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**Developments in
Disability Discrimination Law
2017 - 2018**

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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 years 2015 to 2017 claims filed have remained at their highest levels since the EEOC began enforcing Title I in 1992. Claims filed reached the highest number thus far in fiscal year 2016 (28,073) and hovered near that number in fiscal years 2015 (26,968) and 2017 (26,838).

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. ADMINISTRATIVE AND LEGISLATIVE DEVELOPMENTS

A. Strategic Enforcement Plan

The EEOC’s Strategic Enforcement Plan for Fiscal Year 2017 – 2021 (“SEP”) establishes “substantive area priorities” that set the focus of staff and coordinate enforcement / guidance on issues. The EEOC set the following substantive area priorities in its current SEP: (1) Eliminating Barriers in Recruitment and Hiring; (2) Protecting Vulnerable Workers, Including Immigrant and Migrant Workers, and Underserved Communities from Discrimination; (3) Address Selected Emerging and Developing Issues; (4) Ensuring Equal Pay Protections for All Workers; (5) Preserving Access to the Legal System; and (6) Preventing Systemic Harassment.

Notable for ADA enforcement, the emerging issues priority includes focus on “[q]ualification standards and inflexible leave policies that discriminate against individuals with disabilities” and “[a]ccommodating pregnancy-related limitations under the . . . ADAAA and the Pregnancy Discrimination Act.”

These issues, particularly hiring and return-to-work/leave policies, are prominent in the EEOC's recent litigation proceedings.

B. EEOC Litigation Trends

In fiscal year 2017, the EEOC filed 184 merit-based cases. While over half alleged Title VII violations, 77 of these filings alleged ADA violations. Many focused on hiring; for example:

EEOC v. Health Care Servs. Corp., N.D. Tex., No. 3:17-cv-02626 (Sept. 26, 2017)

In September 2017, the EEOC filed a complaint against Blue Cross/Blue Shield of Texas ("BCBS") claiming that the company's failure to provide reasonable accommodations during its hiring process violated the ADA. The charging party, a deaf individual applying for a Claims Examiner position, was unable to complete the audio-only portion of BCBS's online assessment. The applicant claims she requested reasonable accommodations, such as captions, but BCBS ceased email communications without resolving the issue. The EEOC is seeking damages on behalf of the applicant and a change to BCBS's institutional policies and practices.

EEOC v. Dolgencorp, LLC, N.D. Ala., No. 2:17-cv-01649 (Sept. 25, 2017)

On September 25, 2017, the EEOC sued Dolgencorp, LLC ("Dollar General"), claiming Dollar General's post-offer medical examination screened out candidates who were otherwise qualified to perform the essential functions of warehouse work, specifically those without 20/50 vision in both eyes and candidates with high blood pressure. The EEOC sued on behalf of Vincent Jackson, a Dollar General applicant rejected because of his monocular vision. The complaint also argued Dollar General's medical exams sought family medical history in violation of the Genetic Information Nondiscrimination Act ("GINA"). The EEOC is seeking institutional changes to Dollar General's hiring practices, and damages on behalf of Jackson and the entire classes of applicants impacted by Dollar General's alleged ADA and GINA violations.

EEOC v. Consol Edison Co. of N.Y., S.D.N.Y., No. 1:17-cv-07390 (Nov. 7, 2017)

In November of 2017, the EEOC entered into a consent decree with Consolidated Edison Company of New York ("Con Ed"), resolving charges of disability discrimination and Genetic Information Nondiscrimination Act ("GINA") violations in Con Ed's hiring practices. The EEOC claimed that Con Ed conducted medical examinations on applicants without first extending conditional offers of employment, failed to hire applicants because of real or perceived disabilities discovered during the medical examinations, discriminated against existing employees because of medical conditions, and conditioned employment on disclosure of genetic information in violation of GINA. Under the consent decree, Con Ed agreed to pay \$800,000 to impacted applicants and employees and change its hiring practices.

Other EEOC priorities can be ascertained from settlements and consent decrees:

Pregnancy Accommodation

Case: *EEOC v. Allsup's Convenience Stores, Inc.*, 1:15-cv-00863, U.S. District Court for the District of New Mexico.

In September of 2017, the EEOC settled charges of pregnancy and disability discrimination against Allsup's Convenience Stores, Inc. for a sum of \$950,000 distributed between 28 former female employees. Allsup's operates over 300 convenience stores across New Mexico and Texas. In its

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