

**ADA Update:  
What the EEOC's Regulatory  
and Litigation Initiatives  
Mean For Employers**



**FRANCZEK RADELET**

*Attorneys and Counselors*

*Presented by*

**Lisa A. McGarrity & Michael A. Warner, Jr.**

**November 4, 2009**

# Our Firm

- National labor and employment practice
- Counsel and represent employers exclusively in all aspects of labor and employment law
- With over 50 attorneys, it is the largest, single-office labor and employment boutique in the Midwest and one of the largest in country

Website: [www.franczek.com](http://www.franczek.com)

Lisa A. McGarrity  
Michael A. Warner, Jr.  
Franczek Radelet P.C.  
300 South Wacker  
Suite 3400  
Chicago, IL 60606  
(312) 986-0300

lam@franczek.com  
maw@franczek.com



FRANCZEK RADELET  
*Attorneys and Counselors*

# Webinar details

- Please turn up your computer speakers to hear the Webinar audio
- Questions may be submitted by entering question in box on right of the screen
- If you need assistance during the webinar, contact Tony Capecci at (312) 786-6580 or [tcap@franczek.com](mailto:tcap@franczek.com)
- Illinois MCLE credit is available; for details and instructions, refer to email that will be sent to attendees following the presentation



# Background

- ADA enacted in 1990
- Made it unlawful for employers to discriminate on the basis of disability
- Required employers to provide reasonable accommodations to employees with disabilities
- Restricted use of medical inquiries and examinations and maintenance of medical records



# Background

- Supreme Court's interpretation of ADA
  - *Sutton v. United Airlines, Inc.*
    - Must consider mitigating circumstances
  - *Toyota v. Williams*
    - Disability means permanent or long-term impairment in ability to perform “activities that are of central importance to most people’s daily lives”
- Result that many ADA cases were dismissed at summary judgment



# Background

- ADA Amendments Act passed in September 2008; effective January 1, 2009
- Expressly overturns *Sutton* and *Toyota*
- Stated purpose to “reinstate” a broad scope of protection and make it easier for plaintiffs to litigate ADA claims on the merits



# Recent Activity

- EEOC has recently stepped up ADA enforcement activities
  - One focus is on employers with “automatic” termination policies after a fixed term of disability-related leave which don’t consider possible accommodations
- EEOC issued new proposed regulations to conform with ADAAA on September 23, 2009



# What to Expect Today

- Highlight changes in ADAAA and proposed regulations
- Preview impact of broader construction on employers
- Consider best practices
- Address recent EEOC litigation regarding employer leave policies
- Discuss how to avoid becoming the EEOC's next target
- Questions



# Overview of Proposed Regulations

- EEOC expressly authorized to promulgate regulations
- Timeline:
  - September 23, 2009: Notice of Proposed Rulemaking
  - November 17, 2009: Town Hall Session in Chicago
  - November 23, 2009: 60-day public comment period ends
  - 2010?: Proposed final regulations will be sent to Office of Management & Budget; final regulations will be published in Final Register
- Regulations may change, but likely not dramatically
- Final regulations will apply retroactively to January 1, 2009



# Overview of Proposed Regulations

- Disability “redefined”
  - A physical or mental impairment that substantially limits one or more major life activities; or
  - A record of such an impairment; or
  - Being regarded as having such an impairment
- Same definition; new meaning
- Contains numerous examples of conditions that constitute disabilities



# Presumed Disabilities

- Deafness
- Blindness
- Intellectual disability
- Partially or completely missing limbs
- Mobility limitations requiring use of wheelchair
- Cancer
- Cerebral palsy
- Diabetes
- Epilepsy
- HIV/AIDS
- Multiple sclerosis
- Major depression
- Post-traumatic stress disorder
- Obsessive-compulsive disorder

**29 CFR 1630.2(j)(5)**



# Usually Not Disabilities

- Common cold
- Seasonal flu
- Sprained joint
- Minor non-chronic gastrointestinal disorders
- Broken bone expected to heal

**29 CFR 1630.2(j)(8)**



# It Depends

- Asthma
- High blood pressure
- Learning disability
- Panic attacks
- Leg or back impairment
- Carpal tunnel syndrome
- Hyperthyroidism

**29 CFR 1630.2(j)(6)**



# Examples

- Individual with a learning disability who has trouble reading or concentrating compared to most people is “disabled” even if the individual has achieved a high level of academic success
- Individual with carpal tunnel syndrome who experiences more pain compared to most people when performing manual tasks is “disabled”



# Transitory and Minor

- Transitory and minor impairments are not disabilities
- However, no durational minimum for “transitory and minor”
  - E.g., individual with a 20 lb. lifting restriction due to a back impairment that is expected to last “several months or more” is “disabled”



# Episodic Impairments

- Impairments that are episodic or in remission are considered disabilities if they substantially limit a major life activity when active
- Examples
  - Epilepsy
  - Hypertension
  - Multiple sclerosis
  - Asthma
  - Diabetes
  - Cancer
  - Psychiatric disabilities

**29 CFR 1630.2(j)(4)**



# Major Life Activities

- Old Rule: “activities of central importance to daily life”
- New Rule: “basic activities, including major bodily functions, that most people in the general population can perform with little or no difficulty”

**29 CFR 1630.2(h)(2)(i)**



# Major Life Activities

- Non-exhaustive list:

- Caring for oneself
- Performing manual tasks
- Seeing
- Hearing
- Eating
- Sleeping
- Walking
- Standing
- Sitting
- Reaching
- Lifting
- Bending
- Speaking
- Breathing
- Learning
- Reading
- Concentrating
- Thinking
- Communicating
- Interacting with others
- Working

**29 CFR 1630.2(h)(2)(i)(1)**



# Major Life Activities

- Also includes major bodily functions:

- Immune system
- Special sense organs
- Skin
- Normal cell growth
- Digestive
- Genitourinary
- Bowel
- Bladder
- Neurological
- Respiratory
- Circulatory
- Cardiovascular
- Endocrine
- Hemic
- Lymphatic
- Musculoskeletal
- Reproductive

**29 CFR 1630.2(h)(2)(i)(2)**



# Substantially Limits

- Old Rule: significantly or severely restricts
- New Rule: need not prevent or significantly or severely restrict
  - Focus no longer on what employee is able to do despite impairment, but on what employee cannot do
  - No extensive analysis; construction in favor of broad coverage
  - “Common sense” standard; compare to most people in general population

**29 CFR 1630.2(j)(1)**



# Substantially Limited in Working

- Old Rule: impairment substantially limits ability to perform a broad class or range of jobs
- New Rule: impairment restricts ability to perform, or meet the qualifications for, the type of work at issue

**29 CFR 1630.2(j)(7)**



# Substantially Limited in Working

- Impairment that does not substantially limit a major life activity – as compared to most people – may be still be disability if it substantially limits ability to perform job at issue
  - E.g., inability to stand for long periods of time may be normal compared to general population but maybe disabling for retail worker



# Effect of Mitigating Measures

- Old Rule: must be considered in determining disability
- New Rule: may not be considered in determining disability
  - Lone exception: eyeglasses/contact lenses
  - Effect of mitigating measures may be considered with respect to need for reasonable accommodation

**29 CFR 1630.2(j)(3)**



# Regarded As

- Old Rule: Employee had to show employer regarded him/her as having a substantially limiting impairment
- New Rule: Employee need only show he/she was subjected to a prohibited action because of an actual or perceived impairment, whether or not the impairment limits or is perceived to limit a major life activity
  - Includes actions taken based on symptom of impairment or use of mitigating measure (e.g., refusing to hire because of use of medication)
  - Excludes transitory impairments which typically last less than six months
  - Not entitled to reasonable accommodation

**29 CFR 1630.2(1)**



# What Has Not Changed

- Employee must still be qualified to perform essential job functions
- Reasonable accommodation
- Undue hardship
- Interactive process
- Direct threat
- Medical inquiries, examinations and records



# What This Means

- More employees will be covered under the ADA
- Courts more likely to rule on the merits
- More ADA claims



# So What Do We Do Now?

- Presume virtually all impairments are disabilities
- Focus on reasonable accommodation



# Old Best Practices Still Apply

- Engage in interactive process
- Isolate decision makers from employees' medical information
- Be conscious of “regarded as” prong during interviews
- Conduct fair investigations of employee misconduct
  - Respond to conduct, not cause
  - Let employee give his/her side of story
- Document accommodation efforts and interactive process
- Update job descriptions



# EEOC Litigation

- The expanded definition of “disability” likely means that the EEOC will aggressively pursue pattern and practice claims that were nearly impossible to win under the old standard
- EEOC budget has increased; investigative and legal staff have been added



# EEOC Litigation

- Current ADA enforcement priorities of EEOC's Chicago District Office include targeting employers with “inflexible” leave policies that provide for “automatic” termination of employment at the conclusion of leave
  - ❖ *EEOC v. Sears Roebuck*
  - ❖ *EEOC v. SuperValu, Jewel-Osco*
  - ❖ *EEOC v. UPS*



# *Sears Roebuck*

- EEOC alleged that Sears automatically terminated employees on workers compensation leaves at the end of one year period without considering possible accommodations; Sears denied allegations
- Sears agreed to pay \$6.2 million to settle; largest ADA settlement in EEOC history
- Sears also agreed to revise its policy and notify employees on leave of the right to reasonable accommodation



# *Jewel and UPS*

- EEOC alleges that Jewel and UPS maintain inflexible one-year leave policies
- In the *Jewel* case, EEOC also alleges that Jewel:
  - Refused to allow employees with work restrictions to return to work
  - Refused to assign employees to temporary light-duty jobs unless they were injured on the job
- Stay tuned for updates in *Jewel-Osco* and *UPS* cases



# EEOC Position

- Maximum leave policies are not per se unlawful
- However, policies must incorporate case-by-case assessment and right to request reasonable accommodation
- Employers get no credit for past accommodations granted, such as extended leaves, so “automatic” terminations are unlawful
- Reasonable accommodation may include assignment to temporary light duty position and/or additional leave



# Case Law: Temporary Light Duty

- Employer under no duty to create light duty position for disabled employee
- Temporary light duty positions may be reserved for employees with occupational injuries



# Case Law: Additional Leave

- Additional leave may be a reasonable accommodation
- Determine on a case-by-case basis
  - Three weeks found unreasonable accommodation where employee couldn't show that additional leave would result in consistent attendance. *Brannon v. Luco Mop Co.*, 521 F.3d 843 (8th Cir. 2008)
  - Five months found not per se unreasonable, where no individual assessment was performed. *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638 (1st Dist. 2000)



# Case Law: Collective Bargaining Agreements

- Employers need not violate seniority provision of CBA to accommodate disabled workers.  
*U.S. Airways. v. Barnett*, 535 U.S. 391 (2002)
- So, provision in CBA that employee loses seniority at conclusion of leave period may be on stronger footing.



# Best Practices

- Review and, if necessary, revise leave policies, especially those with automatic termination provisions, to incorporate individualized assessment and reasonable accommodation
- Consider whether maximum leave policy should be maintained at all



# Management Concerns

- EEOC will be holding a Town Hall Session, and accepting public input on the new regulations on November 17, 2009
- We have reserved a time slot and will raise concerns on behalf of our clients
- Please forward any questions/concerns you would like us to raise by November 13, 2009



# Need help?

Call or email us (or the Franczek Radelet attorney with whom you typically work):

Lisa McGarrity:

[lam@franczek.com](mailto:lam@franczek.com)

(312) 786-6136

Michael Warner:

[maw@franczek.com](mailto:maw@franczek.com)

(312) 786-6118



FRANCZEK RADELET

*Attorneys and Counselors*

# Questions?



**FRANCZEK RADELET**  
*Attorneys and Counselors*

**ADA Update:  
What the EEOC's Regulatory  
and Litigation Initiatives  
Mean For Employers**



**FRANCZEK RADELET**

*Attorneys and Counselors*

*Presented by*

**Lisa A. McGarrity & Michael A. Warner, Jr.**

**November 4, 2009**