

LABOR PERSPECTIVES

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PROPOSED FEDERAL LEGISLATION WOULD BROADEN THE SCOPE OF PROTECTION UNDER THE ADA

Should someone who has hearing problems, but through the use of a hearing aid is able to hear perfectly be considered disabled? How about someone who suffers from insomnia, but takes sleeping pills that make him sleep soundly every night? Come January 1, 2009, they may be considered disabled, and will thus be protected by the Americans with Disabilities Act (“ADA”).

The ADA Amendments Act of 2008 (“ADAAA”) passed in the U. S. House of Representatives on June 25, 2008, by an overwhelming majority vote of 402 to 17, and is currently waiting to be voted on in the Senate.

The ADAAA came about as a reaction to several U. S. Supreme Court decisions which narrowed the scope of the ADA, specifically the cases Sutton v. United Airlines, Inc., 527 U.S. 471 (1999), and Toyota Motor Manufacturing, Kentucky Inc. v. Williams, 534 U.S. 184 (2002). In Sutton, the Supreme Court held that the determination of whether an impairment substantially limits a major life activity is to be made taking into account the ameliorative effects of mitigating measures such as eyeglasses or contact lenses, medication, hearing aids or prosthetics. Subsequently, in

Toyota, the Court held that the terms “substantially” and “major” in the definition of disability in the ADA “need to be interpreted strictly to create a demanding standard for qualifying as disabled under the ADA, and that in order to be substantially limited in performing a major life activity, 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.”

Originally, the bill was introduced on July 27, 2007, as the ADA Restoration Act (“ADARA”). The ADARA eliminated the current ADA requirement that a disability “substantially limit a major life activity” by removing that phrase from the definition of disability, and it shifted the burden of proof from plaintiffs to employers regarding whether an individual is “qualified” to perform the job. These drastic changes led to great opposition to the bill from many business groups, and thus, to negotiations between the disabled community and the business community. These negotiations eventually led to the drafting of the current language of the ADAAA, which is supposed to be a compromise between the two sectors.

The ADAAA retains the current ADA definition of disability as a physical or mental impairment that substantially limits one or more major life activities, a record of such an impairment, or

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In this Issue...

Proposed Federal Legislation Would Broaden the Scope of Protection Under the ADA..... 1-2
by: Zahira Colón Collazo

Employer’s Burden of Proof in Disparate-Impact Claims Under ADEA..... 3
by: Jorge A. Antongiorgi Betancourt

Employers: Are You Aware of Your Obligations Under the Genetic Information Nondiscrimination Act? 4-5
by: Rafael I. Rodríguez Nevares

Snapshot of Medical and Disability Leave Rights Under Local Law 6-7
by: James D. Noël III

Practice Group News..... 7
by: María Antongiorgi

(continued from page 1)

being regarded as having such an impairment. However, it defines the term “substantially limits” as “materially restricts,” a term for which the proposed legislation fails to provide a precise meaning (which will probably lead to an increase in litigation in order for the courts to provide a clear meaning of the phrase), but which is clearly a less demanding standard than the one currently applied by the courts. Moreover, the House legislation redefines the term “major life activity” to be nearly everything one might do in a day. The text includes a non-exhaustive list of activities such as performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. Further, the definition also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. Any impairment that “materially restricts” a person from doing any of these activities or his body from performing these operations would constitute a disability for purposes of the legislation.

One aspect of the ADAAA that employers will especially need to be aware of is the expansive nature of the “regarded as” prong of the definition of disability. According to the ADAAA, an individual is disabled if he or she is “regarded as having such an impairment.” The Act explains that an individual establishes the elements of the “regarded as” prong if he or she has been subjected to an adverse employment action because of a perceived or actual physical or mental impairment regardless of whether it limits a major life activity. A mental or physical impairment includes almost

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any health condition or cosmetic disfigurement. Moreover, two important statutory restrictions would limit this otherwise expansive prong. First, the impairment cannot be transitory and minor. A “transitory” impairment is one with an actual or expected duration of six months or less. This eliminates short-term impairments such as the flu or the common cold. Second, an employer has no obligation to even consider a request for a reasonable accommodation under the “regarded as” prong of the definition. Thus, “regarded as” discrimination claims may only address discrimination in the terms and conditions of employment.

The ADAAA would prohibit consideration of the effects of mitigating measures such as medication, assistive technology, hearing aids, or prosthetics, in determining whether an individual has a disability. The only exceptions would be ordinary eyeglasses or contact lenses. This prohibition clearly supersedes the exact opposite requirement enunciated by the Supreme Court in [Sutton](#).

The ADAAA requires that the Act’s provisions be construed broadly, clearly overturning the decision of the Supreme Court in [Toyota](#).

Under the ADAAA, the employee would continue to bear the burden of proving that he or she is a qualified individual with a disability.

If passed, the legislation as it is currently drafted, would take effect on January 1, 2009.

We will keep you informed as to any developments regarding the ADAAA. For more information regarding this matter, you may contact any of the attorneys of our Labor and Employment Law Practice Group. **M&V**



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EMPLOYER'S BURDEN OF PROOF IN DISPARATE-IMPACT CLAIMS UNDER ADEA

In the recent court decision in Meacham et al. v. Knolls Atomic Power Laboratory, No. 06-1505, June 19, 2008, the U. S. Supreme Court answered the question as to whether the employer facing a disparate-impact claim must bear the burden of producing evidence and persuading the fact-finder in an age discrimination case, pursuant to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C.A. § 621 et seq, when it plans to defend itself using the statutory exemption for employers actions otherwise prohibited by ADEA, but "based on reasonable factors other than age."

ADEA, in general, protects individuals 40 years or older from adverse employment actions taken "because of such individual's age." Under ADEA, two theories of discrimination have been developed and applied: "disparate-treatment" and "disparate-impact."

Under the disparate-treatment theory, the employer simply treats some individuals less favorably than others because of their age. Cases under this theory are usually focused on the employer's discriminatory motive.

On the other hand, disparate-impact claims involve employment practices that appear neutral in their treatment of different groups but, in fact, have the result of a harsher treatment on members of a protected group. As a result, under ADEA, an employer who classifies his employees without respect to age may still be liable under this theory if such classification adversely affects the employees because of their age.

Separately, ADEA provides some exceptions or defenses against claims based upon certain employers' practices that otherwise are prohibited under the statute: the *bona fide* occupational qualification ("BFOQ") and the reasonable factors other than age ("RFOA"), among others. See 29 U.S.C.A. § 623f(1).

The BFOQ defense assumes that age was used as a basis for the challenged employment practice or policy but that such use was "reasonably necessary to the normal operation of the particular business." On the other hand, the RFOA defense precludes employer liability if the adverse impact was attributable to a non-age factor that was reasonable.

In Meacham, the U.S. Supreme Court analyzed the RFOA defense and the disparate-impact theory on a claim filed by former employees affected by an involuntary reduction in force ("RIF").

After a reduction in the demand for its services, Knolls, a federal contractor retained to do maintenance work on the Navy's fleet of nuclear-powered warships, began to reduce its workforce. Knolls began offering a voluntary reduction in force through buyout offers. However, Knolls was still left with over 30 jobs to be cut. As a result, the employer began an "involuntary reduction in force" plan, in which its managers were required to score employees using criteria such as performance, flexibility, and critical skills. The scores assigned to those criteria were added to the individual's years of service, and the totals were used to determine which individuals were to be retained. In accordance with the RIF plan, Knolls

terminated 31 employees, 30 of which were at least 40 years old. Twenty-eight of the individuals thus affected by the RIF sued Knolls alleging disparate-treatment and disparate-impact under ADEA. The jury, however, found for plaintiffs on the disparate-impact claim only. The U. S. Court of Appeals for the Second Circuit affirmed, but the U. S. Supreme Court vacated the judgment. On remand, the Court of Appeals vacated its decision and held that the employees had failed to carry their burden of proof showing that the criteria used in the evaluation system were unreasonable.

In review of the Court of Appeals judgment, the Supreme Court held that: RFOA is an affirmative defense to be presented by the employer; and it is incumbent upon the employer, and not the employees, to bear the burden of producing evidence raising the RFOA defense and also the burden of persuading the fact-finder of its merits.

Although the Supreme Court in Meacham acknowledges that this holding may create some concerns among employers, it emphasized that even under this new scenario, plaintiffs with a disparate-impact claim may not rely on just pointing to a generalized policy that leads to such an impact. They have to isolate and identify the specific employment practices that are allegedly responsible for an adverse impact on older workers.

If you require assistance in the handling of related issues, please contact any of the attorneys of our Labor and Employment Law Practice Group. **M&V**



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EMPLOYERS: ARE YOU AWARE OF YOUR OBLIGATIONS UNDER THE GENETIC INFORMATION NONDISCRIMINATION ACT?

On May 21, 2008, the Genetic Information Nondiscrimination Act, also referred to as GINA, was signed into law by the President of the United States. GINA is the result of a decade-long battle to protect people from being the victims of discrimination which may prevent them from getting genetic tests that could prove beneficial to their health. The fear of restricted access to health insurance coverage or adverse employment actions are some of the reasons behind an individual's reluctance to take part in genetic tests or research studies.

GINA specifically addresses this concern by protecting individuals from being the victims of discrimination as a result of differences in their DNA that may increase their risk of developing certain diseases, such as cancer, Alzheimer or diabetes. It also encourages individuals to participate in research studies without fearing that the information obtained from DNA testing will be used against them in the workplace or by health insurance providers.

GINA essentially serves two main purposes. First, Title I prohibits group as well as individual health insurers from requiring genetic testing from beneficiaries, and using such information to determine plan eligibility and calculate premiums. Second, it bans employers from discriminating against job applicants and employees on the basis of genetic information. The following is a brief overview of GINA's most significant provisions regarding the prohibition of discrimination in the workplace, as

well as some practical recommendations employers should follow in order to ensure compliance with this law.

Title II of GINA establishes that it shall be an unlawful employment practice for an employer:

- “(1) to fail or refuse to hire, or to discharge, any employee, or otherwise discriminate against any employee with respect to the compensation, terms, conditions, or privileges of employment of the employee, because of genetic information with respect to the employee; or
- (2) to limit, segregate, or classify the employees of the employer in any way that would deprive or tend to deprive any employee of employment opportunities or otherwise adversely affect the status of the employee as an employee, because of genetic information with respect to the employee.”

What exactly is genetic information? GINA defines the term as information on an individual's genetic tests, the genetic tests of family members of such individual, and the manifestation of a disease or disorder in family members of such individual. An individual's age or sex has been excluded from the definition of genetic information. Indeed, the scope of the term “genetic information” as defined by GINA is so broad that Congress was forced to create several specific exceptions to protect employers from situations in which they

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may gain access to an employee's genetic information as part of the normal course of business. Generally, an employer shall not be held liable for requesting, requiring or purchasing genetic information from an employee or his or her family members under the following circumstances:

- (1) where an employer inadvertently requests or requires family medical history of the employee or family member of the employee;
- (2) health or genetic services are offered by the employer, including such services offered as part of a wellness program; the employee provides prior, knowing, voluntary, and written authorization;
- (3) where an employer requests or requires family medical history from the employee to comply with the certification provisions of the Family Medical Leave Act of 1993 or such requirements under State family and medical leave laws; and
- (4) where an employer purchases documents that are commercially and publicly available (including newspapers, magazines, periodicals, and books, but not including medical databases or court records) that include family medical history.

In addition, GINA imposes strict confidentiality requirements on employers who have access to an employee's genetic information. This type of information must be maintained on separate forms and medical files and be treated as a confidential employee medical record. In addition, employers must handle and treat this information in compliance with the same standards applicable under the Americans with Disabilities Act.

Employers can undoubtedly be held liable for mishandling an individual's genetic information or that of a family member as the basis for refusing to hire, discharging,

or discriminating against an employee with respect to his/her compensation and terms and conditions of employment. It is of utmost importance that employers be aware of their obligations under GINA in order to avoid potential liability exposure. Title II violations are enforced under Title VII of the Civil Rights Act of 1964. The legal remedies available to employees who are victims of this type of discrimination

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include reinstatement or hiring (with or without back pay) or other equitable relief. Moreover, if a court has determined that the employer's discriminatory acts were intentional, the employee may recover compensatory as well as punitive damages.

What can both employers and supervisors do to reduce the risk of exposure?

The following are some practical recommendations you should consider in order to avoid a potential liability under GINA.

- Every employer has the obligation to implement an anti-discrimination policy in the workplace which bans discrimination based on all protected categories i.e. age, race, sex. Make sure that your policy is amended in order to affirmatively state that the company will not tolerate discrimination against its employees based on their genetic information or that of their family members.
- In addition, human resource managers, supervisors and other managerial staff should be trained on how to treat an employee after learning that he/she has a disposition towards a genetic-based disease or condition, or if a member of the employee's family is suffering from such a disposition.
- Most importantly, employers should exercise extraordinary care when taking adverse employment actions that could affect an employee's working conditions, particularly after gaining access to the employee or family member's genetic information.

For more information regarding the development of related policies, you may contact any of the attorneys of our Labor and Employment Law Practice Group. [M&V](#)



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SNAPSHOT OF MEDICAL AND DISABILITY LEAVE RIGHTS UNDER LOCAL LAW

It is important for you to be aware of employees' local leave rights, because under our legislation the violation of a protected leave may result in an employer being sued by the employee or former employee for damages, loss of income, reinstatement and attorney's fees, among other types of relief.

The following are local laws which provide medical or disability leave benefits:

1. Puerto Rico's Non-Occupational Disability Insurance Act, Act No. 139 of June 26, 1968 ("Act No. 139") establishes a leave for employees who become disabled because of a non-occupational illness or injury.
2. Puerto Rico's Compensation System for Work-Related Accidents Act, Act No. 45 of April 18, 1935 ("Act No. 45"), provides that the State Insurance Fund Corporation ("SIFC", commonly referred to as "el Fondo") will examine an employee who suffers a work-related injury or illness and determine whether or not to place the person on a protected leave. Individuals who work in their homes must also be insured and are protected by this law.
3. Puerto Rico Act No. 44 of July 2, 1985 ("Act No. 44") requires employers to provide reasonable accommodation to persons with disabilities as defined in this law. A leave of absence may be a form of accommodation. A leave of absence may also be a reasonable accommodation under the Americans With Disabilities Act ("ADA").
4. Puerto Rico's Chauffeurs' Social Security Act, Act No. 428 of May 15, 1950 ("Act No. 428"), establishes a disability leave for any non-exempt person whose work requires him or her to drive a "motor vehicle" as part of his or her regular duties, which includes finger-lifts operating in a warehouse.
5. Puerto Rico's Automobile Accident Social Protection Act, Act No. 138 of June 26, 1968 ("Act No. 138), covers every person traveling in a motor vehicle through public places in Puerto Rico and provides for a leave if a person becomes incapacitated and cannot work as a result of an injury due to a non-work-related motor vehicle accident.
6. Puerto Rico's Working Mothers Protection Act, Act No. 3 of March 13, 1942 ("Act No. 3"), establishes, among other rights, a right to maternity leave. The federal Pregnancy Discrimination Act of October 31, 1998 also requires that women who are affected by pregnancy, childbirth or related medical conditions be treated the same as other persons not so affected (but similarly restricted in their ability or inability to work) for purposes of leave benefits, among other rights. Moreover, the Family and Medical Leave Act of 1993 ("FMLA") may apply in conjunction with or in addition to maternity and some of the other leaves mentioned in this article.
7. Puerto Rico's Minimum Wage, Vacation and Sick Leave Act, Act No. 180 of July 27, 1998 ("Act No. 180") provides for the accrual of paid sick leave to non-exempt (hourly) employees.

You also need to consider the company's employee manual, because it may create rights and obligations. In Santiago v.

Kodak Caribbean, Ltd., 129 D.P.R. 763 (1992), the Puerto Rico Supreme Court held that the discharge of an employee due to absenteeism which was in conflict with the Kodak Employee Manual's provision pertaining to sick leave was a discharge without just cause.

Are you aware of the various forms to be used pursuant to local legislation? For example, under Act No. 45 both the employer and the employee have the duty to report a work-related injury or illness within five days. The employer must fill out the form. This means that even if the employee does not report the work-related injury or illness to "el Fondo", you still must file a written employer's report with "el Fondo" within five days after the date of the injury or illness.

You need to keep in mind that there are different time periods during which the position of the person on a leave must be reserved. The following are examples of such reservation of employment periods under the mentioned legislation: Act No. 45: up to 360 days after the occurrence of a work related accident or work related illness; Act No. 139: up to 365 days after commencement of the non-occupational disability; Act No. 428: up to 365 days after commencement of the chauffeur's disability; and Act No. 138: for up to 180 days after commencement of the disability caused by a motor vehicle accident.

You must consider the interaction between the different types of leaves. For example, an employer may designate the paid portion of a maternity leave under Act No. 3 as running concurrently with FMLA leave. As a general rule, when an employer finds out that a leave

is being taken for a reason covered by the FMLA and there are no extenuating circumstances, it has two business days to notify the employee that the paid leave will run concurrently with FMLA leave. In the case of a maternity leave, this decision must be made by the employer within two business days of the time the employee gives notice of the need for leave. Moreover, some employers have adopted a rule that FMLA leave will run concurrently with both the paid prenatal leave and the paid postpartum leave under the rationale that the prenatal leave is in the nature of a leave due to a serious health condition under the FMLA and the postpartum leave is a leave due to the birth of a child under the FMLA. However, if you do not have a policy that FMLA leave will run concurrently with the paid part of the maternity leave, then an employee could be entitled to up to twenty-four additional weeks of leave without pay due to postpartum complications after the paid leave expires. This would be twelve weeks of unpaid leave under the Maternity Leave Act, plus twelve weeks under the FMLA due to "a serious health condition of the mother," the birth of the child and to care for the newborn child.

You must also consider including for each type of leave, the time period after the date when the employee is authorized to return to work within which he or she must report back to work or lose the right to reinstatement. For example: An employee on a workers' compensation, non-occupational disability or motor vehicle accident leave has 15 calendar days to report to work after medical release, whereas an employee on chauffeurs' leave has 30 days to return to work after the medical discharge.

Mistakes can be costly. Make sure not to terminate the employment of someone who you may believe is not entitled to a

PRACTICE GROUP NEWS

by: María Antongiorgi

Francisco Vargas was promoted to Income Member of the firm effective June 1, 2008. **Francisco** provides counseling in matters such as Family and Medical Leave Act, wage and hour, workers' compensation, Americans with Disabilities Act, union representation, and OSHA. He also provides lectures to clients, the general public and attorneys on compliance requirements under these statutes. **Francisco** is also a member of the Mergers and Acquisitions Practice Area.

On July 30 and 31, 2008, **Sandra Negrón** was the speaker at the monthly round-table seminar sponsored by the Society for Human Resources Management (SHRM). The seminar was held at SHRM's facilities at the Capital Center Building in Hato Rey. The topic discussed was "Separation Agreements and Severance Plans under ERISA." Over 120 participants attended both sessions.

leave, or to an additional leave, without first examining Puerto Rico legislation and regulations. If your leaves policy has not

Luis R. Amadeo was among the speakers at the "Fundamentals of Employment Discrimination Law Seminar," sponsored by the National Business Institute on July 10, 2008, at the San Juan Marriott. **Luis'** topic included the discussion of procedural and substantive issues under federal and local anti-discrimination statutes, such as Title VII and Act 100. **Luis'** topic also included a discussion on retaliation, mobbing, and disparate treatment, as defined by these statutes.

On June 6, 2008, **Francisco (Frankie) Chévere** and **Juan Felipe Santos**, along with **Ariadna Alvarez** from the Taxes Practice Group, were the speakers at a seminar offered to the Asociación de Profesionales de Recursos Humanos de Cooperativas on recent labor law legislation, recent jurisprudence on discrimination and retaliation, and obligations under ERISA. The seminar was attended by representatives of more than 25 credit unions and was held at the offices of McConnell Valdés LLC. **M&V**

been revised recently, consider doing so to ensure that it is up-to-date and complies with amendments to local legislation. **M&V**

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