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APPENDICES

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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Practices
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Education
J.D., Duke University School of Law, 1976
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Board certified in labor and employment law by the Texas Board of Legal Specialization

Experience
For 45 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.

Mr. Kizziar has served as chairman of The University of Texas Law School Conferences on the Americans with Disabilities Act and chairman of The University of Texas Law School Conferences on Developments in Labor and Employment Law.

Professional recognition
- The Best Lawyers in America, labor and employment law 2003-2021
- Selected as the Best Management Labor and Employment Attorney in San Antonio, Texas for 2013, 2019 and 2020 by The Best Lawyers in America
- Texas Super Lawyer, labor and employment law, 2003-2021
- Scene in SA: San Antonio's Best Lawyers, labor and employment law, 2005-2009, 2013-2018
- Listed in Chambers USA: America's Leading Lawyers for Business, Labor & Employment, 2011-2013

Community Involvement
Mr. Kizziar served as chairman of the American Heart Association, San Antonio Division, 2003-2004, and 2013-16; he served on the organization's board of directors from 1991 to 2005 and from 2012 to 2017. In 2004, he received the Paul D. Apgar Award of Excellence from the American Heart Association. Mr. Kizziar served from 1982 to 1988 on the Board of Directors of the San Antonio YMCA. He also serves on the board of directors of the Canyon Lake Sailing Foundation.

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Texas Bar Foundation, life fellow • Federal Bar Association, National Council, past member • Federal Bar Association, San Antonio Chapter, Past President • San Antonio Human Resources Management Association, past officer and board member

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The University of Texas School of Law, J.D., 2012 – *with honors*
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Amber Dodds counsels employers in all areas of employment law. Her advice includes analysis and direction on employment and benefits issues, such as leave administration, employee investigations, use of background checks and consumer reports, employee discipline and preventing harassment and retaliation claims. She drafts employment policies and employee handbooks specific to client industry and management needs. Amber also routinely advises on employee pay practices, such as compliance with overtime, per diem, pay deduction, and exemption classification requirements. She has experience advising clients on compliance with Occupational Safety and Health Act (OSHA) regulations, including the General Duty Clause, Process Safety Management, and a variety of industry or hazard-specific regulations.

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.

Amber served as an intern in the United States District Court for the Western District of Texas with the Honorable Lee Yeakel and the Texas First Court of Appeals with Justice Evelyn V. Keyes.

Noteworthy
U.S. District Court for the Western District of Texas, Intern
Texas First Court of Appeals, Intern
The University of Texas School of Law, *Texas International Law Journal*, Article and Notes Editor
The University of Texas School of Law, Dean's Achievement Award, Outstanding Performance in Business Associations

Community Involvement
YWCA San Antonio, Board of Directors; 2014-2019
Concordia University, Nebraska, Personnel Committee

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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 remained at higher levels than prior to the ADAAA. Between 2015 and 2017, the average number of disability-based claims brought per year was at its highest levels, between 26,838 and 28,073. In the most recent three years (2018-2020), however, the annual average has been slightly lower, between 24,237 and 24,065, approximately 14 percent below the all-time high of 28,073 in 2016.

II. 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 sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions.

c. Indicating that the term "major" as a descriptive of life activities is not to be interpreted strictly to create a demanding standard for disability.

d. Emphasizing that whether an activity is a "major life activity" is not determined by reference to whether it is of "central importance to daily life."

E. Definition of "Substantially Limits" (29 C.F.R. § 1630.2(j))

The EEOC declined to follow the instructions of Congress to affirmatively define "substantially limits." Instead, the EEOC set out the parameters in nine rules of construction "that must be applied in determining whether an impairment substantially limits a major life activity." The nine rules are summarized below:

a. The term must be broadly construed in favor of expansive coverage, to the maximum extent permitted under the ADA. "Substantially limits'' is not meant to be a demanding standard.

b. An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. However, not every impairment will constitute a disability.

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 an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment "substantially limits" a major life activity should not demand extensive analysis.

d. The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term "substantially limits" must be interpreted and applied to require a degree of functional limitation that is lower than the standard for "substantially limits" that applied prior to the ADAAA.

e. The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis. Nothing in the regulation is intended, however, to prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate.

f. The determination of whether an impairment substantially limits a major life activity must be made without regard to the ameliorative effects of mitigating measures. However, the ameliorative effects of ordinary eyeglasses or contact lenses may be considered.

g. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

h. An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.

i. The six-month "transitory" part of the "transitory and minor" exception to "regarded as" coverage does not apply to the definition of disability under the "actual disability" prong or the

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