Law Offices of Mary L. Topliff
Workplace Wave

Practical Implications of the ADA's Updated Regulations

By Mary L. Topliff, Esq.

An employee submits a doctor's note to Human Resources, describing certain lifting restrictions. The company's typical process is to have the employee complete a Request for Accommodation form and have the employee's health care provider complete a more detailed medical certification regarding the employee's disability and recommended job accommodation. Do the final regulations issued regarding the Americans with Disabilities Act Amendments Act (ADAAA) require any changes to this process or to policies and other materials?

The intent of the ADAAA of 2008 is to expand the definitions of disability to make it easier for employees and applicants to obtain the law's two-fold protections of requiring reasonable accommodations while prohibiting discrimination. The ADAAA overturned several United States Supreme Court opinions that narrowly interpreted who was considered disabled. The goal of the recently finalized regulations is thus to provide predictable, consistent and workable standards to determine if an individual is disabled.

According to the updated definition, a disability covered by the ADAAA means that an individual has either: 1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; 2) a record (or history) of such an impairment; or 3) being regarded as having such an impairment in which the individual was subjected to discrimination because of an actual or perceived impairment that is not transitory (less than six months) and minor. The regulations clarify that the term, "substantially limited," is to be construed broadly and is not meant to be a demanding standard. Moreover, an impairment that is episodic or in remission may be a disability if it would substantially limit a major life activity when active. According to the regulations, some impairments will virtually always constitute a disability, for example, epilepsy, diabetes, cancer, HIV infection, and bipolar disorder.

The ADAAA became closely aligned with California's legal definitions of disability. One of the most significant changes to the ADAA is that an assessment of whether an individual has a disability does not include whether the effect of the disability may be lessened through medication, hearing aids

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Ms. Topliff will be the featured speaker for the American Payroll Association on August 11, 2011 in San Jose where she will present Recent Developments in Wage and Hour Laws. For more information, please contact topliff@joblaw.com.

or other mitigating measures. However, the negative effects of a mitigating measure, such as severe side effects from medication, may be considered. If the mitigating measure itself eliminates the need for an accommodation, there is no obligation to provide one, for example, if an employee's use of a prosthetic device means that no further job accommodation is necessary.

The ADAAA allows one type of positive effect from a mitigating measure to be taken into account for individuals who have a visual impairment that is mitigated by eyeglasses or other ordinary vision correction device. This is not an exception under California law and there remain some distinctions between the two laws such that both laws must always be evaluated for California employees.

Addressing the introductory scenario, the company should ensure that its medical certification form contains the updated definitions of disability under the ADAAA and that it otherwise tracks the appropriate level of inquiry. For example, prior to the ADAAA, medical certification forms may have included specific questions about the major life activities that were substantially limited or the extent to which mitigating measures impacted the effects of the impairment. Medical certification forms may continue to ask about the major life activities that are limited, but the company's analysis of whether the individual is sufficiently limited by the impairment must not be overly restrictive. In other words, it would be the exception rather than the rule for an employer to delve into a detailed analysis as to whether the employee's impairment substantially limited a major life activity. Although each disability determination continues to be based on an individualized assessment, employers should typically proceed to the accommodation analysis if the medical certification indicates that the employee has a covered impairment.

Employee Handbooks should contain a "disability accommodation" section, including a description of how employees are to request disability accommodations, the medical certification required, and expectations regarding the interactive process for making the accommodation determination. Employee Handbooks should also refer to disability fitness for duty examinations.

The EEOC has published a wide range of resources that can be found on its website, including "Work at Home/Telework as a Reasonable Accommodation," "Applying Performance and Conduct Standards to Employees with Disabilities," and "Diabetes in the Workplace and the ADA," to name a few. The Job Accommodation Network website, www.askjan.org, also contains detailed and useful information.

California Overtime Rules Held to Apply to Non-Residents Working in California; the DOL Provides an "App" for Workers

By Mary L. Topliff, Esq.

On June 30, 2011, the California Supreme Court answered "yes" to the question of whether California's overtime requirements apply to employees when they perform work in California but otherwise reside in another state. The case, *Sullivan v. Oracle Corp.*, is a bit unusual since it involved the federal Ninth Circuit Court of Appeal referring the central questions in the case to the California high court to address.

Oracle Corporation, a large software company, is headquartered in California with offices in numerous other states.

The three plaintiffs, two of whom resided in Colorado while the third plaintiff lived in Arizona, had been employed as instructors to train Oracle's customers in the use of its products in various states, including California. As a result of a prior class action lawsuit, Oracle reclassified its instructors from overtime exempt to nonexempt. Thereafter, the plaintiffs claimed unpaid overtime for the hours they worked in California.

California law requires payment at an overtime premium rate when nonexempt employees work more than eight hours in a workday and over 40 hours in a workweek. In contrast, Colorado law requires overtime pay when nonexempt employees work more than 12 hours in a workday and over 40 hours in a workweek. Many states, including Arizona, do not have laws addressing overtime pay and thus the federal law, the Fair Labor Standards Act (FLSA) applies, which requires overtime premium to be paid when a nonexempt employee works more than 40 hours in a workweek.

The court examined relevant California Labor Code sections, noting that the state's overtime laws apply to all employment in the state without reference to an employee's residence. Significantly, the California Legislature created a specific exemption from the state's workers' compensation laws for out-of-state employers who temporarily send employees into California to perform services, so long as the employer is compliant with its home state's workers' compensation law. Yet, no similar provision could be found regarding the overtime laws. Moreover, Colorado's overtime law explicitly covers work performed within the state of Colorado, but does not mention work outside the state.

The Court rejected Oracle's argument that the application of California's overtime law to nonresidents would have a ripple effect since California has other unique employment laws regarding vacation time, meal periods and paycheck stubs. The court noted that these issues were not presented in the case and, in any event, proved no burden to Oracle since it is based in California.

The Court noted that if it did not apply California law, employers would be encouraged to substitute lower paid temporary employees from other states for California employees, thus threatening California's legitimate interest in expanding the job market. In contrast, not applying the overtime laws of Colorado or Arizona would impact those states' interests negligibly, or not at all. The court thus held that the California overtime rules apply to the work performed in California by nonresidents.

Employers who have nonexempt employees performing work in California (while residing elsewhere) must now ensure that the California overtime rules are applied. It would also be wise to ensure that the non-resident employees you think are overtime exempt really are.

Worth noting are some questions that remain unanswered by this opinion. Since the Court focused on Oracle as a California-based company, it is unclear if it would have reached the same result had the company been based elsewhere. Given the Court's primary reasoning, it probably would not make a difference, but the question was not before the Court. The Court did not address whether the overtime exemption classifications under California law would apply during the time a nonresident performs work in California. Another potential open question is whether nonresident employees provide services in California through electronic

means, such as videoconferencing, would be covered by California law and how an employer would, practically speaking, track this time.

And who said the federal government moves slower than a snail? The United States Department of Labor has entered the smartphone application development arena and this one should give employers pause. The DOL recently announced that its first "app" is a timesheet to help employees independently track the hours they work, break times, and overtime hours to verify their wages owed. It is currently issued in English and Spanish. According to the DOL, this information could be invaluable during an audit or investigation when the employer has failed to maintain accurate employment records. More information can be found at www.dol.gov.