SEWARD & KISSEL LLP

Employment Law Newsletter

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This edition of Seward & Kissel's Employment Law Newsletter reviews significant changes to the Americans with Disabilities Act of 1990 (the "ADA"), the adoption in New York State of a Worker Adjustment and Retraining Act ("WARN"), and amendments to the Family and Medical Leave Act of 1993 ("FMLA") and its regulations. Employers should be aware of these developments because they may require revisions to existing employment policies and practices to be in compliance and to avoid employee disputes.

These major developments include:

• The Americans With Disabilities Act of 1990

The ADA Amendments Act of 2008 takes effect January 1, 2009. The ADA applies to employers who have 15 or more employees, either individually or aggregated with a joint employer, such as a professional employer organization. The ADA amendments:

- Significantly broaden the definition of "disability";
- Expand the scope of coverage for employees "regarded as" disabled.

• The New York Worker Adjustment and Retraining Act

The NY WARN Act supplements the protections afforded to employees under the Federal WARN Act. The NY WARN Act takes effect on February 1, 2009.

- The NY WARN Act applies to employers with 50 or more employees and requires employers to give advance notice of "mass layoffs" or "plant closings." The Federal WARN Act applies to employers with 100 or more employees.
- The NY WARN Act requires advance notice of 90 days, whereas the Federal WARN Act requires 60 days.

• The Family and Medical Leave Act of 1993

The FMLA has been amended to provide expanded benefits to military families. Additionally, significant changes to the FMLA regulations issued by the U.S. Department of Labor have been adopted. The FMLA applies to employers who have 50 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, either individually or aggregated with a joint employer, which may include a professional employer organization.

- The FMLA now provides 12 weeks of unpaid leave for employees who have a qualifying exigency as a result of a family member's active service and 26 weeks of unpaid leave to care for a servicemember with a serious health condition.
- New final regulations taking effect on January 16, 2009 clarify existing FMLA rules, including: (1) whether the use of a professional employer organization ("PEO") subjects an employer to the FMLA where an employer individually employs fewer than 50 employees; (2) whether FMLA claims can be waived in a general release; and (3) providing detailed procedures under which employees and employers may request and designate FMLA leave.

The ADA Amendments Act of 2008

On September 25, 2008, President Bush signed into law the ADA Amendments Act of 2008 (the "ADAAA" or the "Act") to take effect on January 1, 2009. The Act amends the Americans with Disabilities Act of 1990 (the "ADA") which prohibits discrimination in employment against employees with disabilities. Covered employers should reassess their ADA policies and practices to ensure that they are consistent with the ADAAA and ensure that their human resources personnel understand the new amendments and their implications.

While we expect that the scope of the new statutory scheme will be better defined by the EEOC and the courts, Congress' intent in the Act is clear – to expand the ability for employees with a wider variety of disabilities to request and receive reasonable accommodations from their employers.

An Expanded Definition of Disability

Under the ADA, a disability is defined as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment." 42 U.S.C. §12102(2). While the Act does not change this basic definition, it does clarify what it means to be "substantially limited" in a "major life activity." In doing so, the ADAAA overturns the two leading Supreme Court decisions that interpreted the definition of a disability under the ADA, Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002).

In Sutton, the Court held that an individual may not be "disabled" for purposes of the ADA if the use of mitigating measures, such as medication or prosthetics, ameliorates the impact of the condition on a major life activity. In other words, if the substantial limitation on a major life activity may be alleviated with medication or other treatment, under Sutton, the individual may not be considered disabled under the ADA. The ADAAA overturns Sutton, specifically instructing that "the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures, such as medication, medical supplies, equipment, or appliances . . . ." The ADAAA does, however, permit the ameliorative effects of "ordinary eyeglasses or contact lenses" to be considered when determining whether an individual is disabled under the ADA.

The ADAAA also rejects the holding in Toyota Motor which interpreted the scope of "major life activities" under the ADA. Because the text of the ADA prior to the ADAAA did not define "major life activity," it was left to the courts and the EEOC regulations to delineate the meaning of that term. Toyota Motor construed the term narrowly, holding that "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."

The ADAAA rejects this standard, expressly defining "major life activities" broadly to include "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working" as well as "the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." The Act also specifically instructs that "the definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act." Further, the ADAAA clarifies that "an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."

Broader Coverage For Those "Regarded As" Being Disabled

In addition, the ADAAA expands the current protections afforded to those who are "regarded as" having a physical or mental impairment. Previously, an aggrieved employee needed to show that his or her employer regarded the employee as having a physical or mental impairment that substantially limited a major life activity. The ADAAA protects individuals who are subject to an action prohibited under the ADA "because of an actual or perceived physical or mental impairment, *whether or not*

the impairment limits or is perceived to limit a major life activity." The ADAAA does exclude, however, minor and transitory impairments (i.e., those that are of an actual or expected duration of six months or less).

Implications For Employers

While the ADAAA expands the scope of individuals covered under the ADA, an employer's obligations under the ADA remain generally the same. An employer may not discriminate against a qualified individual with a disability because of the disability. An employer must still seek to provide a reasonable accommodation to a qualified individual with a disability by engaging in the "interactive process" — the term referring to the dialogue an employer should have with an employee to understand the nature and scope of the employee's limitations and the employer's job needs to identify a reasonable accommodation. Examples of reasonable accommodations include modifying an employee's work schedule or providing the employee with specialized equipment or devices. What the Act means, however, is that employers will find themselves under a duty to engage in the interactive process with greater frequency as more covered employees request accommodations. In addition, with a wider array of conditions considered disabilities under the ADAAA, the range of potential reasonable accommodations will necessarily be more varied. The interactive process will take on a new importance as employers are faced with determining whether a potential accommodation is required or reasonable under the circumstances. Indeed, the amendments raise serious questions regarding the scope of reasonable accommodations for employees who are, for example, substantially limited in their ability to think and concentrate. Employers should anticipate that, under the ADAAA, they may need to implement more accommodations for more of their employees.

By loosening the definition of disability under the ADA, the ADAAA will likely result in an increase in the number of charges of discrimination filed with the EEOC and, ultimately, the courts. In addition, defending against ADA cases will be more challenging to employers as the courts focus their inquiry more on the alleged adverse employment action instead of the threshold questions of whether the employee is disabled or regarded as being disabled.

New York Worker Adjustment and Retraining Notification Act

On August 5, 2008, Gov. David Paterson signed into law the New York State Worker Adjustment and Retraining Notification Act ("NY WARN Act"), to take effect on February 1, 2009. The law is modeled after the Federal Worker Adjustment and Retraining Notification Act ("Federal WARN Act"), 29 U.S.C. §§ 2101-2109, which requires covered employers to provide affected employees with advance notice of "mass layoffs" or "plant closings." The NY WARN Act, however, was designed to supplement the federal statute and is therefore both broader in scope and more stringent for employers in several respects. While the Federal WARN Act covers businesses with either 100 or more full-time employees or 100 or more employees including part-time employees who work in the aggregate at least 4,000 hours per week, the NY WARN Act covers businesses with as few as 50 or more full-time employees or 50 or more employees including part-time employees who work in the aggregate at least 2,000 hours per week.

Under the NY WARN Act, employers are required to provide written notice of any mass layoffs, relocations or plant closings at least 90 days in advance as opposed to 60 days under the Federal WARN Act. The NY WARN Act requires such notice to be sent to a broader group of individuals and agencies than required under the Federal WARN Act.

Like the Federal WARN Act, the NY WARN Act requires employers to provide advance notice to affected employees of "mass layoffs" and "plant closings." However, the NY WARN Act also requires advance notice in the event of a relocation, which is defined as "the removal of all or substantially all of the industrial or commercial operations of an employer to a different location fifty miles or more away." Moreover, while the events that trigger the NY WARN Act are substantially similar, the thresholds for those events are lower. Under the NY WARN Act, a mass layoff requiring notice to affected employees occurs when there is a reduction in force that results in an employment loss at a single employment site for 25 employees, so long as they represent at least

33% of all full-time employees, or at least 250 full-time employees. In contrast, a mass layoff under the Federal WARN Act occurs when there is a reduction in force resulting in an employment loss at a single employment site for at least 50 employees, so long as they represent at least 33% of all full-time employees, or at least 500 full-time employees. Similarly, the NY WARN Act defines a plant closing requiring written advance notice as a permanent or temporary shutdown of an employment site or a facility within a site that results in an employment loss at that site of at least 25 full-time employees, as opposed to 50 full-time employees under the Federal WARN Act.

With the passage of the NY WARN Act, New York joins a number of other states, including California, Connecticut, New Jersey, Wisconsin, Tennessee and Illinois, that have enacted laws designed to supplement the federal statutory scheme. Employers should take care to determine whether they are covered by the NY WARN Act and, if so, to ensure that in planning reductions in force they are prepared to give the required notice.

FMLA Amendments and Revised Final Regulations

There are two important developments regarding the Family and Medical Leave Act of 1993 (the "FMLA"), which requires covered employers to provide eligible employees with unpaid leaves of absence to care for their own or their family members' serious medical condition. First, the FMLA was amended to provide expanded leave for military families. Second, the U.S. Department of Labor ("DOL") issued new regulations that will take effect on January 16, 2009.

Servicemember Family Leave Amendments

On January 28, 2008, President Bush signed into law the National Defense Authorization Act for 2008, which includes amendments to the FMLA to expand FMLA benefits to employees whose families are affected by a servicemember's call to duty. Under this new law, FMLA leave coverage is expanded for military families in two ways. First, it permits employees to take FMLA leave "because of any qualifying exigency . . . arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces . . . ." Second, it adds a new category of Servicemember Family Leave, which provides that a covered servicemember's "spouse, son, daughter, parent, or next of kin" may take up to 26 workweeks of leave during a 12 month period to care for the servicemember.

Revised FMLA Final Regulations Clarify Existing Rules

The DOL also has issued revised FMLA final regulations, representing the first wholesale revision of the FMLA regulations since they were adopted in 1995. These regulations, which will take effect on January 16, 2009, clarify existing rules and provide guidance in implementing the new servicemember-related amendments. Employers should familiarize themselves with the new regulations and consider whether existing policy manuals will need to be revised.

Several significant changes to the current regulations are highlighted below:

Joint Employer Coverage. The new regulations clarify that professional employer organizations ("PEOs") that contract with employers to provide certain payroll and administrative functions will not be considered "joint employers" with their clients provided that the PEO only performs administrative functions and does not have the right to hire, fire or otherwise direct or control the client's workforce, and does not benefit from the work that the client's employees perform. The regulations note that the determination of whether a PEO is a joint employer turns on the economic realities of the situation. The regulations also clarify that in a PEO situation, the client employer most likely will be the primary employer in a joint employment relationship.

FMLA Waivers. The final regulations confirm that employees may voluntarily release FMLA claims without court or DOL approval, resolving a split in the Circuit Courts of Appeals. Prospective waivers of FMLA rights continue to be prohibited, however.

Employee Eligibility. To be deemed eligible for FMLA leave, an employee must have worked at least 1,250 hours during the 12 month period preceding the leave, must have been employed by the employer for 12

months, and be employed at a worksite where 50 or more employees are employed within a 75-mile radius. Existing regulations provide that the 12 month employment requirement need not be continuous. The final regulations clarify that periods of employment prior to a break in service of seven years or more need not be counted, except if the break in service is due to military leave and certain other types of employer-approved leaves of absence, including childcare and education leave.

Definition of Serious Health Condition. The DOL has retained the current definitions of serious health condition, which *inter alia* requires periodic treatment or visits to a healthcare provider. The new regulations do, however, include two additional points of guidance. First, the proposed regulations clarify that visits to a health care provider must occur within 30 days of the beginning of the incapacity, and that the first visit for treatment must occur within seven days of the first day of the incapacity. Second, the new regulations define "periodic" visits to a health care provider as two or more visits to a health care provider for treatment each year.

Substitution of Paid Leave. The new regulations confirm that an employer's paid time off policies apply and must be followed by the employee for that employee to substitute accrued paid leave for FMLA leave. The DOL also confirmed that to substitute paid leave for unpaid FMLA leave means that the paid and unpaid leave will run concurrently.

Employer Notice Requirements. The final regulations enhance and clarify the notice requirements on both employers and employees. The regulations require employers to provide to an employee within five business days after the employee requests FMLA leave or when the employer acquires knowledge that an employee's leave may be for FMLA qualifying reason, a notice detailing whether the employee is eligible for FMLA and, if not, at least one reason why the employee is not eligible. Concurrent with this eligibility notice, the employer must provide the employee with notice of his or her rights and responsibilities under the FMLA. In addition, the employer must also provide the employee with written notice within five business days that their requested leave has been designated as FMLA leave, once the employer has received sufficient information from the employee to determine whether the requested leave qualifies as FMLA leave.

The final regulations also address the penalties for noncompliance with the employer notice requirement in light of the Supreme Court's decision Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81 (2002). In Ragsdale, the Supreme Court invalidated a DOL regulation that specified that if an employer failed to designate an employee's leave as FMLA leave, any leave taken does not count against the 12-week entitlement. The Court held that such a regulation was beyond the DOL's authority because it in effect required an employer to provide an employee with more than 12 weeks of leave even when the employee is not prejudiced by the employer's failure to designate leave as FMLA leave. The final regulations clarify that an employer may retroactively designate leave as FMLA leave absent a showing of individual harm, but that if there is harm, the employee may be entitled to a remedy.

Employee Notice Requirements. The final regulations also clarify an employee's obligation to give his or her employer adequate notice of the need for FMLA leave. When the need for leave is foreseeable and the employee does not give the employer at least 30 days' notice, the final regulations require the employee, upon the employer's request, to provide an explanation why he or she did not give the requisite notice. The final regulations continue to require employees to notify their employers of foreseeable leave "as soon as practicable" if 30 days' prior notice is not possible. Employees need not explicitly assert their rights under the FMLA or even mention the FMLA in their request for leave, but must give their employers sufficient information to make the employer aware that FMLA rights may be at issue. The final regulations clarify that "sufficient information" may include information that the employee is unable to perform the functions of his or her job, the duration of the leave, and whether the employee intends to visit a health care provider or seek continuous treatment.

Medical Certifications. While employers are not required to obtain medical certifications before granting FMLA leave, many do. The final regulations clarify that an employer should request a medical certification and identify the potential consequences of the employee's failure to provide adequate certification, within five days of receipt of the employee's request for leave. The employee must then provide medical certification within

15 days of the employers' request, regardless of whether the need for leave is foreseeable or unforeseeable. If the certification provided is incomplete, the employer must notify the employee that the documentation is incomplete, and identify the additional information needed to make it complete. The employee then has seven days to cure. The regulations detail categories of additional information employers may request from the employee's health care provider in the process of obtaining medical certification. The regulations also clarify that an employer (but not the employee's direct supervisor) may have direct contact with the employee's health care provider to authenticate and obtain clarification of a medical certification, so long as the requirements of HIPAA privacy regulations are met.

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If you have any questions or comments about this Newsletter, please feel free to contact any of the attorneys in our Litigation Group listed below via telephone at (212) 574-1200 or via e-mail generally by typing in the attorney's last name **@sewkis.com**.

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Seward & Kissel has extensive experience in the employment field. Our attorneys handle all types of employment disputes in federal and state courts and also represent clients in proceedings before administrative and regulatory agencies, including the EEOC and state divisions of human rights, and in arbitrations before the arbitration tribunals, such as the Financial Industry Regulatory Authority ("FINRA"), the American Arbitration Association ("AAA") and JAMS. We also regularly counsel clients with respect to employment issues. Our primary clients in the employment area are financial institutions and investment fund managers. We advise our clients on all facets of employer-employee relations, including pre-employment inquiries, negotiation of employment and executive compensation agreements, non-competition agreements (and related contractual issues), issues that arise from hiring decisions, the application of discrimination laws, harassment complaints, the scope and enforcement of restrictive covenants, the employee's duty of loyalty, whistleblower claims, equal employment opportunity matters, staff reductions, employment terminations, assembling business teams and compensation matters. We develop employee handbooks, manuals and other employment policies and procedures. Together with our Taxation and Employee Benefits practice, we handle executive compensation matters both for management and executives, including incentive and deferred compensation arrangements, stock options, employee stock ownership plans and benefits issues. Seward & Kissel is a leading adviser with respect to the particular employment issues investment fund managers encounter, including those that are building their businesses and others that are established. We offer seasoned counsel with judgment and perspective in employment matters.

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