



The ADA and FMLA: Changes are brewing - Is Your Company Prepared?

By Liz Tascio
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Recent court cases have set limits on workplace protections for employees with disabilities, illnesses, and other medical issues, but that could change under new legislation and under amendments to the Americans with Disabilities Act and the Family Medical Leave Act. The changes, some proposed and some enacted, expand the definition of disability, extend specific protections to military personnel and their families, protect employees' genetic information, and more.

The changes are not without controversy. Supporters of the ADA Restoration Act, for example, say past court decisions have undermined the original intentions of the ADA. But some observers argue that the new legislation would overextend disability protections to cover even minor medical conditions, resulting in unfair costs for employers and an increase in litigation.

Howard Schragin, an attorney with Epstein Becker & Green, stepped into the fray to clarify what the changes mean for human resources professionals, explaining the amendments and proposals at TemPositions' recent HR Roundtable.

The ADA Restoration Act

The ADA Restoration Act, also known as the ADA Amendments Act, passed by the House of Representatives in June 2008, does three things:

1. It expands the definition of disability.

In the recent past, the legal trend has been to base an employee's eligibility for ADA protection based on what the employee is *able* to do, not what he or she is *unable* to do. For example, the 11th Circuit Court ruled that an applicant who was denied a job at Wal-Mart was not disabled – despite an undisputed mental handicap – because he had good verbal skills, could drive a car, and could take care of himself in general.

Two plaintiffs with severe back pain were denied disability status in separate cases because, in one case, the employee could still stand by bracing himself up and was allowed a break every 30 minutes, and in the second case, the employee, a nurse, could still bathe, drive, and perform other daily functions, despite being limited in her ability to dress herself and perform basic household chores.

The proposed ADA amendments are a reaction to court decisions like these. “Now, anytime you have a mental or physical impairment, you would be considered disabled,” Schragin explained. “Obviously, employee groups are very excited because it could potentially cover everyone. On the other hand, employers and employer groups are a little dismayed – because it could cover everyone.”

2. It makes allowances for mitigating factors.

When the ADA was enacted, lawmakers intended its protections to extend to people with debilitating illnesses, such as epilepsy and diabetes. But the Sutton trilogy of legal decisions by the Supreme Court created exclusions for medical conditions that could be managed with medication, medical equipment, or other mitigating factors. Under the ADA Restoration Act, even people with managed conditions can be considered for disability status.

3. It shifts the burden of proof to the employer.

Before, if a job applicant wanted a reasonable accommodation, the applicant had to show that with the accommodation, he or she could do the job. Now, it will be up to the employer to prove the applicant can't perform the job.

"The employer is going to have to prove that the accommodation is not viable, and they're going to have to, of course, bring it to court," Schragin said. "I think this has opened the flood gates and really complicated and mired things down."

Defining 'reasonable accommodation'

An HR professional at the Roundtable asked Schragin what to do about an employee with epilepsy who, it's suspected, is not taking her medication. Her seizures can come at any time, and it makes the other employees nervous.

"It's a tricky question, and I don't know that the new rules are necessarily going to change that," Schragin answered. "(She) would be considered disabled, and we'd have to try to work to accommodate that. However, it's a reasonable accommodation. It's not something that's going to completely disrupt the workplace and affect the fellow employees. ... Forgetting the ADA, forgetting mitigation, you need to address that issue and deal with it and try to come to a solution."

The Supreme Court hasn't ruled on whether reassignment is a reasonable accommodation – whether an employee with a disability who needs to be shifted into another job should get preferential treatment over someone more qualified. The 8th Circuit decided in a case brought against Wal-Mart that the store could give a job to the candidate it considered most qualified. The 2nd Circuit leans the other way, Schragin said.

"They have not really successfully addressed the issue, but as a general proposition, if you try to reassign (an employee) to a job with less pay, less duties, different job functions, whatever it may be, that would not be considered a reasonable accommodation," he explained.

There's no definitive case law on telecommuting, either, Schragin said, but in most cases, it would likely count as reasonable accommodation.

Clarifications to New York laws

State law already forbade New York businesses that are open to the public from denying services to those in wheelchairs, the blind, and others.

"How you went about doing that sort of depended," Schragin said. "Now, they've recognized there was a gap in the law, and employers now have to take affirmative steps to allow them to use their facilities."

New legislation went into effect in January 2008. Now, employers must make accommodations, such as installing elevators, widening doorways and hallways, providing menus and other printed material in Braille and large print, and making salespeople available to assist wheelchair-bound customers in stores.

Changes to the Family Medical Leave Act

Proposed clarifications to the FMLA will make some aspects of it easier to implement, Schragin said, but not intermittent leave – the changes don't address how to measure it. The proposals were announced in February, and the comment period ended in April. Final regulations have yet to be issued. The biggest differences are as follows:

1. Employers can now waive FMLA claims without approval from a court or from the Department of Labor. "It allows you to potentially settle and resolve an issue, and not worry about getting sued over and over for the same thing," Schragin explained.
2. Employees are now required to give more information about their own long-term leave. If they have an idea how much time they will need, they should say so. If they'll be seeing a doctor, they should tell the employer so the employer can certify the leave.
3. Employers now have five days instead of two to provide an FMLA packet to an employee taking leave; the packet should include notice of the employee's rights, responsibilities, eligibilities, and any other information the employer would have ordinarily provided. It's a good idea to include a HIPAA form, Schragin said.
4. Employers who don't have an employee handbook must provide employees with written notice of their FMLA rights once a year. This can be done via e-mail.
5. Employees have to log fewer hours – 1,250 – over 12 months within a five-year period before they are eligible under FMLA. An employee who has to leave work for military service gets to have that service counted toward the 1,250 hours, a new provision of the law. Family members of injured military personnel may take 26 weeks of unpaid leave to care for them.
6. Employees who take leave under the FMLA have to call the employer that day or within an hour of the start of the shift to report it. Previously, they had two days to do so.
7. An employer now has the right to go directly to the employee's doctor and ask for certification of the employee's health condition. They can request recertification every six months, and not more often than every 30 days. HIPAA still applies, and employers can't access employees' medical records.

The clarifications don't create more practical measurements for intermittent leave, which is difficult to track, nor do they address transfer of duties for an employee on intermittent leave. If an employee has to be out half a day, three days a week, his or her job duties can still be temporarily performed by others, but can not be formally reassigned.

Defining a 'serious' medical condition

An HR professional at the Roundtable told Schragin about an employee with an undiagnosed medical condition. The employee can work regularly, but when the condition flares up, the employee has to receive a treatment that renders the employee unable to work for the rest of the

day. How can the employer know whether the employee has a serious health condition, protected by law, if not even the employee's doctor knows what it is?

"I don't know that it would automatically not qualify just because it hasn't been defined yet," Schragin said. "The goal of the statute is to allow people to take time off and heal themselves. Just because it doesn't have a title yet wouldn't prevent them from doing that."

On the horizon: A Family Medical Leave Insurance Act?

Some families can't afford to take weeks of unpaid leave, no matter how badly a family member needs care. The proposed Family Medical Leave Insurance Act would address that by establishing a sort of trust fund, which is paid into by employees and employers and would provide 12 weeks of paid leave.

"This is something interesting that's floating around right now," Schragin said. "It has some restrictions on the employee. They have to be working at the employer for up to six months. So you couldn't come in and after a month expect to get 12 weeks of paid leave."

Some states already have legislation that allows for this, Schragin said. Under the federal act, employers could opt out if they provide similar benefits.

In the genes: Forecasting health problems

The Genetic Information Non-Discrimination Act, which has health provisions that go into effect in January 2010, protects employees in a way that's somewhat controversial: It's for employees who don't yet have a serious illness but who are likely to develop one.

"If you find out that they are predisposed to have cancer or some other debilitating illness, you cannot deny them a job or a promotion or anything," Schragin explained. "The employer's rationale is, 'We don't want to bring someone in who, a year from now, could maybe need leave for the next three years, costing us a ton of money.' The employee's position is, 'If you protect the people who already have a disability, why shouldn't you protect someone who is predisposed to getting one down the road?'"

It also prevents employers from requesting, purchasing, or demanding an employee's genetic information or his or her family members' genetic information.

An employer *can* request the information relevant to health-related inquiries – for example, if the employer is testing whether employees are being exposed to toxic or hazardous work conditions. But the information cannot be used in employment decisions, and it must be kept separate from employees' other records, just like medical records.

New York state law already prohibits discrimination based on genetic information.

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