

California Executive Magazine

ADA Amendments May Bring Subtle Change to Cal Businesses

October 30, 2008

By Steve Tanner

Amendments making the Americans with Disabilities Act (ADA) much stricter for U.S. employers, signed into law earlier this year, take effect in 2009. But those amendments, for the most part, should have little bearing on employers in California, which has its own equivalent, the Fair Employment and Housing Act (FEHA).

FEHA law remains a little more employee-friendly than federal law, which means that little will change in the way that Golden State employers handle disability issues. But some labor and employment attorneys say the new amendments may actually spur more lawsuits in California and that they lower the bar for plaintiffs to cite federal law.

The difficult part for employers in defending such cases will be that plaintiffs will be more apt to file suit under both ADA and FEHA.

"The major difference for California employers is that they'll see more ADA claims and they'll be harder to defend," says Irvine-based labor and employment attorney Bob King.

For most states other than California, the amendments are a serious game-changer, says Atlanta-based attorney and ADA expert Myra Creighton, a partner with Fisher & Phillips LLP.

ADA applies to companies with 15 or more employees, while FEHA is applicable to businesses with at least five employees.

ADA Amendments: On Par with California

The ADA amendments generally broaden how a disability is defined under federal law, overturning a U.S. Supreme Court decision that tightens this definition to only include impairments that "severely restrict" major life

activities. In line with California's definition, the ADA will now include impairments that "substantially limit" major life activities, a notion the Equal Employment Opportunity Commission (EEOC) will further define in the near future.

Overturing another U.S. Supreme Court decision, which holds that impairments are to be evaluated after considering the effects of "mitigating factors" such as medication or prosthetics, the amendments largely do away with such evaluations.

"The Supreme Court found that if your disability was controlled with insulin, for example, then you're not necessarily disabled," Barer says. "The amendments change this, so that you're still considered disabled."

He says this likely will not include the roughly 75% of Americans who use eyeglasses or contact lenses, also in line with California law.

What's New For California Employers

It remains to be seen exactly how the new amendments will play out in federal courts. But one element of the ADA that may provide more protection than state law for California employees - meaning it would have to be followed - is the inclusion of people who are merely "regarded as" being disabled, says attorney Margaret Rosenthal. Pending guidance by the EEOC will provide more details about this and other amendments.

"I think that 'regarded as' is covered under state law, but the issue under state law is how it is defined and whether or not you are entitled to accommodations," says Rosenthal, a partner in the Los Angeles office of Baker & Hostetler LLP, adding that attorneys are still waiting to see how the ADA amendment will define 'regarded as' and whether it will require accommodations.

If the EEOC decides that employers do not have to accommodate someone who is merely perceived as being disabled, it could help level the playing field, King says. The "regarded as" claim, he adds, is primarily a plaintiff's legal weapon.

"California law isn't clear in that respect. So you can say, as comparable precedent under the ADA [hypothetically speaking], that you don't have to accommodate employees who are only regarded as disabled," King says.

But if the ADA amendment ends up requiring accommodations or otherwise affords more protection for employees, then it would have the opposite effect, attorneys say.

Increased ADA Claims?

There is some debate whether or not the strengthened federal ADA requirements will indeed trigger more lawsuits for California employers, although attorneys all say the amendments will make it easier for plaintiffs to cite federal law. Another theory is that the sweeping changes in ADA will generate more attention to disability discrimination, prompting more suits.

"You'll see more people challenging decisions on an ADA basis, even if the law in California hasn't changed," says Jennifer Berman, managing director of the HR advisory consulting and training group at CBIZ Inc. in San Jose.

King says the amendments will give plaintiffs citing both federal and state law more firepower, since the ADA will provide nearly as much protection as FEHA. One likely result, he says, is an increased difficulty in challenging claims of an employee's disability status.

"So you'll start seeing more federal claims against California employers," King says. "There was a big initial hurdle, which was to prove whether or not someone is disabled. Now that hurdle is much lower."

Rosenthal says she believes the ADA amendments won't have much of an impact in California, but that plaintiffs in the state might be more willing to file in federal court for "regarded as" claims.

Attorneys also say lawsuits could increase for California companies that have offices in other states.

Compliance Advice

Employers already compliant with FEHA and that have properly trained their supervisors and HR managers are probably in good shape, attorneys say.

"If employers have good policies in place right now, with regard to accommodations, then I don't think it will affect them too much," says Scott Barer, an attorney based in Woodland Hills, referring to the requirement under both FEHA and ADA to provide reasonable accommodations for disabled employees.

Those that have been lax with respect to their FEHA and ADA obligations, however, should take the opportunity to get back up to speed. Berman says many of the California companies she consults are woefully vulnerable to ADA (and FEHA) lawsuits.

"You look at most policies, and they're just generic," Berman says, suggesting that employers specifically address discrimination under ADA, as well as FEHA, in training and employee handbooks. She says it might also be a good idea to create a separate section on disability discrimination within an organization's anti-discrimination training program.

Berman stresses the importance of providing relatively detailed job descriptions, which are matched against employees' accommodation requests. Attorneys echo the importance of job descriptions as well.

"The best way to prove whether or not someone could do their job is to have a description on hand," says Washington, D.C. attorney Tina Maiolo, a member of Carr Maloney P.C.

King and other attorneys say the new ADA amendments, even if they change little for California employers, are an opportunity to review the so-called "interactive process" of sitting down with a disabled employee and determining what reasonable accommodations would help them meet the job requirements. This process should be documented as well, attorneys say.

"I think where these claims often go awry really is in the interactive process, which often breaks down," King says. "I would use these amendments as a framing opportunity to review the interactive process again. Not just for HR people, but also managers."

Rosenthal says most small businesses in particular often need help analyzing disability issues. Similarly, Barer says it's often money well spent to consult an attorney if a disability issue arises, that business executives and managers should not be expected to become experts on ADA and FEHA but rather "issue-spotters."

California employers would be wise to review their policies and be prepared for the changes to federal law, but most attorneys say the ADA amendments change little within the state. The amendments take effect on Jan. 1, 2009.

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