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## GENERAL COUNSEL NOTE

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April 2009

Not since the passage of the Americans with Disabilities Act of 1990 and the Family and Medical Leave Act in 1993 have changes occurred as significant and controversial as the ones that go into effect this month, January 2009. This note will highlight the impact of the Americans with Disabilities Act Amendments Act of 2008 (“ADAAA”) and the Family and Medical Leave Act’s revised regulations<sup>1</sup>. As you will see, there are some modifications which are beneficial to employers, and others which will result in some heartburn for employers and their managers.<sup>2</sup>

### **Effective Dates of Changes -- Now!**

The changes to the Americans with Disabilities Act went into effect on January 1, 2009. The changes to the regulations under the Family and Medical Leave Act go into effect on January 16, 2009. Therefore, it is imperative that employers modify their practices accordingly in dealing with issues which arise under these two laws.

### **Changes to the Americans with Disabilities Act – the ADAAA**

When the Americans with Disabilities Act of 1990 was initially passed, it was interpreted as protecting a limited number of persons with disabilities. In one of the cases interpreting and narrowing the scope of the protection under the Act, the U.S. Supreme Court noted that:

“When it enacted the ADA in 1990, Congress found that ‘some 43,000,000 Americans have one or more physical or mental disabilities.’ §12101(a)(1). If Congress intended everyone with a physical impairment that precluded the performance of some isolated, unimportant, or particularly difficult manual task to qualify as disabled, the number of disabled Americans would surely have been much higher. Cf. *Sutton v. United Air Lines, Inc.*, 527 U.S., at 487 (finding that because more than 100 million people need corrective lenses to see properly, ‘[h]ad Congress intended to include all persons with corrected physical limitations among those covered by the Act, it undoubtedly would have cited a much higher number [than 43 million disabled persons in the findings]’).”<sup>3</sup>

By passing the ADAAA, Congress has explicitly rejected this narrow view of who is protected under the ADA. In fact, in the language of the Act itself Congress expressly states that it is changing the law as defined by several Supreme Court decisions. In introducing the rationale for the amendments, the ADAAA states in part:

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<sup>1</sup> This note will focus on the changes which are most important to University administration and management in dealing with employment issues under these laws. The details of the changes to the timing of the FMLA notification process, for example, and other similar processes will not be addressed in this note.

<sup>2</sup> Heartburn may, under the new definitions contained in the ADAAA, be an indication that a person has a disability under the Act. Read on to learn how this can occur.

<sup>3</sup> *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002)

"4) the holdings of the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect;

(5) the holding of the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) further narrowed the broad scope of protection intended to be afforded by the ADA;

(6) as a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities;

(7) in particular, the Supreme Court, in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), interpreted the term 'substantially limits' to require a greater degree of limitation than was intended by Congress;"<sup>4</sup>

The ADAAA further states in part that its purpose is:

(2) to reject the requirement enunciated by the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures;

(3) to reject the Supreme Court's reasoning in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973;

(4) to reject the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), that the terms 'substantially' and 'major' in the definition of disability under the ADA 'need to be interpreted strictly to create a demanding standard for qualifying as disabled,' and that to be substantially limited in performing a major life activity under the ADA 'an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives';

(5) to convey congressional intent that the standard created by the Supreme Court in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) for 'substantially limits', and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis;"<sup>5</sup> (Emphasis added)

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<sup>4</sup> ADA Amendments Act of 2008, Pub. L. No. 110-325, §2, 122 Stat. 3553, 3553 (2008).

<sup>5</sup> ADA Amendments Act of 2008, Pub. L. No. 110-325, §2, 122 Stat. 3553 3554 (2008).

This language evidences a clear mandate to employers that the analysis of whether a person has a disability under the ADA has changed dramatically<sup>6</sup>. As noted above, the U.S. Supreme Court had limited the scope of coverage of the ADA such that very few employees would have a "disability" and be entitled to coverage under the Act. As a result of this narrowing of coverage, an employer's analysis of an ADA claim or request for an accommodation usually ended in a determination that the employee was not "disabled" under the ADA.

The new definition of disability is considerably broader.<sup>7</sup> However, the basic framework for the analysis did not change. An individual can be covered under the Act if they have any one of the following three factors:

- (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment ....

However, this legislation changes the definition of who is protected under the first prong of the test dramatically by redefining "substantially limits" and "major life activities".

Until the EEOC issues its new regulations under the ADAAA, the exact definition of "substantially limits" is unclear. We do know that the definition will be broader and less stringent.

"Major life activities" is broadened by adding a number of activities to the statutory list, some of which had been excluded by the courts. For example, lifting and bending, common limitations assigned by a physician after a back injury, had not been considered "major life activities". Now, they are expressly included. This is just one example of how conditions which are common in the population (back injuries) may now rise to the level of a covered disability after January 1, 2009. Another example is the addition of "thinking" and "concentrating". Consider the possible breadth of these terms, which could be impacted by a variety of medical conditions, including the normal aging process.

There is now a list of "major bodily functions" in addition to the "major life activities" which should be considered in determining whether someone has an impairment which substantially limits a major life activity. These functions include the following:

"functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."

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<sup>6</sup> While we do not typically quote statutory language in these Notes, the quoted language from this statute is compelling in its clear and unequivocal rejection of the U. S. Supreme Court's interpretation of the law.

<sup>7</sup> The coverage provisions in an earlier version of this legislation (the "ADA Restoration Act") were even broader, more generous to employees, and more onerous for employers. It has been widely reported that the current version is a compromise between employer groups, disability advocates, and others involved in the legislative process.

The Act clearly states that only one major life activity must be limited in order to be considered a disability under the ADA. This is a change, as well. It is readily apparent that the addition of an impairment that substantially limits one of these factors to the coverage definition makes the test quite broad. Let's take the earlier example of heartburn. If the heartburn is an indication of an impairment to the individual's digestive function and, if there is a substantial limitation to this function, the individual may be entitled to coverage under the ADA.

### **Ameliorating Factors**

Another major change in coverage is how ameliorating factors, such as medication, are considered in the analysis of whether a person has a disability under the Act. Under the ADA, these factors cannot be taken into account unless the condition is ameliorated by "ordinary eyeglasses or contact lenses". In other words, if a vision problem is involved, the person's vision with these corrective measures is used to determine if they are substantially limited in this major life activity (seeing). However, if there is another condition which would constitute a disability without medication, an employer must consider the impact of the condition without the medication. Consider the difference in the analysis for conditions such as epilepsy and high blood pressure, which may be totally controlled with medication, but may still entitle the employee to protection under the ADA.

### **Episodic impairments and impairments in remission**

Another important change is the expansive view of whether impairments which are not active (in remission) or are episodic are to be considered as a disability. The ADA makes it clear that if the impairment would be considered a disability when active, it still qualifies under the Act. Consider under this change the impact of the ADA on a person whose cancer who is in remission or who has an impairment due to a back injury which flares up from time to time.

### **"Regarded as" changes**

The ADA expands coverage to provide protection for a person who is regarded as having an impairment, whether or not the impairment is regarded as substantially limiting a major life activity. The ADA does make a helpful clarification with regard to individuals protected under this prong – it clearly states that they are protected from discrimination, but that they are not entitled to reasonable accommodations. In addition, the "regarded as" protection does not apply to "impairments that are transitory and minor", defined as "an impairment with an actual or expected duration of 6 months or less". This exclusion of temporary impairments and the definition of what is considered transitory are helpful to employers.

### **No claim for reverse discrimination**

The ADA states that non-disabled individuals cannot claim "reverse" discrimination. In other words, a non-disabled person cannot claim that a disabled person was treated more favorably. This clarification is consistent with the stated intent of the Act.

## **SUMMARY**

Now that your head is spinning, which may trigger the disability analysis, here is some good news. You don't have to make these decisions alone. Once an employee indicates that they have restrictions due to a medical condition which may require job modifications, raises the issue of performance problems being related to a medical condition, or claims that they have been treated unfairly because of a disability, the answer is the same now as it was under the prior law – contact the Opportunity Development Center, Vanderbilt's Equal Employment Opportunity office, for help (322-4705). The analysis is still tricky, and although the law is more explicit, the decision of whether a reasonable accommodation can and should be made is still complicated. The Office of the General Counsel is also available for advice and questions about the changes to this law and its application to current or future situations.

You should expect these questions to come up more often once the ADAAA is more well known. It is also universally acknowledged by commentators that there will be more discrimination claims, EEOC charges, and lawsuits which result from the increased coverage under the ADAAA. Being proactive in involving your internal resources (the ODC and the OGC) early in the process will be a key factor in preventing and prevailing on these claims.

## **Revisions to the Family and Medical Leave Act Regulations**

The Family and Medical Leave Act was originally enacted in 1993 and its regulations were issued in 1995. Since that time, employers, employees, the U. S. Department of Labor, and the courts have struggled with interpreting this law and its requirements. It has inspired debate, questions, and confusion since its passage. One thing is clear, however. Unless you are superhuman or never work for a covered employer, everyone in today's work force will utilize the protections of the Family and Medical Leave Act during their career.

## **Background**

The revisions to the Family and Medical Leave Act Regulations were triggered by a number of factors.

- Amendments to the FMLA which provided for military family leave were included in the National Defense Authorization Act (NDAA) in 2008.
- The impact of United States Supreme Court and lower court opinions on the FMLA regulations.
- The Department of Labor's communications over the 15 years since the passage of the FMLA with stakeholders and its experience with the current law and regulations.
- Ambiguity in the current regulations.

The United States Department of Labor issued a Request for Information ("RFI") in 2006 and received over 15,000 public comments. In June 2007, it published a report on the RFI. The DOL then issued proposed revised regulations and received over 4,600 comments during the comment period. Finally, the final rule (the

revised regulations) was issued on November 17, 2008 with an effective date of January 16, 2009.

In addition to addressing concerns surrounding the prior regulations, these revised regulations include guidance on the January 2008 amendments to the FMLA,<sup>8</sup> which expanded coverage to include leaves related to military service. An exhaustive evaluation of the changes is beyond the scope of this article, as the revised regulations contain 200 pages of detailed information. However, the developments most applicable to you as managers follow.<sup>9</sup>

### **Eligibility -- General Provisions**

**Break in service:** As you know, an employee must have been employed for 12 months in order to be eligible for leave<sup>10</sup>. However, the revised regulations make it clear that the 12 months does not need to be consecutive – there can be a break in service. How far does an employer have to go back? The employment must have been in the last 7 years. Are there exceptions to the seven year rule? Yes. If the break in service resulted from military service or if the employee was covered under a written agreement (such as a collective bargaining agreement) which required rehire after a break in service, periods of employment beyond 7 years may be considered.

**Hours worked:** An employee must also have worked 1,250 hours in the 12 months prior to the leave to be eligible. What about employees who have been in the military during that period due to National Guard or Reserve obligations? These employees get “credit” for the hours that they would have worked if they had not been called up to active duty. The lesson here is that no determination about eligibility should be made without all of the facts.

### **Notice by Employer and Employee -- General Provisions**

The notice provisions of the regulations have been a source of confusion and conflicting decisions in the courts. This is an area where the revisions sought to clarify the requirements under the Act. There are new notice forms to be used by the employer which should simplify the process.<sup>11</sup> The regulations still place the burden on the employer to let employees know that they are eligible for the requested FMLA leave, but allow five days to do so (compared to two days under the prior regulations). One of the new forms is entitled “Employee Rights and Responsibilities (**attached**).” (It may be helpful to think of this notice as the FMLA equivalent of the Notice of Privacy Practices which patients receive from their health care provider.) This Notice provides a helpful framework/checklist for FMLA leave

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<sup>8</sup> These amendments were contained in the National Defense Authorization Act of 2008.

<sup>9</sup> Some of the changes impact the medical certification process and the definition of a serious health condition. Medical certifications and the determination of whether a condition qualifies as a serious health condition are handled through Vanderbilt Occupational Health. Questions regarding any other FMLA issues should be directed to Employee Relations (for staff), the Associate Dean of Graduate Medical Education (for Housestaff) and the appropriate Dean’s office (for Faculty). Therefore, those changes will not be addressed in this Note.

<sup>10</sup> The regulations also clarify what happens when an employee is already out on non-FMLA leave when they reach the 12 month requirement for eligibility. In this situation, they become FMLA eligible as of the date this requirement is met and the leave is designated as FMLA from that date forward.

<sup>11</sup> These notification forms can be obtained from the appropriate internal offices.

issues and requests which you may want to retain as a brief reference guide to the FMLA.

The revised regulations are consistent with a U.S. Supreme Court ruling from 2002 regarding the impact of timing on an FMLA designation. That decision invalidated the provisions in the prior regulations which imposed a “penalty” on employers who did not appropriately designate FMLA leave and timely notify employees.<sup>12</sup> Under these regulations a retroactive designation of FMLA leave may be appropriate in some circumstances. However, an untimely designation may also result in damages or equitable relief. Because of the fact specific determination here, it is wise to obtain advice from Employee Relations, the appropriate Dean’s office, or the Office of the General Counsel prior to making a retroactive designation of FMLA leave and counting that time against an employee’s entitlement.

Another confusing area for employers surrounded the request/notification of a need to take leave by an employee under the FMLA. The questions usually arose when an employee merely called in sick or asked for time off due to sickness: How much information did the employee need to give? Did they have to ask for “FMLA leave”? What could the employer ask the employee? The revised regulations are helpful in guiding employers in this situation. The first inquiry by the employer should be whether the leave or time off could/should be FMLA qualifying leave, as the employee is not required to specifically reference the FMLA when requesting leave for the first time. Once an employee has been granted an FMLA leave, the burden is on the employee to indicate that the illness or absence is related to that leave by referencing that FMLA leave is involved or by giving the FMLA-qualifying reason. However, it is advisable to have established call-in and leave request procedures within your department to document the reason for the absence/leave. These procedures and the responsibility of the employee to designate protected leave as FMLA should be clearly spelled out.

The notice provisions in particular are very fact specific. Therefore, it is advisable to consult with your internal resources prior to denying FMLA leave, especially for failure to follow a notice requirement.

### **Medical Certifications and Other Forms -- General Provisions**

The forms utilized for FMLA leaves have been modified and updated to take into account the military leave provisions and to make them more user friendly. Based on a review of the forms, it appears that they are more comprehensive and user-friendly. For example, the regulations clarify that a new medical certification may be requested each leave year if the medical condition lasts longer than one leave year. This change addresses concerns that a certification may no longer be valid because the individual’s medical condition has changed.<sup>13</sup> The revised regulations also clarify that information available to the employer because of other requests (accommodations under the Americans with Disabilities Act or a workers’

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<sup>12</sup> See *Ragsdale v. Wolverine World Wide, Inc.*, 535 U. S. 81 (2002).

<sup>13</sup> There are other provisions which address when and how often a medical recertification can be requested. If you believe that a medical certification may need to be recertified, please contact the internal office responsible for administering the FMLA leave process, as there are specific limitations and mechanisms for requesting recertification.

compensation claim, for example) can be considered. This coordination provision should prove helpful to employers. Finally, the regulations clarify that the employee is responsible for obtaining the medical certification. An employer should not ask for an authorization to obtain the required medical information. At Vanderbilt, requests for clarification of a medical certification should be directed to Occupational Health.

### **Intermittent Leave – Planned Medical Appointments**

The revised regulations allow an employer to require employees to make a “reasonable effort” to schedule their appointments so that they are not disruptive to the employer. However, it is still unclear how “reasonable effort” will be interpreted by the courts. This is another scenario where internal resources may be useful prior to denying leave.

### **Waiver of Rights**

The regulations clarify that an employee can’t prospectively waive his/her rights to FMLA leave, but an employee’s settlement and release of past claims is valid without having the settlement approved by a court or the Department of Labor. This is a good development for employers and removes uncertainty created by a federal court decision.

### **Military Leave – Amendments under the National Defense Authorization Act**

There are two categories of military leave available under the FMLA: military caregiver leave and qualifying exigency leave. While requests for these types of leave are not common, they may arise from time to time. Therefore, a basic understanding of the framework is helpful for all managers. It should be noted that the persons eligible to take leave for these events, as well as the maximum leave periods are different from other types of FMLA leave<sup>14</sup>. The definitions of “son or daughter”, “parent of a covered servicemember” and the concept of the “next of kin” who are entitled to these leaves is expanded and should be considered first if a request is made. Intermittent leave is available, as well as continuous leave.

### **Military Caregiver Leave (or Covered Servicemember Leave)**

This leave is available to a person who needs leave to care for a servicemember with a serious illness or injury, provided that the injury or illness was incurred in the line of duty while on active duty. The maximum leave time is 26 weeks (not 12 as in other types of leave) in a single 12 month period. The 12 month period under this provision begins on the first day of the leave and is not the same as the rolling 12 month period used to compute available leave time for other FMLA qualifying conditions. If this wasn’t confusing enough, there are also coordination provisions which relate to the maximum allowable leave time when the employee has taken (or takes) leave for another FMLA qualifying condition (such as their own serious health condition). The definition of who is a “family member” is also expanded for this type of leave and includes, for example, “next of kin.”

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<sup>14</sup> The interplay of these types of leaves with “regular” FMLA leave and the computation of whether an employee has reached their maximum leave time are very fact specific.



### **Qualifying Exigency Leave**

This leave provision is intended to address the needs of National Guard and Reservists called to active duty (as defined in the regulations). This provision does not apply to members of the regular armed forces. The time limit for leaves of this type is 12 weeks, not 26. Examples of the qualifying reasons for this type of leave are listed in the regulations and include the following:

- Leave to address issues arising from a short-notice deployment;
- Leave related to military events and activities related to military status;
- Leave related to childcare and school activities of the servicemember's child;
- Leave related to financial and legal arrangements;
- Leave for counseling;
- Leave for rest and recuperation (limited to up to five days);
- Leave for post-deployment activities; and
- Leave for other agreed upon reasons (employer and employee must agree on this category).

As you can see, this category of leave is very broad. It is unclear what will happen if an employer and employee cannot agree on a leave under this provision. Will there be a reasonableness requirement imposed in this situation? This question will likely be answered in the courts and/or in opinion letters from the Department of Labor.

### **SUMMARY**

If you receive a request for leave to care for a servicemember or for what may be a qualifying exigency, consult the appropriate internal office for guidance. It is anticipated that these requests will be infrequent and the regulations are complicated.

We encourage you to contact the appropriate internal office or the Office of the General Counsel for questions regarding the revised regulations or specific leave requests. Being proactive and appropriately addressing these requests for leave can save time and money!

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