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Developments in Disability Discrimination Law 2014 - 2015

JAMES H. KIZZJAR, JR.
Bracewell & Giuliani LLP

Author contact information:

**James H. Kizzjar, Jr.
Bracewell & Giuliani LLP
San Antonio, Texas**

**James.kizzjar@bgllp.com
210-299-3526**

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**THIS OUTLINE IS INTENDED TO ASSIST PARTICIPANTS WITH A
GENERAL UNDERSTANDING OF CURRENT DEVELOPMENTS IN THE LAW.
IT IS NOT TO BE CONSIDERED LEGAL ADVICE.**

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I. INTRODUCTION

The Americans with Disabilities Act of 1990 (the “Act” or the “ADA”) protects individuals with disabilities from discrimination in employment, access to facilities, and access to services. Title I of the ADA prohibits covered employers from discriminating against qualified individuals with disabilities (“QID’s”) in job application procedures, hiring, advancement, discharge, compensation, training, and other terms, conditions, and privileges of employment.

On September 25, 2008, President Bush signed the ADA Amendments Act (“ADAAA”). The ADAAA reversed various Supreme Court decisions interpreting Title I of the ADA and required a broader application of the ADA. Among other things, the ADAAA bans lawsuits by non-disabled individuals for reverse disability discrimination, clarifies the Equal Employment Opportunity Commission’s authority under the ADA to develop and implement binding regulations, and amends the definition of disability for claims under the Rehabilitation Act. The amendments, which significantly change the ADA, became effective on January 1, 2009. The principle impact of ADAAA is that it will make it easier for an employee to establish coverage under the ADA.

In September 2009, the EEOC issued proposed regulations implementing the ADAAA. On March 25, 2011, the EEOC published final regulations in the Federal Register. The regulations became effective on May 24, 2011.

The ADAAA’s broad coverage mandate, the expanded definition of “major life activity,” the virtual elimination of mitigating measures and the easing of the burden of plaintiffs to meet the “regarded as disabled” standard, have contributed to a surge in disability discrimination claims filed with the EEOC and the courts. See [Appendix A](#), which illustrates that in U. S. governmental fiscal year 2014 the EEOC received the fourth-highest number of disability charges since the EEOC began enforcing Title I in 1992. The number of disability charges filed peaked in 2012 at 26,379 and has declined slightly since that year but remains well above levels preceding the ADAAA. Fiscal years 2011, 2013 and 2014 each included disability charge numbers within 1,000 charges of the 2012 level. It also likely that a greater number of disability claims will continue to trial before a jury since disputes over whether a particular impairment “substantially limits” a “major life activity” under the ADAAA, or whether an employer “reasonably accommodated” a disability often involve disputed questions of facts.

Because of the extensive changes wrought by the amendments and the subsequently issued regulations, this outline includes only post-amendment decisions in sections where the ADAAA has resulted in significant changes. For ADA issues that were not affected by the ADA Amendments, this outline summarizes both pre-and post-amendment decisions.

II. LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS

A. EEOC Issues Guidance on Specific Conditions in the Workplace

In 2013, the EEOC issued four question-and-answer documents directly addressing these conditions: diabetes, epilepsy, intellectual disabilities, and cancer. Each guidance provided general information about the condition; obtaining, using, and disclosing medical information; accommodating persons that that condition; concerns about safety; and general sections on harassment, retaliation, and filing an EEOC charge. The guides provide several examples of accommodation obligations for each condition. These guides are available at: <http://eeoc.gov/laws/types/disability.cfm>.

B. OFCCP Adopts Rule Increasing Federal Contractors' Obligations to Hire Individuals with Disabilities

In the September 24, 2013, Federal Register, the Office of Federal Contract Compliance Programs published the final version of its regulation requiring contractors to “take affirmative action to employ and advance in employment qualified individuals with disabilities.”¹ The regulation sets a utilization goal for employment of individuals with disabilities at 7% for each job group in the contractor’s workforce. According to OFCCP director Patricia Shiu, previous expectations that contractors would make a “good faith effort” to recruit and hire individuals with disabilities clearly has not been working; as a result, the rule now defines specific goals, requires real accountability, and provides clear guidelines for employers to comply with the law. Although these requirements are not “quotas,” employers are required to undertake positive efforts to recruit individuals with disabilities and veterans and document those efforts. Documentation may be reviewed by the OFCCP to determine if the employer’s efforts were reasonable.

The regulation provides for:

- A nationwide utilization goal of 7% for workers with disabilities in each job group (or, if the contractor employs fewer than 100 employees, 7% of the employer’s entire workforce);
- Establishment of hiring “benchmarks” for veterans—employers may either adopt the national percentage in the civilian workforce (currently 8%) or develop their own benchmark based on OFCCP factors;
- Development of action-oriented programs to address underrepresentation of individuals with disabilities including steps such as altering recruitment and outreach efforts or modifying personnel processes;
- Review of basic qualification requirements to ensure they do not screen out or tend to screen out individuals with disabilities or veterans;
- Expanded recordkeeping requirements, specifically hiring metrics and analyses, that must be kept for 3 years;
- Mandatory external outreach efforts for veterans and disabled;
- Direct Listing of vacancies with state employment service for veterans (no reliance upon 3rd party listing services);
- Signed linkage agreements with veterans outreach organizations, e.g., local state employment service veterans representative; service organizations listed in National Resource Directory;
- Pre- and post-offer self-identification opportunity for both veterans and applicants with disabilities;
- Annual re-solicitation of disability information from existing employees;
- Additional job posting requirements for veterans; and

¹ 78 Fed. Reg. 58,614; 78 Fed. Reg. 58,682.

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