

LEGALINSIGHTS

FOR FIRE PROTECTION DISTRICTS

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ADA Amendments Act expands disability coverage

by Maureen Anichini Lemon

Effective January 1, 2009, more Americans will be considered disabled and eligible for workplace protections under the Americans with Disabilities Act (ADA). President Bush signed Senate Bill 3406, the ADA Amendments Act of 2008 (the "ADAAA"), into law on September 25, 2008. Since the ADA's original passage in 1990, the U.S. Supreme Court has issued decisions narrowing the definition of an individual with a disability. Through the ADAAA, Congress rejects the U.S. Supreme Court's actions, and seeks to re-establish the original broader coverage of the ADA.

The ADA defines a disability as (1) a physical or mental impairment that substantially limits one or more major life activities, (2) a record of such an impairment, or (3) being regarded as having such impairment. Previously, major life activities were understood to mean caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. The ADAAA adds to the definition of a major life activity 'major bodily functions' including, but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. Through this addition, Congress clarified that individuals with cancer, AIDS or infertility are covered under the ADA.

In its 2002 decision, *Toyota Motor Mfr., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), the U.S. Supreme Court ruled that an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of cen-

tral importance to most people's daily lives in order for the impairment to 'substantially limit' a major life activity. In *Toyota*, a car paint inspector claimed that she was disabled because her carpal tunnel syndrome prevented her from performing the repetitive motion of wiping down freshly painted cars. The Company denied her request for an accommodation and fired her after she missed work because her condition worsened. The U.S. Supreme Court ruled that Williams was not substantially limited in performing manual tasks because she was able to perform other daily manual tasks, such as gardening, cooking, and cleaning. Since the *Toyota* decision, employers have required that an individual's impairment substantially limit many life activities in order for it to be considered a disability.

In response, the ADAAA directs employers to broadly construe the ADA, erring on the side of finding that an employee has a disability. An impairment must substantially limit only one major life activity (i.e., the repetitive movement required to wipe down freshly painted cars) to be eligible for coverage. In addition, an impairment that is either episodic or in remission is a disability if it would 'substantially limit' a major life activity when active.

Another means by which the ADAAA expands ADA coverage to more individuals relates to the consideration of mitigating measures to determine whether an individual has a disability under the ADA. In *Sutton v. United Air Lines, Inc.* 527 U.S. 471 (1999), the U.S. Supreme Court ruled that an employer can consider measures that mitigate the individual's impairment (including medication, medical supplies,

Children at the firehouse: Legal concerns

by Shawn Flaherty & Patrick Jesse

A fire station can be a dangerous place. Firefighters and paramedics have ready access to large vehicles, axes, ropes, power tools, accelerants, and medications. Given this backdrop, it is indeed surprising that some fire department officials have decided fire stations are suitable locations for childcare. Apparently, a few fire departments have made provisions for their volunteer and paid-on-call staff to leave their children at the firehouse while they respond to an emergency call. Some fire departments have designated areas of their fire stations specifically for these instances. This practice subjects a fire department and its officials to a steep risk of legal liability. This article is intended to dissuade our clients from engaging in such a practice.

Licensure

A noteworthy area of concern is that a fire department could be subject to administrative liability for operating an unlicensed childcare facility. In Illinois, anyone operating a child care facility must be licensed with the Illinois Department of Children and Family Services (DCFS) as mandated by the Child Care Act (225 ILCS 10). This Act imposes licensure, record-keeping, and a litany of additional regulations and requirements that all childcare facilities must follow, including potential on-site visits from DCFS, interviews with employees, and employee background checks. There is a potential for prosecution of criminal violations for entities operating a childcare facility in contravention of the Child Care Act.

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The U.S. Department of Labor issues final FMLA rules

by David Zafiratos

On November 17, 2008, the U.S. Department of Labor published amendments to the regulations implementing the Family Medical Leave Act (“FMLA”). These regulations, which become effective on January 16, 2009, clarify existing FMLA leave requirements and implement military family leave. The Department of Labor has made the final rules available in PDF format at the following website address:

<http://www.dol.gov/federalregister/PdfDisplay.aspx?DocId=21763>.

The new regulations either change or clarify several issues that arise under the FMLA, including substitution of paid leave, light duty, the definition of a Serious Health Condition, employer and employee notice requirements, and medical certification requirements.

In the past, confusion existed over what type of paid leave – sick leave, personal leave, or vacation leave – could be substituted for FMLA leave. For example, employees could

substitute paid sick leave for FMLA leave because of their own serious health condition, but could not substitute paid sick leave for FMLA leave for absences related to the birth of a child. The changes to Section 825.207 now permit employees to substitute paid leave as determined by the terms and conditions of the employer’s normal leave policy. Employers should keep this rule in mind when establishing paid leave policies. Additionally, an employer is still authorized to require employees to substitute and exhaust any accrued paid leave while on FMLA leave.

Optional light duty assignments in the context of the FMLA have also changed. Previously, some courts had interpreted Section 825.220 to mean an employee on voluntary light duty for a serious health condition could be considered on FMLA leave. Section 825.220 now states that employers may not count time used by an employee on voluntary or optional light duty against the employee’s twelve (12) weeks of FMLA leave.

Under the FMLA, a serious health condition includes an incapacity that requires treatment two or more times by a health care provider. The new regulations address the phrase “treatment two or more times,” and include a new requirement that the two or more treatments occur within thirty (30) days of the first day of incapacity. An employee attempting to base a serious health condition on an incapacity which required two or more treatments *greater than* thirty (30) days apart will fail to satisfy that definition.

The previous regulations contained several sections devoted to the employer’s responsibility to provide notice to employees of their FMLA rights. However, the new rules combine all those regulations under Section 825.300 including clarification of the pre-existing employer notice requirements.

First, employers will now be required to post a general FMLA notice in the workplace. Second, if an employer has a written employee handbook or policy manual, the employer must

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Liability

The primary concern for a fire department is not licensure, but exposure to legal liability. Many tort immunity provisions that help protect fire department operations from legal liability exclude provisions for the willful and wanton activities of fire officials and employees. Public officials who permit children to regularly frequent a firehouse for childcare purposes may have difficulty defending their actions under the current immunity statutes. Insurance policies may have exclusions for accidents, injuries, or child molestation that could potentially occur in such an environment. A gap in coverage could result in a significant financial loss to the fire department. Workers’ compensation issues and other employment law issues for caregivers could be impacted as well.

A fire department that permits even sporadic childcare to occur in its firehouse cannot underestimate the importance of a

criminal background check. There is always a risk that a caregiver may have a history of child abuse, neglect, or molestation. It may even be a person whom you would never expect. The Child Care Act requires background checks for all childcare facilities. Failure to conduct a thorough background check could open the door for a negligent hiring cause of action.

There are occasions when a child’s presence at a fire station is welcome and encouraged. A well-organized, supervised fire station tour or fire prevention week open house at a fire station can go a long way toward promoting fire safety and prevention. Problems occur when the occasional well-supervised minor visitor becomes a regular or semi-regular fixture at the fire station.

Mandated Reporters

Occasionally, we are asked when a public official has a duty to report suspected child abuse or neglect. The Abused and Neglected

Child Reporting Act, 325 ILCS 5, provides that mandated reporters are professionals who may work with children in the course of their professional duties. The Act identifies seven major groups of mandated reporters: medical personnel, school personnel, social service/mental health personnel, law enforcement personnel, coroner/medical examiner personnel, childcare personnel, and members of the clergy. Under the Act, mandated reporters are required to report suspected child maltreatment immediately when they have “reasonable cause to believe” that a child known to them in their professional or official capacity may be an abused or neglected child. Essentially, mandated reporters serve as an early detection system to identify probable abuse early enough to avoid serious long term damage to the child.

The Act does not specifically list fire protection district trustees as mandated reporters. However, there are many instances where trus-

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appliances, low-vision devices, prosthetics, hearing aids and mobility devices) in determining whether the individual has a disability. For example, an amputee who would be substantially limited in the major life activity of walking is not so limited with the use of a prosthetic leg. That individual would not be considered disabled under *Sutton*. The ADAAA adopts the opposite of this holding, requiring disability determinations to be made without considering mitigating measures. An employer must hypothetically consider the amputee without the use of his prosthetic leg, find him to be disabled, and then determine whether he requires a reasonable accommodation to perform the essential functions of his job. The only remaining exceptions related to mitigating measures are eyeglasses and contact lenses; employers can consider an individual's vision with the use of eyeglasses or contact lenses when determining whether that individual's visual impairment significantly limits one or more major life activities.

Congress also clarified what it means to be 'regarded as disabled.' Simply put, an employer cannot discriminate against in-

dividuals that it regards as being disabled, even if the individual is, in fact, not disabled. This principle protects individuals from being denied a job because of the myths, fears and stereotypes associated with perceived disabilities. While employers have a duty to not discriminate against individuals perceived to have a disability, employers do not have a duty to provide any work-related accommodations to such individuals since they do not actually have a disability.

In general, due to the overall expanded scope of what constitutes a disability, more individuals will be able to allege protection under the ADA due to the existence of a physical or mental impairment. With this expanded interpretation, anyone with any sort of operational impairment of a major bodily function is considered disabled. More individuals may now allege that they have been discriminated against because of a disability. Through the ADAAA, Congress has shifted the focus from whether an individual has a disability (they probably do), to whether the employee needs a workplace accommodation.

Fortunately, the standard for determining what constitutes a reasonable accommodation remains the same as prior to the passage of the ADAAA. An employer must still provide a reasonable accommodation to a qualified employee unless the accommodation would cause an undue hardship. Employers can still consider an individual's mitigating measures when assessing the need for a work-related accommodation. Thus, an individual whose medication generally controls his diabetes or high blood pressure will now be considered disabled. Yet, that individual may require no accommodation, or may require the mere opportunity during his work day to check his insulin levels. For this reason, it is likely that many individuals who will now be protected under the ADA will not require significantly more accommodations, if any.

The EEOC is developing new regulations to implement the ADAAA. In the meantime, if you have any questions regarding the ADAAA and its impact on your obligation to treat an applicant or employee with a disability, please call one of our attorneys at (630) 682-0085. ■

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tees would be mandated to report suspected child abuse or neglect. For instance, if the trustee holds one of the listed professions, such as emergency medical technician, physician, nurse, court employee, parole officer, or police officer (among others). In addition, any personnel working with children at day care, pre-school or recreational programs are considered mandated reporters. This would include caregivers for the previously mentioned, ill-advised firehouse childcare facilities.

It is interesting to note that school board members now have a specific statutory obligation under the Act to report child abuse and neglect under certain circumstances. If a school board member learns during a school board meeting about any type of child abuse allegation concerning a school district student, the respective board member is duty bound to contact the school superintendent

or other school administrator and report the child abuse. Fire protection district trustees are not subject to a similar statutory obligation, but are well advised to follow suit. Section 4 of the Act states that "in addition to the above persons required to report suspected cases of abused or neglected children, any other person may make a report if such person has reasonable cause to believe a child may be an abused child or a neglected child." This catchall phrase seemingly encourages persons under no express legal obligation to report suspected abuse to still do so. Setting aside liability for a moment, it makes sense from an ethical standpoint to report any incident of suspected child abuse rather than risk further abuse to a child.

It is always good public policy—whether you have a duty to report or not—to promptly report suspected child abuse. We urge fire district trustees and officials who suspect any

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type of child abuse to promptly inform local law enforcement authorities. This ensures that the information is provided to a person with a legal duty to report the information to DCFS. The police department and DCFS are charged with the duty of properly investigating all reports of suspected child abuse and when warranted, to proceed with criminal prosecution. ■

FMLA rules

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provide new employees with its written FMLA policy at the time of hire. Employers are allowed to distribute their written FMLA policies electronically.

Employers have always been required to notify an eligible employee of the right to FMLA leave when the employer knows a leave of absence may qualify. The previous regulations required notification to occur within two (2) days. Section 825.300 now allows employers five (5) days to notify employees that they may be entitled to FMLA leave.

Employees are required to notify employers of the need for FMLA leave within a certain time frame. With regard to unforeseeable leave, employees are required to give notice as soon as possible. Prior regulations permitted employees to notify employers of the need for FMLA leave up to two (2) days after an absence, even when earlier notice was possible. Now, Section 825.303 requires employees to follow "the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances." That Section also states an employee's unjustified failure to abide by the employer's call-in procedure may allow employers to deny or delay FMLA leave.

The new regulations change several aspects of the medical certification process for FMLA leave taken because of a serious health condition. First, taking into account the Health Insurance Portability and Accountability Act (HIPAA) as it pertains to communications between an employer and an employee's health care provider, the new regulations prohibit an employee's direct supervisor from contacting the health care provider. Also, employers must limit their inquiries to information required by their FMLA certification forms. The standard

Department of Labor certification form has been updated.

The regulations also officially change the ability of employers to require periodic re-certification of medical conditions. Since employees are entitled to twelve (12) weeks of FMLA leave every twelve (12) months, employers have often sought to obtain re-certification of medical conditions every year for conditions lasting longer than one year. The new regulations follow a Department of Labor opinion letter stating that employers may request re-certification every six months.

The FMLA now allows employees to take FMLA leave for a "qualifying exigency" caused by a family member's call to active duty in support of a contingency operation, or to care for a covered servicemember if that person is the employee's spouse, son, daughter, parent, or next of kin. These two types of military family leave are known respectively as qualifying exigency leave and military caregiver leave.

The addition of "qualifying exigency leave" is intended to help families of members of the National Guard and Reserves make the necessary arrangements to manage their affairs when the servicemember is called to active duty in support of a contingency operation. The term "qualifying exigency," left undefined by the FMLA when the military family leave provisions were added in early 2008, is defined by Section 825.126 of the final rules. The following items are now listed as qualifying exigencies: "short-notice deployment," "military events and related activities," "childcare and school activities," "financial and legal arrangements," "counseling," "rest and recuperation," "post-deployment activities," and a catchall "additional activities." Section 825.126 includes details on each particular qualifying

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exigency leave. Most of these categories are self-explanatory.

The FMLA now allows eligible employees to take up to twenty-six (26) workweeks of leave in a single twelve (12) month period to care for an injured servicemember. Section 825.127 of the final rules helps to clear up some uncertainty surrounding the phrase "26 workweeks in a single 12-month period." The rule explains that a "single 12-month period" begins on the first day an eligible employee takes FMLA military caregiver leave and ends 12 months after that date. Any unused leave is forfeited after 12 months.

The Department of Labor has also created certification forms for compliance with the FMLA's military family leave certification requirements. These forms have been published as Appendices G and H to the final FMLA regulations.

Given the numerous changes to the regulatory framework of the FMLA, as well as the new regulations covering military family leave, employers should consider revising their existing FMLA policies to ensure compliance with these regulatory changes. Please contact one of our attorneys at (630) 682-0085 to review your FMLA policies and practices. ■

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