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Labor: Increased Litigation Under the ADAAA

In the wake of new regulations, more association discrimination claims and claims over episodic conditions crop up

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In 2008, Congress enacted the Americans with Disabilities Act Amendments Act (ADAAA). This past spring, the Equal Employment Opportunities Commission (EEOC) published the final ADAAA regulations. Since the passage of the ADAAA and the publication of the regulations, administrative agencies and courts have seen a steady increase in the number of disability claims filed. For instance, in the 2007 fiscal year (the last year before passage of the ADAAA), there were 17,734 charges of discrimination filed that included disability discrimination claims. In the 2011 fiscal year, that number rose to 25,282 charges.

The increase in "association discrimination" claims is of particular interest. These claims are brought by employees who allege to be victims of an adverse employment decision based not on their own disability, but on their relationship with someone who has a disability. Association discrimination claims generally fall into one of three categories:

1. **Expense claims** involve situations where an employee suffers an adverse action because his or her spouse has a disability that is costly to the employer (e.g. health plan coverage costs).
2. **Disability** by association claims involve situations where an employer believes the employee could also become inflicted with the same disability (e.g., an employee's partner is infected with HIV and the employer fears the employee could become infected).
3. **Distraction claims** involve situations where the employer is concerned that an employee is distracted at work because the employee's family member has a disability that requires attention.

To avoid liability for such claims, employers must be sure to base their decisions on well-documented performance issues or other non-discriminatory reasons as opposed to the relative's disability.

Another major change that is leading to increased litigation involves conditions that are in remission or are episodic in nature. Under the ADA, such conditions did not qualify as a disability protected by the statute. However, under the ADAAA, such a condition may qualify if it "would substantially limit a major life activity when active." In one recent decision, a federal court in Indiana denied an employer's summary judgment motion and found that an employee whose cancer was in remission had a "disability" under the ADAAA. Other courts have recently held that episodic depression, carpal tunnel syndrome and multiple sclerosis could qualify as disabilities under the ADAAA.

In addition to the increasing number of claims, the EEOC has begun filing more lawsuits on behalf of employees. In one case that has been garnering a good deal of attention, the EEOC claims that Walgreens discriminated against an employee who had diabetes. The employee, a cashier, was terminated after Walgreens accused her of stealing a bag of potato chips. The employee alleges she took the bag of potato chips and ate them to stave off low blood sugar. Even though she didn't pay for the chips right away (despite sitting at the cash register), she claims she paid for them as soon as possible. Her lawsuit claims that Walgreens should have accommodated her medical emergency. Among other reasons, Walgreens is defending on the grounds that it has a zero-tolerance policy for employees consuming Walgreens' products before they are paid for.

Finally, despite the fact that the final regulations and ADAAA are still fresh, the EEOC has hinted that further guidance is forthcoming. In a recent webinar sponsored by the American Bar Association, two EEOC commissioners indicated that the EEOC is drafting new guidance on reasonable accommodation principles under the ADAAA. This guidance should be welcomed by both employers and employees, as the last EEOC guidance was published in 2002.