

**Disability Laws**

**What You Don't Know Could Hurt You**







**FiveL**  
COMPANY

*Helping Leaders Limit their Liability by Learning the Law™*

July 10, 2012

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**Program Agenda**

- Legal Updates
- Legislative Updates
- Regulatory Updates
- All with a smattering of Nebraska news and...
- Tips for Practical Application!

This program does not constitute the rendering of legal advice.  
You should consult with employment counsel on matters impacting your organization.



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**Disability Discrimination - In the News**

- June 29<sup>th</sup> - Company to Pay **\$150,000** to Settle EEOC Suit
- June 25<sup>th</sup> - Company to Pay **\$380,000** to Resolve EEOC Suit
- June 20<sup>th</sup> - Company Settles EEOC Suit for **\$20,000**
- June 19<sup>th</sup> - Company to Pay **\$160,000** to Settle Lawsuit
- June 8<sup>th</sup> - to Pay **\$50,000** to Settle EEOC Lawsuit
- June 6<sup>th</sup> - Company Resolves Lawsuit for **\$65,000**
- June 6<sup>th</sup> - Company Settles EEOC Lawsuit for **\$50,000** +
- June 1<sup>st</sup> - **Joint employers** to Pay **\$49,500** to Settle EEOC Disability Lawsuit



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### Some Related, Current Stats

- FWI/SHRM’s 2012 “National Study of Employers” found that \_\_\_% of respondents appeared to be out of compliance with the FMLA



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### Legal Updates – ADA – May 25th

#### But-for Causation

- An employee develops a medical condition that requires her to sometimes use a wheelchair. Approximately 6 months after developing the condition she is fired for an “outburst” she has an work, which witnesses say included the use of profanity. She is terminated for the outburst. She says that’s a pretext for disability discrimination.
- Must an employee show that disability was the sole cause of discrimination or *a* cause?
- 6<sup>th</sup> Cir says...BUT...8<sup>th</sup> Cir (plus 7 others) say....



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### Legal Updates - ADA

- No-Fault attendance policies. Does an employer’s strict “no fault” attendance policy that imposes points that may lead to corrective action for each occurrence of absence violate the ADA if it is uniformly applied to all employees, those with and without disabilities
- Can attendance be an essential function of a job?



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### Legal Updates - ADA

- Wellness Programs. Does an employer's wellness program that requires participants to complete a biometric screening (finger stick for glucose and cholesterol) and an online Health Risk Assessment and imposes a bi-weekly fee upon employees who do not participate in the program violate the ADA, which prohibits making certain disability-related inquiries or conducting medical exams?



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### Legal Updates - ADA

- Is an employer required to reassign an employee with a disability to a vacant position for which /she qualifies if it has a more qualified candidate?
- EEOC says...
- March 7<sup>th</sup>, 7<sup>th</sup> Cir. *EEOC v. United Airlines* says....
- Others? 10<sup>th</sup> Cir & DC say....!
- NE's FEA says....



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### Legislative Updates – Federal

- November 2011 - VOW to Hire Heroes Act, which provides tax incentives to employers hiring certain unemployed veterans and providing training and education for certain veterans also amends USERRA to prohibit discrimination with respect to terms, conditions and privileges of employment. Effectively, this means the same standard for hostile environment charges or claims now applies to harassment based on military status as for other legally protected status under Title VII of the Civil Rights Act.
- Practical application?



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May 8<sup>th</sup> – HR 5647: PWFA (88 CoSponsors: 0 NE)

- Unlawful for Er to:
- (1) not make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a job applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship...;
- (2) deny employment opportunities to a job applicant or employee, if such denial is based on the need of the covered entity to comply with #1;
- (3) require a job applicant or employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation that such applicant or employee chooses not to accept; or
- (4) require an employee to take leave under any leave law or policy of the covered entity if another reasonable accommodation can be provided to the known limitations related to the pregnancy, childbirth, or related medical conditions of an employee.

5/18 – Referred to House Subcommittee



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Regulatory Updates:

- June 2011 – EEOC Hearings Leave as a Reasonable Accommodation
- December 2011 – OFCCP proposes rule for covered contractors for goal of 7% of workforce to be persons with disabilities



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Regulatory Updates: A Federal Snapshot

- January 25, 2012 – EEOC publishes its 2010 FY charge statistics
- \_\_\_\_\_ - 37.4% of all charges filed
- \_\_\_\_\_ - 35.40%
- \_\_\_\_\_ - 28.50%
- \_\_\_\_\_ - 25.80%
- \_\_\_\_\_ - 23.50%



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### EEOC Nebraska Stats: Disability Charges

	FY 2009	FY 2010	FY 2011
% of total state charges	23.10%	32.20%	32.60%

- NE's FEA covers employers with how many employees?
- How are essential functions of a job determined and when?



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### Regulatory Updates

- February 2012
  - EEOC Hearing on Unlawful Discrimination Based on Pregnancy and Caregiving Responsibilities
  - Updated FMLA Forms (exp. date 2/28/15)
  - Proposed FMLA Rule – Notice & Comment ext'd to 4-30
    - One Hour Rule
    - Different Rule; Different Shifts / Different Rule; Different Leave
    - Physical Impossibility to Return to Work



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### ESGR & Nebraska SHRM!

- SHRM Nebraska State Council
- HR Association of the Midlands
- Lincoln HR Management Association
- Great Plains HR Management Association
- Central Nebraska HR Management Association
- Norfolk Area Human Resource Association
- Columbus Area HR Association



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Comments?



Questions?

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