BAKER DONELSON
BEARMAN, CALDWELL & BERKOWITZ, PC

Taking Flight:
The 30,000 Foot View of Some of the Top Compliance Issues Facing Today's Employers

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EXPAND YOUR EXPECTATIONS℠

What's new, what's hot, what's next?

- In the ever-changing landscape of the HR industry it is becoming more and more crucial to stay on top of the changes in legislation and the real issues employers are facing in the courts and administrative agencies.
- This program will provide you with an overview of some of the most prevalent issues facing employers today.
- Other programs during the conference will look at some of these issues in greater depth.
- Let's get started…

Here they come…

- One of the most prevalent issues facing employers is the drastic increase in Wage and Hour litigation.

- The DOL's Wage and Hour Division, through its Deputy Administrator Nancy J. Leppink, announced on May 21, 2010 **that the agency would be pursuing an aggressive auditing and enforcement policy.**
  - Leppink noted that the DOL would target employers that "have been setting the pace in the race for the bottom of the compensation scale," pointing to things like misclassifying workers as independent contractors or otherwise treating qualifying employees as exempt from the payment of overtime as examples.

Wage and Hour Issues

- The Fair Labor Standards Act requires nonexempt employees to receive overtime premium pay for every hour worked in excess of 40 hours per week.
- Under the FLSA, hours worked includes **<u>all</u>** hours worked, not the hours you ask your employees to work. There can be a big difference!
- FLSA litigation is currently a hot issue not just for the DOL but also for the plaintiff's bar. These cases are easy to bring and lend themselves handily to class actions.
- Telecommuting/"Pervasive Workplace"- the ability to work anywhere, anytime, can expose employers to potential lawsuits for nonexempt employees working at home – off the clock - and in some cases this concern can apply to exempt employees too.
- With the increased use of technology, you can also expect "BlackBerry"/PDA claims to increase.

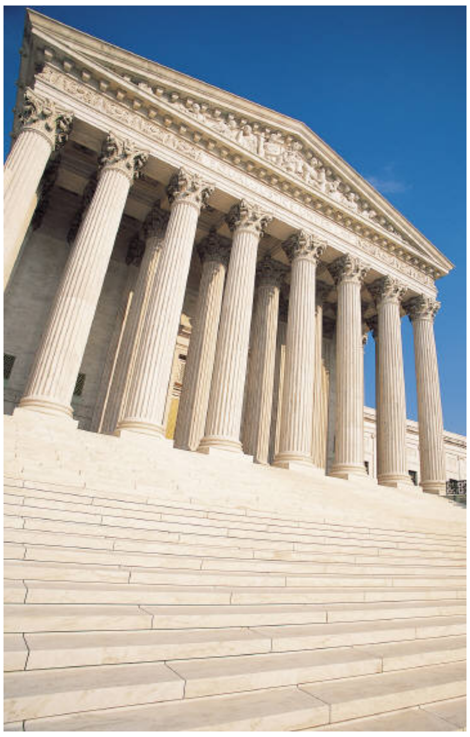
Steps to Avoid Potential FLSA Claims

- Watch for employees embellishing their time for after hours or offsite work via PDAs, BlackBerries, etc.
- Strictly enforce policies requiring prior approval for "after hours" work by nonexempt employees, but not by withholding compensation.
- Make sure supervisors understand the FLSA requires employers to capture <u>all</u> working time for nonexempt employees.

Avoiding Wage and Hour Issues and Claims

- Make sure you have a Compensation Policy that includes a "safe harbor" provision.
- Require employees to report potential or perceived compensation issues.
- Investigate and remedy, if necessary.
- Err in favor of compensation. If you can't prove the employee is not entitled, it's probably better to pay them.
- Require employees to report ALL time worked, including checking emails, cell phone calls after hours, etc.
- Discipline employees for failing to adhere to any overtime policy.
- These steps can help avoid three year statute of limitations, liquidated damages and attorney's fees.

Fair Pay Act



- In 2007 the U.S. Supreme Court decided *Ledbetter v. Goodyear Tire & Rubber Co.*, in which it ruled that the plaintiff was barred from recovery by the statute of limitations.
  - According to the Supreme Court, the statute of limitations began to run when the discriminatory pay decision *was made*, not when it was discovered by the employee.
  - Plaintiff, Lilly Ledbetter, was therefore not able to pursue her gender discrimination claim based on disparate compensation, despite the fact she brought her action as soon as she learned of the perceived inequity.

Fair Pay Act, *continued*

- Congress effectively reversed the Supreme Court with the enactment of the Fair Pay Act, the first piece of legislation signed into law by President Obama.

- The Fair Pay Act operates to renew the applicable federal statute of limitations each time an employee is impacted by a discriminatory practice, thus renewing the limitations period each time the employee is paid.

Fair Pay Act, *continued*

- Compliance is theoretically simple, just don't consider membership in a protected class in making compensation decisions. But how do you protect your organization?
  - Implement policy that, among other things, requires reporting of perceived disparity.
  - Require legitimate, non-discriminatory reasons for compensation decisions to be memorialized in writing, especially if a compensation disparity exists.
  - Keep an eye on statistical disparities and avoid adverse impact claims.

The ADA Amendments Act

- The ADA did just celebrate its 20th anniversary. That does not mean, however, that we can ignore its mandates or amendments.
- As of January 1, 2009, the ADA Amendments ACT (ADAAA) became effective.
- The purpose of this revision to the ADA is to expand the definition of "disability" which
- has been narrowed by recent United States Supreme Court decisions.
- The ADAAA expands the definition of disability through the "major life activity" analysis.

Major Life Activities

- The ADA was previously silent on what would constitute a major life activity, however, the ADAAA has introduced a non-exhaustive list that includes:
  - Communicating
  - Bending
  - Reading
  - Normal cell growth
  - Endocrine functions
  - Neurological and brain functions
    - Immune system
    - Reproductive functions
    - Digestive, bowel and bladder
    - Respiratory and circulatory functions
  - Neurological and brain functions

So What Do We Do Differently?

- Focus on the interactive process with the qualified employees. It is ALL about the interactive process!!!

- Keep records of requests made, accommodations made or denied, and the basis for those decisions.

- Make sure job descriptions thoroughly and accurately describe the essential functions of the jobs.

- Revisit and review requests for accommodation that have been previously denied.

Reliance on Conviction Records

- There is no Federal law that clearly prohibits an employer from asking about arrest and conviction records, but using such records as an absolute measure to prevent an individual from being hired could limit the employment opportunities of some protected groups and therefore can be problematic for employers.
- The EEOC has recently taken a sincere interest in employers' reliance on conviction records in making employment decisions. The EEOC takes the position that the use of criminal conviction records has an adverse impact on racial minorities and is therefore unlawful, absent a business necessity.
  - Business justification rests on issues of job-relatedness and credibility, a blanket exclusion of people with arrest records therefore "will almost never withstand scrutiny," according to the EEOC.

Making sure your penny saved does not lead to thousands lost.

- In our current economic environment employers are looking for ways to save money so the doors can stay open.
- Over the past few years employers have tried several different approaches, including Reductions in Force, Furloughs, and hiring of Independent Contractors.
- None of these measures are easy from an HR standpoint, but sometimes they are necessary so everyone does not lose their job.
- So how do you proceed legally?

Discrimination with Reductions in Force

- Reductions in force (RIF) can often lead to claims of employment discrimination.
- To avoid these claims, employers should review and double check all employees selected for a RIF to ensure the application of RIF selection factors was consistent, non-discriminatory, and can be defended if challenged.

When implementing a Reduction in Force, you should:

- Establish clear guidelines for the selection of employees affected by your reduction in force,
- Analyze job categories and identify which positions will be affected,
- Review protected categories and the impact on employees within those protected classes, and
- Create a clear record of selection decisions.

Independent Contractors

- Governmental agencies are increasing scrutiny on employer's use and classification of independent contractors:
  - DOL has set aside $25 million to enforce improper classification
  - IRS has announced it will audit 6,000 companies
- A 2000 Department of Labor (DOL) study found that 30 percent of firms misclassify their employees as independent contractors.
- Employee Misclassification Prevention Act (pending legislation) – if enacted would increase the potential liability if the IRS reclassified the workers as employees, would require at least 25% of the DOL Wage and Hour Division's audits focus on potential misclassifications of workers as independent contractors, and would amend the FLSA to require employers to keep records of independent contractors.

DOL Factors For Determining Independent Contractor Relationship

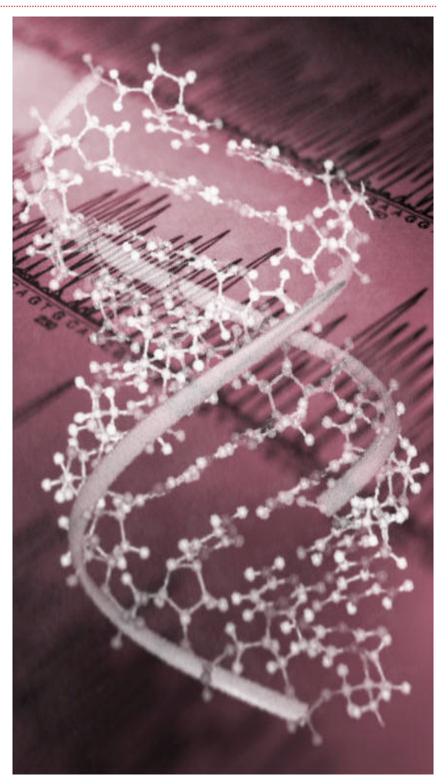
- The nature and degree of the alleged employer's control as to the manner in which the work is performed
- The alleged employee's opportunity for profit or loss depending upon his/her managerial skill
- The alleged employee's investment in equipment or materials required for the task, or the alleged employee's employment of other workers
- Whether the services rendered by the alleged employee require special skill
- The degree of permanency and duration of the working relationship
- The extent to which the services rendered by the alleged employee are in integral part of the alleged employer's business

Best Practices For Independent Contractors

- Relinquish control over all but the final result
  - Hours and location of work
  - Dress
  - Right to discipline
- Do not prohibit from performing work for other entities
- Enter into a written contract outlining the relationship
- Review and analyze existing independent contractor relationships

Genetic Information Discrimination

- Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA), which prohibits genetic information discrimination in employment, took effect on November 21, 2009.
- Under Title II of GINA, it is illegal to discriminate against employees or applicants because of genetic information. Title II of GINA prohibits the use of genetic information in making employment decisions, restricts acquisition of genetic information by employers and other entities covered by Title II, and strictly limits the disclosure of genetic information.



GINA Says…

- Genetic information includes information about an individual's genetic tests and the genetic tests of an individual's family members, as well as information about any disease, disorder, or condition of an individual's family members (i.e. an individual's family medical history). Family medical history is included in the definition of genetic information because it is often used to determine whether someone has an increased risk of getting a disease, disorder, or condition in the future.

- The EEOC says an employer may never use genetic information to make an employment decision because genetic information does not tell the employer anything about an employee or potential employee's current ability to work.

Family Responsibilities Discrimination

- EEOC and Obama Administration initiative focused on inherent bias against women in workplace.

- Includes discrimination against pregnant women and employees with family responsibilities for newborns, other children, elderly parents or ill spouses or partners.

- Litigation claiming bias against workers who care for children or aging parents has increased 400 percent in the past decade, and the average verdict in a FRD case now is more than $500,000, according to a report released by the Center for WorkLife Law in February 2010.

- No federal statute expressly prohibits discrimination based on family responsibilities so most caregiver cases are brought under federal and state antidiscrimination and leave laws (Title VII, FMLA).

Family Responsibilities Discrimination, *continued*

- On August 12, 2010, NBC's "Today Show" ran a story about the disparity between salaries and career tracks of working mothers and other employees. While the story referred to this phenomenon as the "Motherhood Penalty" the idea is the same as that discussed by the EEOC.

- The EEOC has in fact issued a document on employer's best practices to avoid discrimination against workers with caregiving responsibilities. That document is available at: http://www.eeoc/policy/docs/caregiver-best-practices.html.

Social Media in the Workplace

- Practically everyone is catching the social media bug. Social media can lead to very serious problems for employers, and employers are encouraged to be proactive…and realistic.

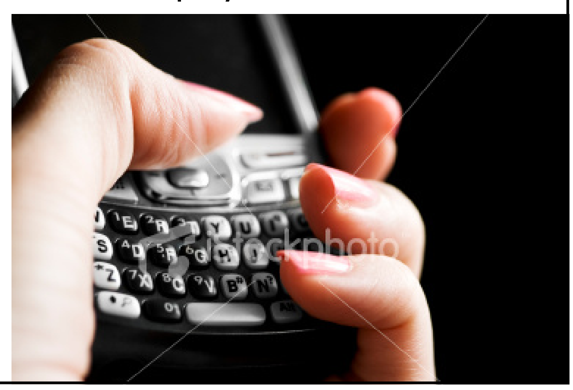
- Employees practically have access to social media sites all day long. If an employee has a Smartphone or PDA he can access a social media site. Employers who do not block social media sites on their systems also provide employees with a direct connection to the world of social media which can open the door to a variety of lawsuits.

- "Social networking" claims, often focus on unfair competition, trade secrets, defamation and/or harassment.

- Examples of social media applications are LinkedIn, Facebook, MySpace, Wikipedia, YouTube, Twitter, Yelp, Flickr, Second Life, Yahoo groups, Wordpress, ZoomInfo, etc.

Social Media Potential Pitfalls

- Anonymity = Myth
- Can post updates from PDAs (especially Twitter)
- Defamatory postings about company
  - Postings can reveal confidential information, leading to liability
  - Postings can reveal status of company projects to competitors
  - Postings can lead to claims of harassment if sexual in nature or about protected characteristics of other employees
- Unprofessional pages
- Inappropriate photographs



You can Manage Social Networking in Your Company!

Consider implementing written policies related to social networking:

- Do not post on company time
- Do not include defamatory or racially or sexually offensive material
- Do not disparage the employer or its products, or a competitor
- Do not use the company logo or any confidential or proprietary information
- Use common sense – The internet is a public forum

That's all folks!

- Be sure to attend the break-out sessions during the conference that discuss some of these topics in much more detail.
- If you have additional questions, please contact me at: tmcconnell@bakerdonelson.com

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Soaring with the Blinders Off:
Doing Business in a Post-ADAAA World

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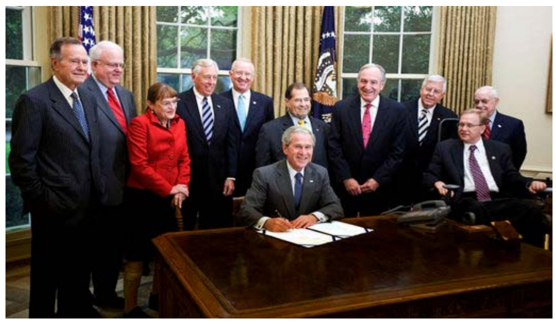
EXPAND YOUR EXPECTATIONS℠

THE NEW ADAAA



- **Signed into law September 25, 2008 by former President George W. Bush**
- **Provisions of the ADAAA became effective January 1, 2009**
- **Considered an expansion of the ADA**
- **Will most likely result in increased legal and administrative expenses for employers**

Out with the old, in with the new….

Issue	ADA	ADAAA
Scope of the Definition of Disability: In General	A **disability** is "a physical or mental impairment that substantially limits a major life activity of an individual." The Supreme Court has narrowly construed this definition to **exclude** coverage to individuals with diabetes, epilepsy, cancer, muscular dystrophy, and artificial limbs.	A "**disability**" is "a physical or mental impairment that substantially limits a major life activity of an individual." ADAAA rejects the Supreme Court's interpretation of "substantially limits" and makes clear that Congress intends to apply a **less demanding** standard than that applied by the courts, and to cover a **broad range** of individuals. Definition of disability shall be construed in favor of broad coverage of individuals, to the **maximum extent** permitted by the terms of the ADA.

More Differences

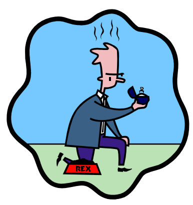
Issue	ADA	ADAAA
Mitigatin g Measures	In *Sutton v. United Airlines*, the Supreme Court said that **mitigating measures** (such as medication or devices) were to be taken into account in determining whether a person was substantially limited in a major life activity. Thus, if medication or devices enabled a person with an impairment to function well, that person was often held by a court **NOT** to have a disability under the ADA – even if the impairment was the basis for discrimination.	The ADAAA provides that the **ameliorative effects** of mitigating measures should **NOT** be considered in determining whether an individual has an impairment that substantially limits a major life activity. An exception is made for "ordinary eyeglasses or contact lenses," which may be taken into account.

More Differences

Issue	ADA	ADAAA
The "Major Life Activity" Requirement	In *Toyota Motor Mfg. of Kentucky v. Williams*, the Supreme Court ruled that a "**major life activity**" must be an activity that is "of central importance to most people's daily lives."	The ADAAA includes a non-exhaustive list of major life activities, such as seeing, hearing, eating, sleeping, walking, learning and concentrating. Major life activities also include the operation of "**major bodily functions**," such as the immune system, normal cell growth, and the endocrine system.

ADAAA Regulations

Proposed…..

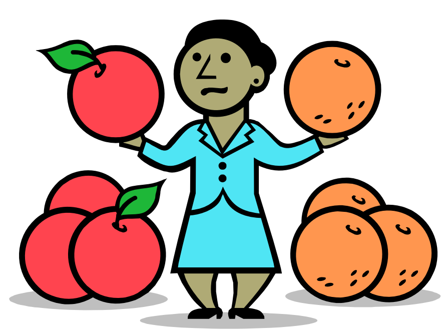


Commented on…..

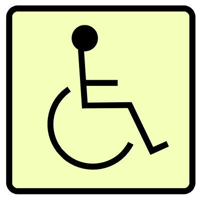
Final Version?

Proposed Regulations

What's the Difference?



Broad interpretation of the term "disability"



- The proposed regulations state that the focus of an ADA case should be on *whether discrimination occurred*, **NOT** whether an individual meets the definition of "disability."

- The proposed regulations note that "because of certain characteristics associated with these impairments, the individualized assessment of the limitations on a person can be conducted **quickly** and **easily**, and will <u>consistently result in a determination that the person is substantially limited in a major life activity</u>."

Broad interpretation of the term "substantially limits"

- Like the ADAAA, the proposed regulations state that a limitation **need not** "significantly" or "severely" restrict a major life activity in order to be considered substantially limiting.

- The proposed regulations also **delete** reference to the terms "condition, manner, or duration" under which a major life activity is performed.

- According to the proposed regulations, an impairment is a disability if it "**substantially limits**" the ability of an individual to perform a major life activity "**as compared to most people in the general population**."

Major Life Activities - - This is MAJOR!

- The ADAAA includes a **non-exhaustive** list of major life activities, to which the proposed regulations add *sitting*, *reaching*, and *interacting* with others.
- The ADAAA also states that major life activities include the operation of **major bodily functions** and lists some bodily functions considered to be major life activities. The proposed regulations add several examples to the ADAAA's list of bodily functions.
- Additionally, the proposed regulations state that an individual whose impairment substantially limits a major life activity is **not also required** to show that he or she is limited in the ability to perform activities of central importance to daily life to be considered an individual with a disability.

Mitigating Measures

- In accordance with the ADAAA, the proposed regulations state that the **ameliorative effects** of mitigating measures are **NOT** to be considered in determining whether an individual is substantially limited in a major life activity.
- However, both the ADAAA and proposed regulations provide that the **use of ordinary glasses or contact lenses** can be considered in determining whether an individual has a disability.

Reasonable Accommodation

- The proposed regulations clarify that **both the positive and negative** effects of mitigating measures can be considered when determining whether a reasonable accommodation is needed and whether an individual poses a direct threat.

- The EEOC's Q/A states "For example, if an individual with a disability uses a mitigating measure which eliminates the need for a reasonable accommodation, then an employer will have **no obligation** to provide one."

"Substantially Limited in Working"

- The proposed regulations provide that the determination of whether an individual is substantially limited in working should be made by addressing whether an individual is limited in the ability to perform a "**type of work**" (such as commercial truck driver).
  - This definition replaces the concepts of a "class" or "broad range" of jobs from the 1991 ADA regulation.

- Therefore, "evidence from the individual regarding his educational and vocational background and the limitations resulting from his impairment <u>may be sufficient</u> for the court to conclude" that he is substantially limited in performing a type of work.
  - Thus, the statistical analysis previously required by some courts will not be needed in order to establish that an individual is substantially limited in working.

Bottom Line for Employers

- Like the ADAAA, the proposed regulations emphasize that the determination of whether an individual is disabled **should not** be the primary focus of ADA cases.
  - Instead, the focus should be on whether prohibited discrimination has occurred.

- Thus, from a practical standpoint, employers in most situations will be better able to defend an ADA lawsuit by showing that they made a **good faith effort** to **accommodate** the employee, rather than by challenging the employee's disability.

What impact will the ADAAA have on the workplace?

- **Increased** number of individuals in the workplace who are protected
- Range of coverage and protections afforded will **expand** significantly
- Likely to be an **uptick** in litigation:
  - Involving the employer's "undue hardship" defense;
  - Individuals claiming to be "regarded as" disabled and
  - First two prongs of the "disability" definition, in the event employers resist the broad coverage envisioned by Congress as incorporated in the ADAAA
- Remove the focus from a "disability" inquiry, and place it squarely on the **interactive process**

Strategies for Compliance

Strategies for ADAAA Compliance: Be Cautious!

- Follow the proposed regulations as if they were already in effect!
  - Even though the proposed regulations are technically not applicable to employers yet, there have been reports that the EEOC is applying them in its investigations of *disability discrimination* charges.
  - But in general, employers are required only to undertake good-faith efforts to comply with the ADAAA's new requirements, which may or may not entail following the approach set out in the proposed regulations.

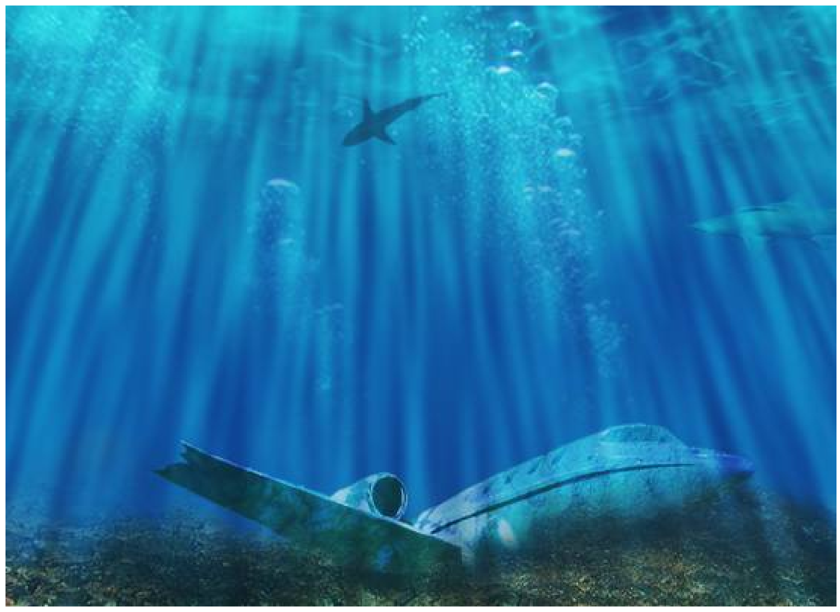
Strategies for ADAAA Compliance: Document, Document, Document!

- It is absolutely critical that employers have the documentation to back up their actions with regard to disabled employees or applicants. In particular, make sure you:
  - Have **current, detailed job descriptions** that specifically identify the job's essential functions.
  - Always **initiate the interactive process** and follow it through to a good-faith resolution.
  - Make sure you **contemporaneously document all employment actions and decisions**, no matter how mundane.

Strategies for Compliance: The Interactive Process

- Employers should review their policies and practices governing the ADA's interactive process, and **focus** on their reasonable accommodations procedures.
- Upon request for a reasonable accommodation, **engage** in an interactive process with employees or applicants regardless of whether medication, aids, or other mitigating measures are available to them.
- If an employee or applicant demonstrates a physical or mental impairment that would limit his ability to request an accommodation, **initiate** an informal interactive process to accommodate the employee.

The Bermuda Triangle of Employment Law:
Interplay Between ADAAA, FMLA and Workers' Compensation



What are the Differences?

- Employers cannot assume that an employee qualifies for protection under all laws, simply because he qualifies under one law.
- Key phrases under each area of law:
  - "**Work-related**" for workers' compensation purposes (i.e., it occurred in the course of and arising out of the employee's employment)
  - A "**disability**" under the ADA
  - A "**serious health condition**" under the FMLA

Purpose of Each Law

- The **ADAAA** prohibits discrimination against employees who are qualified individuals with a "disability."
- The **FMLA** sets minimum leave standards for employees for the birth and newborn care of a child, placement of a child for adoption or foster care, as well as care for an immediate family member with a serious health condition and for the employee's serious health condition.
  - NEW: **Military Caregiver Leave**
  - NEW: **Qualifying Exigency Leave**
- **Workers' Compensation** laws provide for payment of compensation and rehabilitation for workplace injuries while minimizing employer liability.

ADA & ADAAA

- EEOC enforces
- 15 or more employees for each of 20 or more calendar weeks in current or preceding year
- Employee must be qualified and able to perform essential functions with or without reasonable accommodations

FMLA

- DOL enforces
- 50 or more employees within a 75 mile radius for at least 20 weeks in current or preceding year
- Employee who has worked at least 12 months <u>and</u> 1250 hours prior to the start of the leave <u>and</u> works at worksite where 50 or more employees within 75 mile radius

Worker's Compensation

- State Workers' Compensation Commission; In Tennessee, DOL & Courts
- 5 or more employees (state law governs)
- Employee who has an injury arising out of or in the course and scope of employment (possible exceptions)

ADA & ADAAA

- No specific limit on the amount of leave (Reasonable accommodation unless an undue hardship)
- Cannot discriminate with respect to provision of benefits
- Required reinstatement to previous job unless an undue hardship

FMLA

- 12 weeks of leave in defined 12 month period
- Health care coverage continued; other benefit continuation as determined by policy for provision of such when employee on other forms of leave
- Required reinstatement to the same or an equivalent job

Worker's Compensation

- No specific limit on amount of leave
- Not required to be continued (but watch for FMLA coverage)
- No reinstatement requirements under most state laws (but watch for retaliatory discharge)

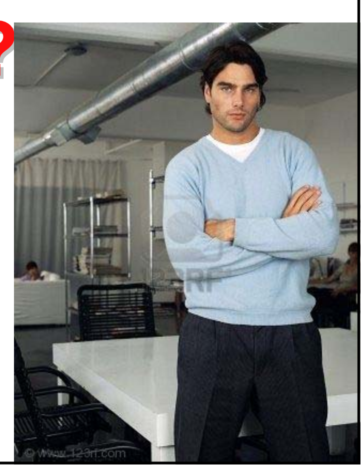
HOW DO I KNOW IF THE SITUATION I'M DEALING WITH FALLS UNDER THE ADA OR THE ADAAA ?

WHAT DO I DO WHEN THE EMPLOYEE'S FMLA LEAVE RUNS OUT?

ARE ALL SERIOUS HEALTH CONDITIONS GOING TO BE DISABILITIES ?

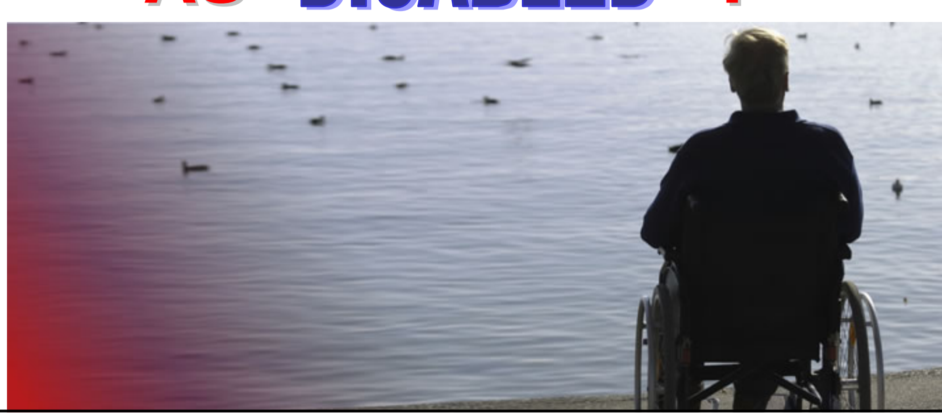
IF AN EMPLOYEE UTILIZES A MITIGATING MEASURE, WHY/HOW WILL I BE EXPECTED TO ACCOMMODATE?

WHAT IF THE EMPLOYEE SIMPLY WILL NOT INTERACT WITH ME?



HOW DO I KNOW IF I'VE LOOKED AT All POSSIBLE ACCOMMODATIONS?

WHAT DOES IT MEAN TO "REGARD" AN EMPLOYEE "AS DISABLED"?



Questions?

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Being a Good Wingman: How HR Professionals Can Assist Lawyers

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Did You Know?

- Sometimes a case is won or lost well before any trial of the matter.
- What happens **before trial** is IMPORTANT!
- Consider:
  - From 2008-09, there were 64,296 cases filed in TN Circuit Courts
    - Of these, there were only 345 jury trials and only 9,187 non-jury trials.
  - Overall, only **0.05%** of cases that are filed nationwide actually make it to trial!

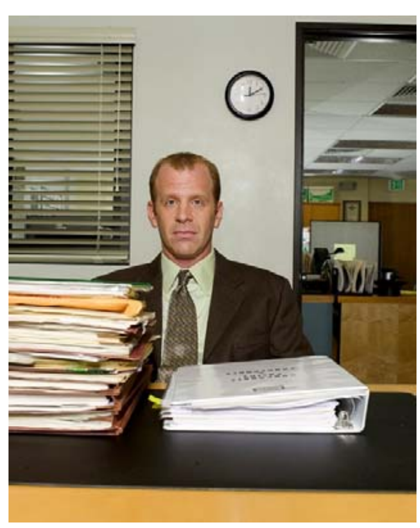
Pre-Litigation Tips

Achieve Your Compliance Goals

- **Educate** yourself on current laws.
- Create an **HR policy manual** and regularly update it.
- Train your **managers**
  - Review policy manual
  - Make sure they understand the expected standards
- Train your **employees**
  - make sure they know the policy manual
  - Provide periodic retraining on important issues, such as sexual harassment.

Document, Document, Document!

- Memories fade over time, and a lack of documentation can leave you vulnerable to HR noncompliance claims.
- Document all key decisions and employee evaluations, establish written policies, keep a written record of important communications, and maintain all personnel files.
- Documentation is critical!



Don’t Wait! Think About It Now

- The wrong time to decide whether an issue is worth fighting about is when you face litigation.
- The **pressure** and **emotion** inherent in litigation can cloud ordinarily clear judgment.
- The result is that litigation decisions control the organization, rather than the organization controlling the litigation decisions.

Decide Now What You’ll Fight for Later

Proactively identify and prioritize legal problems into three categories:

- Those you are willing to **litigate at all costs**
- Those you are willing to settle **only upon favorable terms**
- Those you will manage on a **case-by-case basis**

Know When to Call an Attorney

- Not every decision you make as a Human Resource Professional requires consultation with an attorney, but there are plenty of decision that have hidden legal dangers.
  - Distinguishing between the two can be difficult.
  - Rely on experience, or if possible, talk to an attorney about a monthly, low-cost retainer that provides you with unlimited telephone or e-mail consultations.
- In the end, it is better to spend a relatively small amount on legal fees to prevent what could turn into an expensive litigation process.

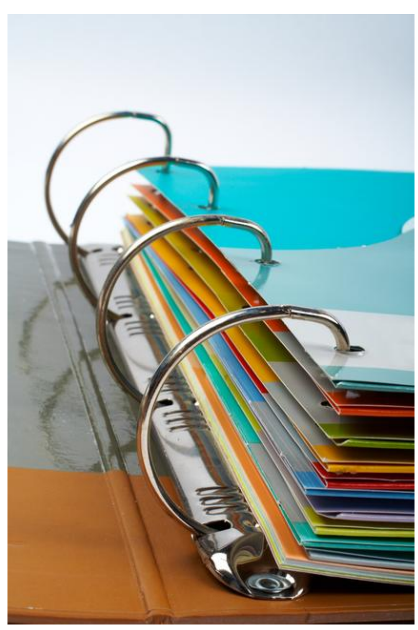
Preventing a Claim Against an HR Professional

- Conduct termination meetings in a **closed door** environment
- If a witness is to be present at the termination meeting, select a witness with **legitimate business reasons** for being present.
- Be able to articulate **concrete facts** that support the allegations made against the employee.
- Be able to explain the **reasonable steps** the employer took to investigate the allegations against the employee
- Be able to prove the employer **did not** conduct a one-sided investigation.

Launching an Investigation

Review Your Policies

- EEO/Harassment
- Workplace Searches
- Discipline/Discharge
- Code of Conduct/Ethics
- Privacy
- Violence
- Technology



Develop an Investigation Plan

- Who will conduct the investigation?
- Who will be interviewed?
- What documents or other evidence must be reviewed?
- What policies are relevant?
- What follow-up will be done after the investigation?

What the EEOC Says About Investigations

EEOC
U.S. Equal Employment Opportunity Commission

- The employer should set up a process for a "**prompt, thorough and impartial**" investigation.
- Where an investigation is necessary, "**it should be launched immediately.**"
- The employer should be prepared to "**undertake intermediate measures* before completing the investigation** to ensure that further problems do not occur."
- The employer should "ensure that the individual who conducts the investigation will **objectively gather and consider the relevant facts**…and should be **well-trained** in the skills that are required for interviewing witnesses and evaluating credibility."

What to Do With the File?

- You've interviewed your witness, reviewed your evidence, drafted a memo to the employees in question, and now you have a **large file** containing witness statements, piles of paper, and various notes and reports. Here's what to do:
  - Take the notes, which are not complete, and **summarize them** into a logical format. BUT keep the notes just to be safe.
  - Make sure you have **everything you need** in the file to document your actions and upon which you based your interviews and questions.
  - Put the file in a **separate locked cabinet** away from the employee file.

Role of HR Professional During Discovery

- HR professionals may not appreciate how important they are the defense team during **discovery**.
- **Discovery** is the point in the lawsuit where each party's legal team sends requests for documents and written responses to questions, and takes ***depositions*** from the parties involved.
- HR professionals are fundamental in fact gathering:
  - Know location of important documents
  - Can identify important witnesses
- Overall, HR Professionals can save the company money!

A lawsuit has been filed, and you (the HR Professional) have been called to give a ***deposition***. What should you expect, and what should you do/not do?

DON'T GO BANANAS!

Good Retention Policies

- First, make sure you protect all documents related to the employee in question.
- Keep any **emails, personnel folders, or any other documents** pertaining to the employee in a safe area.
- Any destruction of information related to the employee could lead to legal complications, like ***spoliation*** of evidence.

Spoliation of Evidence?

- **Spoliation of evidence** is the intentional or negligent withholding, hiding, alteration or destruction of evidence relevant to a legal proceeding.

- Spoliation has two consequences:

  - the act is **criminal** by statute and may result in fines and incarceration for the parties who engaged in the spoliation

  - evidence which might have been altered by the spoliation may be interpreted under a **spoliation inference**, which means the jury can view it in favor of the opposing party.

How Devastating Can Spoliation of Evidence Be?

- Consider:

  - In 2005, Morgan Stanley continued its policy of overwriting e-mail every 12 months, despite the SEC requirement to retain e-mails for 2 years.

  - In a case against Ronald Perelman, Morgan Stanley was unable to produce pertinent information, which led to the court to give Perelman an "adverse inference."

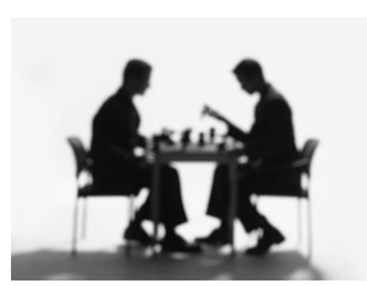
  - This led to a $1.45 BILLION award!!!

What is a Deposition?

- A **deposition** is a legal proceeding at which the lawyer for the plaintiff will ask you questions.
- Your answers to all questions will be **under oath.**
- While the proceeding will be relatively informal, there is little difference between the effect of testimony at a deposition and testimony in the courtroom.

The Purpose of a Deposition

- The plaintiff's lawyer is asking you questions for the following reasons:
  - He/she wants to **find out what you know** regarding the issues in the lawsuit
  - He/she is looking for **evidence** favorable to his/her side's case
  - He/she wants to **commit you** to statements under oath so you will have to tell the same story at trial
  - He/she may be looking for ways to **discredit** your testimony or to discredit the testimony of other defense witnesses through you.



Practical Suggestions for Being an Excellent Witness

Prepare for the Deposition

- Concentrate and reflect on the facts in the case
- However, do not review any documents or discuss the facts of the case with anyone, unless you have checked with your attorney first.
  - Avoids confusion and "fixing your stories"
- If you want to make notes, check with your attorney first.
  - The plaintiff's lawyer has a right to look at any notes or other materials you review in preparation for the deposition.

Give Full Disclosure

- Tell your attorney **<u>everything</u>** before the deposition.
- If your attorney does not know every fact about the case, he or she will be unable to effectively represent your rights during the deposition.
- When in doubt, disclose it!

ALWAYS Tell the Truth, and Do Not Exaggerate

- You are under oath. If you lie, you will be committing perjury.
- Even with regard to a small issue in the case, a false statement will be very damaging to your credibility.
- Do not try to improve upon the facts by **stretching** them. Such efforts are easily exploited by the other side.

Correct Your Answer

- If you discover during a deposition that one of your answers was inaccurate or incorrect, you may correct your prior answer.
- You should say, for example, "I previously gave that answer, but I was confused. The correct answer is…"

Do Not Volunteer Information; Answer Only the Question Asked

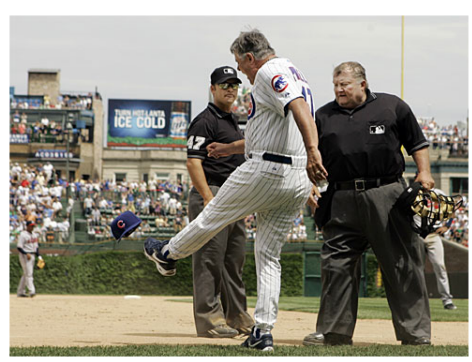
- Volunteered information cannot help the employer's case, and may actually *hinder* it.
- Do not give long-winded or rambling answers. **Short**, **concise** and **responsive** answers are best.
- If the plaintiff's attorney asks the "wrong" question, **do not** help him or her by suggesting the "right" question or "right" answer.

Take Your Time in Answering a Question

- Never answer before the plaintiff's lawyer has finished asking his or her question.
- Once the question has been asked, consider the question carefully and **think through** your answer.
- Take as much time as you need to phrase your answer.
- The deposition transcript does not show the length of time you use to answer. Also, the pause gives your attorney a chance to object, if needed.

Keep Your Emotions In Check

- In some respects, a deposition is a game of wits.
- The opposing lawyer may try to get you **ANGRY** or **excited** in the hope that you will lose your cool and say something that can be used against the employer.
- Be aware of this tactic, and try to stay calm and collected.
- Also, NEVER argue with the plaintiff's lawyer.



Never Joke in a Deposition

- The humor in a deposition would likely not be apparent on the cold transcript
- Making jokes may make you look crude or scornful about the truth.

Conclusion – HR Professionals are Vital!

- **Early coordination** of efforts is key
  - Ask questions early and often!
- **Don't assume** your own expertise
  - When in doubt about a topic, ask a lawyer!
- **Don't add or subtract** information
  - Refrain from filtering information for outside counsel
- **Have a familiarity** with the law
  - Keep up to date on important changes

Questions?