

ADAAA Update: EEOC Issues Proposed Regulations

The EEOC, charged with preparing proposed revisions to the Americans with Disabilities Act ("ADA") regulations and accompanying interpretive guidance to comply with the ADA Amendments Act of 2008 ("ADAAA"), issued its proposed rule (the "Rule") on September 23, 2009. The public will have 60 days from September 23 to submit comments. As expected, the proposed Rule significantly expands the class of employees who are considered "disabled" under the law. Indeed, the Rule requires that the term "disability" be read so broadly that it encompasses impairments that are episodic or are in remission if the impairment would substantially limit a major life activity when active. Moreover, despite the ADA's cornerstone requirement that employers undertake an "individualized assessment," the Rule presupposes that some conditions or impairments will consistently meet the definition of a disability. This list of impairments, which is contained in the EEOC's newly published Questions and Answers guidance, includes:

- autism
- cancer
- cerebral palsy
- diabetes
- epilepsy
- HIV/AIDS
- multiple sclerosis
- muscular dystrophy
- major depression
- bipolar disorder
- post-traumatic stress disorder

- obsessive compulsive disorder
- schizophrenia

In addition to the overly expansive definition of a "disability," the proposed regulation expands the definition of the term "substantially limits," and provides that a limitation need not "significantly" or "severely" restrict a major life activity in order to meet the definition of "substantially limiting". The result would be to increase the number of employees who fall within the scope of the ADAAA.

In addition to the expansive nature of the ADAAA and its implementing regulations, the EEOC is also stepping up its enforcement action and has recently obtained a \$6.2 million dollar settlement with a single employer for alleged ADA violations. Although the initial Charge of Discrimination was filed by a single employee, the EEOC claimed that its investigation revealed hundreds of other employees were also subject to similar disability discrimination.

Given the expansive nature of the ADAAA, its implementing regulations, and the EEOC's increased enforcement, employers should be prepared for a possible increase in requests for reasonable accommodation and increased litigation if such requests are denied. Nevertheless, there are steps that an employer can take now to help minimize the impact of these new developments. First, employers should review and update job descriptions, ensuring that all essential functions of a position are included. Employers should also review their policies and procedures, including leave policies, and evaluate possible changes to minimize the impact of "disabled" employees' requests for reduced leave schedules or extended leaves of absence. Finally, employers should ensure that they fully understand the interplay between the ADAAA, the Family and Medical Leave Act, and workers' compensation laws to avoid the problem of complying with one law while violating another.



Art from page 1

alternative means to obtain the services sought to be prohibited.

Because non-competes are disfavored in Virginia and it is the employer's burden to establish reasonableness of a covenant, it is imperative that the terms, when considered together, are no greater than necessary to protect the employer's legitimate business interests.

Virginia's "Mini-COBRA"

While an employer with less than 20 employees usually is not required to offer federal COBRA benefits, these small employers are typically subject to Virginia's health care continuation law ("mini-COBRA"). Indeed, Virginia's mini-COBRA covers all employers, including those with fewer than 20 employees, who maintain group medical policies or are self-insured. An employee whose group health coverage is discontinued may elect to continue benefits. Normally, if continuation is elected, there is a 90 day coverage period and the total premium for those 90 days must be paid by the employee prior to termination. However, in April, 2009 Virginia adopted a new statute that allows an employee who is involuntarily terminated from a small business to make premium payments monthly and provides a 65% subsidy for up to nine months. To be eligible for the full subsidy, the covered employee must:

- have involuntarily lost his or her job between September 1, 2008, and December 31, 2009;
- earned less than \$145,000 (\$290,000 for joint filers) prior to termination;
- be eligible for continued health coverage under COBRA or Virginia's Mini-COBRA law;
- have been continuously insured under a group policy during the entire three-month period immediately prior to termination of eligibility; and

- not be eligible for coverage under another group plan (such as through a spouse's employer) or for Medicare.

Under the newly enacted Virginia law, employers are required to provide notice to the employee of his/her eligibility for continuing coverage and a subsidy within 30 days following the date of the employee's termination. The employee has 60 days following notification of eligibility to elect continuing coverage.

Pursuant to the mini-COBRA provisions of the American Recovery and Reinvestment Act of 2009, the insurance company is typically responsible for paying the 65% premium subsidy, which it can recoup through a tax credit. The involuntarily terminated employee pays the remaining 35% of the premium costs.

WAW has been serving our clients' legal needs for nearly 160 years, and has attorneys experienced in business, taxation, employment, health care, litigation, estate planning and administration, land use, patent, and intellectual property.



For more information on WAW or the topics discussed in this Brief, please visit us online at www.wawlaw.com