

# LEGALINSIGHTS

FOR LOCAL GOVERNMENTS

OTTOWSEN BRITZ KELLY COOPER & GILBERT, LTD.

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## ADA Amendments Act expands disability coverage

by Maureen Anichini Lemon

**E**ffective 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,

## Court clarifies the prerequisites for closing public meetings

by Timothy Hoppa

**T**he appellate court recently expanded the authority of public bodies to hold closed session meetings. In *Wyman v. City of Champaign*, \_\_\_ Ill.App.3d \_\_\_ (4th Dist. 2008), the court held that closed session need not be included on the open meeting agenda. Additionally, the *Wyman* court also relaxed its previously articulated formalities required to enter closed session.

In *Wyman*, the City of Champaign ("City") conducted a regularly scheduled meeting of the city council. Although the agenda posted for the meeting did not include a closed session, the city council voted to close the meeting for the purpose of discussing "litigation" and "property acquisition." The city council and several staff members attended the closed session meeting.

The plaintiff maintained that the closed session meeting violated numerous requirements of the Open Meetings Act (the "OMA"). First, the plaintiff argued that the City was required to list its intention to hold a closed session meeting on the open meeting agenda. Second, plaintiff asserted that the appellate court's decision in *Henry v. Anderson*, 356 Ill.App.3d 952 (2005) required the City to list the specific sections of the OMA under which the meeting was closed. Third, the plaintiff interpreted the OMA to require a separate, roll call vote on *each* exception asserted for closing the meeting. Finally, the plaintiff argued that the inclusion of persons other than the city council was inappropriate and contrary to the OMA.

Continued on page 3

Continued on page 2

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

by David Zafiratos

**O**n November 17, 2008, the U.S. Department of Labor published amendments to the regulations implementing the Family Medical Leave Act (“FMLA”). These regulations, which became 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

*Continued on page 4*

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## Closing public meetings

*Continued from page 1*

In a decision that clarifies its prior decision in *Henry*, the court ruled that the City had not violated the OMA. In *Henry*, the court found an OMA violation where a public body held a closed session meeting for the purpose of “litigation” without further explanation. There, no litigation was pending but was only probable. The *Wyman* court clarified that, where the litigation matter to be discussed in closed session is not yet pending, the public body is required to articulate why the litigation is imminent and record the basis for that decision in the minutes of the meeting. Where the litigation matter is already pending, however, the public body may close the meeting for the purpose of “litigation” without further clarification and without recording the basis for the decision in the meeting minutes.

While Section 2a of the OMA requires that “each member” vote to authorize the closing of a meeting, the Act does not specify

if a roll call vote is required. The *Wyman* court found that when the City conducted a voice vote and recorded the vote in the meeting minutes, it complied with the requirements of the OMA. The court specifically rejected reading into the OMA a requirement that a roll call vote of each member be taken. Further, the court held that individual votes on each basis for closing the meeting was not required; a single, voice vote on whether to close the meeting for the reasons articulated in the motion complies with the OMA.

The court rejected the plaintiff’s argument that only members of the city council could properly attend its closed session meetings. In so doing, the court accepted the City’s argument that the City attorney needed to attend the closed session to discuss the pending litigation. Similarly, the purchase of property could not be discussed by the city council in closed session without the input of the staff member responsible for negotiating

the real estate purchase contract. The court confirmed that the OMA does not delineate who is allowed to attend closed session meetings or prohibit a public body from inviting non-members into the closed session.

Although most public bodies include a closed session on their open meeting agenda, the *Wyman* court held that the plain language of the OMA does not require advanced notice of the intent to convene a closed session meeting. The *Wyman* decision provides Illinois boards increased freedom when deciding whether to conduct closed session. It is clear that, as long as the statutory provision under which the meeting is closed is identified, the board need not identify by number the provision used to close the meeting. If something comes up after the agenda has been published, the *Wyman* case establishes the ability of a board to convene a closed session meeting entirely.

*Continued on page 3*

# ADA Amendments Act

Continued from page 1

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. ■

## Closing public meetings

Continued from page 2

Keeping in mind that boards cannot act on a matter that is not on the agenda before the meeting began, we recommend that boards list closed sessions on their open meeting agendas as well as a subsequent agenda item indicating "Action on Items Arising Out of Closed Session." If you have any questions regarding the OMA, please call one of our attorneys at (630) 682-0085. ■

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## Attorney Notes

- ◆ Congratulations to **Karl Ottosen**, who - for the fourth consecutive year - is listed as a leading lawyer in the areas of Governmental, Municipal, Lobbying & Administrative Law in the January 2009 business edition of *Leading Lawyers Network Magazine*. Karl was selected by his peers in a statewide survey and through a four-phase research process as being among the top attorneys in Illinois.
- ◆ For the second consecutive year, the 2009 edition of *Illinois Super Lawyers* magazine has designated **Shawn Flaherty** as a "Rising Star" in the areas of Government / Cities / Municipalities. This distinction is awarded to the top 2.5% of Illinois attorneys who are under the age of 40 or have been practicing ten years or less.
- ◆ In January 2009, **John Kelly** spent a week in New Orleans, Louisiana, building and renovating homes for families still recovering from the devastation of Hurricane Katrina as a volunteer for Camp Restore, a ministry of the Southern District Lutheran Church - Missouri Synod. This was John's third trip to New Orleans as part of Camp Restore's ongoing efforts to assist the victims of Hurricane Katrina.
- ◆ For the fourth consecutive year, *Illinois Super Lawyers Magazine* recognized **Karl Ottosen** as a 2009 Illinois Super Lawyer in the areas of Government / Cities / Municipalities. *Law & Politics* conducts a rigorous review, research, and selection process of nominated attorneys. Only five percent of attorneys in Illinois are recognized as Super Lawyers by their peers for outstanding professional achievement. ■

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## FMLA rules

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*Continued from page 2*

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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### ***Employers will be required to post a general FMLA notice in the workplace.***

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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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