Firehouse Lawyer

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Inside This Issue

ADA Amendments Act of 2008

Last month, the President signed the ADA Amendments Act of 2008, which has an effective date of January 1, 2009. The clear legislative intent is to return to the original intent and broad protections of the disabled inherent in the 1990 Americans with Disabilities Act. Since 1990, certain U.S. Supreme Court decisions had narrowed the definition of disability. Fewer persons with serious health conditions were considered a "qualified individual with a disability" under the ADA, as interpreted by the Court.

The ADAAA expressly rejects the Court's decision in *Sutton v. United Airlines,* which held that mitigating measures must be considered in determining whether an individual is disabled in the first place. The new legislation also rejects *Toyota v. Williams,* which defined narrowly the concept of a "substantial limitation" in the major life activity of working. Such decisions made it harder for ADA plaintiffs to prove they were "substantially limited in a major life activity." Instead, the ADAAA makes it clear that Congress intends broad coverage under the Act, to the maximum extent permitted by the law. The ADAAA declares that current EEOC regulations on that point are inconsistent with congressional intent by expressing too high a standard for proving that a condition "substantially limits" a person's functioning. Of course, this means that the EEOC will have to promulgate new regulations to assist in interpreting the Act as amended.

In rejecting *Sutton,* the ADAAA states that "the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures." Employers are therefore prohibited now from considering medication, medical supplies, equipment, or appliances, prosthetics, hearing aids, and the like in applying the definition of disability. This therefore broadens the definition or increases the segment of the population that would be a "qualified individual with a disability". The ADAAA also explains and broadens the meaning of "major life activity". Basically, the statute at one point essentially provides that operation or function of any bodily organ or system is a major life activity.

In a clarification that I believe is not a major change, the ADAAA allows

a person to prove they are "regarded as" disabled, when there is an *actual or perceived* impairment, irrespective of whether it involves a major life activity. The "regarded as" definition now does make it clear that a "transitory or minor" impairment does not fit within that particular definition.

The upshot of this amendment, it seems to the Firehouse Lawyer, is that the federal law, as amended, is now quite broad and comprehensive, and now is more similar to the Washington State Law Against Discrimination, which has been interpreted quite broadly in favor of disability protections. Of course, this may cause plaintiffs to choose federal court more often than they have before, at least in this State. Our advice to employers will not unduly change in light of these amendments, but caution and accommodation are ever more important.

COMPENSATORY TIME USAGE – FURTHER CLARIFICATION

Last month, we included a short article on the proposed FLSA amendments designed to clarify *when* the employer must grant the employee's request to use earned comp time. In short, we noted that the thrust of the amendment in question was to allow a "reasonable time" to allow such compensatory time use. A recent article in Thompson Publishing Company's *Fair Labor Standards Handbook* shows further discussion is warranted. (By the way, this publication is excellent and is my main resource for FLSA research for my fire service clients. I highly recommend it.)

Those who read last month's article—or indeed who read the amendments—may still have the question: "But how long is a reasonable time?" Alternately phrased, "How long is too long" to delay allowing the employee to use the comp time they have earned? In the *Fair Labor Standards Handbook* article the author noted that courts have upheld a wide range of time periods as being reasonable, from 30 days in the *Houston Police* case to one year in the Ninth Circuit's *Mortensen* case (see last month's *Firehouse Lawyer* for discussion of *Mortensen*). Of course, the author noted, shorter time periods are more likely to pass muster, and I agree that even in this Circuit it would be better not to tempt fate by approaching the *Mortensen* time limit. A year is a long time and perhaps unreasonably long in some circumstances. Finally, as the author suggested, and again I agree, why not define in the negotiated collective bargaining agreement what the parties expect as the "reasonable time" for allowing the comp time to be used? I suggest a section something like this be bargained into the

union agreement:

> "With respect to an employee's use of earned compensatory time, the parties mutually agree that an employee shall be entitled to use compensatory time on the dates requested or within a reasonable time thereof. The alternative dates suggested by the employer should be within six months of the dates requested, absent extenuating circumstances. The employer may deny a compensatory time request, if it finds that the request would be unduly disruptive to fire department operations or administration. In making such a determination, the employer may consider factors such as:
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> 1. Whether the request would necessitate overtime;
> 2. Whether the request would cause staffing to fall below required minimum levels or create a safety threat;
> 3. Whether the request would otherwise cause undue hardship to the employer."

MODEL POLICY ON PHOTOS AND VIDEO

In recent issues I have alluded to the Florida controversy regarding liability or other consequences arising from emergency scene photographs that are inappropriately published. Last month I mentioned a model policy I have developed. Due to a significant number of requests for a copy of the model policy, I have decided simply to reprint it here in the newsletter for all to use, critique, re-draft, etc. Consider this a rough draft, if you will, because I developed it from scratch, having found no models or templates to guide me in drafting. Put your thinking caps on. My objective is to start your thinking process on this issue. Here it is for your perusal:

Policy on Photographs and Video

Purpose and Scope:

This policy is intended to provide guidance and regulation of the taking, use and disposition of photographs and video, primarily by members of this fire department, at emergency scenes to which this department responds or in non-emergency situations. The policy recognizes the usefulness of such media, for training, quality assurance, and also for educational purposes. However, creating, using and disposing of such media must be managed with care so as to protect the privacy and modesty interests of various persons that may be depicted in such media, particularly patients and other members of the public. Therefore, the Board has approved this policy, which applies to all department operations, whether located within this jurisdiction or outside the jurisdiction, such as mutual aid responses. This policy shall be included in new member orientation and shall be the subject of annual training and reminders for all personnel. Violation of this policy may result in discipline. This policy should be read together with, and construed consistently with, the policy on use of computers, e-mail, and the internet.

Taking of Photos and Video

The creation or taking of photos and videos, at emergency scenes and on the fireground, shall be allowed but only with the permission of the incident commander or a Chief Officer. Ideally, such permission should be obtained in advance, i.e. before taking the photo or video. In the creation or staging of the photograph, all members shall be mindful of the need to depict only those portions of the patients' anatomy needed for the training or educational purpose of the photo. Since all department members are trained to be protective of patient privacy and confidentiality, every effort will be made to protect patients and other members of the public from intrusive media attention or photography, within the parameters or boundaries of the emergency scene, to the extent practical. It is recognized, however, that it is not possible or appropriate to prohibit other persons (non-members of the department) from taking photos or videos from or in other public places, near but outside of the emergency "perimeter".

Taking photographs or videos of department personnel, equipment or facilities for private or commercial use without prior written permission of the Fire Chief is strictly prohibited.

Use of Department Photos or Video

Photographs or videos taken at emergency scenes by department members shall only be used for training, quality assurance, or education (including public education, when permitted). Under no circumstances, should such media be shared with, or shown to, non-members of the department, except with the prior written approval of the Fire Chief or his designee. This limitation applies also to mutual aid calls involving members of other departments. Photos or Video taken by department members may only be shown or included in public education media, such as election materials, open house posters, newsletters, and the like, when patients are visible, if such depictions of patients are minimal, or if more than minimal, used with the written permission of the patient. A "minimal" depiction of a patient means that the viewer cannot in any manner identify the patient, and can visualize little or no part of the patient's unclothed anatomy, even by using magnification. Non-emergency photos or video may be included in such publication education media, but the privacy interests of the public should still be considered.

Disposition of Photos and Video

Once such photos and video have served the training, quality assurance, or other educational purposes for which they were created, they should be destroyed and/or deleted from the memory of whatever medium in which they are stored.

So there you are. Readers should feel free to let me know of anything they believe is missing or wrong with this draft model policy.

DISCLAIMER