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THE TIMES THEY ARE A-CHANGING

In September, Congress made significant changes to the Americans with Disabilities Act (ADA). The main text of the statute remains the same: an employee or applicant is disabled and may be entitled to reasonable accommodation if he or she has:

A physical or mental impairment that **substantially limits** one or more... **major life activities**...

42 U.S.C. §12102(2).

The changes outlined below were intended to clarify and broaden the protections of the ADA. The changes go into effect on January 1, 2009, but the full impact of the amendments will not be known until the EEOC has issued interpreting regulations, and courts have resolved initial challenges.

Major Life Activities

The new law spells out examples of major life activities:

> Caring for oneself, performing manual tasks, seeing hearing, eating sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

Also, an impairment of a "major bodily function" is now explicitly defined as an impairment of a major life activity, and examples of such functions are listed as including the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

"Substantially"

As noted above, a person is defined as disabled under the ADA when he or she suffers from a medical condition that "substantially limits" one or more major life activities.

Undocumented Workers. Columbia County employers are now required to utilize the federal E-Verify system to check the eligibility of all workers, and may lose their licenses (including building permits) for "knowing or intentional employment of unauthorized aliens." Contractors will face mandatory fines of $10,000.

Safety Rules/Safety Committees
Effective 1/1/2009: Employers with one or more employees must have a safety committee or quarterly safety meetings. http://www.osha.oregon.gov

The EEOC has generally interpreted the word "substantially" to mean what it appears to mean—*significant* limitations. In other words, a person is disabled and entitled to reasonable accommodation when he or she has significant difficulty with the ordinary life activities an able-bodied person takes for granted. Similarly, the United States Supreme Court held in *Toyota Motor Manufactuing, Kentucky, Inc., v. Williams*, 534 U.S. 184 (2002) that "substantially limits" referred to difficulty that is "considerable" or "to a large degree," and is not "minor." *Id*. at 196-97.

Congress has now indicated that "significant" and "considerable" are too restrictive, and has ordered the courts and the EEOC to interpret the term "substantial" more broadly, so as to bring more individuals under the protections of the ADA.

As of this writing, there is no way to predict what impact that mandate will have on the workplace, and on employers' attempts to maintain compliance with the Act.

Mitigation/Remission/Episodic Conditions

Until now, employers had to follow a tortuous chain of logic to determine whether an employee was disabled as that term is defined by law even when an impairment was in remission, only occurred occasionally, or was mitigated by the practical self-help steps of the employee. Consider the following scenario.

> Carol has diabetes. By taking frequent short breaks to test her blood sugar and eat small snacks, she keeps her diabetes under control, so that it does not affect her daily life (*i.e.* her "major life activities"). Carol has asked her supervisor to make an exception to the company rule that employees take no more than the two legally-required ten-minute breaks during an eight hour day, as accommodation for her diabetes.

The problem, under the Supreme Court's previous interpretation of the ADA, is that because Carol controls or mitigates

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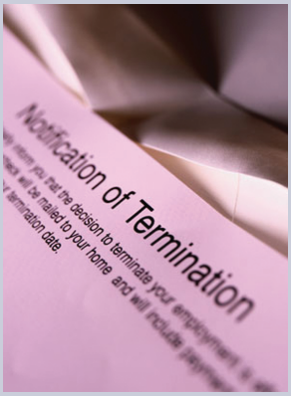
her diabetes with frequent breaks to check her blood sugar and adjust with snacks, she is no longer considered disabled, so she is no longer entitled to the reasonable accommodation of — you guessed it — frequent breaks.

The common-sense amendment spells out that if an employee's condition would affect a major life activity without mitigation, the employee is disabled, and may be entitled to reasonable accommodation.
The only exception is corrective lenses (glasses or contacts) — if an employee's only qualifying medical condition is a vision problem, and the condition is corrected with glasses or contacts, he or she will not be able to seek accommodation for the vision problem based on an assertion that he or she is disabled.

In a related change, under existing law, it is unclear whether a person whose cancer is in remission, or who suffers from episodic fibromyalgia or asthma attacks, is entitled to seek reasonable accommodations when those conditions flare. The amendment explicitly defines such persons as disabled and entitled to reasonable accommodation, where their conditions, when active, substantially impair one or more major life activities.

Questions? Contact Shari Lane at slane@cvk-law.com



Tough Times: If you are laying off a significant number of employees, there may be a statutory notice period and other restrictions, under the Worker Adjustment and Retraining Act ("WARN"). If you are providing severance in exchange for a release of claims, the process may be governed by the Age Discrimination in Employment Act and Older Workers Benefit Protection Act (ADEA, OWBPA). Finally, there may be restrictions on laying off nonimmigrant employees working under H-1B, H-1B1, or E-3 visas. Consult with an attorney when planning layoffs.

Hiring Veterans? The Office of Federal Contract Compliance wants to thank you! The OFCCP is now accepting nominations for the G-FIVE Award. The benefits include a three year exemption from OFCCP compliance reviews. http://www.dol.gov/esa/ofccp/

NON-DISCLOSURE AGREEMENTS BY CPAS PROHIBITED

When settling disputes with clients, it is common practice for professionals to include a non-disclosure agreement — essentially a promise, sometimes mutual, that neither party will talk about the dispute or its resolution with others. This kind of agreement can be beneficial to both parties, as it ensures unfounded allegations will not be publicly disseminated, and generally provides closure. However, such agreements may also protect the professional from exposure to the consequences that are supposed to flow from misconduct.

It is the latter issue that prompted the Oregon Board of Accountancy to promulgate OAR 801-030-0020(13) (effective January 1, 2008), which prohibits licensees from entering into non-disclosure agreements. Under the new rule, licensees may not enter into or benefit from an agreement that prevents anyone "from reporting an alleged violation of ORS Chapter 673 or OAR chapter 801 to the Board, or that inhibits any party from cooperating with an investigation by the Board, an agency of any state, or an agency of the Federal government."

Note that the rule specifically references disclosure of illegal conduct to the Oregon Board of Accountancy and other government enforcement agencies; the rule does not prohibit an agreement not to disclose the details of the dispute to other third parties. CPAs may still prevent idle gossip to other clients, "blogging" about the dispute, etc. Nor are CPAs precluded from entering into an agreement not to discuss a personality clash or other dispute unrelated to the professional rules contained in ORS 673 and OAR 801.

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