Welcome to the April 8, 2011 Breakfast Briefing presented by the law firm of King & Ballow in Nashville, Tennessee. Today's Breakfast Briefing will discuss the Americans with Disabilities Act.

I am Eddie Wayland, your host for this morning’s Breakfast Briefing and the partner-in-charge of King & Ballow’s Litigation Section.

Joshua Sudbury, an associate with King & Ballow, is our other presenter. Today, we will provide an overview of the new ADA regulations and how they will affect your business. Also, we will take you step-by-step through the ADA's Interactive Process.

Log onto www.kingballow.com for more information on the next Breakfast Briefing or our past Breakfast Briefings. Also, follow King & Ballow on Twitter at www.twitter.com/kingballow.
Recent Developments

- Oral complaints are sufficient to support claim for retaliation under the Fair Labor Standards Act (Kasten v. Saint-Gobain Performance Plastics Group)
- Immigration status may be irrelevant to collecting on wage-and-hour claims (Lin v. Chinatown Restaurant Corp.)
- Compliance with state court subpoena may constitute ADA violation. (Bennett v. USPS)
- Harassment claims may not be brought under USERRA (Carder v. Continental Airlines, Inc.)
- Make sure your criminal background searches (and your searchers!) comply with the Fair Credit Reporting Act (Hunter v. First Transit, Inc.)
- NLRB holds secret recording of workplace meeting by employee is protected activity (Stephens Media d/b/a Hawaii Tribune-Herald)

ADA Quick Review

- 3 Prongs -
  - Qualified Applicant or Employee with a Disability
    - Meaning the individual has a physical or mental impairment which substantially limits one or more major life activity
  - Those With a “Record of a Disability”
  - Those “Regarded As” Disabled
ADA Amendments Act (ADAAA)

- Became Effective January 1, 2009
- Final Regulations Published March 25, 2011
- Final Regulations Take Effect May 24, 2011

ADAAA

- Congress specifically provides for courts to construe the ADA in favor of “broad coverage”
- Expands the definitions of:
  - “Actual Disability”
  - “Substantial Limitation”
  - “Major Life Activity”
- Broadens the meaning of “regarded as”
Final Regulations

- Clarify the changes made by the ADAAA do not apply retroactively
  - Applies to employer actions after January 1, 2009
  - Also applies to an employer’s denial of a request for reasonable accommodation that is renewed after January 1, 2009
- Turn the court’s focus onto the “merits of the case,” i.e., whether the employer reasonably accommodated the employee

Disability

- Determination of whether an individual is disabled “should not require extensive analysis”
- Certain conditions will virtually always qualify
- Includes: Deafness, cancer, cerebral palsy, epilepsy, diabetes, bipolar disorder, post-traumatic stress disorder, HIV, MS, etc.
Major Life Activity

- Not to be determined by its “central importance to daily life”
- Includes non-exhaustive list of activities and bodily functions
- Final Regulations add “immune” and “circulatory” systems to the list of major bodily functions, consistent with ADAAA

Substantially Limits

- Term to be construed broadly to permit “expansive coverage”
  - Should not require extensive analysis
  - Will not usually require scientific, medical, or statistical evidence
- Need not prevent, or significantly or severely restrict performance of a major life activity
- Covers conditions which are episodic or in remission
**Working as a Major Life Activity**

- Generally should be unnecessary to consider
- Class or broad range of jobs in various classes
  - Nature of the work; or
  - Job-related requirements
- Limitation in performing unique aspects of a single specific job is insufficient
- Example: Lifting

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**Mitigating Measures**

- Reduce or eliminate the symptoms or impact
  - Medication, Medical Equipment/Devices, Prosthetic Limbs, Hearing Aids, Mobility Devices, etc.
- Positive effects of mitigating measures
  - Cannot consider for disability purposes
  - Exception: “Ordinary” eyeglasses or contact lenses
  - No specific level of vision impairment provided
- May consider negative effects for disability purposes
Other Disability Issues

- Current Drug Use: Still Excluded
- Still Covered:
  - Successful completion of drug rehab
  - Current participation in supervised rehab program
- Pregnancy: NOT a disability
  - Impairments resulting from pregnancy, may be considered a disability

“Record of” a Disability

- Individual had a qualified disability in the past
- Also includes someone previously erroneously deemed as having qualified disability
- All changes lowering the threshold for finding a substantial limitation apply to evaluating whether individual meets the “record of” standard
**“Regarded as” Disabled**

- Taking an action based on an impairment, actual or believed, unless both transitory and minor
  - Transitory = lasting or expected to last 6 months or less
  - Objective standard applies
- No requirement that employer believe the impairment “substantially limits” the performance of a major activity

**Liability requires action by employer**

- Must show unlawful discrimination
  - “Motivating Factor” or “Sole Reason”

**Defenses to Liability**

- Unqualified for the position
- Direct Threat
- Action required by another federal law

**Reasonable Accommodation not required**
Other Common ADA Issues

- No change to definitions of:
  - Qualified
  - Direct Threat
  - Reasonable Accommodation
  - Undue Hardship

- ADAAA does not affect workers compensation laws or Federal and State disability benefit programs

Duty to Accommodate

- Unaffected by ADAAA
- Ongoing
- Interactive
- Duty only exists if reasonable accommodation possible
- Reasonable does not necessarily mean employee’s preference
Duty to Accommodate

Duty does not arise:

- When employee is only “regarded as” disabled
- When accommodation would create undue burden
- When accommodation would pose a direct threat to health and safety at workplace

An Employer’s Guide to the Interactive Process

Recognizing When a Request for Accommodation Has Been Made
When Has a Request Been Made?

- Generally, employee is responsible for notifying the employer of the need for a reasonable accommodation
  - Employers not obligated to ask if the employee needs an accommodation unless disability is *obvious*.
- “Plain English”
  - The employee does not have to say “reasonable accommodation”
  - Does not even have to mention the ADA
  - Employee must only make the employer aware need for accommodation is due to medical condition

When Has a Request Been Made?

- Employee/Applicant may make a disability request *at any time*
- Employer *may not ignore* request because employee did not make accommodation request earlier
- An *obvious* disability may trigger interactive accommodation process *without a request*
When Has a Request Been Made?

- There is *no requirement* the request for accommodation be *in writing*
  - Request may be by any method available to the employee

- May Employers ask the employee to fill out a form documenting the request?
  - Yes
  - However, employers may not ignore the initial request

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When Has a Request Been Made?

- Request may be made by someone other than employee
  - Family member
  - Friend
  - Other representative

- Health Professionals may also request
  - A note from an employee’s doctor stating the employee may return to work with certain work restrictions may constitute a request for reasonable accommodations
Sherry Singer Scenario

Sherry Singer is a customer service representative. Her job duties include data entry and extensive typing. While Sherry is a good customer service representative, she has difficulty completing her data entry assignments within her shift and often stays late to complete these tasks. Sherry sometimes complains to her co-workers of pain in her wrists and hands and often makes comments that her hands are either tingling or feel numb. Sherry has not spoken with her manager, Henry Right, about the situation.

Sherry has one disciplinary write up in her employment file for failing to complete her data entry assignments as required. One morning, after failing to complete yet another task in the time allotted, Henry calls Sherry into his office. The two discuss Sherry's repeated failure to complete her job duties and Henry issues Sherry a second written discipline. Henry informs Sherry that her failure to timely complete her data entry assignments a third time could result in her termination.

Sherry then tells Henry she thinks she has carpel tunnel syndrome, that her wrists and arms constantly hurt, and that her hands feel weak and often tingle or go completely numb. Sherry says she has not seen a doctor, but she is sure she has carpel tunnel because she read about its symptoms on the Mayo Clinic's website. Sherry says the constant pain and tingling are from her typing duties and are the reason she has been unable to complete her tasks on time, but says nothing further. She does not request leave time, and does not ask for any change to the terms or conditions of her position.

Sherry Singer Scenario

- **Is Sherry disabled?**
  - Yes. **Sherry has a physical impairment, which affects her nervous system**

- **Has she requested a reasonable accommodation?**
  - *Most likely yes. Sherry has identified a disability, and has provided Henry with enough information to put him on notice.*
Addressing the Request

If a manager or supervisor believes an employee has made a request for accommodation, the manager or supervisor should notify a Human Resources official or other designated person immediately!

Addressing the Request

- The HR official or other designated person should schedule a meeting, including:
  - Employee
  - The employee’s immediate manager or supervisor
  - A Human Resources official (or other designated company official)
  - Union Representative (if applicable)
Addressing the Request

At the first meeting:

– Review the ADA
  • Go over relevant terms
  • Identify each party’s responsibilities

– Obtain a medical release form
– Send letter to health care provider

Requesting Documentation from the Individual with a Disability

- May ask appropriate health care provider for documentation about the disability and its functional limitations
- Specify what types of information you are seeking
- Be careful: “obvious” disability may limit or eliminate an employer’s ability to request documentation of medical condition
Requesting Documentation from the Individual with a Disability

- May seek only the documentation needed to establish the disability and the need for accommodation
- Usually may not request individual’s complete medical history

Documenting an Employee’s Disability: Genetic Information Nondiscrimination Act (GINA)

- Prohibits
  - Use of Genetic Information in Employment Decisions
  - Intentionally acquiring genetic information
- Genetic Information includes
  - Family Medical History
  - Genetic Tests/Diagnostics
- Disclaimer
Documenting an Employee’s Disability

- ADA/GINA: Any information obtained must be kept confidential
  - Separate from employee’s personnel file
  - Limit access to necessary supervisors and managers
- Documents regarding requests for accommodation must be kept for one year
  - If an EEOC charge is filed, the records must be maintained until the charge is resolved

Documenting an Employee’s Disability

- Employers may require an individual see a health care provider of the employer’s choice
  - No prohibition under ADA, but the employer must pay
  - But only after employee provides insufficient information
- Examination must be job-related, consistent with business necessity, meaning it must be limited to determining nature and limitations of disability
Documenting an Employee’s Disability

- Employee failure to provide documentation is considered **bad faith**
- Employer has responsibility to explain why employee’s medical information is insufficient
- Employee’s refusal to comply with reasonable request for documentation may eliminate the obligation to reasonably accommodate

Confidentiality Concerns

- The ADA prohibits employers from disclosing an employee’s disability or the fact that the employee is receiving an accommodation to fellow employees, or supervisors who are not required to know
- However, employers may discuss necessary restrictions on work or job duties with the individual’s supervisor
- Always keep an employee’s ADA-related information in separate file, with limited access
Analyzing the Particular Job: Is the Individual “Otherwise Qualified”?

- Disabled employee/applicant must be “qualified” for the position
  - What are all the job-related qualifications?
  - Are they all listed in the job description?
  - **Review/Update job descriptions**
    - What steps were taken to ensure that each qualification is actually job-related?
    - Are the screening tools to disqualify on a non-disability-related basis (i.e., criminal history and drug tests) applied equally to all employees/applicants regardless of disability?

Important Note: Establishing Essential Functions of a Job or Position

- Prior to any accommodation requests being made, an employer should sit down and determine the essential functions of each job
  - **Document these efforts**
- If an employee cannot perform the essential functions with or without an accommodation, the employee is not qualified and therefore not entitled to accommodation
- Essential Functions do not have to be changed to accommodate a disabled individual, *but nonessential functions do!*
Sherry Singer Scenario

A few weeks later, Sherry takes time off to schedule surgery. Sherry later returns to full duty from carpel tunnel syndrome surgery. Upon returning to work, Sherry asks Henry for specific voice recognition software, which is compatible with the customer service representative software, to be installed on her computer. Sherry explains the software would make the large amount of typing more manageable given her condition. Henry, who is now familiar with Sherry’s carpel tunnel syndrome and corrective surgery, immediately denies her request and tells Sherry that she has been released to work with no restrictions and, therefore, the company is unable to consider her request for a reasonable accommodation.

Sherry Singer Scenario

- Was Henry’s reliance on her original doctor’s note proper?
  - No. Henry should have re-engaged Sherry in the interactive process.
An Employer's Guide to the Interactive Process

Exchanging Information with the Employee

Exchanging Information

- After you have obtained information establishing the employee’s disability and their limitations, hold a second meeting with the employee.
  - The same individuals who attended the first meeting should attend
- Review information regarding work restrictions and identify which essential work functions are impacted by these restrictions, if any.
- Limit discussion to the types of accommodations needed to allow the employee to perform the essential functions of the job
Exchanging Information

- Allow the employee to make a request for a certain type of accommodation
- Consult other resources, such as the Job Accommodation Network, provided by the Department of Labor (www.askjan.org)
- Do not rush to judgment.
  - May need time to evaluate options, depending on information known prior to second meeting
  - But…do not cause undue delay
  - Keep the lines of communication open with employee for possible changes on either side

The Employee's Input

- Employee preference of accommodation must be considered but is not controlling
- May ask the employee’s doctor for suggestions of accommodations
  - Limit communications to information regarding these accommodations
  - Do not stray beyond the issue of accommodation or what is in the medical release signed by employee
Reasonable Accommodations

- **Reasonable Accommodation** – Any change or adjustment in the work environment or in the way things are customarily done that would enable a qualified individual with a disability to enjoy equal employment opportunity.
  - Modifications to a job application process
  - Modifications to the work environment or manner in which job is performed
  - Modifications that enable an employee to enjoy equal benefits and privileges
- A reasonable accommodation must **effectively** remove equal opportunity barriers caused by the disability

**Employer’s Checklist for Determining the Proper Reasonable Accommodation**

- Analyze the essential functions of the specific job
- Consult with the employee
- Identify potential accommodations and assess their effectiveness
  - Undue hardship analysis
  - Direct threat analysis
- Consider the individual’s preference and select and implement accommodation that is most appropriate for both the individual and the employer
- If no accommodation is possible, consider alternatives to termination
Sherry Singer Scenario

The next day, Sherry brings in a doctor's note stating she has a neuromuscular disease that causes decreased sensation in her extremities, including her fingers and hands, and delayed fine motor skills. The note also states Sherry can only handle 80% of the typing load of a normal customer service representative. Sherry gives the note to Henry and renews her request for the voice recognition software.

That evening, Henry goes out and locates the software, but feels it is outrageously priced. He does some searching online, and finds another voice recognition software product which is comparable to the one proposed by Sherry, but much more cost effective. The following day, he meets with Sherry and tells her of the new software he purchased for her based on the doctor’s note and their discussion of what would adequately accommodate her in her job. Sherry tells Henry that was not the software she requested, that she refuses to use the one he had purchased and that he must return the replacement software and buy the software she requested. Henry declines to capitulate.

Was Henry’s decision appropriate?

- Yes. *The duty to accommodate does not require the employer to provide the employee’s preferred accommodation.*
Categories of Accommodations

- Job Restructuring
- Modifying the Work Site
- Modifying the Work Schedule
- Providing Assistive Technology
- Reassignment to a Vacant Position
- Utilizing Leave Time

Job Restructuring

- Employers are not required to modify the essential functions of a job
  - Be careful not to do so inadvertently
- Employers are required to modify those functions which are non-essential
  - In computer-based jobs, attendance may be non-essential
- Important to establish and continually reevaluate the essential functions of each job
### Modifying the Work Site

- Type of Furniture
- Reconfiguring the Office Layout
- Adapting Equipment
- Fragrance Free Policy

### Modifying Work Schedule

- Adjusting arrival or departure times
- Providing additional breaks
- Altering when an employee does certain tasks
- Changing an employee from full-time to part-time
- Intermittent absences
Job Assistive Technology

- Mechanical Page Turners
- Modifying Computer Keyboards
- Voice-recognition Software
- Headsets
- Negative Tilted Keyboards and Mouse
- Adjustable Desks
- Sip/Puff Switch or Foot Switches

Reassignment to a Vacant Position

- Employers must consider reassigning an employee to an existing vacant position if the employee is qualified for that position
  - Remember, qualified means the employee can perform the essential functions of the position with or without a reasonable accommodation
- Employers are not required to create a new position or bump another employee from a position to create a vacancy
Reassignment to a Vacant Position

- There is no requirement that the employer promote the employee
- Demotion or movement from full-time to part-time designation is also acceptable, if no similar positions exist
- Light Duty issues

Utilizing Leave Time

- When to consider?
  - If the employee cannot be accommodated in current position,
  - Employee cannot be accommodated in a similar or lesser position, or
  - Employee cannot be accommodated by moving from full to part-time
- Leave time should be definite, but the employer should remain flexible
Utilizing Leave Time

- Paid leave is preferable to unpaid leave, but only if available
  - No obligation to create paid leave
  - Cannot force employee to take unpaid leave if paid leave is available to other employees
- Communicate with employee while on leave
  - If a position comes open while employee is on leave, employee should be considered for position
  - Make sure the employee knows of his responsibility to inform you of any changes in condition while on leave.

Utilizing Leave Time

- Remember: Employer is not obligated to grant an employee ADA leave as a reasonable accommodation if another, effective, reasonable accommodation exists

- Periods of leave that qualify under the Family and Medical Leave Act should comply with that statute as well
Other Possible Accommodations

- Providing Readers/Interpreters
- Making Facilities Accessible
- Flexible Work Schedule/Location
- Outside Resources

Sherry Singer Scenario

Three weeks after the voice recognition software is installed, Sherry returns to Henry and explains that the software is not fully compatible with the customer representative software, that she still types the great majority of the necessary data entry, and she is still unable to complete her work within her scheduled shifts. Sherry again asks for the specific voice recognition software that is compatible with the customer service software. Henry denies this request and simply states “The company has already bought software to accommodate your disability and will not be buying any additional software.”
Sherry Singer Scenario

- Did Henry appropriately address Sherry’s new concerns?
  - No. The duty to accommodate is ongoing. Also, the accommodation must effectively provide an equal employment opportunity.

Undue Burden

- Employer must show the proposed accommodation:
  - Involves significant difficulty or expense to the employer;
  - Is unduly extensive, substantial, or disruptive; or
  - Would fundamentally alter the nature or operation of the business.

- Difficult standard to meet
- Case-by-Case analysis
Undue Burden Analysis - Factors

- The nature and cost of the accommodation;
- The financial resources of the at-issue facility, including the number of persons employed and any impact the accommodation would have on facility operations;
- The overall financial resources of the employer, including its size and the number, type, and location of its facilities;
- The type of operations performed by the employer and the relationship of the employer to the at-issue facility.

Other Accommodation Considerations

- Direct Threat
  - Employer must show a “significant risk” of substantial harm to the health and safety of the individual and others
  - Employer must determine whether a reasonable accommodation would eliminate the risk or reduce the risk where the substantial harm no longer exists
- Factors
  - The duration of the risk
  - The nature and severity of the potential harm
  - The likelihood that the potential harm will occur
  - The imminence of the potential harm
Implementing the Accommodation

- Employers should act promptly to implement an accommodation.

- The ADA does not give specific timeline for implementing accommodations.

- Delay may be seen as failure to accommodate, exposing the employer to liability.

May not require a disabled individual to accept an accommodation.
- However, individual’s failure to accept accommodation may make the individual unable to perform the essential functions of the job, and therefore, may provide grounds for employee’s termination.
- *Jackubowski v. The Christ Hospital*

- Employers should **DOCUMENT** all attempts to provide accommodation, as well as employee’s responses.
An Employer's Guide to the Interactive Process

Review

Review: The Interactive Process Checklist

- Consult with employee or applicant about his/her possible accommodations
- Seek outside advice
- Assess possible accommodations for reasonableness AND effectiveness
  - Consider employee preference, but choose a reasonable accommodation
  - Remember to consider alternatives: reassignment, demotion, part-time, leave time, etc.
  - Consider undue hardship and direct threat analysis
Review: The Interactive Process Checklist

- Present accommodation to the employee in a timely manner
  - If employee does not accept an effective accommodation proposal, employer obligation is still fulfilled
- Continue to Monitor
  - Accommodation duty is ongoing
  - Employee’s condition may change, which means the type of reasonable accommodation needed may change
- DOCUMENT, DOCUMENT, DOCUMENT!!!!

Questions & Answers
Remember

King & Ballow’s May Breakfast Briefing

Topics: Drafting the Right Social Media Policy for Your Organization, and the “Ethics Hour”

Details: To follow