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S T A P L E T O N**

Navigating the Family Medical Leave Act and the Americans With Disabilities Act

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Americans with Disabilities Act (“ADA”)

Best Practices for Your School

The ADA Amendments Act

- Significantly expanded the scope of the ADA and complete shift in ADA analysis.
- Provides an illustrative list defining "major life activities," a term which the ADA left to the courts to define.
 - "Major life activities" include, but are not limited to, "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."
 - Also includes major bodily functions within this definition, with the intent of including certain kinds of diseases and cancers within the definition of a "disability."
- Overturns US Supreme Court precedent that strictly defined "substantially limits" as an impairment that "prevents" or "severely restricts" a major life activity. The ADAAA requires this term to be defined more inclusively and in light of the purposes of the ADA and the ADAAA.
 - Further, the impairment may substantially limit a major life activity even if it is episodic or in remission, which previously was not the case.
- Overturns US Supreme Court precedent that required corrective or mitigating measures and devices to be considered in assessing whether an individual is "disabled." Under the ADAAA, the determination of whether an individual has a disability must be made *without* reference to such measures and devices.
 - Interestingly, eye glasses and contact lenses can still be considered.

How does ADAAA impact your school and what should you do?

- Provide ADAAA training to supervisors and managers.
 - Even with the amendments, the ADA still prohibits medical inquiries and examinations, except in limited circumstances such as when an employee requests a reasonable accommodation and his/her disability is not obvious.
- Review existing ADA-related policies and procedures to ensure they comply with the ADAAA.
- Review each job description to ensure it accurately describes the essential functions of the position.
- Employers must protect the confidentiality of medical information by keeping it in secure files separate from the general personnel files.
- Employers should expect an increase in the number of employees requesting accommodation under the ADA as a result the ADAAA. These requests must be carefully analyzed in accordance with ADAAA.

First Crucial Step – Before Hiring

- Position Descriptions
- “Proof positive” of what duties a school considers “essential functions of the job” for purposes of determining reasonable accommodations.
- Your judgment as to which functions are essential, and a written job description prepared before advertising or interviewing for a job will be considered by EEOC as evidence of essential functions. Other kinds of evidence that EEOC will consider include:
 - the actual work experience of present or past employees in the job
 - the time spent performing a function*
 - the consequences of not requiring that an employee perform a function
 - the terms of a collective bargaining agreement.

Essential Functions of the Position

- The basic job duties that an employee must be able to perform, with or without reasonable accommodation.
- You should carefully examine each job to determine which functions or tasks are essential to performance (this is particularly important before taking an employment action such as recruiting, advertising, hiring, promoting or firing).
- Factors to consider in determining if a function is essential include:
 - whether the reason the position exists is to perform that function,
 - the number of other employees available to perform the function or among whom the performance of the function can be distributed, and
 - the degree of expertise or skill required to perform the function.

What is a Reasonable Accommodation?

- It is a violation of the ADA to fail to provide reasonable accommodation to the known physical or mental limitations of a qualified individual with a disability, unless to do so would impose an undue hardship on the operation of your business.
- Reasonable accommodation is any change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to participate in the job application process, to perform the essential functions of a job, or to enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities. For example, reasonable accommodation may include:
 - acquiring or modifying equipment or devices,
 - job restructuring,
 - part-time or modified work schedules,
 - reassignment to a vacant position,
 - adjusting or modifying examinations, training materials or policies,
 - providing readers and interpreters, and
 - making the workplace readily accessible to and usable by people with disabilities.
- Reasonable accommodation also must be made to enable an individual with a disability to participate in the application process, and to enjoy benefits and privileges of employment equal to those available to other employees.

The “Interactive Process”

- Schools must engage in an interactive process with the employee to identify reasonable accommodations.
- Document efforts to discuss with employee.
- Seek insight from doctors, experts in the field, Job Accommodation Network (“JAN”). (Caution)
- The more discussion the better.

Undue Hardship

- Undue hardship means that an accommodation would be unduly costly, extensive, substantial or disruptive, or would fundamentally alter the nature or operation of the business.
- Factors to determine undue hardship include:
 - accommodation,
 - the employer's size,
 - financial resources, and
 - the nature and structure of its operation.
- If a particular accommodation would be an undue hardship, you must try to identify another accommodation that will not pose such a hardship.
- If cost causes the undue hardship, consider whether funding for an accommodation is available from an outside source, such as a vocational rehabilitation agency, and if the cost of providing the accommodation can be offset by state or federal tax credits or deductions.
- You must also give the applicant or employee with a disability the opportunity to provide the accommodation or pay for the portion of the accommodation that constitutes an undue hardship.



**EEOC GUIDANCE ON
APPLYING PERFORMANCE
& CONDUCT STANDARDS
UNDER THE ADA**

Performance standards under the ADA:

- The same quantitative & qualitative requirements for performing essential functions apply to all employees.
 - But, an employer may have to provide a reasonable accommodation to enable the employee to meet such requirements.
- The same evaluation criteria that applies to employees without disabilities applies to disabled employees.
- If, in response to a lower performance rating, an employee reveals a disability is causing the performance problem, the employer still may give the lower rating.

Performance standards continued...

- An employee with a disability is not required to ask for a reasonable accommodation at a certain time.
- If an employee first asks for an accommodation in response to a low performance rating or counseling:
 - Finish the counseling or evaluation.
 - Begin the “interactive process”.
- Cannot withdraw a work at home arrangement or a modified schedule provided as a reasonable accommodation because the employee is given an unsatisfactory performance rating.

Conduct Standards Under the ADA:

- An employer may discipline a disabled employee for violating a conduct standard, where the disability did not cause the violation.
- An employer may discipline an employee whose disability causes violation of a conduct standard, if the conduct standard is:
 - Job-related & consistent with business necessity, and
 - Applied consistently to all employees.
- If an employee first raises disability and/or need for accommodation in response to counseling or discipline for misconduct:
 - If appropriate discipline is termination, can continue without further discussion.
 - If less than termination, can discipline but must begin “interactive process”.

Conduct standards continued...

- An employer may enforce conduct rules that are not found in workplace policies, employee handbooks, or similar documents if they are:
 - Job-related and consistent with business necessity, and
 - Applied consistently to all employees.
- An employer cannot require an employee to receive or change treatment for a disability to comply with a conduct standard.

Considerations:

- An employer should not mention an employee's disability during a discussion with the employee about a performance or conduct problem.
- When discussing performance or conduct problems with an employee who has a known disability, an employer may ask if the employee needs a reasonable accommodation.
- An employer must provide a reasonable accommodation to a disabled employee who needs the accommodation in order to be able to discuss a performance or conduct problem.
- Under certain circumstances, an employer can require an employee who is having performance or conduct problems to provide medical information or undergo a medical examination.
- An employer who has a sufficient basis for requesting medical information or requiring a medical examination is not required to take such steps instead of imposing discipline for poor performance or conduct.

Attendance issues & the ADA:

- The ADA does not require an employer to exempt an employee with a disability completely from time & attendance requirements, but modifications may be required as a reasonable accommodation.
- If a disabled employee waits until after attendance problems occur to request an accommodation:
 - If termination warranted, can proceed without considering the disability.
 - If termination is not warranted, can impose lesser discipline, but must begin “interactive process”.

Best Practices

- Presume everyone meets definition of “disabled” under the ADAAA
- Document, Document, Document
 - Initial request
 - Doctor’s records
 - Subsequent conversations and all actions/efforts related to “interactive process”
 - Position description analysis by 3rd party
- EPL Insurance: To have or not to have

Warning Signs

- Attorney
- Use of legalese or cites in documents
- Unwillingness to bend or in good faith engage in the “interactive process”

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The Family Medical Leave Act (“FMLA”)

What Every Employer Needs to Know

First question – are you a Covered Employer?

- 50 or more employees; or
 - Public employers are covered regardless of number of employees
- (Caution)

Who is an “Eligible Employee”?

- Employed for at least 12 months (during a 7-year period); **and**
- Employed for at least 1250 hours during the 12-month period immediately preceding commencement of leave; **and**
- Employed at worksite where 50 or more EEs are employed by the ER within 75 miles of worksite. (“Surface” miles, not linear).

Who is Entitled To Leave?

- Birth or Adoption of Child
- Care of Family Member's Serious Health Condition (clarifies that employee need not be the only one available for care)
- Own Serious Health Condition
- Military Caregiver Leave (recent changes)
- Qualified Exigency Arising from Military Leave (recent changes)

Who is a “family member” or a “child” for purposes of FMLA?

- **“Family Member”**: an employee's spouse, children (son or daughter), and parents are considered immediate family members. The term "parent" does not include a parent "in-law."
- **“Child”**: a “biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis (one with day-to-day responsibility to care for or financially support a child) who is under 18 years of age or 18 years of age or older who is incapable of self-care because of a mental or physical disability.”

Definition of “Serious Health Condition”

- Period of incapacity must be more than 3 consecutive “full” calendar days and either (1) 2 visits to health care provider; or (2) treatment by provider with at least one visit that results in continuing treatment.
- First visit to health care provider must be within 7 days of the start of incapacity.
- “Continuing treatment” – treatment two or more times by a health care provider must take place within 30-day period.
- Chronic conditions requiring periodic visits, such visits must take place at least twice a year.
- “Health care provider” expanded recently...not just a physician.
- For a current service member, a serious injury or illness is one incurred in the line of duty on active duty that may render the service member medically unfit to perform the duties of his or her office, grade, rank, or rating and includes injuries or illnesses that existed before the beginning of the member’s active duty and were aggravated by service in the line of duty on active duty in the Armed Forces.

Employee Notice Requirements

- Allows employer to deny FMLA leave if employee fails to follow notice and procedural requirements for requesting leave and calling in absences.
- Same requirements for 30 days advance notice or as soon as practicable (all qualified exigencies).
- *Caution: Clinkscale* case (8th Cir.)

Employer Notice/Posting Requirements

- General Notice: Every covered ER must post; in addition, if covered ER has eligible EEs, a second notice is required (either handbook or other benefits forms or separate notice upon hire).
- Eligibility Notice: ER has 5 business days to provide EE with written notice of eligibility (or non-eligibility) the first time EE takes FMLA-qualifying leave within 12-month period.
- Designation Notice: ER must provide EE notice that leave has been designated as FMLA leave within 5 business days of when ER has sufficient information to determine FMLA-qualifying.
- ER obligated to translate notices where significant portion of workers are not literate in English.
- Sample forms available at www.dol.gov – USE THEM.

Eligibility and Medical Certifications

- Limitations on discussions with health care provider clarified (i.e. may call to clarify handwriting or understand meaning and purpose).
 - Such call may not be made by employee's direct supervisor.
 - Any further discussions require employee's permission (i.e. compliance with HIPAA).
- ER has 5 business days to provide EE with copy of 2nd/3rd opinion.
- Does not apply to military leave provisions.

Impact of Employee's Failure to Comply

- Employer may deny leave if employee refuses to release relevant medical records to individual rendering second or third opinion.

Light Duty Assignments

- Time spent performing “light duty” work does not count against an employee’s FMLA leave entitled.
- Employee’s right to restoration is suspended during period of time the employee performs light duty (or until the end of the applicable 12-month FMLA leave year).
- If employee is voluntarily performing light duty work, employee is not on FMLA leave.

Recertification

- ER may request recertification every 6 months in connection with an absence
- Circumstances may arise where ER can seek recertification in less than 30 days
- ER may request same information on recertification as is permitted during initial certification.
- ER may provide MD with EE's attendance records and inquire as to whether need for leave is consistent with the EE's serious health condition.
- Does not apply to military leave provisions.

Intermittent Leave

- Employer must account for intermittent leave “using an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave provided that it is not greater than one hour.”
- May require use of longer periods if physically impossible to report to work (i.e. flight attendants, or if designed to address other policy issues such as chronic tardiness).

Return to Work and Fitness for Duty Certifications

- Must include notice that a fitness for duty certification will be required in the initial FMLA designation notice.
- If notice provided, and employee fails to provide such certification, employee loses right to reinstatement (unless employee has requested additional FMLA leave).
- Interplay of fitness for duty certifications and intermittent leave: employer prohibited from requesting certification after each intermittent leave absence; however, employer may require certification every 30 days if employee has used intermittent leave during that period and “reasonable safety concerns exist regarding employee’s ability to perform his or her duties.”
- Employer may not terminate employee while awaiting fitness for duty certification.

Special Rules for Employees of Local Educational Agencies

- Employees *may* be required to follow special rules for the following leaves:
 - Caring for serious health condition of Employee's spouse, son, daughter, or parent;
 - Employee's serious health condition that makes it impossible to perform the functions of their position; and
 - Service member Family Leave.

Special Rules for Employees of Local Educational Agencies

■ When:

- Leave is ***foreseeable*** based on a planned medical treatment;
- Leave is ***covered***; and
- Employee will be on leave for ***greater than 20%*** of the total working days.

■ How:

- If an employee meets the above qualifications, the school may require an employee to:
 - ✓ Take leaves of absence for periods of particular duration; or
 - ✓ Temporarily transfer an employee to alternative position.

Leave More Than 5 Weeks Prior to End of Term

- For the most common forms of leave, eligible employees taking leave more than 5 weeks prior to the end of the academic terms can be required to take leave until the end of the term if:
 - The leave is at least 3 weeks in duration; or
 - The return of employment would occur during the 3-week period before the end of such term.

Leave Less Than 5 Weeks Prior to End of Term

- For the most common forms of leave, eligible employees taking leave less than 5 weeks prior to the end of the term may be required to continue taking leave until the end of the term if:
 - The leave is greater than 2 weeks in duration; or
 - The return of employment would occur during the 2-week period before the end of such term.

Leave Less Than 3 Weeks Prior to End of Term

- For the most common forms of leave, eligible employees taking leave less than 3 weeks prior to the end of the term and the duration of leave is greater than 5 working days, the school may require the employee to continue taking leave until the end of such term.

Questions?

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