

**OSC 10**  
Ohio Safety Congress & Expo

**Current Trends in ADA, FMLA and Workers' Compensation**

Drew C. Piersall, assistant attorney general  
Richard Cordray, Ohio Attorney General  
Ann M. Shannon, legal counsel BWC

Thursday, April 1, 2010 10:30 to 11:30 a.m.

**Americans with Disabilities Act (ADA) Amendments Act of 2008**

- o Signed into law by President George W. Bush on Sept. 25, 2008
- o Effective as of Jan. 1, 2009
- o Not retroactive
- o Equal Employment Opportunity Commission (EEOC) Notice of Proposed Rulemaking published for public comment on Sept. 23, 2009

**ADA background**

- o ADA passed in 1990
- o Rehabilitation Act passed in 1973
- o Covers all state and local governments
- o Covers private employers employing "15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year"

**ADA background**

- o No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job-application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment.
- o Estimated 43 million individuals with disabilities

**ADA background**

"Qualified individual with a disability" =

"an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."

**Why did Congress amend the ADA?**

- o Courts were construing definition of "disability" too narrowly and finding too many people outside the ADA's protection.
- o ADA's definition of "disability" is based on the Rehabilitation Act, which courts pre-ADA construed broadly.

## Supreme Court interprets the ADA

- The 1999 “Sutton Trilogy”
  1. Sutton v. United Air Lines (527 U.S. 471)
  2. Murphy v. UPS (527 U.S. 516)
  3. Albertsons v. Kirkinburg (527 U.S. 555)

## Supreme Court interprets the ADA

- The Sutton Twins
- “The determination of whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment, including, in this instance, eyeglasses and contact lenses.”

## Supreme Court interprets the ADA

- Toyota v. Williams, 534 U.S. 184 (2002)
- The statutory requirements for defining disability “need to be interpreted strictly to create a demanding standard for qualifying as disabled.”

## Practical implications

- The following kinds of disabilities are sometimes found not covered by the ADA:
  - Deafness;
  - Epilepsy;
  - Cancer;
  - Learning disabilities;
  - Missing limbs;
  - Visual, cognitive and psychological impairments.

## ADAAA enacted — intent of Congress

- “The definition of disability in this Act **shall be construed in favor of broad coverage** of individuals under this Act, to the maximum extent permitted by the terms of this Act.”
- “It is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA **should not demand extensive analysis.**”

## “Disability” definition

Language of basic three-part definition remains the same:

1. Physical or mental impairment that substantially limits a major life activity; or
2. A record of such an impairment; or
3. Being regarded as having such an impairment.

## Changes to “Disability” definition

- “**Substantially limited**” redefined
- Major life activities include “**major bodily functions**”
- Ameliorative effects of mitigating measures (other than glasses/contacts) **cannot** be considered in determining “disability”
- Impairment that is **episodic or in remission** is a disability if it would be “substantially limiting” when active
- “**Regarded as**” redefined

## “Substantially limits”

- When is an impairment a disability under prongs one or two of the “disability” definition?
  - When it “substantially limits” (or substantially limited in the past) an individual in performing a major life activity as compared to most people in the general population
- Need not prevent, or significantly or severely restrict

## Major life activities

- Non-exhaustive list
 

1. Caring for oneself	11. Lifting	12. Bending
2. Performing manual tasks	12. Speaking	13. Breathing
3. Seeing	13. Breathing	14. Learning
4. Hearing	14. Learning	15. Reading
5. Eating	15. Reading	17. Thinking
6. Sleeping	17. Thinking	18. Concentrating
7. Walking	18. Concentrating	19. Communicating
8. Standing	19. Communicating	20. Working
9. Sitting	20. Working	
10. Reaching		
- Bolded terms were not previously contained in EEOC regulations.

## Episodic/in remission

- An impairment that is episodic or in remission is a disability if it would be substantially limiting when active.
- Examples are:
  - Multiple sclerosis;
  - Epilepsy;
  - Bipolar disorder;
  - Cancer.

## Listed disabilities under EEOC proposed regulations

Impairments that “will consistently meet the definition of disability” are:

1. Deafness;
2. Blindness;
3. Intellectual disability;
4. Partially or completely missing limb;
5. Mobility impairments requiring use of a wheelchair;
6. Autism;
7. Cancer;
8. Cerebral palsy;
9. Diabetes;

## Listed disabilities under EEOC proposed regulations

10. Epilepsy;
11. HIV/AIDS;
12. Multiple sclerosis;
13. Muscular dystrophy;
14. Major depression;
15. Bipolar disorder;
16. Post-traumatic stress disorder (PTSD);
17. Obsessive-compulsive disorder (OCD);
18. Schizophrenia.

## Impairments that may be disabilities

Examples that may be disabling for some individuals but not for others are:

1. Asthma;
2. Back and leg impairments;
3. Carpal tunnel syndrome;
4. Learning disabilities.

## Examples of impairments that usually will not be disabilities

Temporary, non-chronic impairments of short duration with little or no residual effects are usually not disabilities. Examples are:

1. Common cold;
2. Seasonal or common influenza;
3. Sprained joint;
4. Minor and non-chronic gastrointestinal disorders;
5. Broken bone that is expected to heal completely.

## “Regarded as” having an impairment

- “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.”

## “Record of” a disability

- Not changed under the ADA
- Protects an individual who may have had a physical or mental impairment that substantially limited a major life activity in the past but no longer does

## Reasonable accommodations

- Removal of “workplace barriers”
- Three general categories of accommodations are:
  1. Changes to the job-application process;
  2. Modifications to the work environment;
  3. Changes so a disabled employee can enjoy equal benefits and privileges.

## Types of reasonable accommodations

- Job restructuring
- Part-time or modified work schedules
- Reassignment to a vacant position
- Acquiring or modifying equipment
- Changing exams, training materials or policies
- Providing qualified readers or interpreters

## How “Reasonable?”

- A reasonable accommodation is one that “seems reasonable on its face, *i.e.*, ordinarily or in the run of cases.”
- Look at the *costs* of providing the accommodation weighed against the *benefits* of the accommodation.

## Undue hardship

- Means significant difficulty or expense in providing the accommodation.
- Analysis focuses on the particular employer’s resources—and on whether the accommodation is unduly extensive, substantial or disruptive, or would fundamentally alter the nature or operation of the business.

## The nine-step “interactive process”

1. Employee requests a reasonable accommodation.
  - Employee not required to use “magic words” or even use the “reasonable accommodation” term.
  - Modification is needed and it is needed because of a condition that could be a disability.

## Step two

2. The employer examines the employee's job and determines its essential functions.

## Step three

3. The employer consults with the employee to find out physical/mental abilities and limitations as they relate to performing the job's essential functions.
  - This is the core of the interactive process.

## Step four

4. Employer determines if the individual has a disability covered by the ADA.
  - Under the ADA, employee probably **not** disabled.
  - Under the ADAAA, employee probably disabled.

### Step five

5. Employer makes an individualized determination, based on objective medical or other evidence, of whether a person with a disability poses a direct threat of harm to himself/herself or others and if so, whether the threat can be removed by reasonable accommodations.

### Step six

6. Employer and employee identify potential accommodations. Employer may consult with other experts on accommodating individuals with disabilities.

### Step seven

7. If more than one accommodation would be effective, the employee's preference is considered but the employer makes the final choice and may choose the accommodation that is less expensive or easier to prove.

### Step eight

8. Employer must consider, on a case by case basis, whether a reasonable accommodation would impose an undue hardship on the business. If a particular accommodation would impose an undue hardship, it does not have to be provided, but the employer must consider whether an alternative accommodation is available that would not impose a hardship.

### Step Nine

9. If a reasonable accommodation that would not cause an undue hardship is available, the employer provides it in a timely manner.

### Telling other employees

- o What may an employer tell its employees about a reasonable accommodation?
- o The ADA prohibits employers from disclosing an employee's "medical" information (with limited exceptions).
- o EEOC: Employer may "explain that it is acting for legitimate business reasons or in compliance with federal law."

## EEOC disability charge intake statistics

FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
14,893	15,575	17,734	19,453	21,451

About a 50-percent increase in number of charges in last five fiscal years —

Nearly a 10-percent increase in 2009 alone

## EEOC merit suits with ADA claims

FY 2008	FY 2009
37	76

More than a 100-percent increase in one year

## ADAAA implications

- Assume applicant/employee has a disability
- Focus shifts to reasonable accommodation/interactive process

## Family and Medical Leave Act (FMLA)

## What is the FMLA?

The FMLA provides **12 weeks** of unpaid leave in a **12-month period** to **eligible employees** to care for the employee's own **serious health condition** or for a family member's **serious health condition**.

## What is the FMLA?

- 12 weeks = 12 work weeks
  - Look-back period
- 12-month period
  - Calendar
  - Rolling forward
  - Rolling backward

## What is an eligible employee?

- Employee who has been employed:
  - For at least 12 months
    - Non-consecutive
    - Seven-year look-back period
    - Exceptions
  - For at least 1,250 hours during a 12-month period
    - Becoming eligible while on leave
    - Overtime worked vs. overtime paid
    - Time on the payroll\*

## Who is a covered employer?

- All public employers
- Private employers – 50+ employees

## When can an employee use FMLA leave?

- Childbirth/adoption/foster-child placement
  - Serious health condition of family member
  - Employee's own serious health condition
- NEW**
- Care for a covered service member
  - Qualifying exigency

## What is a serious health condition?

Illness, injury, impairment or physical or mental condition involving inpatient care or continuing treatment by a health-care provider

- **Inpatient care:** overnight stay in hospital
- **Continuing treatment:** incapacity of three + consecutive days and subsequent treatment

## FMLA process

- Notice to employer
  - Employee needs to take leave
  - FMLA or not?
- Notice to employee
  - Employee is eligible
  - Leave is/is not designated
- Certification
  - Annual
  - Second and third opinions
- Recertification
  - Frequency
  - Information requested
- Return to work

## How FMLA leave is taken

- Consecutive
  - Adoption/childbirth
  - Within first year, unless employer approves otherwise
- Intermittent OR reduced leave schedule
  - Minimal disruption to employer
  - Possible transfer to different position for duration of the FMLA leave

## How FMLA leave is taken

- Paid or unpaid?
  - Exhaust leave balances
  - Order of preference/default
  - Unpaid leave
  - Extending leave
  - Compensatory time

## Returning to work

- Intent to return to work
- Fitness for duty certification

## When can an employee use FMLA leave?

### New

- **Qualifying exigency** arising because the employee's child, spouse or parent is called to active duty in support of a contingency operation.
- Care for a **covered service member** with a serious injury or illness if the employee is the spouse, son, daughter, parent or next of kin of the service member.

## Qualifying exigency

- **Qualifying exigency** arising because the employee's child, spouse or parent is called to active duty in support of a contingency operation.  
Eligible employee can take leave when covered military member is on active duty or called to active duty for a **qualifying exigency**.
  - Short-notice deployment
  - Military events and related activities
  - Childcare arrangements/school activities

## Qualifying exigency

- Financial and legal arrangements
- Counseling
- Rest and recuperation\*
- Post-deployment activities
- Additional activities

## Covered service member

- Care for a **covered service member** with a serious injury or illness if the employee is the spouse, son, daughter, parent or next of kin of the service member.  
Covered service member —
  - A current member of the armed forces who has a serious injury or illness incurred in the line of duty on active duty who is undergoing medical treatment, recuperation or therapy; OR otherwise on a temporary disability retired list

## Covered service member

- **Not applicable** to former members of the armed forces
- **Serious injury or illness:** renders service member medically unfit to perform duties of his/her office, grade, rank or rating
- **Outpatient status:** assigned to treatment facility as an outpatient
- Employee's **son or daughter:** age 18 years old not relevant

## Workers' compensation

### What is it and how does it relate to the ADA and the FMLA?

- Workers' compensation is governed by state law vs. federal law.
- In Ohio employers with one or more employees must provide coverage to employees. Coverage protects both injured workers and their dependants from the costs associated with occupational injury, disease or death.
- To establish a claim, an injured worker must file within two years of the injury

## How will federal laws impact the state workers' compensation program?

- Not all workers' compensation claimants are subject to the ADAAA/FMLA; and not all employees subject to the ADAAA/FMLA are workers' compensation claimants. However, there is some overlap.
- If more employees are covered by ADAAA, it is anticipated that more workers' compensation claimants will also be covered by the ADAAA.
  - For example, carpal tunnel syndrome, asthma, back conditions are **possible** conditions that may be subject to ADAAA.

## ADAAA, FMLA and workers' compensation comparison

	ADAAA	FMLA	WC
1. Does it apply to job applicants?	Yes	No	No
2. Is there a minimum amount of service time to be eligible?	No	Yes	No
3. Does it apply to family members?	No	Yes	Yes*
4. Can an employer require its employees to go to a medical exam?	Yes*	Yes	Yes
5. Is there a time limit to the protections offered under these laws?	No	Yes	No*

## Reasonable accommodation: 1) Request for leave

- Under ADAAA, most authority indicates that unpaid leave **IS** a form of reasonable accommodation.
- Under FMLA, unpaid leave or leave with pay can be given to a qualifying employee.
- Under workers' compensation, leave from work may be necessary to permit an employee to heal. Leave may be unpaid or paid, and/or workers' compensation benefits may be payable. The employee must provide medical evidence in support of any benefits that may be requested.

## Reasonable accommodation 1) Request for leave

How long is the leave time under:

- ADAAA — It depends;
- FMLA — 12 weeks per year;
- Workers' compensation — It depends.

### Reasonable accommodation: 2) Job restructuring or transitional duties

- Under the ADAAA, employer might have to modify a job to reallocate nonessential job functions. Employer is not required to reallocate essential job functions. If employer has existing light duty jobs, it may have to consider reassigning employee to one of those jobs as a reasonable accommodation. Employer does **NOT** have to create a new light duty job.

### Reasonable accommodation: 2) Job restructuring or transitional duties

- Job restructuring and transitional duties do not apply to FMLA.
- Under workers' compensation, employers are not **required** to provide job restructuring or transitional duties. However, there are incentives within the workers' compensation system for employers who do provide these to injured employees.

### Reasonable accommodation: 3) Modified work schedule

- Under the ADAAA, employer **may** have to modify (e.g., alter arrival/departure times, provide periodic breaks, etc.) as a reasonable accommodation. The key is whether there is a nexus between the disability and the requested schedule.

### Reasonable accommodation: 3) Modified work schedule

- Under FMLA, the employer may have to grant leave, but does not have to modify the work schedule.
- Under workers' compensation, the employer is not required to provide a modified work schedule. However, there are some incentives to employers to do so within the system.

### Job protection for the employee

- ADAAA: Reassignment to a vacant position for which a disabled employee is qualified is a form of reasonable accommodation.
- FMLA: The employee must generally be reinstated if there is a violation.
- Workers' compensation: State law prohibits employers from taking retaliatory action against an employee for filing a claim. (Revised Code 4123.90)

## Questions?