

Legislative Blast May/June 2011

FEDERAL UPDATES

US DOL Publishes Final Updates for FLSA

On May 5, 2011, the Department of Labor published final updates to the Fair Labor Standards Act (FLSA). The most significant revision affects employers that implement fluctuating workweek compensation programs. The new rules, which will be enforced by the U.S. Department of Labor's Wage and Hour Division, not only cover future salary calculations, they may even be applied retroactively. It's critical that employers understand these new provisions and adjust their compensation. According to www.employmentlawmatters.net.FLSA, in July 2008, the Department of Labor's Wage and Hour Division (WHD) published proposed rules that would change several regulations issued under the Fair Labor Standards Act (FLSA) and the Portal-to-Portal Act, including tip credit, fluctuating workweek, compensatory time, commuting, and other provisions. The proposed rules were not finalized during the previous Administration; however, a final rule was published in the Federal Register on April 5, 2011, and took effect May 5, 2011.

One of the primary changes is an update to the regulations regarding "tip credit" to reflect increases in the minimum wage. Tip credit means that an employer can pay to a tipped employee an hourly wage less than the legal minimum, so long as a combination of that less-than-minimum wage and the person's tips equals at least the legal minimum wage. The final rule raised the maximum federal tip credit from \$4.42 an hour to \$5.12.

Other changes made include clarification of certain overtime exemptions for employees engaged in firefighting activities (allowing such employee to engage in a certain amount of non-exempt work), as well as an adoption of the youth opportunity wage provision, which allows an employer to pay a less-than-minimum wage to an employee under the age of 20 for the first 90 calendar days of employment.

Other updates are as follows according to flsaovertimelaw.com/2011:

Fluctuating Workweek Under 29 C.F.R. §778.114

The proposed regulations issued by DOL in 2008 under the Bush administration (73 Fed. Reg. 43654) would have amended regulations on the "fluctuating workweek" method of calculating overtime pay for nonexempt employees who have agreed to received pay in the form of fixed weekly payments rather than in the form of an hourly wage. The proposed regulations would have amended 29 C.F.R. §778.114 to permit payments of non-overtime bonuses and incentives (such as shift differentials) "without invalidating the guaranteed salary criterion required for the half-time overtime pay computation." The DOL left out this proposed change from the final rules however, saying it had "concluded that unless such payments are overtime premiums, they are incompatible with the fluctuating workweek method of computing overtime." Explaining the decision not to amend the FWW reg, the DOL noted that "several commenters ... noted that the proposal would permit employers to reduce employees' fixed weekly salaries and shift

the bulk of the employees' wages to bonus and premium pay" contra to the FLSA's intent.

Compensatory Time

The final rules also do not include a proposed change that would have allowed public-sector employers to grant employees compensatory time requested "within a reasonable period" of the request, instead of on the specific dates requested. Instead, the final rule will leave the regulations unchanged, "consistent with [DOL's] longstanding position that employees are entitled to use compensatory time on the date requested absent undue disruption to the agency."

For additional information on FLSA changes and updates, visit www.dol.gov or the abovementioned web addresses.

Final ADAA Regulations in Effect

Effective May 24, 2011, the Equal Opportunity Employment Commission (EEOC) announced their final rulings on the American's with Disabilities Act Amendment Act (ADAAA). The following highlights of the ruling are as follows and the information was found on-line with credit due to Margaret Hart Edwards and Patrick Martin. Margaret Hart Edwards is a Shareholder in Littler Mendelson's San Francisco office, and Patrick Martin is a Shareholder in the Miami office. For additional information, you can visit www.littler.com or www.eeoc.gov.

Changes in the Components of "Disability"

While the ADAAA and the rules still provide that a disability is an impairment that substantially limits a major life activity, the definitions of major life activity and "substantially limits" are changed. As the words have stayed the same, but the meanings have changed, going forward employers must use with great caution all cases on these issues decided under the ADA before amendment.

Major Life Activity Redefined

Major life activity is now defined under the rules to encompass not only those activities formerly included, but several more such as "interacting with others." The ADAAA also added the operation of a major bodily function as a major life activity, and the EEOC added to the statutory definitions to include virtually every physiological function. Thus, major life activities now include the functioning of the immune, musculoskeletal, neurological, brain, genitourinary, circulatory, and reproductive systems, and all major organs.

The EEOC makes it plain that the intention is to include virtually all physical and mental conditions, except those which have never been considered impairments, such as genetic predisposition to a disease (now covered by the Genetic Information Nondiscrimination Act), pregnancy (but not pregnancy-related disability), eye color, left-handedness, and personality traits such as a bad temper.

The sweep of the definition of major life activity is such that the EEOC eliminated its former regulations and guidance regarding the major life activity of "working." As a person is most likely to have a limitation on another major life activity, the EEOC determined there would be little occasion to focus on the major life activity of working in and of itself.

Substantially Limits Redefined

The EEOC explicitly declined to redefine "substantially limits." Rather, it created nine "rules of construction," derived from the ADAAA language and legislative history to be applied to make a determination of "substantially limits."

These rules are:

1. "Substantially limits" is to be construed as broadly as the ADA allows.
2. The impairment need only substantially limit the ability to perform a major life activity compared to most people in the general population. It need not prevent, or significantly or severely restrict, the individual from performing the major life activity. This is noteworthy as "substantially" evidently means something less than "significantly." This may be the subject of future litigation.
3. The focus of analysis is on whether employers have complied, not on whether the impairment substantially limits a major life activity. This rule is ancillary to rule number one.
4. The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. The degree of limitation is lower than it was pre-ADAAA. And, while the EEOC eliminated its previously proposed list of impairments that would "consistently," "sometimes," or "usually not" be disabilities, as well as its recommended list of "per se" disabilities, it introduced a new concept resulting in much the same outcome. The final rules contain the concept of "predictable assessments," meaning that by applying its new rules of construction, there are impairments that in virtually all cases will be considered disabilities, such as: deafness, blindness, intellectual disability (formerly called mental retardation), missing limbs, autism, cerebral palsy, cancer, diabetes, HIV infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia. As a result, in many cases, the "individualized assessment" will be perfunctory.
5. The comparison of an individual's performance of a major life activity to that of the general population will not usually require scientific, medical or statistical analysis, although such analysis may still be used. For those with learning disabilities, the comparison is still with those without the learning disability, even though the usual method of diagnosis may be in terms of the difference between actual and expected achievement of the individual. Further, success in school does not mean that the person does not have a protected disability.
6. The ameliorative effects of mitigating measures are ignored for the purposes of determining substantial impairment. In contrast, the negative effects of mitigating measures, such as the side effects of medications, should be considered. While the EEOC eliminated the confusing proposed inclusion of surgical interventions, the final rule added psychotherapy, and behavioral and physical therapy as examples of mitigating measures. The ADAAA made an exception for "ordinary eyeglasses

or contact lenses," which may be taken into account in determining whether or not a person has a disability. Consistent with the ADAAA, aids for those with "low vision" are not "ordinary eyeglasses." The EEOC declined to include more detail in the definition of ordinary eyeglasses or contact lenses or low vision devices, leaving that determination to case-by-case analysis. The EEOC said in its amended Interpretive Guidance that, if any employer imposes a qualification standard that requires uncorrected vision, adversely affected applicants or employees may challenge that standard, and the employer will be required to demonstrate that the qualification standard is job-related and consistent with business necessity. If a person has mitigating means available and fails to use them, that fact may affect the determination as to whether the individual is qualified or poses a direct threat.

7. An impairment that is episodic or in remission is a disability, even if not active or in remission. This applies to a broad range of episodic conditions, conditions with "flare ups," and conditions that may be at least temporarily cured. As noted above, the EEOC removed a provision in its proposed regulations addressing impairments permanently fixed by surgery as "confusing."
8. Only one major life activity need be substantially limited. In the amended Interpretive Guidance, the EEOC uses the example of a person with a 20-pound lifting restriction that lasts for several months. That restriction is sufficient to substantially limit a major life activity without any showing that the person is unable to perform other activities of daily living. Without referencing the several cases litigated by the EEOC on the subject, the EEOC also cites the example of a person with monocular vision who has adjusted to the condition as someone who has a substantial impairment on the major life activity of seeing.
9. For the purposes of determining whether an individual has an actual disability ("prong one" of the tripartite definition of covered persons), or has a record of a disability ("prong two" of the tripartite definition), impairments that last or are expected to last less than six months may be substantially limiting. This is notable as the EEOC specifically declined to create a bright-line exclusion for short-term limitations, reacting to strong comments from disability rights advocates who argued that short term conditions can impose very significant limitations on a major life activity. The final rule retains the concepts of "condition, manner, or duration" as factors that may be relevant to the determination of whether an impairment substantially limits a major life activity. Thus, duration is just a factor, along with severity, and it is likely that this signals the development of a "sliding scale" standard: the more severe, the less lengthy the duration need be, and vice versa.

Using the "Regarded As" Disabled Prong to Prove Discrimination

Under the ADAAA and the rules, persons who are regarded as disabled need not show that they have a substantial limitation on a major life activity, but only that they were regarded by the employer as having a disability, and because of that were subject to an adverse employment action. An exception is provided by the ADAAA for impairments that are "transitory and minor." *Transitory* means lasting or expected to

last six months or less. The EEOC rules make this exception an affirmative defense, and place the burden of proof on the employer.

The EEOC rules incorporate the clarification provided by the ADAAA that persons who are regarded as disabled, but who do not claim to have an actual disability or a record of disability, need not be provided with reasonable accommodations. Thus, there is no interactive process duty with respect to these persons.

Other Points of Note

The EEOC acknowledged receiving many requests from employers to clarify what evidence of disability an employer may request or rely upon. The EEOC declined to address this issue, saying that its earlier guidance on the subject is sufficient, and that the ADAAA did not change the requirements.

The EEOC eliminated the term "qualified individual with a disability" from the regulations and Interpretive Guidance, as the ADAAA no longer uses this term, but the simpler "individual with a disability." This change does not appear to modify or reduce the plaintiff's burden to demonstrate that he or she is qualified for the position in question.

The EEOC also changed other terms to reflect more current usage. "Intellectual disability" is the new term for mental retardation. HIV infection is used instead of "HIV and AIDS."

STATE UPDATES

Wage Theft Prevention Act

Just a reminder that effective April 9, 2011 Section 195.1 of the Labor Law, requires all employers, other than governmental agencies, to give employees at the time of hire (before work is performed) and on or before February 1st of each year, notice of the following:

1. the employee's rate or rates of pay
2. the overtime rate of pay, if the employee is subject to overtime regulations
3. the basis of wage payment (per hour, per shift, per week, piece rate, commission, etc.)
4. any allowances the employer intends to claim as part of the minimum wage including tip, meal, and lodging allowances
5. the regular pay day
6. the employer's name and any names under which the employer does business (DBA)
7. the physical address of the employer's main office or principal place of business and, if different, the employer's mailing address
8. the employer's telephone number

Additional information on this ruling can be found on the following websites:

www.mvshrm.org, www.shrm.org, and www.labor.ny.gov.

Proposed Payroll Deduction Legislation

S2837-2011: Would authorize employers to make deductions from an employee's wages if such deduction is authorized by the employee and is for the convenience of the employee. This proposed legislation authorizes employers to make deductions from an employee's wages if such deduction is authorized by the employee and is for the convenience of the employee.

Payroll deductions for the benefit of the employee are currently limited to pension or health and welfare benefits, contributions to charitable organizations, payments for U.S. Bonds, or labor union dues or assessments. Payroll deductions are not permitted for services provided by employers for the employee's convenience such as meals in employer dining facilities, uniforms, or prescription drug co-pays at employer operated pharmacies.

This legislation would allow employers to deduct such services from the employee's paycheck when the service is for the convenience of the employee, the employee has authorized the transaction in writing, and the transaction was not due to fraud, undue influence or duress.

We will continue to watch this legislation and pass along updates as they occur. If you would like to track this pending legislation, you can visit www.open.nysenate.gov/legislation/bill/S2837-2011.

For additional information on both State and Federal legislative updates, you can visit www.shrm.org. As a member of SHRM National, you have access to a great deal of case rulings, trends and other types of law (i.e. compensation and benefits, retirement, recruitment, etc.). As a non-member of SHRM National you are still able to visit their site and have limited access to valuable material.