

FOCUS ON EMPLOYMENT LITIGATION PRACTICAL CONSIDERATIONS UNDER THE AMERICANS WITH DISABILITIES ACT

By Christopher P. Wesierski and Laura J. Barns

The Americans with Disabilities Act (“ADA”), affords protection to qualified individuals with disabilities. It is unlawful to discriminate against a “qualified” individual in regards to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training and other “terms, conditions and privileges of employment.” Amendments effective January 1, 2009, expand the coverage of the ADA. This article does not cover discrimination under California or other federal laws.

Employers Covered: The ADA applies to employers of 15 or more employees, as well as employment agencies and labor organizations.

Definition of Disability: A person is disabled if he/she: (a) has a physical or mental impairment that “substantially limits” one or more “major life activities,” (b) has a record of such an impairment or (c) is regarded as having such an impairment.

A “qualified” individual with a disability is one who, with or without reasonable accommodation, can perform the essential functions of the job the person holds or desires. Employers must provide reasonable accommodation to such an individual unless they can show the accommodation would impose an undue hardship.

Perceived Disabilities: Applies to “perceived” disabilities or if the employee is “regarded” as having a disability. The recent amendments clarify that someone perceived as having a disability cannot be discriminated against or retaliated against. The employer need not provide reasonable accommodation to such an individual.

Major Life Activities: Major life activities are basic activities the average person can perform with little or no difficulty. It includes physical, mental, social and employment related activities.

The recent amendments expand the definition of “disability” by changing the definition of “major life activities.” “Major life activities” include standing, lifting, bending, reading, concentrating, performing manual tasks, thinking, working, caring for oneself, seeing, hearing, eating, sleeping, walking, speaking, breathing, learning and communicating. It also includes any “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 amendments clarify that a person must still be considered disabled even if the effects of the disability could be limited or corrected by medication, medical supplies, equipment, appliances, prosthetics, hearing aids, mobility devices, oxygen therapy equipment and supplies, assistive technology or other aids or services. An employer cannot consider these devices or treatment as eliminating a disability or reducing the limitation of a major activ-

ity. Exceptions are ordinary corrective eyeglasses or contact lenses.

Reasonable Accommodation: Whether an accommodation is reasonable is a question of fact specific to each case. It may include, among others: (a) making existing facilities readily accessible to and usable by persons with disabilities; (b) job restructuring; (c) parttime or modified work schedules; (d) temporary transfers; (e) unpaid leave; (f) the use of accrued paid leave; or (g) transfer to a vacant position for which the employee is qualified and if it is of equal pay and equal status.

Practical examples are: (a) more frequent breaks for a diabetic; (b) leave for chemotherapy; (c) amplification devices for the hearing impaired; (d) replacing equipment; (e) raising or lowering fixtures; (f) a computer for work from home; (g) allowing a treating alcoholic who is not using alcohol access to a telephone during working hours to contact a sponsor; (h) sign language interpreters for an interview; (i) written materials in alternative formats, such as Braille or larger print; (j) voice recognition software; (k) installing ramps, widening a doorway or reconfiguring work space; (l) installing ergonomic equipment; and (m) providing parking or a closer parking space.

An employer does not have to tolerate violence, threats of violence, stealing or other misconduct. An employee with a disability may be disciplined for misconduct, including termination. However, the timing of such discipline may give credence to a retaliation claim if it occurs after the employer has notice of the disability.

Informal Interactive Process: The employer must engage in an “informal, interactive process” in good faith with the employee to identify the limitations caused by the disability and potential reasonable accommodations. If an employer knows an employee has a disability, it should initiate this discussion.

Disabilities: The following are some of the conditions found to be disabilities: AIDS/HIV, cancer, terminal illnesses, impotence or any condition that limits sexual relations or procreation, diabetes, asthma, learning disabilities, severe arthritis, bipolar disorders, depression, anxiety, and obsessive-compulsive disorders that substantially limit the ability to think and concentrate.

Conditions Which Are Not Disabilities: The following are not disabilities: homosexuality and bisexuality, sexual behavior disorders such as transvestitism, transsexuals, pedophilia, exhibitionism, voyeurism and gender identity disorders not resulting from physical impairments, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal use of drugs.

Alcohol and Drug Use: An employer may not make an adverse employment decision simply because the employee is an alcoholic or perceived to be an alcoholic. A former addict whose addiction substantially limits a major life activity may be treated as disabled if he/she has successfully completed a drug rehabilitation program or is participating in a rehabilitation program and is no longer using the illegal drug. An employee currently using or addicted to illegal drugs is not protected.

Conclusion: Whether an employee or applicant has a “disability,” whether that disability “substantially” impacts a “major life activity” and what are “reasonable accommodations” are all intensely factual inquiries. The recent amendments will mean more claims of disability and requests for accommodations, especially for conditions limiting the ability to stand, lift, or bend and for reading or learning impairments.

Too frequently, employers react in a knee jerk fashion claiming it would create an undue hardship because the accommodation is too expensive. The EEOC has determined that most accommodations are not expensive. One-fifth of them cost nothing. More than one-half cost between \$1.00 and \$500.00. The median cost is under \$250.00 Tax credits may be available. In contrast, defending a suit for discrimination, retaliation or failure to engage in good faith in the interactive process will require significant defense costs, expose the employer to

punitive damages and, if an employee prevails, payment of the employee's attorneys' fees.

RECENT DEVELOPMENTS IN CALIFORNIA LAW THAT HELP EMPLOYERS

By Christopher P. Wesierski & Nancy N. Lubrano

California employers may finally get a break from the traditionally employee-friendly environment of the California judicial system. The California Supreme Court has granted review of two very similar class action cases that address the issue of whether an employer must merely provide meal and rest breaks or ensure that employees actually take meal and rest breaks. The California Court of Appeal ruled in both *Brinker* and *Brinkley* that employers are not required to ensure that the breaks are actually taken. Rather, employers must make such breaks available. Until the Supreme Court rules, however, neither *Brinker* nor *Brinkley* is reliable law.

Prior to *Brinker* and *Brinkley*, the Court of Appeal ruled that employers must ensure that employees are relieved of all duties to provide an opportunity to take meal and rest breaks. Plaintiffs have attempted to stretch that ruling to burden employers with the obligation of ensuring that employees actually take meal and rest breaks. In *Brinker* and *Brinkley*, however, the Court of Appeal recognized that requiring employers to ensure that an employee is relieved of all duties so that meal and rest breaks are possible is not an affirmative duty to ensure that the employee actually takes the break. Indeed, as the Court of Appeal discussed, such an affirmative duty would create an unfair burden on employers and "create perverse incentives," encouraging employees to violate company break policies in order to receive the penalties employers must pay under California wage and hour laws for each meal or rest period violation. For now, the focus remains on whether the meal and rest periods are provided. Currently, this means that employers must carefully schedule shifts so that non-exempt employees are fully relieved of duties so that there is an opportunity to take a meal or rest break.

Notably, the Court of Appeal considered employer evidence showing written policies providing for meal and rest breaks, that non-exempt employees and managers were aware of such policies, that strict compliance was required, and that employees were reprimanded for not taking breaks. Although the outcome of *Brinkley* and *Brinker* may offer some relief to California employers who contend with great administrative burdens and liability exposure, preventative measures such as these are highly advisable in light of the penalties associated with violation of California wage and hour laws.

Although employers have an affirmative obligation to ensure that employees are relieved of all duties so that they can take a meal or rest break, if the California Supreme Court upholds the Court of Appeal's ruling on this issue in *Brinker* or *Brinkley*, California employers will feel the bigger burden shift to the employee who brings a meal or rest break violation claim. California law prohibits employers from impeding, discouraging or dissuading an employee from taking a break. Employers must also refrain from coercing an employee to waive a meal or rest break. Absent any evidence of such interference with the employee's right that might support a violation claim, under *Brinker* or *Brinkley* the employee would be required to show a denial of the opportunity to take a meal or rest break. Indeed, the burden would shift because showing that breaks were provided because an employee was relieved of all duties which created the opportunity to take breaks is a task California employers should already do in the regular course of business.

While we await the California Supreme Court review of *Brinker* and *Brinkley* one thing is clear, it is extremely important that employers stay apprised of California wage and hour law updates, have policies in place, and make sure employees are informed and acknowledge their duty to comply with company policies. Wesierski & Zurek LLP practices employment law throughout Southern California and has extensive experience defending wage and hour claims in court and at the Labor Board and with the EEOC. As such, we have the expertise to advise and train California employers in an effort to avoid costly litigation of wage and hour claims.

STEPS EMPLOYERS CAN TAKE TO AVOID AND MINIMIZE EMPLOYEE LAWSUITS PREVALENT DURING THE RECESSION

By Mary Kim

According to the US Department of Labor, 5.1 million jobs have been lost since the recession began in December 2007. There is no doubt that the effect of recession is that employers are terminating and laying off employees at record numbers.

Claims by a laid off or terminated employee can cost a business a huge amount of attorneys fees and costs. While an employer cannot prevent a former employee from filing a claim or lawsuit against the employer, the employer can take steps to minimize exposure to possible liability and strengthen their defense. California is an at-will state, meaning that absent a written contract, employers and employees alike can terminate the employment at any time irrespective of cause.

However, there are exceptions to the at-will employment. For example, employers are prohibited by various California and federal statutes from terminating employees on the basis of their age, race, sex, religion, disability, and sexual orientation. There are numerous other statutes that limit termination or discipline of an employee, including but not limited to filing a complaint with the Labor Commissioner, filing a workers' compensation claim, complaining about workplace safety, and disclosing an employer's illegal acts to government authorities.

Very often, a laid off or terminated employee may bring an action against the former employer for a variety of causes of action, including defamation, discrimination, and wrongful termination. While many of these actions are valid, there are also a great number of cases filed by disgruntled employees or employees who simply feel such actions are economically necessary. A prudent employer should treat every termination or layoff as a potential wrongful termination action, and take all steps and precautions necessary to minimize risks.

An important preventative and protective measure against such claims that employers can take is to consistently keep a detailed paper trail on all employees. These should at minimum include documentation of warnings given to employees, evaluations, and records of attendance issues. Often, an employer's documentation of an employee may be the only evidence available at trial, other than witness testimony. Especially during troubled economic times, there is a danger of the jury becoming sympathetic to a fired employee. Indeed, some of the largest verdicts include punitive damage awards against former employers in employment actions.

Another important step an employer can take to prevent or minimize wrongful termination claims is to implement and follow a clear termination procedure. These procedures should be implemented consistently to all employees that are to be terminated so as to minimize any claims of discrimination, and again, documenting all actions taken during each step of the process. An employer also needs to be concerned about issues that can arise after termination and be prepared to deal with them, including possible job reference liability for claims of defamation, libel and slander by employees based on job references given by the former employer.

While knowledge of the applicable employment law will be helpful in preventing or minimizing employee lawsuits, it is imperative that employers adequately train individuals in supervisory capacity, namely those with authority to hire, fire, and promote employees, about these laws and procedures. At Wesierski & Zurek, seminars are offered to employers who want to train their managerial staff on the law related to all aspects of employment, including termination, as well as recommended practices for employers to minimize exposure to claims and suits, and to better defend against them in the event of such claims and suits.

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