

THE EMPLOYER'S ADVISORY

A QUARTERLY NEWSLETTER

HIGHLIGHTING CURRENT EMPLOYMENT LAW ISSUES

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THE ADAAM HAS TEETH... AND JUST TOOK A BITE

The ADAAM (Americans with Disabilities Act Amendments Act), which became effective January 1, 2009, dramatically expanded the situations under which an individual is considered "disabled" and covered by the ADA. It did so, in part, by eliminating the effects of mitigating factors (such as medication and cancer in remission) when determining "disability" status. Before the ADAAM, many courts held that employees with cancer were not disabled when the cancer was in remission and there was no current substantial limitation on their major life activities. The employee's health was assessed when an accommodation was *requested*, and no accommodation was required if there was no currently manifested substantial limitation.

Things have changed, as evidenced by the finding in *Hoffman v. Carefirst of Fort Wayne, Inc.*, one of the first cases to apply the ADAAM. Hoffman, an employee at Carefirst, had renal cancer in remission. While Hoffman worked a 40-hour week without restrictions, a dispute arose when Carefirst told him that he would now need to work 65-70 hours per week, and commute 40 miles

for a weekly night shift, as well as be on-call on weekends. Hoffman had worked 9 to 5, from home, up to that point, and was concerned it would put him "in the grave" if he worked that much more. His doctor certified that he could only work 8 hours a day, 5 days a week, due to Stage II Renal Cancer.

Hoffman was initially told to resign or accept the added workload. Then, Carefirst said he could work a 40-hour workweek, but not from home, which added two hours of driving time to his day. Hoffman asked to continue working out of his home office. Carefirst refused and fired him.

Hoffman alleged Carefirst terminated him without offering him a reasonable accommodation for his renal cancer (allowing him to work from home), thus violating his rights under the ADAAM. Carefirst argued Hoffman wasn't disabled since his cancer was in remission, didn't substantially limit a major life activity, and Carefirst didn't "regard him as disabled." It claimed that allowing him to work an 8-hour day at the Fort Wayne office was a reasonable accommodation. Finally, it said Congress surely didn't intend for "all cancer survivors in remission, with no medical evidence of active disease, to be considered disabled, as a matter of law, for the rest of their lives."

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The court disagreed, denying Carefirst's Motion for Summary Judgment. It held that the ADAAA clearly provides that "an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." Hoffman was disabled and the accommodation he requested could be viewed by a jury as reasonable, especially since he had already been working out of his home office. So the case now goes to the jury to decide. 2010 WL 3522573.

Hint: When an applicant or employee asks for an accommodation due to a health condition, always consider whether the request can be reasonably accommodated without creating an undue burden on your company or other employees. Seek input from the person's physician regarding the medical necessity of the requested accommodation. If you deny the request, give written notice of the options you considered and why they are unreasonably burdensome or will not enable the employee to perform the essential job functions. Include in the options vacant positions for which the individual was considered.

CHILD LABOR REGULATIONS AMENDED

On May 20, 2010, the Department of Labor's Wage and Hour Division published a Final Rule designed to protect working children from hazards in the workplace while also recognizing the value of safe work to children and their families. According to the Department of Labor, "the Final Rule contains the most ambitious and far-reaching revisions to the child labor regulations in the last thirty years and marks another step forward in the Department's ongoing effort to promote positive, safe work experiences for young workers." The provisions of the Final Rule became effective on July 19, 2010. This is the second

update to the child labor rules since 2005. <http://www.dol.gov/whd/cl/whdfsCLFR.htm>.

The DOL explains that the Rule spells out more precisely what jobs and hours youths under 16 may work and for the first time allows youths as young as 14 to perform "intellectual" and "artistic" work such as computer programming, drawing or teaching in establishments that were previously prohibited.

Examples of new prohibitions impacting the employment of youth under the age of 18 years include working at poultry slaughtering and packaging plants, riding on a forklift as a passenger, working in forest fire fighting, forestry services, and timber tract management, operating certain power-driven hoists and work assist vehicles, operating balers and compactors designed or used for non-paper products, and operating power-driven chain saws, wood chippers, reciprocating saws, and abrasive cutting discs.

It also prohibits the operation of power-driven hoisting apparatus for minors between 16 and 18 years of age, and includes in the definition of "hoisting apparatus" hydraulic hoists to lift patients. This puts into question employing 16 and 17 year olds as certified nursing assistants.

Other prohibitions include making it illegal for 14 and 15 year olds to engage in youth peddling activities or non-charitable door-to-door sales. Further, it establishes 15 as the minimum age to work as a lifeguard at traditional swimming pools.

The Rule permits 16 and 17 year olds to operate, under specified conditions, power-driven pizza-dough rollers and portable, counter-top food mixers. And it establishes a new work-study program for 14- and 15-year-old students who wish to use their school-supervised work experience as a

means to realize their academic potential and obtain a college education.

Those interested in obtaining additional information should visit the DOL's website: <http://www.wagehour.dol.gov>.

ARE YOUR ARBITRATION PROVISIONS ENFORCEABLE???

When employers draft employment agreements they usually get to pick and choose what provisions to include. A recent California case, however, serves as a good reminder that just because an employer includes a provision in its agreements, doesn't necessarily mean it will be enforced by a Court.

In *Trivedi v. Curexo Tech. Corp.*, Curexo required Trivedi to sign an Employment Agreement in order to be hired as the company's CEO. In pertinent part, that Agreement contained a mandatory arbitration provision requiring any dispute arising out of or relating to the Agreement to be resolved by an arbitrator from the American Arbitration Association ("AAA").

So, what did Trivedi do when he got fired? He brought his employment and contract disputes to state court and asked the Court to ignore the arbitration provision, claiming that enforcement of the arbitration provision would be unconscionable. And the Court agreed!!!

The Court held that the arbitration clause in Trivedi's employment agreement was unconscionable for several reasons: First, the Court found significant the fact that the Agreement was prepared by the employer (Curexo), the arbitration provision was a mandatory part of the Agreement, and Trivedi was never given a set of

the AAA rules. Courts, including those in Colorado, are always concerned when one party drafts an agreement, appears to be in a stronger negotiating position and then offers the weaker party a take-it-or-leave-it offer.

The Court also found the Agreement unconscionable because by going to Arbitration, Trivedi would lose his right, in some instances, to attorneys' fees that are mandated by statute. Thus, the Agreement put Trivedi at greater risk than if he just brought his claims in court. For better or for worse, courts are reluctant to make it any harder for employees to get their day in court.

Courts often comment that statutes requiring plaintiffs to be awarded attorneys' fees when they are successful in a lawsuit against their employer are critical to ensuring legitimate claims get heard.

Finally, the Court held that the Agreement was unconscionable because it allowed the parties to obtain injunctive relief through the courts rather than going to arbitration. "Injunctive relief" is when the court orders a party to not engage in certain activities or to perform certain obligations, rather than simply awarding damages for breaching a contractual promise or obligation. The Court recognized that this exception to arbitration was unfairly in favor of Curexo because employers are far more likely to seek injunctive relief than employees (usually to prohibit an ex-employee from working for a competitor, soliciting other employees to quit and compete, or using trade secrets of the employer for competitive purposes).

It bears noting that this was a California case interpreting California case law and, thus, there is no guarantee that a Colorado court would decide the same issues exactly the same. Nevertheless, Colorado courts routinely support many of the same basic principles cited by the California courts and

employers looking to maintain enforceable arbitration provisions in their agreements would be wise to consider steps to increase the perceived fairness in those agreements.

A Few Tips to Creating Enforceable Arbitration Provisions: Give your employees a chance to have the Agreements reviewed by an attorney and include a provision that clearly states that both sides were provided the opportunity to have legal counsel review the agreement...even if they ultimately elect not to have legal counsel review! These provisions let courts know that, rather than a take-it-or-leave-it offer, the parties negotiated in good-faith, and after careful review, agreed to all of the provisions in the Agreement.

Arbitration provisions that state the parties will use rules from another organization, such as the AAA, should also state that all parties reviewed those specific rules and understand what they are getting into by agreeing to arbitration with that organization. Provide a copy of the rules to the employee and, if it is intended that amendments to the rules will control, state this and include instructions on how the employee can access the most up-to-date version.

Exclude from any provision that requires the employee to pay for their own attorneys' fees in disputes covered by statutes that entitle the employee to receive attorneys' fees if they prevail.

Final Thought: Arbitration provisions are NOT always cheaper or safer for employers. In many circumstances arbitration provisions make it far more costly to resolve simple disputes. When litigation is in court or before an administrative law judge, the only cost for a judge or jury is the filing fee. But arbitrators must be paid and can charge several hundred dollars per hour for their services, which can be a significant burden.

So, before deciding to include arbitration provisions in your agreements, check with counsel to make sure those provisions are truly in your best interest.

MINIMUM WAGE INCREASE

“Happy New Year” in Colorado always means a change in the minimum wage. In 2009, the minimum wage actually went down, dropping four cents from \$7.28 to \$7.24. For 2010, the change is more typical—it is increasing! On January 1, 2011, Colorado’s minimum wage will go from \$7.24 per hour (\$7.25 under the FLSA) to \$7.36—a whopping 12-cent bump. The tip credit remains at \$3.02 per hour, which means wages paid to tipped employees go from \$4.22 to \$4.34 per hour.

THE ACCIDENTAL SUCCESSOR UNDER FMLA

Johnnie worked for XYZ Corp. for 5 years when the company filed Chapter 11 bankruptcy and laid off everyone. At the time of layoffs, employees were told that ABC Inc. had acquired XYZ’s leasehold interest in the bankruptcy and would be opening shop at the same location within the month. Employees were encouraged to apply with ABC. Johnnie did so the same day and was hired immediately as assistant manager. She started working the next day for ABC at the same location, helping ABC with the move-in. Johnnie never lost a day of work in the transition from XYZ to ABC.

It is now six months later and Johnnie is about to deliver her first baby. She asks ABC for 12 weeks of FMLA leave beginning when the baby is born. ABC’s manager says, “Forget about it! You’ve only worked for ABC six months. You have to work here at least 12 months to be eligible for FMLA leave. I know the law.” Johnnie visits

Billy Flynn, an attorney who has become wildly wealthy suing employers for FMLA violations. Following Flynn's advice, Johnnie sues ABC claiming that it is the "successor employer" to XYZ and, therefore, must give Johnnie credit for her years of employment with XYZ when determining eligibility for FMLA leave. In defending against Johnnie's claim, ABC denies successor-employer status, pointing out that it only acquired XYZ's leasehold and only hired 10 of XYZ's employees out of 35 new hires. Billy Flynn buys a new Jaguar, confident that he will win for Johnnie and be awarded attorneys' fees against ABC for his efforts. That's how the FMLA works—employees who sue and win get their lost pay and benefits, plus up to 100% penalty, and reimbursement of their costs and attorneys' fees incurred in the litigation.

Who will win this suit? It is impossible to tell without more facts. But the scenario brings up real issues under the FMLA for employers acquiring other companies, their assets or employees. If there is "substantial continuity" between the two companies, the new company will be deemed the "successor employer" of the old company's employees. Successor employers must credit the employees with their period of employment and hours of work at the old company when determining FMLA eligibility.

Although the FMLA does not define the term "successor employer," the Department of Labor has issued regulations stating that the factors to be considered include: (1) substantial continuity of the same business operations; (2) use of the same plant; (3) continuity of the workforce; (4) similarity of jobs and working conditions; (5) similarity of supervisory personnel; (6) similarity in machinery, equipment, and production methods; (7) similarity of products or services; and (8) the ability of the predecessor to provide relief.

"Successor" status is not determined by the application of any single criterion, but rather the entire circumstances are to be viewed in their totality. 29 C.F.R. § 825.107; *Sullivan v. Dollar Tree Stores, Inc.*, 623 F.3d 770 (C.A.9, 2010). Because the origins of successor liability are equitable, fairness is a prime consideration in application of the regulation. The Supreme Court has held that courts must examine the successorship question from the viewpoint of the employee: "In conducting the analysis, [the court] keeps in mind the question whether 'those employees who have been retained will understandably view their job situations as essentially unaltered.'" *Fall River*, 482 U.S. at 43, (quoting *Golden State Bottling Co.*, 414 U.S. at 184; *Jeffries*, 752 F.2d at 464).

Billy Flynn will win for Johnnie and pay off that new Jaguar if he can show that ABC benefits from the retention of long-term employees of its predecessor and that the employees it retained reasonably believed their employment was continuous. Substantial continuity exists where the employees have the same job and duties with the new employer as they had with the old and the only difference in the transition was that they had to fill out new paperwork. If Johnnie's duties and compensation with ABC are the same as with XYZ and the product or services offered are the same, Flynn may be flying high!

Q & A

Q. Can we reduce our payroll expenses during these hard times by furloughing our salaried, exempt employees one day a month without pay? We are a private employer covered by the Fair Labor Standards Act.

A. Employees who are exempt from overtime under the FLSA because their duties qualify for the Executive, Administrative or Professional exemption, must receive a guaranteed salary that does not vary due to “quantity or quality” of work. Forcing such exempt employees to take a day off without pay can destroy the “salary basis” of their compensation and turn them into non-exempt employees who are entitled to overtime pay for working over 40 hours in a workweek. Unless the employees have contracts that prevent reductions in salary, you can advise them that their salary is being reduced by 5% (or whatever amount is necessary to satisfy your financial constraints and still meet the \$455 per workweek minimum FLSA requirement), effective at some future date that is after the current pay period.

Q. An employee became so loud and verbally threatening when disputing with his supervisor whether his truck was safe to drive that other employees ran to the supervisor’s office because they feared she was in danger. The supervisor was threatened by his loud voice, angry words and shaking fist. Can we fire him for this encounter?

A. It is against public policy to fire an employee for refusing to engage in activities that are unsafe. But employees are not protected from termination if the manner in which they bring

up safety concerns is insubordinate, violent or threatening. If you fire the employee under these circumstances, it is imperative to provide a written termination notice stating that the reason for discharge is the use of a loud voice, angry words and shaking fist toward his supervisor in a manner that caused his supervisor and other employees to reasonably fear for her safety. In no way should the termination be based on the fact that he stated safety concerns or refused to drive a truck that he believed was unsafe. 2010 WL 5019973

Q. A supervisor got drunk at her subordinate’s home Christmas party and in the presence of other employees, got naked and jumped into the hot tub. The work place has been totally disrupted by this conduct; no work is getting done and the supervisor is complaining that her subordinates are treating her disrespectfully. Can we fire her for her conduct at the party?

A. CRS § 24-34-402.5 prohibits employers from terminating any employee for engaging in a lawful activity off the premises of the employer during non-working hours unless such conduct conflicts with that employee’s responsibilities to the employer. Here, common sense would tell the supervisor that getting drunk and naked with subordinates will adversely affect her ability to supervise and, thus, conflict with her job responsibilities. Termination will not conflict with this state law. But it could create a sex discrimination claim if male supervisors have engaged in similar conduct without discipline or discharge.