

*Presenting a live 90-minute webinar with interactive Q&A*

## **ADA Amendments Act: Latest Court Developments**

Avoiding and Defending Against Claims Under the Expanded Definition of Disability

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TUESDAY, JUNE 26, 2012

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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**EEOC Regulations  
under the Americans with Disabilities Amendments Act**

June 26, 2012

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# What We Will Cover ...

- Regulatory Overview
- Substantially Limits
- Major Life Activities
- “Per Se” Disabilities
- Mitigating Measures
- Dormant or Episodic Impairments
- “Regarded As” Protection

# Regulatory History

# ADA Amendments Act

- ADA Amendments Act of 2008
  - Signed into law 9/25/08
  - Took effect 1/1/09
- Key Objectives:
  - Broadest possible coverage of protected individuals – “to the maximum extent permitted” by ADAAA
  - Determination whether individual has disability should not demand extensive analysis
  - Primary focus should be whether employer has complied with its obligations, not whether individual has qualifying disability
  - Reverses impact of Supreme Court rulings narrowing coverage

# EEOC Regulations

- Rulemaking Process
  - EEOC Proposed Regulations (9/23/09)
  - EEOC Final Regulations (3/25/11) – Effective 5/24/11
- When issued, the EEOC estimated as many as:
  - 38.4 million working Americans impacted
  - 6.1 million more labor force participants will seek reasonable accommodation
  - Annual incremental cost of \$183 million to U.S. employers

# ADA Definition of Disability

# “Disability” Defined

With respect to an individual, the term "disability" means:

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

42 U.S.C. § 12102(2); *see also* 29 C.F.R. § 1630.2(g).

# Substantially Limits

# Substantially Limits

- Old EEOC Definition:

The term "substantially limits" means: (i) Unable to perform a major life activity that the average person in the general population can perform; or (ii) **Significantly restricted** as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the **average person** in the general population can perform that same major life activity.

- New EEOC Definition:

The terms substantially limits means an impairment that **substantially limits** the ability of an individual to perform a major life activity as compared to **most people** in the general population.

# Substantially Limits

- “Most People”
- Condition, Manner, Duration
- Transitory Conditions

# Major Life Activities

# Major Life Activities

- **Old EEOC Definition:**

Those basic activities that the average person in the general population can perform with little or no difficulty, including functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

- **New EEOC Definition:**

- Expands traditional list of MLAs
- Adds new non-exhaustive list of Major Bodily Functions (MBFs)
- Removes requirement that activity be one which average person in general population can perform
- Clarified that only one MLA/MBF is needed

# Major Life Activities

- New List of Traditional MLAs:

- Caring for oneself
- Performing manual tasks
- Walking
- Seeing
- Hearing
- Speaking
- Breathing
- Learning
- Working
- Eating
- Sleeping
- Standing
- Sitting
- Bending
- Reaching
- Lifting
- Reading
- Concentrating
- Thinking
- Communicating
- Interacting with others

# Major Life Activities

- New List of MBFs:

- Immune system (e.g., HIV infection)
- **Special sense organs and skin**
- Normal cell growth (e.g., cancer)
- Digestive
- **Genitourinary**
- Bowel
- Bladder
- Neurological (e.g., Parkinson's disease)
- Brain
- Respiratory
- Circulatory
- **Cardiovascular**
- Endocrine (e.g., diabetes)
- **Hemic** (e.g., sickle cell)
- **Lymphatic** (e.g., lymphadema)
- **Musculoskeletal** (e.g., rheumatoid arthritis)
- Reproductive systems

# “Per Se” Disabilities

# “Per Se” Disabilities

- Some disabilities, due to inherent nature, lend themselves to “predictable assessment”
- “Virtually always” will qualify as substantially limiting
- No individualized assessment needed

# “Per Se” Disabilities

- Deafness
- Blindness
- Intellectual disability
- Partially or completely missing limbs or mobility impairments requiring the use of a wheelchair
- Autism
- Cancer
- Cerebral palsy
- Diabetes
- Epilepsy
- Human Immunodeficiency Virus (HIV) infection
- Multiple sclerosis
- Muscular dystrophy
- Major depressive disorder
- Bipolar disorder
- Post-traumatic stress disorder
- Obsessive compulsive disorder
- Schizophrenia

# Mitigating Measures

# Mitigating Measures

- New EEOC Regulations:

The “determination of whether an impairment is substantially limiting shall be made without regard to the ameliorative effects of mitigating measures.”

- Exception: “ordinary eyeglasses or contact lenses”

# Mitigating Measures

- Medication
- Medical supplies, equipment, or appliances
- Low-vision devices (defined as devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses)
- Prosthetics including limbs and devices
- Hearing aid(s) and cochlear implant(s) or other implantable hearing devices
- Mobility devices
- Oxygen therapy equipment and supplies
- Use of assistive technology
- Reasonable accommodations or “auxiliary aids or services”
- Learned behavioral or adaptive neurological modifications
- **Psychotherapy, behavioral therapy, or physical therapy**

# Mitigating Measures

- Surgical interventions
- Non-ameliorative effects of mitigating measures
  - negative side effects of medication
  - burdens associated with a treatment regimen
  - complications from surgery
- Refusal to use mitigating measures

# Dormant or Episodic Impairments

# Dormant or Episodic Impairments

- **New EEOC Regulations:**

An “impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”

- **Examples:**

- hypertension
- diabetes
- asthma
- major depressive disorder
- bipolar disorder
- schizophrenia
- post-traumatic stress disorder

# “Regarded As” Protection

# “Regarded As”

- New EEOC Regulations:

ADAAA regulations now define “regarded as” as meaning that the individual has been subjected to an action prohibited by the ADA because of an actual or perceived impairment that is not both transitory and minor.

- “Regarded as” prong does not require a showing that the impairment substantially limits a MLA
- No entitlement to reasonable accommodation under “regarded as” prong

# “Regarded As”

- Transitory and Minor Defense:
  - No definition of “minor”
  - “Transitory” means lasting or expected to last six months or less
- Prohibited Actions – Causation
  - “Because of” actual or perceived impairment
  - Examples: refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment

# Case Law Interpreting the ADAAA and its Regulations

- ***Smith v. Milton Hershey School*, 2:11-cv-07391-CDJ**
  - 13 year old plaintiff filed suit alleging disability discrimination under the ADAAA when he was denied entrance into the private school due to his HIV positive status. The case remains pending in the Eastern District and highlights that HIV is now per se disabling under the new ADAAA regulations.
- ***Cohen v. CHLN, Inc.*, No. 10-cv-514, 2011 U.S. Dist. LEXIS 75404 (E.D. Pa. July 13, 2011)**
  - Employee claimed he suffered disabling pain in his back and legs for approximately four months leading up to his termination. The Court held this was enough under the relaxed ADAAA standards to survive summary judgment and that for an actual disability, there was no hard and fast rule as to how long the disabling condition had to last to qualify as a disability.

# Case Law Interpreting the ADAAA and its Regulations

- ***Norton v. Assisted Living Concepts, Inc.*, 10-cv-91, 2011 U.S. Dist. LEXIS 51510 (E.D. Tex., May 13, 2011).**
  - Court denied employer's summary judgment motion on disability discrimination claim despite the fact that Plaintiff's cancer was in remission, i.e. Plaintiff was not actively disabled, at the time he was dismissed from employment, finding that cancer in remission qualified as a disability under ADAAA.
- ***Kinney v. Century Services Corp.*, No. 10-787, 2011 U.S. Dist. LEXIS 87996 (S.D. Ind., Aug. 9, 2011)**
  - Court denied employer's summary judgment motion, finding under the new ADAAA regulations and cases interpreting it that the question of whether intermittent episodes of depression made plaintiff a qualified individual with a disability created a genuine fact issue for the jury. In reaching the conclusion, the Court discussed other decisions that found intermittent health issues – such as cancer in remission – are qualifying under the new regulations.

# Case Law Interpreting the ADAAA and its Regulations

- ***Gibbs v. ADS Alliance Data Sys.*, No. 10-2421, 2011 U.S. Dist. LEXIS 82450 (D. Kan. Jul. 28, 2011)**
  - Noting the underlying purpose of the ADAAA and its regulations, that “Congress intended to convey that the question of whether an individual’s impairment is a disability under the ADA should *not demand extensive analysis* and that the primary object of attention in cases brought the under the ADA should be *whether entities covered under the ADA have complied with their obligations*[.]” a court found carpal tunnel syndrome that was disabling in only one hand may be a qualifying disability and denied employer’s summary judgment motion.
- ***Lowe v. American Eurocopter, LLC.*, No. 10 CV 24, 2010 U.S. Dist. LEXIS 133343 (N.D. Miss. Dec. 16, 2010)**
  - Under ADAAA, Court found employee stated a disability discrimination claim at motion to dismiss stage for obesity where it affected employee’s ability to walk from the regular employee parking lot, noting that walking is specifically listed as a major life activity under the revised law.

- ***Feldman v. Law Enforcement Assoc.*, No. 10 CV 08, 2011 U.S. Dist. LEXIS 24994 (E.D.N.C Mar. 10, 2011)**
  - Court found sporadic bouts of multiple sclerosis qualified as a disability under the ADAAA, citing the new regulations that specifically listed it as a disability. The court also noted that the regulations made clear that “an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”
- ***Hoffman v. Carefirst of Fort Wayne, Inc.*, No. 1:09-cv-00251, (N.D. Ind. Aug, 31, 2010)**
  - Another remission case, this decision denied an employer’s motion to dismiss a failure to accommodate claim, finding that, although the plaintiff’s kidney cancer was in remission, under the ADAAA, it still qualified as a disability.

*ADA Amendments Act (ADAAA):  
Latest Court Developments  
June 26, 2012*

Joyce Walker-Jones  
Office of Legal Counsel  
EEOC

# Part II: Reasonable Accommodation

Employer Obligation to Provide  
Reasonable Accommodation

# Reasonable Accommodation Under the ADAAA

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- Three important points:
  - The ADAAA does not change the definition of reasonable accommodation or address specific issues relating to reasonable accommodation
  - Because of broadened definition of “disability,” employers likely will have to provide accommodations to larger group of applicants and employees (except for individuals only “regarded as” having a disability)
  - Employers should spend less time deciding whether individual has a disability and more time on determining whether an accommodation can be provided

# Who Can Ask for a Reasonable Accommodation?

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- An applicant or an employee who meets the ADA definition of “disability” under prong 1 (actual) or prong 2 (record of)
- Short-term, long-term, part-time, full-time, and probationary employees may all request a reasonable accommodation. (Note: Rules under the Family and Medical Leave Act are different)

# Reasonable Accommodation Analysis

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- The request must :
  - be “reasonable” – i.e., **plausible** on its face or **feasible** in the run of cases (low burden on the individual requesting the accommodation per the Supreme Court’s Barnett decision);
  - be **effective** – i.e., it enables the individual to participate in the application process, perform the essential functions of the job, or enjoy equal access to the benefits and privileges of employment; and
  - **not impose an undue hardship** on the employer’s operations

# Notice of Need for Reasonable Accommodation

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- To request an accommodation:
  - Individual may use “plain English” and need not mention the ADA or use the phrase “reasonable accommodation,” *but*
  - Must indicate that a change or adjustment is needed at work for a **reason related to a medical condition**

# Notice (cont.)

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- Sufficient :
  - Individual does not have to call medical condition a “disability”; inadequate notice is typically when condition is hidden so unreasonable to expect employer knew of it or need to accommodate. *Sydnor v. Fairfax Co., Va.*, 2011 WL 836948 (E.D. Va. Mar. 3, 2011)
  - Oral request for accommodation okay despite contrary company policy. *Kravits v. Shinseki*, 2012 WL 604169 (W.D. Pa. Feb. 24, 2012)

# Notice (cont.)

## ■ Insufficient:

- Employee's request for "home time" because he needed time with his family and statement that he was leaving work "to see his doctor" was not a request for a reasonable accommodation where employee failed to state that he need to go home and see his doctor because of his HIV. *EEOC v. CR England, Inc.*, 644 F.3d 1028 (10<sup>th</sup> Cir. 2011)
- Plaintiff notified employer of panic disorder and agoraphobia but never requested any accommodation, stating that "if [the employer] believed that I needed certain accommodations . . . they would come to me and say so.") *Garner v. Chevron Phillips Chemical Co.*, 2011 WL 5967244 (S.D. Tex. Nov. 29, 2011)

# Interactive Process -- Generally

- Employer's obligation to engage in interactive process normally triggered by accommodation request
- Failure to engage in interactive process is not enough for violation; must show that **not engaging in process led to failure to accommodate**. *Woodruff v. LaHood*, 777 F. Supp., 2d 33 (D.D.C. 2011); *Lowe v. Independent School Dist., No 1 of Logan County*, 363 Fed. Appx. 548 (10<sup>th</sup> Cir. 2010)
- As part of the interactive process, employer may require documentation to establish that person has a disability and may request information that describes the functional limitations caused by the disability

# Interactive Process – Employer’s Bad Faith

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- Showing “wrong kind of attention” -- instead of looking for accommodation, employer built record to justify firing. *Sydnor, supra*.
- Failing to follow usual procedures. *Valle-Arce v. Puerto Rico Ports Auth.*, 651 F. 3d 190 (1<sup>st</sup> Cir. 2011)
- Offering accommodation that did not work, with no follow-up. *Valle-Arce, supra*.
- Not asking for more details or telling employee information provided was not specific enough. *Valle-Arce, supra*.

# Interactive Process – Employer’s Bad Faith (cont.)

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- Failure to tell employee that request submitted on wrong form and failure to give employee a few extra days to return paperwork. *Cox v. Wal-Mart Stores Inc.*, 441 Fed. Appx. 547 (9<sup>th</sup> Cir. 2011)
- Flatly turning down requested accommodation and failing to offer alternative. *Colwell v. Rite Aid Corp.*, 602 F.3d 495 (3d Cir. 2010)
- Ignoring request because employer believes employee does not have a disability. *Zombeck v. Friendship Ridge*, 2011 WL 666200 (W.D. Pa. Feb., 14, 2011)

# Leave

- Courts widely recognize paid, or unpaid, leave as a form of reasonable accommodation
- Few “bright line” rules regarding duration
- Requests for **indefinite leave** routinely rejected, but:
  - Fact that full recovery date not specified did not mean that employee could not return to light duty. *Schumacher v. Granite Services, Inc.*, 2012 WL 95145 (N.D.N.Y. March 20, 2012)
  - Request for leave until “medical condition is figured out” is okay if trying to see if treatment is working, or if it means until next doctor’s appointment. *Willingham v. Town of Stonington*, 2012 WL 75921 (D. Me. March 7, 2012)

# Leave (cont.)

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- Attendance as an Essential Function
  - Some courts have erroneously concluded that attendance is an essential function
  - EEOC regulations make clear that essential functions are **specific tasks** that must be performed as part of the job
  - Employment positions do not exist for the purpose of performing attendance
    - Although regular attendance may be an essential function of many jobs, plaintiff's ability to meet employer's "extremely lenient: attendance policy indicated that he was qualified. *Carmona v. Southwest Airlines*, 604 F.3d 848

# Leave (cont.)

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- “No-Fault” Leave Policies

- If employee with a disability needs additional unpaid leave as a reasonable accommodation, employer must modify its “no-fault” leave policy to provide employee with additional leave *unless* it can show that:
  - there is another effective accommodation that would enable person to perform the essential functions of job; or
  - granting additional leave would cause an undue hardship

# Flexible Schedule

- Several recent cases :
  - Later start time. *Alastra v. National City Corp.*, 2010 WL 4739763 (E.D. Mich. Nov. 16, 2010)
  - Changing schedule to day shift to sync up with disability-related needs may be required. *Colwell v. Rite Aid Corp.*, 602 F.3d 495 (3d Cir. 2010); *Nixon-Tinkleman v. New York City Dept. of Health and Mental Hygiene*. 434 Fed. Appx. 17 (2d Cir. 2011)
  - Request too open-ended. *Solomon v. Vilsack*, 2012 WL 629399 (D.D.C. Feb. 23, 2012)

# Telework

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- Partial:

- No evidence that proposal for partial work-from-home would not work, especially if temporary. *Willinghan v. Town of Stonington*, 2012 WL 759621 (D. Me. March 7, 2012)

- Full:

- Part-time teleworking permitted, but not full time and not as a way to avoid required traveling. *Gomez-Gonzales v. Rural Opportunities, Inc.*, 626 F. 3d 654 (1<sup>st</sup> Cir. 2010)

# Reassignment

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- Fact that employee would need training does not mean that he or she is not “qualified” for reassignment position . *Garvin v. World Color Printing*, 2011 WL 1485998 (N.D. W. Va. April 19, 2011)
- Employer met accommodation obligation by reassigning employee to lower-level position when he was no longer qualified for his job. *Wilkerson v. Shinseki*, 606 F. 3d 1256 (10<sup>th</sup> Cir. 2010)
- Reassignment not available to applicants or those who never completed probationary training. *O'Brien v. Napolitano*, 2012 WL 423732 (N.D. Cal. Feb. 8, 2012)

# Performance and Conduct

- Employee may prevail by showing that poor performance or misconduct could have been alleviated by reasonable accommodation:
  - Instead of firing employee for violating attendance policy, employer may have been able to provide requested schedule. *Alastra v. National City Corp.*, 2010 WL 4739763 (E.D. Mich. Nov. 16, 2010)
  - Not holding disability-related bathroom breaks against employee's productivity was a reasonable accommodation. *Myles v. University of Pennsylvania Health System*, 2011 WL 6150638 (E.D. Pa. Dec. 12, 2011)
  - More detailed instructions may have obviated employee's poor performance and allowed him to keep his job. *Kravits, supra.*

# Going Beyond Legal Obligations

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- Employers may take actions that are not required as reasonable accommodations
- Employer will not be deemed to have regarded an individual as having a disability just because it exceeded its legal obligations
- Employer may inform an employee that it is taking an action beyond what the ADA requires

# Going Beyond Legal Obligations (cont.)

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- Examples of situations in which any employer may exceed its obligations include:
  - Providing a temporary measure while considering a request for reasonable accommodation
  - “Accommodating” a temporary, non-chronic condition or a long-term condition that is not substantially limiting

# Confidentiality

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- Information about an employee's reasonable accommodation must be kept confidential
  - **Exception:** Information may be disclosed to supervisors and managers for necessary work restrictions or reasonable accommodations
  - **Exception:** Information may be disclosed to individuals involved in making decisions about reasonable accommodations
  - **Exceptions:** When necessary for emergency treatment; to officials investigating compliance with ADA; for workers' compensation and insurance purposes

# Resources

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- U.S. Department of Labor (for information on Family and Medical Leave Act)  
[www.dol.gov/esa/whd/fmla](http://www.dol.gov/esa/whd/fmla)
- Job Accommodation Network (JAN)  
<http://janweb.icdi.wvu.edu/>
- ADA Disability and Business Technical Centers (DBTACs)  
1-800-949-4232 (Voice/TTY)

## Resources (cont.)

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- Registry of Interpreters for the Deaf  
(301)608-0050 (Voice/TTY)
- Disabilityinfo.gov
- RESNA Technical Assistance Project  
<http://www.resna.org/hometa1.htm>

# Questions?

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- Please see EEOC's website [www.eeoc.gov](http://www.eeoc.gov)
- Or, contact:

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# THE ADA AMENDMENTS ACT – Latest Developments\*

## Strategies for Avoiding and Defending Against ADA Claims

*presented for*

**Strafford Publications**

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## Hypothetical

*Employee working in company's telemarketing center advises her supervisor that due to her medical condition, she needs to be able to work from home one day per week to adjust to her medication each week.*

*Is the employer required to agree to this employee's limitations?*

## Hypothetical

*Supervisor advises HR department that due to her treatments for cancer, she needs to be able to work part time for a few months.*

*Is her employer required to agree to this request?*

## Hypothetical

*Employee of social services agency advises his supervisor that his medical condition, an anxiety condition, makes it difficult for him to concentrate and he has trouble meeting his deadlines. He advises his supervisor that what would really help would be if he could have an assistant or if his supervisor would remind him each week of all of his deadlines.*

*Is this request reasonable?*

## Hypothetical

*Employee takes a leave of absence to treat depression. Initially, the leave is for ten weeks. Employee does not return after ten weeks. Instead, employee indicates, through her doctor, that she needs another six weeks of leave, which would take her beyond the FMLA-provided twelve weeks of leave. Employee is poor performance so ideally, her employment would be terminated.*

*Is the employer required to provide the additional leave time?*

## Hypothetical

*Employee's performance is steadily declining. Reason to believe depression is cause. Employee has become increasingly withdrawn. Having previously been enthusiastic and positive, employee is now jaded and negative. Employee also has sad affect and often appears to be on the verge of tears. Do you raise your concerns about depression when talking with the employee about his performance? Can you raise the EAP? If so, how?*

# Hypothetical

*Employee discloses existence of alcohol problem in response to final warning. What effect does disclosure have on final warning? Expectations going forward? What accommodation is appropriate?*

## Hypothetical

*Employee provides doctor's note requesting "removal of all stress-inducing responsibilities." How should you respond?*

## Hypothetical

*Employee has consistently missed significant amounts of work time over the last year due to a disability. Employee has exhausted all available FMLA leave, but continues to miss 2 or 3 days a week from work.*

*At what point may the employer terminate the employee's employment due to lack of attendance? Is attendance an essential function of the position?*

# Potential Barriers to Interactive Process

1. Employee does not provide medical information
  - a. Document requests and time frames to respond

## Potential Barriers to Interactive Process

2. Employee refuses to submit a medical examination by health care professional selected by company
  - a. Inquire as to reason why and document same
  - b. Address if reasonable

## Potential Barriers to Interactive Process

3. Employee does not agree to reasonable accommodation offered by employer
  - a. Inquire as to basis for employee's refusal and document same
  - b. Address if reasonable

# Practical Impact of ADAAA in Litigation

1. Many conditions which previously were not disabilities under ADA will be deemed disabilities under ADAAA
2. Inquiries will be narrower and less extensive in determining whether disability exists in light of broader definition of disability
  - a. Limited use of experts on issue of whether individual is disabled
  - b. Experts more likely to be used on issue of whether offered accommodation was reasonable; whether individual posed direct threat or undue hardship

## Practical Impact of ADAAA in Litigation

3. Far fewer cases will be won on summary judgment on issue of whether employee is “disabled”
  - a. Where close call as to whether individual is disabled, employers should proceed to engage in interactive process in response to accommodation requests
4. Increased risk in “regarded as” cases of written communications by managers
  - a. Critical for supervisors/managers to focus on problems with performance or behavior as opposed to perceived underlying cause in light of broader definition of “regarded as”
    - i. Important before
    - ii. Even more important now

## Common Mistakes Made By Employers

1. Only engaging in reasonable accommodation process if employee formally initiates it

## Common Mistakes Made By Employers

2. Having front-line supervisors obtain the medical information

## Common Mistakes Made By Employers

3. Focusing on disability and not essential job functions

## Common Mistakes Made by Employers

4. Failing to use job description when focusing on essential job functions

## Common Mistakes Made by Employers

5. Dismissing unreasonable requests without exploring more reasonable ones

## Common Mistakes Made by Employers

6. Assuming that burden is on employee and/or his or her doctor to make proposals and not evaluating independently other alternatives

## Common Mistakes Made by Employers

7. Failing to consider other accommodation decisions in similar situations
  - a. Eliminating essential functions temporarily without preserving legal position that going beyond legal obligation

## Common Mistakes Made by Employers

8. Eliminating essential functions temporarily without preserving legal position that going beyond legal obligation

## Common Mistakes Made by Employers

9. Failing to understand potential right of employee to leave of absence under not only ADA but also FMLA

## Common Mistakes Made by Employers

10. Obtaining medical information beyond scope of permissible inquiry
  - a. Impact of *Dillard's* decision on employer absenteeism policies and requirements for doctor's notes

## Common Mistakes Made by Employers

11. Sharing medical information beyond need to know, narrowly defined

# THANK YOU

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