



Lincoln Human Resources
Management Association

New ADAAA Strategies Briefing – Navigating the ADA and the
Disability Leave Trio

Jackson Lewis
Resolving Disputes and
Maximizing Profits for the Workplace

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Jackson Lewis ADAAA Basics

- Enacted September 25, 2008
- Became effective January 1, 2009
- EEOC issued proposed regulations on September 23, 2009
- EEOC issued Final Regulations on March 25, 2011
- Final Regulations became effective 60 days from March 25, 2011 or on **May 24, 2011**

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Jackson Lewis Coming to Grips with the “New” ADA

- Increased reasonable accommodation obligations
- Increased need to defend adverse employment actions related to an individual’s physical ability (in particular under the “regarded as” prong of the disability definition)
 - Including decisions involving poor performance, attendance, and leave
- Increased ADA charges and lawsuit
- More difficult ADA issues when cases are brought
- All of this will cause increased trials (because fewer cases will be dismissed by judges) which, in turn, will prompt increase settlements, which, in turn, likely will prompt increase charges and lawsuits

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Jackson Lewis ADA Charges Already on the Rise

- ADA Charge Statistics
 - 17% increase in last year
 - 30% increase over last two years
 - 40% increase over last three years
- Is this the tip of the iceberg?
 - The EEOC thinks so ...

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Jackson Lewis Anticipated Impact on ADA Litigation

We anticipate that in light of the ADA, including the expanded “regarded as” definition of disability contained in the ADA, **there will be an increase in the number of EEOC charges and lawsuits filed.** In particular, we anticipate that more individuals with disabilities might file charges with the Commission. Moreover, we anticipate that plaintiffs’ lawyers, who previously might not have filed an ADA lawsuit because they believed that an employee would not be covered under the Supreme Court’s cramped reading of the term “disability,” will now be more inclined to file lawsuits in cases where the lawyers believe that discrimination on the basis of disability—broadly defined—has occurred. As a result, **we believe that there may be additional legal fees and litigation costs associated with bringing and defending these claims, but we have no basis on which to estimate what those costs might be.**

Preamble to EEOC Final Regulations, Fed. Register, Vol. 76, No. 58 at 16995

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Jackson Lewis Definition of “Disability” Unchanged

- A physical or mental impairment that substantially limits a major life activity;
- A record of such impairment;
- Being regarded as having such an impairment.

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Jackson|Lewis Rules to Determine Whether Someone Has a "Disability" Have Changed

- An impairment need not prevent, or significantly or severely restrict, performance of a MLA to be "substantially limiting."
- Disability "shall be construed in favor of broad coverage" and "should not require extensive analysis."
- An individual's ability to perform a MLA is compared to "most people in the general population," using common-sense analysis without scientific or medical evidence.
- An impairment need not substantially limit more than one MLA.
- The determination of whether an impairment substantially limits a MLA always requires an individualized assessment.

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Jackson|Lewis Regulations Expand Definition of "Major Life Activities"

- MLA's include "major bodily function," such as functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, circulatory, respiratory, endocrine, hemic, lymphatic, musculoskeletal, special sense organs and skin, genitourinary, and cardiovascular systems, and reproductive functions.
- MLA's also include: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, communicating, sitting, reaching, interacting with others and working.

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Jackson|Lewis Mitigating Measures Ignored

- Positive effects of mitigating measures (except for ordinary eyeglasses and contact lenses) are ignored in determining whether an impairment substantially limits a MLA.
- Examples of mitigating measures which are to be ignored: medication, medical equipment and devices, prosthetics, hearing aids, mobility devices, use of assistive technology

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Jackson|Lewis Impairments that are Episodic or in Remission

- An impairment that is "episodic" or "in remission" is a disability if it would substantially limit a MLA when active.
 - Examples include: epilepsy, hypertension, asthma, diabetes, major depression, bipolar disorder and schizophrenia.
 - An impairment such as cancer that is in remission but may return is also a disability.
 - The effect of an impairment lasting less than 6 months can be "substantially limiting."

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Jackson|Lewis Predictable Assessments

- No "per se" list of disabilities ... but!
- Certain impairments will be disabilities in "virtually all cases"
- This is "intended to provide for more generous coverage and application of the ADA's prohibition on discrimination through a framework that is predictable, consistent, and workable for all individuals and entities with rights and responsibilities under the ADA as amended."

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Jackson|Lewis Predictable Assessments

<ul style="list-style-type: none"> • Deafness • Blindness • Intellectual disabilities (formerly termed mental retardation) • Partially or completely missing limbs or mobility impairments requiring the use of a wheelchair • Autism • Cancer • Cerebral palsy • Diabetes 	<ul style="list-style-type: none"> • Epilepsy • Human Immunodeficiency Virus (HIV) infection • Multiple sclerosis • Muscular dystrophy • Major depressive disorder • Bipolar disorder • Post-traumatic stress disorder • Obsessive compulsive disorder • Schizophrenia
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Jackson Lewis "Regarded As" Coverage

- Huge ADAAA issue – Forget everything you knew about “regarded as” coverage
- Unless impairment is transitory and minor, an individual is “regarded as having such an impairment” if the individual is subjected to a prohibited action because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity.

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Jackson Lewis Transitory and Minor Standard

- Applies only to “regarded as” cases
- Must be both transitory and minor to be excluded from “regarded as” coverage
- Coverage could exist for:
 - Major impairments of short (transitory) duration
 - Minor impairments of longer (non-transitory) duration
- Transitory is defined as lasting or expected to last six months or less
- One problem:
 - “Transitory” is defined but “Minor” is not defined

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Jackson Lewis "Regarded As" Coverage

- Individual is “regarded as having such an impairment” even if there is a defense to such action ... no longer a “coverage” case
- Establishing that an individual is “regarded as having such an impairment” does not, by itself, establish liability
- Liability requires proof of discrimination
 - Was there discrimination?
 - Is there a defense?

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Jackson Lewis "Regarded As" Coverage

- Prohibited actions include but are not limited to:
 - refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, or
 - denial of any other term, condition, or privilege of employment

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Jackson Lewis Implications for Disability Management

- Everybody who has an impairment should be presumed to be protected by the ADA
- Every adverse employment action related to an individual's physical or mental condition should be presumed to be a potential ADA case
- Do not expect to win the disability argument
- Focus your efforts on showing you made the correct employment decision, **even if the person had a disability!!**
- **Proficiency at conducting individualized assessments is critical!!!**

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Jackson Lewis The Regulations: Two Types of ADA Cases

- Discrimination cases (wrongful employment action)
- Reasonable accommodation cases

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Jackson Lewis The Regulations: Two Types of ADA Cases

- Discrimination cases (wrongful employment action)
 - All these cases will be "regarded as" cases
 - Forget about other prongs of disability definition (i.e., actual disability or record of disability)
 - Merits will turn on whether the individual was "qualified" ... could he/she perform the essential job functions

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Jackson Lewis The Regulations: Two Types of ADA Cases

- Reasonable accommodation cases
 - Must have an actual disability or a record of disability meaning an impairment must "substantially limit" one or more "major life activities"
 - If so, the issue is whether employer should have provided a reasonable accommodation
 - Final Regulations suggest finding of disability is likely
 - EEOC Enforcement position is interactive dialogue is required
 - Defenses include undue hardship

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Jackson Lewis Insight from the First ADA Cases

- Hoffman v. Carefirst of Fort Wayne, Inc. d/b/a Advanced Healthcare
- Markham v. Salinas Concrete
- Naber v. Dover Healthcare Assoc.
- Feldman v. Law Enforcement Associates Corp.
- Gesegnet v. J. B. Hunt Transport, Inc.

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Jackson Lewis Hoffman v. Carefirst of Fort Wayne, Inc. d/b/a Advanced Healthcare

- N.D. Indiana - Aug. 31, 2010
- Employer's motion for summary judgment denied
- Service technician supplied patients with home medical devices.
- Reasonable accommodation case: Plaintiff sought relief from mandatory overtime
- Plaintiff 's renal cancer was in remission

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Jackson Lewis Markham v. Salinas Concrete

- 2010 U.S. Dist. LEXIS 130057 (D. Kan. 12/8/10)
- Motion to dismiss denied
- Truck driver terminated after refusing to lift concrete blocks because of back pain
- Plaintiff had prior back injury and hernia but no current lifting restrictions
- Court found assertion of back pain a sufficient allegation of impairment that substantially limits major life activity

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Jackson Lewis Naber v. Dover Healthcare Assoc.

- 2011 U.S. Dist. LEXIS 18118 (D. Del. 2/24/11)
- Motion for summary judgment granted
- Plaintiff was a Recreation Assistant at Nursing Home - terminated for falsifying activity report
- Allegations of disability based on inability to sleep due to depression were sufficient
- Summary judgment granted - employer presented a legitimate reason for terminating
- No reasonable accommodation issue in case

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Jackson Lewis *Feldman v. Law Enforcement Associates Corp.*

- 2011 U.S. Dist. LEXIS 24994 (E.D.N.C. 3/10/11)
- 2 plaintiffs – one with Multiple Sclerosis (Company President) and the other with a TIA (Transient Ischemic Attack a/k/a “mini-stroke”) (Director of Sales)
- Both claims survived motions to dismiss
- MS involved episodic flare up
- TIA was temporary but not minor
- Court relied on Proposed ADA Regulations

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Jackson Lewis *Geseget v. J.B. Hunt Transport, Inc.*

- 2011 U.S. Dist. LEXIS 57537 (W.D. KY 5/23/11)
- Plaintiff alleged bi-polar, anxiety disorders and aversion to being in small spaces
- Despite noted lack of medical evidence, court assumed plaintiff disabled due to expansive definition under ADA
- Granted summary judgment, however, because plaintiff failed to make a sufficient request for reasonable accommodation

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Jackson Lewis *Insight from the First ADA Regulations*

- All adopt a broad reading of disability ... even before the Final ADA Regulations
- Conditions previously denied coverage now have a chance to litigate merits of claim
- Cancer, HIV infection, back pain, MS, TIA, depression
- Be ready to defend judgment that individuals are not qualified or reasons for employment actions were legitimate and nondiscriminatory

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Jackson Lewis *Integrated Disability Absence Management “Take-Aways”*

- Re-examine STD and WC programs
- Every person terminated while out of work receiving short term disability or workers’ compensation has:
 - virtually an automatic “regarded as” claim
 - a credible claim that they have an actual disability which entitles them to a reasonable accommodation
 - EEOC’s enforcement position is that a failure to engage in an interactive dialogue violates the ADA
- My fear: STD and WC will be “breeding ground” for future ADA claims under theories of:
 - Employees were “regarded as” disabled because they were qualified to work when
 - Under-employment
- FMLA and ADA claims will proceed simultaneously as we see in *Naber v. Dover Healthcare* case
- RTW programs must focus on essential functions, reasonable accommodation and direct threat standards

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Jackson Lewis *Compliance Strategies*

- Develop effective handbook policies
- Ensure functional job analysis exists
- State essential job functions and qualification standards in job descriptions
- Develop reasonable accommodation procedures
- Develop template letters or forms for communicating with doctors ... have objective support for medical judgments
- Train on process and recurring accommodation or direct threat scenarios

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Jackson Lewis *Policies Promoting ADA Compliance Efforts*

- Informing employees of commitment to provide reasonable accommodations
- Tell them how to request a reasonable accommodation
- Tell them when management will initiate discussions about reasonable accommodation
- Tell them they may need to provide medical information to aid process
- Tell them accommodations will not be provided if they are not reasonable or they pose an undue hardship
- Give examples of potential reasonable accommodations
- Consider developing different processes for “leave” accommodations and “non-leave” accommodations
 - “Leave” accommodations require coordination and integration with FMLA, short and long term disability, workers’ compensation, group health benefits and other employment benefits

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Jackson Lewis Mastering the Interactive Process

- Remember: Process is key ... but not all accommodations require or deserve the same process
- You don't always need to:
 - Wait for the employee to initiate the process
 - Require employee medical documentation
- Many accommodations are simple to identify and no medical information is needed:
 - Adjust a workspace
 - Provide equipment not normally supplied
 - Change the way the job is normally performed
 - Consider empowering managers and HR to provide accommodations that are "de minimus" in their operational impact or cost but:
 - Reserve the right to discontinue at a later time
 - Confirm that granting the accommodation should not be seen as an admission of ADA obligations

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Jackson Lewis Mastering the Interactive Process

- Step One: Understand the Job's Functional Requirements**
 - Identify the essential functions of the position that the employee must be able to perform to be "qualified" for the position
 - Review job descriptions and/or evaluate current job demands
- Step Two: Meet (or directly communicate) with Individual**
 - Meet with or contact the employee to:
 - Identify the precise job-related functional limitations caused by the medical condition that may be an ADA disability
 - Explore potential reasonable accommodations that would be "effective" in allowing the individual to perform the essential job functions
 - Be creative and identify more than one potentially "effective" accommodation
 - Determine the individual's accommodation preference
 - Convey the employer's obligation to provide an effective accommodation, not necessarily the employee's first choice

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Jackson Lewis Mastering the Interactive Process

- Step Three: Obtain Medical or other Technical Input**
 - Obtain medical documentation explaining or confirming:
 - The medical condition causing the need for the accommodation (if the medical condition is not obvious or known)
 - The functional limitations caused by the medical condition
 - How the accommodation will enable the individual to overcome limitations
 - Other potential reasonable accommodations that might be equally effective
 - Any safety concerns posed by the condition (if the medical condition or accommodation request raises a reasonable question about the individual's ability to perform a job without posing a "direct threat")
 - Include a job descriptions and/or statement of essential job functions
 - Explain employment concerns or challenges that may be prompting request
 - Direct employee to execute any medical authorizations the medical professional might require to provide requested medical documentation

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Jackson Lewis Mastering the Interactive Process

- Step Four: Grant/Deny Accommodation Request & Document Decision**
 - Determine whether accommodation sought is "reasonable" or poses an "undue hardship"
 - Undue hardship can be based on cost or operational impact
 - Cost is much less likely to be persuasive than operational impact
 - Operational hardship should consider the impact on:
 - other employees – must they work harder, longer or different hours?
 - Customers – is timely service or quality of products or services compromised?
 - Document and inform individual of your decision
 - Confirm willingness or intent to re-examine the decision periodically
 - Maintain a record of all reasonable accommodation decisions
 - Ensure medical information is maintained confidential

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Jackson Lewis Thank You!

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