Disability Claims Are Up

By Lynne Eisaguirre

Last year we saw the impact of the Americans with Disabilities Act (ADA) Amendments Act (ADAAA). The Act vastly expanded the definition of "disability" bringing millions more people within the ADA's protection. While in the past employers often won ADA cases on summary judgment, easily establishing that the plaintiffs were not disabled and avoiding jury trials, that easy out has been closed by the Act. THE ADAAA broadened the ADA's definition of disability by expanding the term "major life activities," doing away with the "substantially limited" requirement for those regarded as having a disability, and overturning two U.S. Supreme Court decisions that interpreted the ADA's definition of disability narrowly.

Even before these amendments, harassment claims based on disability were increasing. Of the 27,262 total harassment charges made to the EEOC and state fair employment practices agencies in fiscal 2007, 4,934 were for disability harassment – the third most after race and sexual harassment and more than the amount for age, national origin or religious harassment. Studies show that 75% of workers will be disabled at some point in their working life.

What exactly did the ADAAA do? Basically, create new headaches for HR and your mangers. One decision the Act overturned had let employers consider the ameliorating effects of mitigating measures – such as hearing aids and medication – when determining whether someone even has a disability. Now, under the new Act, employers will be required to evaluate impairments without regard to mitigating measures. If, for example, an employee's clinical depression is controlled by medication, you have to look at their unmedicated state to determine if they have a disability. The Act overturned another Supreme Court decision that had concluded that the term "disability" should be viewed narrowly. Furthermore, impairments that are episodic or in remission may now qualify as disabilities.

Last but not least, the ADAAA also expands the term "major life activities," those activities that show you're disabled if they're affected. They now include "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, working and the operation of a major bodily function."

How to Handle the Coming Storm of Claims

What should you do to handle the coming deluge of claims in your organization? Take a tip from how you've handled sexual harassment issues and institute specific and mandatory training on the ADA for all your HR professionals, managers and executives. While most organizations are cutting training budgets because of the economy, training saves you time and money in the long run. While the ADAAA doesn't require ADA training, the amendments provide a strong business case for it.

Take a page from the sexual harassment handbook in order to understand how to handle the ADA Amendments. Remember that sexual harassment training isn't specifically required by Title VII but most employers understood the advantages of such training after the US Supreme Court decided Burlington Industries, Inc. v. Ellerth and Faragher v. City of Boca Raton in 1998. Those decisions established an affirmative defense for employers with effective sexual harassment policies and training. Good training on harassment reduced inappropriate workplace conduct and gave employers an affirmative defense if litigation arose.

Training should, at a minimum, cover the following:

Who is covered: The act broadly expanded the definition of "major life activities" and removed the defense of mitigating measures from considerations in disability

determinations. The result is that almost anyone who has, or who is regarded as having a serious impairment or disease that is not temporary will qualify as disabled. In training, include any applicable state laws.

How hiring policies and practices are affected: Applicants are now covered; therefore you must re-evaluate hiring processes. For example, reading is now a major life activity. If you're hiring a maintenance staff position for example, and a candidate can't read, you'll have to provide a reasonable accommodation to help the candidate complete the application process. If it is an essential job function, you don't need to provide such assistance. And you don't need to read the applicant's mind; they need to specifically ask for assistance.

The interactive process and its requirements. When someone requests an accommodation, you're required under the amendments to engage in an interactive process with them to determine if a reasonable accommodation can be provided to enable that person to perform the position.

What accommodations are reasonable: These requirements vary depending greatly on the organization and the position. Train your mangers to work with HR and your attorneys to determine reasonable accommodations.

What is prohibited. As noted above, harassment claims are growing under the ADA. Teach your managers to prohibit harassment and report complaints of impairment-related harassment to HR.

Retaliation is also prohibited. If an employee requests accommodation, that individual is protected.

Last but certainly not least, it's important to train your people on the complex interplay between the ADA, the Family and Medical Leave Act, similar state laws, workers' compensation laws, and Social Security claims.

Undoubtedly, the amendments make ADA compliance more complicated. Many of the requirements are counter-intuitive for most managers. It's unrealistic to expect them to understand them on their own. Resolve this year to train your HR team and managers to provide a defense if you go to trial and to prevent mistakes.