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**The Final ADAAA Regulations
and
Their Impact on Employer Practices**

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TIME LINE OF ADA AAA

- January 1, 2009 Effective Date of Act
- September 23, 2009 Proposed EEOC Regs
- March 25, 2011 Final EEOC Regs
- May 24, 2011 Effective Date of Regs

WHY THE ADA WAS PASSED

- To make it easier for an individual seeking protection under the ADA to establish that he/she has a “disability”
 - Minimize litigation over “coverage”
- To shift the focus in claims and litigation *from* whether an individual has a disability *to* whether the employer discriminated or failed to accommodate
 - Increase emphasis on “merits”



OVERVIEW OF KEY PROVISIONS OF FINAL REGULATIONS

SUMMARY OF KEY PROVISIONS OF ADA AND FINAL REGULATIONS

1. With respect to claims based on an “actual disability” or “record of disability:”
 - a. New “rules of construction” for determining if an impairment is “substantially limiting”
 - b. New rules and definition of “mitigating measures”
 - c. New rules and definition of “major life activity”

SUMMARY OF KEY PROVISIONS OF ADA AND FINAL REGULATIONS

2. With respect to claims based on “regarded as having a disability:”
 - a. Elimination of the “substantially limits a major life activity” element of proof
 - b. New “transitory and minor” affirmative defense for employer

SUMMARY OF KEY PROVISIONS OF ADA AND FINAL REGULATIONS

3. Clarification on the duty to accommodate:
 - a. Required if employee has “actual disability” or “record of disability”
 - b. Not required if employee is “regarded as having a disability”

SUMMARY OF KEY PROVISIONS OF ADA AND FINAL REGULATIONS

4. Prohibition of “reverse disability discrimination” claims
 - a. Those without disabilities cannot assert claim that they were discriminated against because they don’t have a disability
 - b. Those without disabilities cannot assert claim that they were treated less favorably than those with disabilities

SUMMARY OF KEY PROVISIONS OF ADA AND FINAL REGULATIONS

5. Clarification that Lilly Ledbetter Fair Pay Act of 2009 applies to claims of discrimination in compensation based on disability

NOT CHANGED

1. Requirement that individual must be “otherwise qualified” and “able to perform essential job duties with or without accommodation”
2. Exceptions from definition of disability (e.g., pregnancy itself, current use of illegal drugs, criminal disorders, etc.)
3. Permissible and impermissible inquiries about disabilities and medical/health conditions

NOT CHANGED

4. Duty to reasonably accommodate, what is and is not an accommodation, and general duty of both employer and applicant/employee to engage in interactive accommodation process
5. Confidentiality requirements
6. Previous defenses (e.g., direct threat, undue hardship, etc.)



DEFINITION OF “DISABILITY”

DEFINITION OF “DISABILITY”

Prong	Actual Language (ADA & ADAAA)	New Interpretation (ADAAA)
Actual Disability	Physical or mental impairment that substantially limits one or more of the major life activities of the individual	<i>An actual</i> physical or mental impairment that substantially limits one or more of the major life activities of the individual
Record of Disability	A record of such an impairment	A record of a physical or mental impairment <i>that substantially limits one or more of the major life activities of the individual</i>
Regarded as Having Disability	Being “regarded as” having such an impairment	Being regarded as <i>having an impairment</i>

COMPARISON

Actual Disability	Record Of Disability	Regarded As Having Disability
Must have impairment	Must have impairment	Must have impairment
Impairment must substantially limit a major life activity	Impairment must substantially limit a major life activity	No requirement that impairment must substantially limit a major life activity
Duty to reasonably accommodate	Duty to reasonably accommodate	No duty to reasonably accommodate



**RULES FOR
ALL THREE PRONGS
(DEFINITION OF “IMPAIRMENT”)**

RULES ON “IMPAIRMENT”

- Individual must have a “physical or mental impairment:”
 - Applies to all 3 prongs
 - Is not a new requirement

DEFINITION OF “IMPAIRMENT”

- Definition:
 - Physical/Physiological. Any physiological ***disorder or condition***, cosmetic disfigurement, or anatomical loss affecting one or more body systems; and
 - Mental/Psychological. Any mental or psychological ***disorder***

DEFINITION OF “IMPAIRMENT”

- Is also now a list of medical conditions that will always qualify (are now “per se” impairments):
 - List is not all-inclusive – other medical conditions could also qualify

“PER SE” IMPAIRMENTS

A. Physical/Physiological:

- Cardiovascular
- Circulatory
- Digestive
- Endocrine
- Genitourinary
- Hemic
- Immune
- Lymphatic
- Musculoskeletal
- Neurological
- Reproductive
- Respiratory
- Skin
- Special sense

“PER SE” IMPAIRMENTS

B. Mental/Psychological:

- Emotional or mental illness
- Intellectual disability
(formerly called mental retardation)
- Organic brain syndrome
- Specific learning disabilities



NEW RULES FOR “REGARDED AS” PRONG

OVERVIEW

- Intended to address unfounded concerns, mistaken beliefs, fears, myths, stereotypes, and prejudice about disabilities
 - Because those negative perceptions and reactions of others can be just as disabling as actual impairments
- Intended for situations where accommodation is not an issue
 - Accommodation not requested or not needed

NEW RULES ON “REGARDED AS” PRONG

1. Individual must have an “actual or perceived impairment:”
 - But no requirement that the impairment must “substantially limit a major life activity” (no “severity” requirement)
 - As long as employer believes the employee has an “impairment,” it is irrelevant whether the employer’s belief is accurate (i.e., employee may have no impairment at all or may have a different one than perceived by the employer).

NEW RULES ON “REGARDED AS” PRONG

2. The actual and perceived impairment(s):
 - a. Cannot be “transitory:”
 - Meaning it actually lasts or is expected to last 6 months or less
 - b. Cannot be “minor:”
 - No definition or guidance in final regulations
 - EEOC had made an attempt to define it in the proposed regs, but then elected not to include any guidance about its meaning in final regulations
 - A non-minor, severe, or serious impairment lasting 6 months or less could give rise to a “regarded as” claim.

NEW RULES ON “REGARDED AS” PRONG

3. Claimant’s prima facie case is simple:
- I have an impairment or my employer believed I had an impairment.
 - I was able to perform the essential functions of my job.
 - My employer knew about my impairment.
 - My employer took adverse action against me.
 - The adverse action was because of my impairment.

NEW RULES ON “REGARDED AS” PRONG

4. Employer may then:

- Introduce evidence to dispute each of the elements of claimant’s prima facie case
- Raise the affirmative defenses previously permitted under ADA
- Raise the new “transitory and minor” affirmative defense:
 - Expect litigation over who has the burden of proof on “transitory and minor”

“TRANSITORY AND MINOR” AFFIRMATIVE DEFENSE

- A. Is based on whether the impairment is “objectively” transitory and minor, not on whether the employer “subjectively” believed it was transitory and minor (focus is on the type of impairment involved, not what the employer thought about it)
- B. Must evaluate whether the perceived impairment **and** whether the actual impairment were transitory and minor (if the perceived impairment is different than the actual one)

“TRANSITORY AND MINOR” AFFIRMATIVE DEFENSE

- C. What impairment did the employer *think the employee had*?
- Did that impairment last or could it have been expected to last 6 months or less?
 - Was it minor?
- D. What impairment did the employee *actually have*?
- Did that impairment last or could it have been expected to last less 6 months or less?
 - Was it minor?

“TRANSITORY AND MINOR” AFFIRMATIVE DEFENSE

- E. The impairments identified in Steps 3 and 4 must **both** last or have been expected to last 6 months or less and **both** must be minor, for the “transitory and minor” defense to apply.
- F. If the defense applies:
 - a. There is no discrimination based on “regarded as” prong (but still could be under “actual” or “record of” prongs)
 - b. There would have been no duty to accommodate (but could have been under “actual” or “record of” prongs)

EXAMPLES OF POSSIBLE “TRANSITORY/MINOR” CONDITIONS

Proposed regs and old regs included the following examples of conditions that probably would have been “transitory and minor,” but EEOC deleted them, so no guidance in final regulations:

- a. Broken bones that are expected to heal normally
- b. Common cold; seasonal or common flu
- c. Minor and non-chronic gastrointestinal disorders
- d. Minor wounds
- e. Sprained joints
- f. Appendicitis (old regs)
- g. Concussion (old regs)
- h. Temporary, non-chronic impairments of short duration with little or no long-term or permanent impact (old regs)



**NEW RULES ON
“ACTUAL DISABILITY”
AND
“RECORD OF DISABILITY”
PRONGS**

OVERVIEW (BOTH PRONGS)

- Both prongs intended for situations where reasonable accommodation is needed or requested
- EEOC believes claimants will use the “regarded as” prong when no accommodation is needed or involved (as burden of proof is much easier)

SUMMARY OF NEW ANALYSIS OF “DISABILITY”

- In determining whether an individual has an “actual disability” or “record of disability,” claimant must show:
 1. An impairment
 2. When viewed in its “active state” and without the benefit of “mitigating measures”
 3. Substantially limits
 4. A major life activity
- Will discuss in this order: #2, #4, #3 (#1 has already been covered in prior slides)



DEFINITION OF “ACTIVE STATE”

NEW RULES ("ACTIVE STATE")

1. An impairment could be "inactive:"
 - In remission (e.g., cancer, Hodgkin's' disease)
 - Episodic but no current flare-up (e.g., migraines, epilepsy)
 - Removed or repaired (e.g., hysterectomy, carpal tunnel disorder)
2. The "inactive" state of an impairment may **not** be taken into account in determining if an impairment is "substantially limiting"

NEW RULES ("ACTIVE STATE")

3. But, the currently inactive state of an impairment **may be taken into account in determining:**
 - Whether an accommodation is currently needed and/or reasonable.
4. And, the possibility that a currently inactive state may become active is one of the factors that **may be taken into account in determining:**
 - Whether the individual poses a direct threat.



DEFINITION OF “MITIGATING MEASURES”

NEW RULES ("MITIGATING MEASURES")

1. An impairment might be capable of being mitigated such that the individual is not limited in performing any major life activity
2. Examples:
 - a. Insulin to control diabetes
 - b. Learned adaptation to overcome dyslexia
 - c. Blood pressure medication to control hypertension
 - d. Surgery to repair/replace damaged knee

NEW RULES (“MITIGATING MEASURES”)

3. The origin of an impairment and the *ameliorative* effects of mitigating measures may **not** be taken into account in determining if an impairment is “substantially limiting:”
 - But the *non-ameliorative* effects of mitigating measures must be taken into account (e.g., negative side effects of medication, burdens associated with following a particular treatment regimen, etc.)

NEW RULES (“MITIGATING MEASURES”)

4. But, the ameliorative *and* non-ameliorative effects of mitigating measures, an individual’s use or non-use of them, and the consequences of use or non-use **may be taken into account in determining:**
- Whether an individual is qualified for the job; and/or
 - Whether an accommodation is needed and/or reasonable; and/or
 - Whether the individual poses a direct threat.

DEFINITION OF “MITIGATING MEASURES”

- No definition of “mitigating measures” in ADA or prior EEOC regulations (was a concept developed by the courts)
- No real definition of “mitigating measures” in ADAAA or final regs either, but:
 - Is now a list of measures that will always qualify (are now “per se” mitigating measures)
 - List is not all-inclusive – other measures could also qualify as mitigating measures

PER SE

“MITIGATING MEASURES”

A. Products and Equipment:

- Medication, medical supplies and equipment
- Prosthetic limbs and devices
- Low-vision devices (that magnify, enhance or otherwise augment a visual image, excluding ordinary eyeglasses and contact lenses)
- Hearing aids, cochlear implants, other implantable hearing devices
- Mobility devices (e.g., wheelchairs)
- Oxygen therapy equipment and supplies
- Assistive technology

PER SE

“MITIGATING MEASURES”

B. Certain Therapies*:

- Psychotherapy*
- Behavioral therapy*
- Physical therapy*

C. Reasonable Accommodations

- As defined in ADA
- Includes:
 - Job coaches*
 - Service animals*
 - Personal assistants*

*** Not in ADA or ADAAA, but added by EEOC in regulations**

PER SE

“MITIGATING MEASURES”

D. Auxiliary Aids and Services

- As defined in ADA
- Includes:
 - Qualified interpreters; other methods of making aurally delivered materials available to those with hearing impairments
 - Qualified readers, taped texts; other methods of making visually delivered materials available to those with visual impairments
 - Acquisition or modification of equipment and devices



DEFINITION OF “MAJOR LIFE ACTIVITY”

RULES OF CONSTRUCTION ("MAJOR LIFE ACTIVITY")

1. The term "major" is *not* a "demanding or high standard"
2. Whether an activity is a "major life activity" is **not** determined by:
 - a. Whether it "is of central importance to daily life" (the overruled *Toyota* standard)
 - b. Comparing it to the "basic activities that the average person in general population can perform with little or no difficulty" (the prior EEOC standard)

RULES OF CONSTRUCTION ("MAJOR LIFE ACTIVITY")

3. The activity probably has to be an "important" life activity to the individual (or so implied in the Preamble and Appendix to final regs)
4. EEOC has stated in the Preamble that the examples listed in the final regs were included because of their "relative importance"

DEFINITION OF “MAJOR LIFE ACTIVITY”

- No real definition of “major life activity” in ADA, ADAAA, or final regs, but:
 - Is now a list of measures that will always qualify (are now “per se” major life activities)
 - List is not all-inclusive – other activities could also qualify as major life activities
- The list is similar to the list that was in the old regs, but is a greatly expanded version

DEFINITION OF “MAJOR LIFE ACTIVITY”

- There are now two types of “major life activities:”
 - Common or customary actions or tasks that people do and that most of us would think of as major life activities (was in old regs)
 - “Major bodily functions” and “operation of individual organs” (new under ADAAA and the new regs)

“PER SE” MAJOR LIFE ACTIVITIES

A. Common and Customary Actions/Tasks

- Bending
- Breathing
- Caring for oneself
- Communicating
- Concentrating
- Eating
- Hearing
- Interacting with others*
- Learning
- Lifting
- Performing manual tasks (including, but not limited to, fine motor coordination,* grasping,* hand strength,* pressure*)
- Reaching*
- Reading
- Seeing
- Sitting*
- Sleeping
- Speaking
- Standing
- Thinking
- Walking
- Working

“PER SE” MAJOR LIFE ACTIVITIES

B. Operation of Major Bodily Functions & Organs

- Bladder
- Bowel
- Brain
- Circulatory
- Digestive
- Endocrine
- Genitourinary*
- Hemic*
- Immune system
- Lymphatic*
- Musculoskeletal*
- Neurological
- Normal cell growth
- Operation of any organ*
- Reproductive
- Respiratory
- Skin*
- Special sense organs*

*** Not listed in ADAAA as are the others, but was added by EEOC in the final regs or in Appendix to final regs**



DEFINITION OF “SUBSTANTIALLY LIMITS”

DEFINITION OF “SUBSTANTIALLY LIMITS”

- No definition of “substantially limits” in ADAAA or final regs
- Were definitions of “substantially limits” in prior EEOC regulations and case law, which were rejected in ADAAA by overturning the *Toyota* case and directing EEOC to change its regulations on the issue – specifically rejected were the following definitions:
 - “Unable to perform” or “significantly restricted” (old regs)
 - “Prevents or severely restricts” (*Toyota* case)

DEFINITION OF “SUBSTANTIALLY LIMITS”

- A number of suggested definitions were proposed to EEOC, all of which were rejected by EEOC:
 - “Ample”
 - “Considerable”
 - “More than moderately restricts”
 - “Discernable degree of difficulty”
 - “Makes achievement of the activity difficult”
 - “Causes a material difference from the ordinary processes by which most people in general population perform the major life activity”

DEFINITION OF “SUBSTANTIALLY LIMITS”

- In the proposed regs, EEOC had suggested “categories” of impairments:
 - “Per se” or “consistently disabling”
 - “Disabling for some, but not for others”
 - “Usually not disabling”
- EEOC deleted these categories in the final regs:
 - Because whether a “disability” exists or an impairment is “substantially limiting” has to be a case-by-case determination (not “one size fits all”)
 - Replaced it with a list of impairments that will “virtually always be” substantially limiting and disabilities

DEFINITION OF “SUBSTANTIALLY LIMITS”

- In the end, EEOC elected not to define it at all and to adopt 9 “rules of construction” (which are taken from the ADAAA’s “Findings and Purposes” and “Rules of Construction”)
- EEOC elected not to define it because it “would draw focus and intensity of attention to the threshold issue of coverage” (i.e., whether the employee has a “disability” rather than whether the employer discriminated or failed to accommodate)
 - Probably true, because employers would then attempt to focus litigation on the definition of “substantially limits” as a litigation strategy

NEW RULES OF CONSTRUCTION ON “SUBSTANTIALLY LIMITS”

1. “should not demand extensive analysis”
2. “construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA”
3. “individualized assessment” requires “a degree of functional limitation that is lower than the standard” previously applied
4. only one “major life activity” need be limited

NEW RULES OF CONSTRUCTION ON “SUBSTANTIALLY LIMITS”

5. “as compared to most people in the general population”
6. “usually will not require scientific, medical, or statistical analysis”
7. evaluate the impairment “when active”
8. “without regard to the ameliorative effects of mitigating measures”
9. impairments that last or are expected to last 6 months or less “can be substantially limiting”

EXPECTED OUTCOMES FROM RULES OF CONSTRUCTION

Expected Outcomes

1. Predictable assessments of “coverage” (whether a “disability” exists):
 - a. Easier to determine “coverage” issue (since easy determination of “impairment” and “major life activity” and much lower standard of “substantially limits”)
 - b. Some types of impairments will “virtually always” be disabilities because they will almost always be “substantially limiting” (but are no longer being called “per se” disabilities)
2. Shift of focus in claims and lawsuits to “merits” (whether employer discriminated or failed to accommodate)

“VIRTUALLY ALWAYS DISABILITIES”

Impairments “Virtually Always Substantially Limiting”	
Impairment	Major Life Activity Affected
1. Deafness	Hearing
2. Blindness	Seeing
3. Intellectual Disability	Brain Function
4. Missing Limbs	Musculoskeletal
5. Mobility Impairments	Musculoskeletal
6. Autism	Brain Function

“VIRTUALLY ALWAYS DISABILITIES”

Impairments “Virtually Always Substantially Limiting”	
Impairment	Major Life Activity Affected
7. Cancer	Normal Cell Growth
8. Cerebral Palsy	Brain Function
9. Diabetes	Endocrine Function
10. Epilepsy	Neurological Function
11. HIV Infection	Immune Function
12. Multiple Sclerosis	Neurological Function

“VIRTUALLY ALWAYS DISABILITIES”

Impairments “Virtually Always Substantially Limiting”	
Impairment	Major Life Activity Affected
13. Muscular Dystrophy	Neurological Function
14. Major Depression	Brain Function
15. Bi-polar Disorder	Brain Function
16. PTSD	Brain Function
17. Obsessive Compulsive	Brain Function
18. Schizophrenia	Brain Function

ANALYSIS OF “SUBSTANTIALLY LIMITS”

Analysis of “Substantially Limits”

First, determine extent of impairment when active and without ameliorative effects of mitigating measures;

Second, determine extent of impairment as “compared to most people in the general population”

ANALYSIS OF “SUBSTANTIALLY LIMITS”

Factors that may be considered when analyzing an individual’s ability to perform a major life activity as “compared to most people in the general population:”

- The conditions under which the individual performs the activity (compared to most people);
- The manner in which the individual performs the activity (compared to most people);
- The duration of time it takes the individual to perform (presumably the time to complete) the activity (compared to most people); and/or
- The duration of time (presumably the maximum time) for which the individual can perform the activity (compared to most people)

ANALYSIS OF “SUBSTANTIALLY LIMITS”

The evaluation of “conditions, manner and duration” basically means:

- The difficulty, effort, or time required to perform the activity;
- How performing it affects the individual (e.g., pain, fatigue, or shortness of breath experienced when performing it);
- Length of time the activity can be performed;
- Way an impairment affects the operation of a major bodily function; and/or
- Non-ameliorative effects of mitigating measures.

ANALYSIS OF “SUBSTANTIALLY LIMITS”

- Note that the “duration of the impairment itself” is not on the list.
- However, EEOC has also said:
 - Duration of an impairment is a relevant consideration, but only one factor to consider;
 - There is no minimum duration requirement for the impairment itself;
 - Non-severe impairments lasting only for a short period of time are typically not “substantially limiting (“several months” seems to be EEOC’s rule of thumb, but is definitely not as long as the 6-month requirement for “regarded as” situations)
 - Severe impairments lasting even for a short period of time could be “substantially limiting.”

ANALYSIS OF “SUBSTANTIALLY LIMITS”

So What Is The Definition of “Substantially Limits?”

1. There is a ceiling –

- But it’s not as high as “prevents,” “severely restricts,” or “significantly restricts”

2. There is a floor –

- But we don’t really know how low it is



IMPACT

COVERAGE

- It will be significantly easier for an individual to prove he/she has a “disability” because:
 - More medical conditions will qualify as “impairments”
 - Estimated that 25-50% of working population will have qualifying impairments
 - More activities will qualify as “major life activities”
 - Since operation of bodily systems and organs are now included
 - More impairments will be deemed to be “substantially limiting”
 - Because of lower standard to prove same

WHAT TO EXPECT

- Increase in “prohibited action” claims
 - Based on “regarded as” prong
 - Because claimant’s overall burden of proof is low and focus will primarily be on whether employer discriminated
- Increase in requests for accommodation
- Increase in “accommodation” claims
 - Based on “actual disability” or “record of disability” prongs:
 - For failure to reasonably accommodate
 - For failure to engage in interactive accommodation process
 - Because claimant’s burden of proving “disability” is low and focus will primarily be on whether employer complied with its accommodation obligations



PRACTICE TIPS

SPENCER FANE RULES OF THUMB

1. On the issue of “impairment:”
 - If it can be treated with basic first aid, does not require intervention by medical personnel, or is not OSHA-recordable, it’s probably not an impairment
 - If it requires more than basic first aid (e.g., evaluation or treatment by a health care provider, use of emergency procedures, or is OSHA-recordable), it’s probably an impairment

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RULES OF THUMB

2. On the issue of “major life activity:”

- Most activities and operation of most major bodily functions and organs will qualify as “major life activities”
- Challenge primarily when:
 - The activity is extraordinarily bizarre and uncommon and no other major life activity is limited; or
 - The normal operation of a major bodily function or organ is not really affected (e.g., paper cut causes bleeding, but doesn’t really affect the normal operation of the hemic system)

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RULES OF THUMB

3. On the issue of “transitory and minor:”

- If it’s a chronic condition, it’s probably **not** “transitory and minor”
- It’s probably “transitory and minor” if:
 - It’s a temporary, non-chronic condition
 - And either:
 - ❖ Actually and fully resolves in 6 months or less from date of onset of the condition (based on written confirmation at time of adverse action, preferably from employee’s own health care provider); or
 - ❖ Is expected to fully resolve in 6 months or less from date of onset of the condition (based on written projection at time of adverse action, preferably from employee’s own health care provider)

SPENCER FANE RULES OF THUMB

4. On the issue of “substantially limiting:”
 - Chronic impairments are probably “substantially limiting”
 - Non-chronic impairments that are **both** non-severe with little or no residual effects and of short duration (probably less than “several months”) are probably **not** “substantially limiting”

KEY ACTIONS

1. Conduct an audit to determine if you are vulnerable on any aspect of ADA compliance or defense
2. Adopt or modify existing policies, procedures, forms, and practices to strengthen your compliance and defense position

KEY AREAS OF POSSIBLE VULNERABILITY

1. Determination and documentation of “job-related qualifications”
2. Determination and documentation of “essential functions” of a job
3. Documentation that an individual is “not qualified” or “could not perform one or more essential duties with or without accommodation”
4. Determination and documentation of legitimate, non-discriminatory and consistent decisions regarding any term, condition and privilege of employment

KEY AREAS OF POSSIBLE VULNERABILITY

5. Determination and documentation of legitimate, non-discriminatory and consistent decisions regarding adverse actions
6. Documentation of meaningful use of interactive accommodation process
7. Determination and documentation that there were no “reasonable and effective” accommodations
8. Communication and coordination between HR and decision-makers or centralized oversight and approval

KEY POLICIES AND PRACTICES

1. Disability Accommodation Program:
 - a. Disability accommodation policy and procedures
 - b. Request for accommodation questionnaire
 - c. Health care provider questionnaire
 - d. Standard accommodation suggestions process:
 - (1) Suggestions from employee
 - (2) Suggestions developed by employer
 - (3) Suggestions by health care providers
 - (4) Search of JAN website (www.askjan.org)
 - e. Documentation of research and minutes of accommodation meetings
 - f. Documentation of conclusions and offers of accommodation

KEY POLICIES AND PRACTICES

2. Fitness for Duty and Safety Program:
 - a. Fitness for duty and direct threat policy and procedures
 - b. Health care provider questionnaire
 - c. Limited “modified” and light” duty policy and practices
 - d. Return to work policy and procedures
 - e. Documentation of conclusions

3. Job Analysis Program
 - a. Process and criteria for determining job “qualifications”
 - b. Process and criteria for determining “essential” job duties
 - b. Written and current job descriptions that include all qualifications and essential job duties

KEY POLICIES AND PRACTICES

4. Supervisory Training Program:

- a. Permissible and impermissible inquiries to applicants (before and after offer made) about medical conditions, health, disabilities
- b. Permissible and impermissible inquiries to employees about medical conditions, health, disabilities
- c. Reasonable accommodation:
 - (1) What constitutes a “request” for or “notice of need” for accommodation
 - (2) The interactive accommodation process
 - (3) What is and is not a reasonable accommodation
- d. Legitimate, non-discriminatory reasons for employment decisions and documentation of same

KEY POLICIES AND PRACTICES

5. Compensation Program:

- a. Salary and wage administration program with:
 - (1) Job groups and compensation ranges based on current wage and salary survey data
 - (2) Objective guidelines for increases and changes in pay
- b. Written and accurate performance evaluations
- c. Documentation of compensation decisions and specific reasons for them
- d. Centralized oversight and approval of compensation decisions

KEY POLICIES AND PRACTICES

6. Employee Relations Program:

- a. Sound HR policies, particularly on:
 - (1) Attendance and call-in procedures
 - (2) Leave of absence request procedures
 - (3) Paid time off policies
 - (4) Work rules and discipline policies
- b. Written and specific performance goals (quantitative to the extent possible)
- c. Written and accurate disciplinary actions and performance improvement plans that include a sufficient amount of detail
- d. Centralized oversight and pre-approval of adverse actions (at least at the final warning, suspension and discharge stages)



QUESTIONS ??



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