 Months
	Permanent Restrictions

### Workers' Compensation

First 6 Months:	TT
Next 2 Months:	Light Duty / Wage Loss
After:	Job Protection? R.C. 4123.90 Leave Policy Coolidge / Bickers

### FMLA

First 12 Weeks:	Serious Health Condition Job Protection Concurrent Leave Effect of Light Duty
After 12 Weeks:	No Restoration Rights

### ADA / ADA44

First 12 Weeks: Disability?  
3 – 6 Months: Disability?  
LOA Policy  
4123.90  
6 – 8 Months: Light Duty

### ADA / ADA44 (cont'd)

8 Months: Permanently Restricted  
Disability  
Not “Qualified”  
Interactive Process  
Unpaid Leave  
Reassignment to Vacant Position  
Undue Hardship



QUESTIONS?



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