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Developments in Disability Discrimination Law

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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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For 44 years, Jim Kizziar has represented management in all aspects of labor and employment law before federal and state agencies and courts. His practice includes litigation and preventative counseling of management on issues such as discrimination, harassment, union organizing and wage-hour issues.

Mr. Kizziar is also a lecturer and prolific writer on labor law issues. He served on the editorial board of the Texas Labor Letter and co-authored a chapter entitled "Risk Management Issues in Employment" for the American Hospital Association's Risk Management Handbook for Health Care Facilities. He has also co-authored a resource guide entitled Human Resources Management: A Comprehensive Guide for Apartment Professionals for the National Apartment Association.

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In addition to regulatory and employment-law compliance, Amber represents employers in pre-litigation administrative investigation and hearings, settlement negotiations, and federal and state court litigation. Her litigation matters have included a variety of employment-law claims, such as retaliation, wrongful termination, discrimination, harassment, and wage and hour issues, as well as general civil litigation matters in the public, private and religious organization employer context. Amber is also experienced in Fair Labor Standards Act (FLSA) collective action litigation, including class certification and notice issues.

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Publications
- "Pandemic Telework May Undermine Employer ADA Defense" *Law360*
- "When Must Employee Illnesses Be Recorded by OSHA?" *IndustryWeek*
- "Should I Let My Employees Wear Earbuds?" *IndustryWeek*

Noteworthy
- U.S. District Court for the Eastern District of Texas, Judicial Extern for Judge Kimberly Priest Johnson
- U.S. Senate Judiciary Committee, Office of U.S. Senator John Cornyn, Summer Clerk
- Innocence Clinic, Buried Alive Project
- U.S. Senate, Office of the Majority Whip, Staff Assistant/Media Tracker
- U.S. Senate, Office of U.S. Senator James Inhofe, Congressional Fellow

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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.

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 shows that since the passage of the ADAAA, disability-based charges have reached their highest levels since the EEOC began enforcing Title I in 1992. Between 2010 and 2019, the average number of disability-based claims brought per year was 25,933, whereas in the preceding nine years (2001-2009) the annual average was 16,921. The number of claims filed with the EEOC peaked at an all-time high of 28,073 in 2016 and has since declined approximately 14 percent to 24,238 in EEOC fiscal year 2019.

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. THE EEOC REGULATIONS IMPLEMENTING THE ADAAA

The EEOC issued final rules implementing the ADAAA on March 25, 2011. The EEOC also concurrently issued a fact sheet, questions and answers regarding the final rule, and guidance for small businesses. The following is a summary of the significant provisions of the rule:

A. Construction (29 C.F.R. § 1630.1(c)(4))

Under this section, the EEOC emphasizes that the ADA now has "broad application":

a. The purpose of the amendments was to make it easier for people with disabilities to obtain protection under the ADA.

b. Consistent with the purpose of reinstating a broad scope of protection, the definition of "disability" is to be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA.

c. The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability.

d. The question of whether an individual meets the definition of disability should not demand extensive analysis.

B. Definition of Disability (29 C.F.R. § 1630.2(g))

This section explains that the definition of the term "disability" was preserved, but "redefined", by the ADAAA. For clarity, the EEOC refers to the first prong as "actual disability" to distinguish it from the other two prongs—a record of a disability and "regarded as" disabled. This section clarifies that:

a. Being "regarded as" having an impairment means that the individual "has been subjected to an action prohibited by the ADA as amended because of an actual or perceived impairment that is not both 'transitory and minor.'"

b. An individual may establish coverage under any one or more of the three prongs.

c. Where claims do not involve a failure to accommodate or the need for a reasonable accommodation, it is generally unnecessary to proceed under the "actual disability" or "record of" prongs, which require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. Claims not involving reasonable accommodation can be made solely under the "regarded as" prong, which requires no showing of an impairment that substantially limits a major life activity or a record of such an impairment.

C. Definition of Physical or Mental Impairment (29 C.F.R. § 1630.2(h))

In this section, the EEOC emphasized that the enumeration of bodily systems provided is not exhaustive, just as the list of mental impairments is not exhaustive. The EEOC has also supplemented these definitions by:

a. Adding the immune and circulatory systems to the list of major bodily functions.

b. Changing the term mental retardation to "intellectual disability."

D. Definition of Major Life Activities (29 C.F.R. § 1630.2(i))

In this section, the EEOC emphasized that the list of major life activities enumerated is not exhaustive. Changes in this section include:

a. The inclusion of the following additional enumerated major life activities: eating, sleeping, standing, sitting, reaching, lifting, bending, reading, concentrating, thinking, communicating, and interacting with others. Some of these activities were rejected by the courts as not constituting a major life activity (see *Smith v. Flying J*, No. 09-433, 2010 U.S. Dist. LEXIS 131393 (D.N.M. 2010) ("As an initial matter, 'concentration' is not considered a major life activity by the Tenth Circuit."); *Battle v. Mineta*, 387 F. Supp. 2d 4 (D.D.C. 2005) (holding that the ability to interact positively with others is not a major life activity, being generally "too undefined, indistinct, and unlike the sort of activities that have been held by other courts to be major life activities")).

b. The inclusion of "major bodily functions" (including the operation of an individual organ within a body system) as a major life activity, including functions of the immune system, special

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