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new ada and proposed feha disability regulations

MSK Client Alert

June 1, 2011

New ADA Regulations

The Equal Employment Opportunity Commission ("EEOC") recently issued its final regulations pursuant to the Americans with Disabilities Act Amendments Act ("ADAAA") of 2008. Congress passed the ADAAA in order to make it easier for claimants to establish that they have a "disability" under the statute. The ADAAA retained the basic definition of "disability" under the ADA (an impairment that "substantially limits" one or more "major life activities"), but broadened the way that the terms were to be interpreted. Congress passed the ADAAA in response to several Supreme Court decisions that narrowly construed the definition of "disability" under the statute.

The ADAAA took effect on January 1, 2009, and the new regulations confirm the expanded scope of the ADA's reach and protections. As the EEOC states, "[t]he 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."

The highlights of the new regulations are as follows.

- **"Substantially Limits."** The new regulations provide that this term "shall be construed broadly in favor of maximum coverage" and that it is "not meant to be a demanding standard." Somewhat more specifically, they provide that 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." (This is quite different from the standard articulated by the Supreme Court in *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002), in which the Court declared that the impairment must "prevent" or "severely restrict" activities.)

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- **"Major Life Activities."** This category encompasses a non-exhaustive list of activities that includes "caring for oneself," "learning," "reading," "concentrating," "interacting with others," and "working," and has been expanded by the inclusion of "major bodily functions," which includes "digestive," "neurological," and "reproductive" functions (among many others), as well as "the operation of an individual organ within a body system." In addition, the EEOC cites several pre-ADAAA cases in which an individual's impairment was found to not limit the major life activity of "working," but the EEOC states that, under the ADAAA, these individuals' impairments would now be found to limit a "major bodily function." These cases include an employee with a seizure disorder who could work in a number of different jobs (who would now be substantially limited in a "neurological function"); an employee with bone marrow cancer (who would now be substantially limited in "normal cell growth"); and a police officer with major depression (who would now be substantially limited in "brain function"). Again, this represents a departure from the Supreme Court's view in *Toyota*, which held that the limited activity must be "of central importance to most people's daily lives."

- **Duration of Impairment.** Now there is no minimum period of time that is required for an impairment to be considered "substantially limiting." If it is severe enough, an impairment of short duration may be a "disability" under the ADAAA.

- **"Regarded As" Prong.** Previously, to show that an employee was "regarded as" disabled, the employee had to show that the employer regarded him or her as having an impairment that "substantially limited a major life activity." Under the ADAAA, the employee must simply show that the employer took a prohibited action based on the employer's belief that the employee had an actual or perceived impairment (as long as the impairment is not both "transitory" and "minor").

- **Mitigating Measures.** Now, to determine whether an impairment "substantially limits a major life activity," one must not take into account "mitigating measures," such as medication. This means, for example, that if an individual's impairment without medication would "substantially limit a major life activity," that individual is still considered to have a "disability" under the ADAAA, even though the medication keeps his/her impairment or condition under control. (The one exception is that eyeglasses and contact lenses are considered in determining whether an impairment substantially limits the major life activity of seeing: people are not considered to have a "disability" simply because they wear glasses or contacts.)

Proposed FEHA Disability Regulations

California's Fair Employment and Housing Commission ("FEHC") has proposed new disability regulations under the Fair Employment and Housing Act ("FEHA"). Currently, these remain merely proposals, and the formal rule-making process (with input from the public) has not yet begun. FEHC staff, however, expect that formal rule-making with public comment will be later this year, probably in the fall, and notice of this process will be posted on the FEHC website.

The intent behind the proposed regulations is to ensure consistency with family- and medical-leave regulations and the new ADAAA regulations. Some noteworthy features of the proposed regulations include:

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- **"Regarded As."** The proposed regulations provide that an individual may be "regarded as" having an impairment even when there is "no present disabling effect," but the impairment may later become a mental or physical disability.

- **"Limits" a Major Life Activity.** Under the FEHA, a disability must only "limit" a major life activity, rather than "substantially limit" the activity. The proposed regulations provide that an impairment limits a major life activity if it makes achievement of that activity "difficult," as measured against "what most people in the general working population can perform with little or no difficulty."

- **"Mitigating Measures."** The proposed regulations confirm that, as under the ADAAA, an individual is not considered to have a disability simply because he or she wears glasses or contact lenses.

- **Medical Documentation.** The proposed regulations specifically provide that, if an employee asks for a "reasonable accommodation" due to a disability, the employer may not ask about the "underlying medical cause" (*i.e.*, medical diagnosis) of the limitation or restriction. If the employer needs additional documentation regarding the disability, it must specify the further information needed and give the applicant or employee a reasonable time to produce documentation. Documentation is "sufficient" when it describes the "functional limitations" that may entitle the individual to a reasonable accommodation. (Requests for medical information must also be accompanied by a specific authorization, to be signed by the employee, as detailed in California's Confidentiality of Medical Information Act.)

ASK MSK - Q&A Session

Q: What if an impairment is merely episodic or intermittent, such that an employee only suffers from its effects once in a while? Is that considered a "disability" under the ADA or the FEHA?

A: Under the old ADA, some federal courts had held that intermittent impairments such as epilepsy or post-traumatic stress disorder were not "disabilities." Under the ADAAA, episodic or intermittent conditions, or conditions in remission, are "disabilities" if they substantially limit a major life activity ***while in their active phase***. The FEHA provides that chronic or episodic conditions are covered as "disabilities."

Q: Are persons with genetic characteristics that create a risk of future illness protected under the antidiscrimination laws?

A: Yes. Under the FEHA, an individual with a scientifically identified gene known to be a cause of disease, or an inherited characteristic determined to cause or increase the risk of developing a disease, is protected from discrimination, even when the gene or characteristic is not associated with any present symptoms. Moreover, the federal Genetic Information Nondiscrimination Act of 2008 ("GINA") makes it illegal for an employer to discriminate, or even to classify or segregate in ways that would tend to deprive employees of opportunities or

otherwise adversely affect their status, on the basis of genetic information. GINA also prohibits employers from requesting or requiring the disclosure of an employee's or his/her family members' genetic information. When an employer seeks medical information about an employee's claim of disability, or need for reasonable accommodation or medical leave, there is obviously a chance that the health care provider could provide "genetic information" as defined by GINA. GINA Yes. Under the FEHA, an individual with a scientifically identified gene known to be a cause of disease, or an inherited characteristic determined to cause or increase the risk of developing a disease, is protected from discrimination, even when the gene or characteristic is not associated with any present symptoms. Moreover, the federal Genetic Information Nondiscrimination Act of 2008 ("GINA") makes it illegal for an employer to discriminate, or even to classify or segregate in ways that would tend to deprive employees of opportunities or otherwise adversely affect their status, on the basis of genetic information. GINA also prohibits employers from requesting or requiring the disclosure of an employee's or his/her family members' genetic information. When an employer seeks medical information about an employee's claim of disability, or need for reasonable accommodation or medical leave, there is obviously a chance that the health care provider could provide "genetic information" as defined by GINA. GINA deems this receipt of genetic information "inadvertent," and thus not unlawful, however, when the employer includes language such as the following in its request for medical information to a health-care provider:

"The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. 'Genetic information' as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services."