

EMPLOYMENT LAW UPDATE

January 2010



*Happy New Year!  
We thank you for  
the opportunity to  
serve your legal  
needs and wish  
you, your families  
and businesses a  
new year that is  
filled with much  
success and  
happiness!*

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**EEOC issues proposed rules on ADAAA**

by Terri C. Davis [tcd@shuttleworthlaw.com](mailto:tcd@shuttleworthlaw.com)

On September 23, 2009, the EEOC issued proposed rules to aid in the interpretation and application of the Amendments Act of 2008 (“ADAAA”) which became effective January 1, 2009. The ADAAA incorporated a number of changes, including a broader definition of “disability” based upon an expanded definition of “major life activities” and a redefinition of who is “regarded as” having a disability. It also modified the definition of “substantially limits” found in the regulations and specified that a “disability” can include impairments that are episodic or in remission, and prohibited the consideration of ameliorative effects of mitigating measures, with one exception.

The EEOC’s proposed rules provide the following guidance:

**BASIC DEFINITION OF “DISABILITY”:**

The basic three part ADA definition is retained:  
A physical or mental impairment that substantially

limits one or more major life activities; a record of such an impairment; or being regarded as having such an impairment. However the meaning of these terms has changed.

**RULES USED TO DETERMINE WHETHER SOMEONE HAS A “DISABILITY”:**

- An impairment need not prevent, or significantly or severely restrict, performance of a major life activity to be “substantially limiting”.
- Disability “shall be construed in favor of broad coverage” and “should not require extensive analysis”.
- An individual’s ability to perform a major life activity is compared to “most people in the general population”, often using a common sense analysis without scientific or medical evidence.
- An impairment need not substantially limit more than one major life activity.

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### **MAJOR LIFE ACTIVITIES:**

Major life activities include “major bodily functions” such as functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, circulatory, respiratory, endocrine, hemic, lymphatic, musculoskeletal, special sense organs and skin, genital, urinary, and cardiovascular systems, and reproductive functions.

Major life activities also include the following: Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, sitting, reaching, interacting with others, and working.

### **MITIGATING MEASURES:**

Positive effects of mitigating measures (except for ordinary eyeglasses and contact lenses) are ignored in determining whether an impairment is substantially limiting.

Examples of mitigating measures include medication, medical equipment and devices, prosthetics, hearing aids, cochlear implants and other implantable hearing devices, low vision devices, mobility devices, oxygen therapy, use of assistive technology, reasonable accommodations and auxiliary aids or services, behavioral or neurological modifications, and surgical interventions that do not permanently eliminate an impairment.

### **IMPAIRMENTS THAT ARE EPISODIC OR IN REMISSION:**

An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. Examples of impairments that are episodic or in remission include epilepsy, hypertension, multiple sclerosis, asthma, diabetes, major depression, bipolar disorder, schizophrenia, and cancer.

### **EXAMPLES OF DISABILITY:**

The EEOC guidance provides a list of impairments which can be presumed to substantially limit a major life activity. These include the following:

- Deafness
- Intellectual disability (formerly known as mental retardation)
- Mobility impairment requiring the use of a wheelchair
- Cancer
- Diabetes
- HIV Aids
- Muscular dystrophy
- Bipolar disorder
- Obsessive compulsive disorder

The EEOC also lists a number of impairments that may be substantially limiting for some individuals but not for others. These therefore may require a more thorough analysis as to whether or not they substantially limit a major life activity. These include:

- Asthma
- Back and leg impairments
- Panic or anxiety disorders
- Carpal tunnel syndrome



The EEOC guidance also provides a list of temporary non-chronic impairments of short duration that will not usually be found to substantially limit a major life activity.

These include:

- A cold
- A sprained joint
- A broken bone expected to heal completely
- Seasonal allergies

It is important to note that, under the proposed rules, an impairment may still be substantially limiting even if it lasts or is expected to last fewer than six months. An example of this would be a 20 pound lifting restriction which lasts several months.

### **SUBSTANTIALLY LIMITED IN WORKING:**

The EEOC proposed rules replace “class” or “broad range” of jobs with a concept of a “type of work” The type of work may be identified by the nature of the work. For example commercial truck driving, assembly line jobs, food service jobs, clerical jobs or law enforcement jobs. A type of work may also be defined by reference to job related requirements. Examples of these include jobs requiring repetitive bending, reaching

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## Misclassification of workers—IRS and IWD team up

by Don Johnson [dlj@shuttleworthlaw.com](mailto:dlj@shuttleworthlaw.com)

In an effort to simplify the payroll process and minimize the employer's portion of the payroll taxes, taxpayers often classify, or misclassify, their workers as "independent contractors". According to the Federal Government Accountability Office, the underpayment of social security, unemployment, and income taxes in 2006 due to worker misclassification totaled an estimated 2.72 billion dollars nationally.

As a means to reduce this portion of the tax gap (i.e. the gap between what taxpayers voluntarily pay and what is actually owed under the law), the Internal Revenue Service is

teaming up with local agencies to prevent the misclassification of workers. Recently, Kristy Maitre, a Senior Stakeholder Liaison with the Internal Revenue Service, reported that the Iowa Workforce Development and the Internal Revenue Service have entered into an agreement to share information regarding the misclassification of Iowa workers. As a result of this agreement, employers should expect to see greater enforcement of the worker classification rules.

The determination of whether a worker is an employee or an independent contractor is based upon all of the information that provides evidence of the degree of

control and independence the taxpayer has over the worker. In an effort to guide taxpayers with this facts and circumstances test, the Internal Revenue Service has provided a number of characteristics that should be considered when determining worker classifications.

With budget concerns at both the state and federal levels, we are likely to see more scrutiny from our taxing authorities. Now would be the time to review your worker classifications to ensure that any visit from the Iowa Workforce Development or the Internal Revenue Service is as pleasant as possible. ♦

## ICE announces Form I-9 audits of 1,000 employers

by Mark P.A. Hudson [mph@shuttleworthlaw.com](mailto:mph@shuttleworthlaw.com)



On November 19, 2009, the United States Immigration and Customs Enforcement (ICE) announced the issuance of notices of inspection (NOI's) to 1,000 employers across the country associated with critical infrastructure, alerting business owners that ICE will audit their hiring records to determine compliance with employment eligibility verification laws. These audits involve a comprehensive review of Form I-9's, which employers are required to complete and retain for each individual hired in the United States. Assistant Secretary John Morton stated, "ICE is focused on finding and penalizing

employers who believe they can unfairly get ahead by cultivating illegal workplaces, [we] are increasing criminal and civil enforcement of immigration related employment laws and posing smart, tough employer sanctions to even the playing field for employers who play by the rules." Protecting employment opportunities for the nation's lawful workforce and targeting employers who knowingly employ an illegal workforce are major ICE priorities. Audits may result in civil penalties and to lay the ground work for criminal prosecution of employers who knowingly violate the law. In addition to announcing the new audits, ICE provides statistics since implementing its new workforce enforcement strategy from April 30, 2009:

- 45 Businesses and 47 individuals debarred

- 142 Notices of Intent to Fine (NIF) totaling \$15,865,181
- 45 Final orders totaling \$798,179
- 1,897 cases initiated
- 1,069 Form I-9 inspections

**How can we help?** Shuttleworth & Ingersoll regularly counsels employers on Form I-9 compliance. We perform private audits of Form I-9 documents, prepare compliance programs, and train managers and HR professionals in implementing the programs. We also help employers decide whether and how to create or store Form I-9's electronically, to use the social security administration's number verification systems, or to participate in the Department of Homeland Security's E-Verify program. Please contact Mark Hudson to discuss these topics. ♦

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or manual tasks; jobs requiring frequent or heaving lifting; and jobs requiring prolonged standing or sitting.

#### **REGARDED AS:**

Under the proposed EEOC guidance, an employer regards an individual as having a disability if the employer takes a prohibited action based on an actual or perceived impairment that is not expected to last for six months or less, and is minor. For example taking an adverse employment action based on a sprained wrist and broken leg expected to heal normally does not amount to regarding an individual as having a disability, because these impairments are transitory and minor. Taking an adverse action based on carpal tunnel syndrome or hepatitis C, or on a two day virus that an employer perceived to be heart disease, would amount to regarding an individual as having a disability.

Actions taken on the basis of an impairment's symptoms, such as a facial tic related to Tourette's syndrome, or an individual's use of mitigating measures, such as anti-seizure medication for epilepsy, are actions taken on the basis of an impairment.

It's important to note that under the ADA reasonable accommodation is

not available to someone who is only covered under the "regarded as" prong of the definition of disability.

#### **UNCORRECTED VISION STANDARDS:**

Employers must show challenged uncorrected vision qualification standards are job related and consistent with business necessity, regardless of whether the person challenging the standard has a disability.

#### **BOTTOM LINE:**

The EEOC's proposed rules are useful as a tool to see how the EEOC is likely to interpret the ADA and rule in future cases. Employers should keep in mind, however, that the guide doesn't have the effect of the law. Federal or state courts could always take a different view of a situation than the EEOC, especially in cases involving claims under state or local disability laws which may contain more expansive definitions of disabilities. Therefore, it's always best to consult legal counsel when faced with a difficult situation involving the application of the ADA, and the application of performance or conduct standards to an employee with a disability. ♦

### **Shuttleworth & Ingersoll's HIPAA HITECH Toolkit**

The HITECH amendments to the HIPAA privacy and security rules represent the first significant changes to the rules since their enactment. Most changes are effective February 17, 2010. While the effective date of the significant changes to the duties of a covered entity to notify patients of any breach of the security or confidentiality of their protected health information was August 23, 2009, the enforcement date for this requirement is February 23, 2010. The amendments will require some significant changes to HIPAA policies and procedures.

Shuttleworth & Ingersoll is pleased to be ready to continue its tradition of assisting its healthcare clients and employee benefit clients in complying with HIPAA with its **HIPAA HITECH Toolkit**, designed to address the changes and update your current policies and procedures.

Please contact Diane Kutzko, Chair of the Health Law Practice, to purchase the Toolkit or to discuss any questions: [dhk@shuttleworthlaw.com](mailto:dhk@shuttleworthlaw.com) or 319-365-9461. ♦



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