Employment Practice Update

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EEOC Proposes List of Presumed Disabilities

By Christopher B. Lunny

On September 17, 2009, the Equal Employment Opportunity Commission ("EEOC") published its notice of proposed rulemaking ("NPRM") to revise its regulations in line with the ADA Amendments Act of 2008 ("ADAA") which took effect on January 1st of this year. The NPRM proposes a significant adjustment in how the EEOC will view disabilities and, if approved, the NPRM will help define Congress' expanded view of conditions that qualify as a "disability."

For example, the NPRM recites a list of impairments that, according to the EEOC, will "consistently meet the definition of a disability." Those conditions include: deafness, blindness, retardation, partially or completely missing limbs, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV or AIDS, multiple sclerosis, muscular dystrophy, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, schizophrenia and major depression.
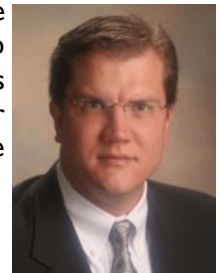
Similarly, the NPRM describes conditions which will likely not meet the definition of a disability, including the common cold, seasonal or common influenza, a sprained joint, minor or non-chronic gastrointestinal disorders or broken bone that is expected to heal completely. In essence, the NPRM marks a concerted effort by the EEOC to distinguish between various impairments. At the June 17, 2009 Commission meeting when the NPRM was approved, the EEOC's Associate Legal Counsel Peggy Mastroianni explained that staff's direction ". . . from day one has been Congress' exhortation in the [ADAA] that the definition of disability should be construed in favor of broad coverage and should not demand extensive analysis."

Employers will quickly note that the NPRM tackles one of the more complex issues that arise in today's workplace: mental impairments. While bipolar disorder and major depression have been categorized as presumptive disabilities, the NPRM notes that other psychiatric impairments may or may not suffice. For example, the NPRM observes that panic disorder, anxiety disorder and some forms of mild depression may substantially limit individuals when compared to most people "as indicated by the time and effort required to think and concentrate, the diminished capacity to effectively interact with others, the length and quality of sleep the individual gets [or] the individual's eating patterns or appetite . . . ." Thus, lesser psychiatric impairments may result in a disability if the condition substantially limits an employee when measured by these and other yardsticks. Again, the NPRM is intended to facilitate "broad coverage."

> *Nonetheless, the NPRM should remind employers to carefully review job descriptions and the "essential functions" which, according to the ADAA, must be performed with or without reasonable accommodation.*

The EEOC will continue to receive written comments on its NPRM until November 23, 2009. No doubt, numerous comments will be received as the NPRM signals active regulation that will attract attention from industry advocates and interest groups. Nonetheless, the NPRM should remind employers to carefully review job descriptions and the "essential functions" which, according to the ADAA, must be performed with or without reasonable accommodation. Given that more conditions will likely qualify as a "disability," the question now becomes which job duties are essential, which are marginal and whether the employee agreed to those distinctions in a written job description. If you have any questions regarding the ADAA, NPRM or your company's job descriptions, please contact our office at (850) 425-6654.

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This article is meant to provide a brief overview and points of discussion regarding employment and labor law topics. Should a particular issue arise or should you desire additional consultation to protect your firm, the advice of a competent counsel should be sought.