The Changing Faces of the ADA and VEVRAA

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The Americans With Disabilities Act:

Why do we even care?
ADA Charges Filed Over the Last 6 Years

<table>
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<tr>
<th>FY</th>
<th>2006</th>
<th>2008</th>
<th>2010</th>
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<tbody>
<tr>
<td>Charges</td>
<td>10,000</td>
<td>12,000</td>
<td>18,000</td>
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Cause for Concern

- ADA Amendments Act of 2008 became effective on January 1, 2009
- Reshapes the way ADA claims are to be analyzed and how discrimination suits will be litigated
- Results?
  - Expect even MORE ADA claims and charges
Notice Issues

• Putting the Employer on Notice of Potential Duty to Accommodate
  • No “magic words”
  • Written request not required
    • Need not even comply with Company policy
    • Request need not be made by Employee
• Employee Need Only Convey Bare Minimum of Information
  • Duty to make reasonable inquiries
What’s Covered?
**Scope of Coverage Under the ADA**

- **Employer**
  - 15+ employees

- **Employee**
  - Applicants
  - Employees regardless of length of employment
  - Qualified individuals with a “disability” who are able to perform “essential job functions” with or without “reasonable accommodation”
Congress Changes Its Intent

• ADA
  • Original language barred discrimination against a qualified individual with a disability because of the disability

• ADAAA
  • “Primary object of attention” should be whether employers “complied with their obligations”

• Change in Focus
  • Courts will likely focus more on an employer’s alleged discriminatory conduct than the disability of the employee
Physical/Mental Impairment

• Physical
  • Any cosmetic disfigurement or anatomical loss affecting 1 or more of the following systems: neurological, musculoskeletal, sense organs, respiratory, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin and endocrine

• Mental
  • Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities
Episodic Impairments

- Under ADAAA impairments now include episodic impairments and those in remission, if, when active, substantially limit a major life activity such as:
  - Diabetes
  - Epilepsy
  - Depression
  - Bipolar disorder; and,
  - Cancer
“Substantial Limitation of Major Life Activities”

- Occurs when an individual is
  - “unable to perform a major life activity that the average person in the general population can perform” or
  - “is significantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity”
  - as compared to an average person in the general population.
Examples of “Major Life Activities”

• ADA Examples
  • Seeing
  • Speaking
  • Hearing
  • Walking
  • Learning
  • Performing manual tasks
  • Working
  • Caring for one’s self

• ADAAA Examples
  • Concentrating
  • Thinking
“Substantial Limitation”

- Factors to Consider:
  - Nature and severity of impairment;
  - Duration or expected duration of impairment; and,
  - Permanent or long-term impact, or expected permanent or long-term impact
Mitigating Measures

• ADA
  • Previously, Supreme Court in Sutton v. United Airlines held that ADA didn’t protect employees for whom mitigating measures could correct impairment

• ADAAA
  • Now, courts must assess employee’s disability without regard to mitigating measures except for “ordinary eyeglasses or contact lenses”
That’s it, right?
ADA and the FMLA

- More “serious health conditions” will now be ADA disabilities
- Medical Inquiries
- Leave Entitlements
  - Including intermittent leave
- Reinstatement Rights
ADA and Workers Compensation

• More WC disabilities will become ADA disabilities
• More requests for accommodations
• Vocational rehabilitation needs might go *down*?!?
• Claims personnel/defense attorneys must need to know more about both laws
• Increase in litigation
• Settlements may be impacted
What are you to do?
The “Interactive Process”

• Required by the ADA
  • Duty to engage in a flexible, interactive discussion with the disabled employee so that together the Employer and Individual can identify the precise limitations and discuss potential accommodations
Facets of the Interactive Process

• Good Faith Duty to Cooperate
• Duty of Reasonable Inquiry
• Individualized Assessment
• Duty to Consider Alternatives
• Informal and Flexible
• Timely
"Reasonable Accommodation"

• Duty to Provide Unless “Undue Hardship”
  • Factors include: nature & cost of accommodation, size and resources of employer, and the type of operation involved

• Extends to All Employment Decisions
  • Hiring/firing, promotions, transfers, etc.

• Extends to All Services and Programs
  • Cafeterias
  • Lounges
  • Gyms

• Direct Threat Defense
Reasonable Accommodations?

- **Yes**
  - Providing unpaid leave
  - Acquiring/modifying equipment
  - Job restructuring
  - Providing “light duty”
  - Reassigning to a vacant position
  - Modifying work schedules/hours

- **No**
  - Providing personal use items to accomplish activities on and off job, e.g. prosthetics, glasses, hearing aids
  - Monitoring medication/treatment
  - Violating collective bargaining agreement for reassignment
Avoiding Common Pitfalls
Most Frequent Employer Errors

- “Tunnel Vision”

- Failure to Train Supervisors/Managers to Follow Protocols
  - *Accountability issues*

- Making Unilateral Decisions

- Acting Too Quickly/Too Slowly

- Failure to Conduct Reasonable Inquiries

- Poor Documentation
Frequent Errors (cont.)

• The Blame Game
  • “That’s not my department”

• Inflexibility

• Failure to Thoroughly Analyze “Undue Hardship” Criteria

• Retaliatory Conduct

• Failing to Consider Practical Issues
Defending Your Decision
Defense Considerations

• Legitimate Business Necessity
  • Documenting your rationale

• Passing the “Smell Test”
  • Good faith

• Impact of ADA v. WC Claims
  • Use of transcripts/medical records in defense

• Not Always a “Right Answer”
What’s a VEVRAA?
1974 Vietnam Era Veteran’s Readjustment Assistance Act

- Prohibits employment discrimination against certain veterans and requires basic affirmative action to employ and advance those veterans.
- This rule has been unchanged since its implementation in 1974 and is now sought to be update/changed because of the increasing numbers of veterans returning from tours of duty in Iraq, Afghanistan, and other places around the world and are facing substantial obstacles in finding employment.
Proposed Changes to VEVRAA by the Office of Federal Contract Compliance Programs

• In general, the proposed changes to the regulations would strengthen the affirmative action provisions, detailing specific actions a contractor must take to satisfy its obligations, as well as increase the contractor’s data collection obligations, and require the contractor to establish hiring benchmarks in measuring the effectiveness of its affirmative action.
OFCCP’s Key Proposed Changes to VEVRAA: Contracting

• Contractors must include the entire equal opportunity clause verbatim in its subcontracts.

• Job solicitations/advertisements:
  • Contractors must also state it is an equal employment opportunity employer of veterans protected under Section 4212.
OFCCP’s Key Proposed Changes to VEVRAA: Self-identification

- Contractors must invite all applicants to self-identify as a "protected veteran" prior to the offer of employment, and must maintain self-identification data. The applicant need not indicate he/she is disabled as part of this process. The purpose of this change is to allow an assessment of the effectiveness of the contractor's recruitment and affirmative action efforts over time.
- Contractors must invite further self-identification at the post-offer stage, to self-identify as a member of one or more of the four classifications of protected veterans.
- Contractors must seek the advice of the applicant regarding accommodations needed.
OFCCP’s Key Proposed Changes to VEVRAA: Personnel practices

• Contractors must review their personnel processes on at least an annual basis, rather than "periodically", to ensure its obligations are being met. The regulations further identify the minimum steps that must be taken to conduct this review, including but not limited to recording specific reasons for personnel actions for protected veterans, and making those reasons available to the protected veteran on request.

• Contractors must review and document all physical and mental job qualification standards.
OFCCP’s Key Proposed Changes to VEVRAA: Personnel practices

• Contractors must document any reasons for a conclusion that an individual constitutes a "direct threat" to the safety or health of the individual or others.

• Contractors must engage, at a minimum, in defined outreach and recruitment efforts.

• Contractors must, on an annual basis, document its review and evaluation of its outreach and recruitment efforts. In the event the previous efforts are not effective, contractors must identify and implement alternative efforts.
OFCCP’s Key Proposed Changes to VEVRAA: Personnel practices

• Contractors must hold meetings with employees at least once per year to discuss its affirmative action policies and to explain its employee responsibilities.

• Contractors must train those who implement personnel decisions on specified topics, including the benefits of employing protected veterans and the legal responsibilities of contractors regarding protected veterans.
OFCCP’s Key Proposed Changes to VEVRAA: Quantitative measurements

• Contractors must document and annually update data concerning referrals (including the total number of referrals and the referrals of protected veterans), applicants (including the total number of applicants and the protected veteran applicants), and hiring (including the total number of job openings and the number of protected veterans who fill those jobs).

• Contractors must establish benchmarks for hiring protected veterans, expressed as a percentage of total hires, using a variety of different sources of information. Contractors must consider and document various factors in determining its benchmarks.
OFCCP’s Key Proposed Changes to VEVRAA: State employment service obligations

- Contractors must inform the state employment service of its status as a federal contractor, certain contact information, and its request for priority referrals of protected veterans.
- Contractors must maintain records relating to referrals for five years.
VEVRAA: Timeline

• The Section 4212 NPRM was published on April 26, 2011 in the Federal Register and opened to the public for comment.
• The comment period ended on July 11, 2011.
• The OFCCP expects to issue a final rule on these changes by July 2012.
Thank You!

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