

Fall 2011 Labor & Employment Seminar

October 5, 2011

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New Developments in Employment Law

David Schenberg
Anthony Grice

Missouri Workers' Compensation

- *KCP & L Greater Missouri Operations Company v. Cook* (W.D. MO)
 - Occupational disease claims are compensable under the Act
 - The exclusivity provision does not apply to occupational disease claims

Missouri Workers' Compensation

- Examples of Occupational Diseases
 - Mesothelioma
 - Occupational Asthma
 - Eczema
 - Hypotension / Hypertension
 - Repetitive Motion Injuries

Missouri Workers' Compensation

- Be prepared to litigate
 - Present your company's story
 - Implement processes and procedures to quickly assess occupational disease cases

NLRB Employee Notice

- Employers required to post notices advising employees of their rights under NLRA
- Must be posted “in conspicuous space”
- Effective November 14, 2011

NLRB and Social Media

- Memorandum OM 11-74, “Report of Acting General Counsel Concerning Social Media Cases”
 - Myers Industries Standard
 - Atlantic Steel Test

NLRB Proposed Rules Changes

- Expedite Election Procedures
- Persuader Activity

IRS Volunteer Program

- Voluntary Classification Settlement Program
 - IRS Announcement 2011-64
 - IRS Form 8952
- Missouri has signed memorandum of understanding with IRS

IRS Volunteer Program

- Emphasis placed on following industries:
 - Hospitality
 - Construction
 - Building Maintenance / Janitorial
 - Home Healthcare and Food Services
 - Any business model that obscures or eliminates the employment relationship

ADAAA Update

- Terminal Leave Policies
 - *Sears Roebuck & Co.*
 - *SUPERVALUE Supermarkets*

ADAAA Update

- Five Lessons Learned
 - Inflexible period of disability leave inadequate
 - Length of leave requires individualized analysis
 - Separate leave administration
 - Clear lines of communication
 - EEOC taking an active role in litigation

Wal-Mart Stores, Inc. v. Dukes

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Missouri Supreme Court Trend

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Staub v. Proctor Hospital

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Illinois Workers' Compensation

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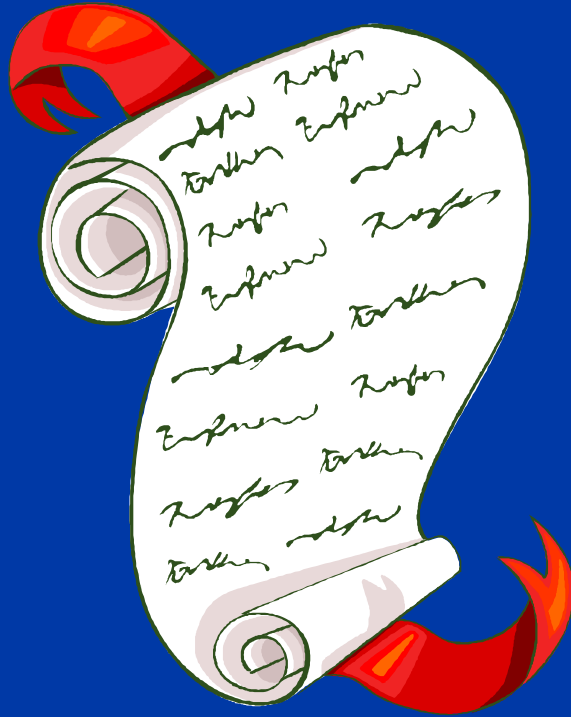
Americans with Disabilities
Act Amendments Act
(ADAAA)
Final Regulations

Joe Glynias
Kate Heideman

Agenda

Quick Summary

Impact



"Let's face it, I've always *been* handicapped. I'm just *now* getting the recognition for it."

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ADAAA

- Statutory Changes in the Law
 - Substantially limits
 - Major life activity
 - Mitigating measures
 - Episodic/in remission
 - Regarded as

Operating Principle

“The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability.”

Substantially Limits

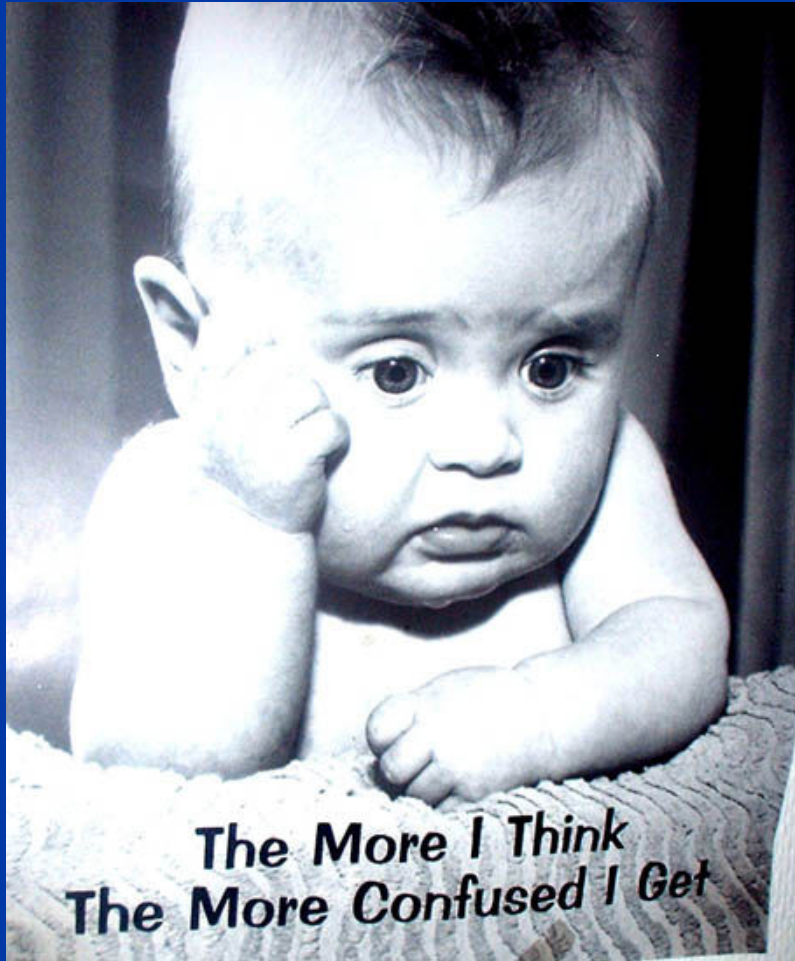
- Term to be construed **broadly** in favor of **expansive coverage**
- Key factors in rules of construction
 - Comparison with “most people”
 - Should not require extensive analysis
 - Made without regard to mitigating measures (eye glasses)
 - Non-ameliorative effects of mitigation (negative side effects) should be taken into consideration
 - Impairment that is episodic or in remission is a disability

Major Life Activities

- In General:
 - Statute: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, working (when employee cannot perform his/her job, even when he/she can perform a broad range of other jobs)
 - Regulations: Add sitting, reaching, and interacting with others

Major Life Activities

- Major Bodily Functions:
 - Statute: Immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions
 - Regulations: Add special sense organs and skin, genitourinary, bladder, cardiovascular, hemic, and musculoskeletal



What does
the ADAAA
mean for
you?

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Impact on Employers

- Increase in charges filed
 - Disability discrimination charges filed with the EEOC rose to 25,165 for FY 2010, up 23% from FY 2009
- FMLA/ADAAA Combination Lawsuits
- Burden clearly on employer to prove compliance and accommodation

What Should HR Do?

- Know changes and re-familiarize with old requirements
- Review job descriptions
- Re-evaluate internal leave policies
 - Look for (and eliminate) blanket leave policies
 - If CBA, look at seniority policies and blanket leave policies
- Establish a protocol for evaluating ADAAA issues once FMLA expires

What Should HR Do?

- Provide Training to Supervisors
 - Issue spotting
 - “knew or should have known”
 - Need for HR involvement from outset
 - Importance of interactive dialogue

Interactive Dialogue

- An increasingly important step in the analysis
- Document efforts
- Obtaining input from employee's physician vs. Functional Capacity Evaluation

Contact Legal Counsel
to help make “close calls”

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BREAK

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Hiring Dos and Don'ts: Top 10 Issues Related to the Hiring Process



Laura Staley
Kimberley Mathis

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Why Is This Important?

- Failure to Hire Cases Are On The Rise
- These Cases Are Extremely Difficult to Defend
- Every Individual Who Applies Is A Potential Plaintiff
- Golden Opportunity to Pick Quality Candidates

1. Recruiting

- Dos
 - Use a variety of sources – make sure you are reaching diverse groups
 - Include job-related issues only – take verbatim from job description
 - Include a statement that company is an equal opportunity employer

Recruiting Cont.

- Don'ts
 - Do not overpromise
 - Do not leave ad open for too long
 - Do not omit management from process

2. Applications

- Include Disclaimers
 - Include signature verifying truth and accuracy of information, indicating that falsification of information will result in failure to hire or in discharge once discovered
 - No contract/employment-at-will
 - Obtain consent for background checks and medical examinations

Applications Cont.

- Recommendations:
 - Do not consider applicants without prerequisites
 - Limit the consideration period to as short a time as possible
 - Require specificity as to position sought

3. Interviews

- Dos
 - Ask about job-related abilities
 - Have a job description handy
- Don'ts
 - Do not engage in conversation that could lead to danger areas
 - marital status
 - child care
 - work-related injuries

4. Asking Health Questions

- Do Not Ask
 - Have you ever filed for workers' compensation?
 - Do you have any medical conditions?
- What Can I Ask?
 - Will you be able to meet attendance requirements?
 - Will you need an accommodation to complete the hiring process?
 - Can you, with or without accommodation, perform all of the job functions of this job?

Asking Health Questions Cont.

- Can I Ask if Employee Will Need Reasonable Accommodation to Perform the Job?
 - Yes IF...
 - Obvious disability
 - Voluntary disclosure of hidden disability
 - Voluntary disclosure of need for accommodation

5. Medical Exam

- Dos
 - Keep exam results confidential
 - Engage applicant in interactive process if disability is discovered (consider reasonable accommodation)
- Don'ts
 - Do not conduct medical exam until conditional offer has been made
 - Do not reject applicant based on factors that are not job-related
 - Do not pick and choose between employees for medical exam

6. Social Media Investigation

- Facebook
- LinkedIn
- Do you really want to know what is out there?
- If checked, do not mention or reference information obtained on those sites during an interview

7. Offer Letters

- Dos
 - Include at-will language
 - Consider special language for non-compete agreements
- Don'ts
 - Do not include time period or trial period
 - Do not ignore special circumstances

8. Background Checks

- What can I check?
 - Arrest conviction records
 - Missouri
 - Illinois

Background Checks Cont.

- Fair Credit Reporting Act
 - Was it done by a consumer reporting agency (third party)?
 - Written authorization required
 - Before adverse action, copy of report and notice of rights provided

Background Checks Cont.

- After adverse action, "adverse action notice"
 1. Name, address, and phone number of the employment screening company
 2. A statement that this company did not make the adverse decision, rather that the employer did
 3. Notice that the individual has the right to dispute the accuracy or completeness of any of the information in the report

9. Checking References

- Dos
 - Ask for references and check them
 - Go back to applicant for additional names if necessary
 - Evaluate the feedback and document
- Don'ts
 - Do not skip the process
 - Do not ask the reference things you could not ask applicant
 - History of workers' compensation claims
 - Medical conditions

10. Pre-Employment Testing for Illegal Drugs

- Mandated? Regulated industries
- Illinois Right to Privacy in the Workplace Act – No testing for legal substances, such as alcohol (exception for non-profit)
- Missouri – Avoid testing for alcohol due to MHRA civil rights issues
 - Maintain consistency in testing
 - Follow policy
 - Maintain thorough records and confidentiality

The Investigation Process From Start to Finish

Bob Tomaso
Elena Parker

A Complaint Can Come in Many Forms

- Informal verbal complaint by victim
 - Suspicion
 - Specific Concern
 - General Unfair Treatment
- Informal complaint by witness who “just wants to let you know”
- Formal grievance or charge



Investigate Regardless of the Form of the Complaint

- Anytime an issue of unfair treatment or misconduct comes to attention of management
- Investigation should be conducted promptly



Pre-Investigation

- Identify potential witnesses
- Identify and review relevant policies and personnel records
- Review documented reports of related activity
- Consider prior complaint outcomes and other potential motivations
- Prepare a chronology
- Outline interview questions
- Select investigator

What To Do With the Subject Of the Complaint

- Remove from workplace
- Change supervisory responsibilities
- Temporarily change reporting structure



Interviewing the Complaining Party

- Promptly and privately
- Obtain facts with brief, open-ended questions
 - Try not to let your opinion influence your questioning
- Ask to identify witnesses
- Ask for notes and documents related to complaint
- Address confidentiality



Interviewing the Complaining Party

- Tell complainant company will not retaliate
- Tell complainant to immediately notify investigator or supervisor if he/she believes he/she has experienced retaliation
- Tell complainant you will get back to him/her at the conclusion of the investigation

Interviewing Subject of Complaint

- Advise investigation is internal & explain complaint
- Give opportunity to respond to allegations
- Convey impartiality
- Explain no decision has been made regarding alleged misconduct or discipline
- Reminder: No Retaliation



Limitations on Investigation

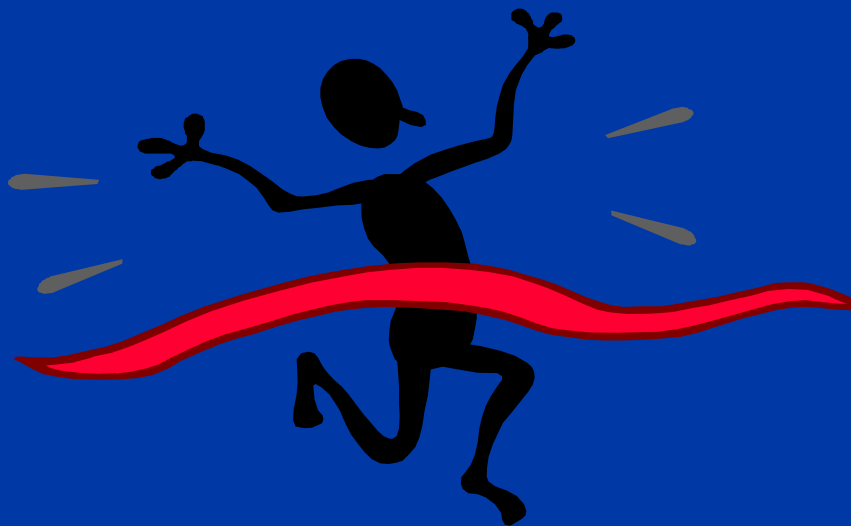
- Duty to cooperate
 - Refusal leads to discipline for insubordination
 - Exception: criminal charges
- Request for a co-worker
- Request for an attorney
- Office search
- Computer search

The Crucial Aspects of Documentation

- Document for a prospective jury
- Use facts
- Avoid opinions and conclusions
- Be objective and thorough (avoid subjective descriptions like “crazy,” “honest,” “liar”)
- Do not include discipline recommendations

Finishing the Investigation

- Review investigative file
- Make a determination
- Take remedial or disciplinary action (consider various levels of discipline)
 - Consider similarity of past conduct
 - Past handling of similar situations involving others
- Eliminate unnecessary publication of investigation results



Closing the Loop

- Meet with the subject of the Complaint
 - Briefly summarize facts discovered
 - Identify rules violated
 - Cite previous discipline
 - Specify expectations for future behavior
 - Explain EAP (if appropriate)
 - Inform department manager or legal (if applicable)
 - Remind of relevant policy or handbook

Closing the Loop

- Meet with the Complaining Party
 - Explain the investigation and its results
 - Document, document, document

Closing the Loop

- You have brought "X" to our attention. We investigated these allegations by doing "Y"
- We have also decided to do "Z." You have agreed that this was an appropriate reaction on our part
- While we all expect our response to resolve this situation, please let us know immediately if this conduct occurs again

Closing the Loop

- Maintain the Investigation Record
 - Keep in a separate confidential file
 - Make sure file is complete: complaint, interview notes, copies of records reviewed, determination, and disciplinary action taken.
 - **Avoid legal conclusions**

Social Media Missteps

Randy Thompson
Brittany Ems

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Social Media Statistics

- 46% of people globally access a social network everyday
- 95 million tweets are posted every day
- 175 million Facebook Users log on to Facebook every day
- If Facebook were a country, it would be the world's third largest and two times the size of the U.S. population
- Polls estimate that between 45-80% of employers use social media for recruitment

Types of Social Media

- Social, Friendship, Invitation Based

- Facebook
- MySpace
- Twitter
- Google Plus



- Professional, Career Based

- LinkedIn
- BranchOut
- BeKnown



- Personal, Affinity, or Company Blogs

Social Media: A Tool for Recruitment

Issues:

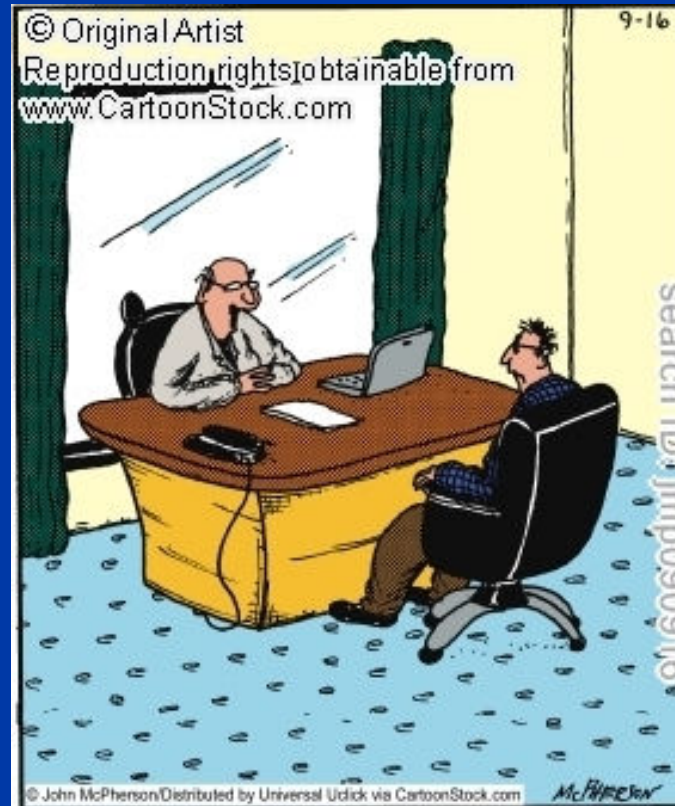
- Language used can suggest an offer of employment
- Target audience can suggest disparate impact
- Comments and pictures can suggest discrimination

Social Media: A Tool for Recruitment

Recommendations:

- Include an Equal Employment Opportunity Policy on any company web pages
- Make sure your job posting and descriptions cannot be construed as offers of employment
- Do not use language/photos that suggest a preference for a certain age, gender, race, etc.
- Use a variety of sources to recruit candidates

Social Media & Background Checks



"We were ready to hire you until we saw the photo of you on Facebook sliding on the ice at Rockefeller Center wearing only bowling shoes and a viking helmet."

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Social Media & Background Checks

Issues:

- Choosing the Parameters
 - What are you looking for?
 - How much research should you conduct?
- Accuracy
 - Inaccurate Information
 - Wrong Profile

Social Media & Background Checks

Issues:

- Potential Bias
 - Title VII
 - ADA
 - GINA
 - Workers' Compensation
 - Financial Information
 - Arrest/Conviction Records
- Negligent Hiring
- Privacy Concerns

Social Media & Background Checks

Recommendations:

- Strict Conservative Approach
 - Avoid considering any social media in hiring decisions
- Still a Conservative Approach
 - View social media only post-offer
 - Limit the individuals who can search social media (*e.g.* Human Resources, Third-Party Recruiter, Third-Party Research Company)
 - Be consistent when rescinding job offers

Controlling Employees' Use of Social Media During Employment

NOISE TO SIGNAL
RobCottingham.ca



Our benefit package is we don't block Facebook.

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Controlling Employees' Use of Social Media During Employment

Recommendations:


- Adopt a Company Computer Policy
- Adopt an Internet Usage Policy
 - Banning vs. Restricting

Controlling Employees' Use of Social Media During Employment

Recommendations:

- Update other policies
 - Behavior/Discipline Policies
 - Fraternization Policies
 - Advertising Policies (FTC Issues)
- Be consistent when applying policies

Discipline and Discharge Decisions Using Social Media




[REDACTED]
Thanks for eating at Brixx, you cheap piece of s[REDACTED]camper.




 Like ·  Comment ·  Share ·

Activities and Interests  Edit

Activities  **teaching chitlins in the ghetto**



[REDACTED]
Cisco just offered me a job! Now I have to weigh the utility of a fatty paycheck against the daily commute to San Jose and hating work.

20 seconds ago  Favorite  Reply  Delete

Discipline and Discharge Decisions Using Social Media

- **Starbuck's Barista:** Fired after posting disparaging "Rant Song" on **YouTube**
- **Washington Wizards' Player:** Suspended after joking about bringing guns into the locker room on **Twitter**
- **Virgin Atlantic Crew Members:** Discharged after posting disparaging comments about passengers on **Facebook**
- **KFC Employees:** Discharged after turning a restaurant sink into a hot tub and posting pictures on **MySpace**

Discipline and Discharge Decisions Using Social Media

Issues:

- Privacy
- First Amendment Freedom of Speech
 - Public vs. Private Employers
 - J.S. v. Blue Mountain School District*
 - T.V. v. Smith-Green Community School District*
- Retaliation
 - Morse v. JP Morgan Chase & Company*

Social Media Evidence

United States v. Hill



“. . . pictures from Smith’s Facebook profile depict Smith in possession of, and displaying, large quantities of cash.”

Social Media Evidence

Status updates, tweets, and posted photos may harm or help you in later litigation.



Like Comment Tag Photo

Album: Wall Photos · 6 of 6
Share with:  Custom

Tag This Photo
Add Location
Download
Make Profile Picture
Delete This Photo

Like · Comment · Share · Edit · about a minute ago

 Looks like the flu is really taking it out of ya.
a few seconds ago · Like

Write a comment...

How Can We Help?

- Counsel on individual situations
- Assist in decision-making
- Draft Social Media/Internet Usage Policies
- Train employees on social media guidelines
- Litigation services

Questions?

Thank you.

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