

FOCUS

President's Message

Woodrow Ban

Many of you attended NEOACCA's summer social at the Crawford Museum on June 16. Thank you for coming. Our heartfelt thanks go out to Jackson Lewis for hosting this event again. Those attending had a great opportunity to network with other members, get better acquainted with some of the local Jackson Lewis attorneys, and view some wonderfully preserved vintage planes and automobiles. Stay tuned for news about our December winter social, currently in the planning stage, where you'll again have an opportunity to network with other members in a relaxed social setting.

Networking can substantially enhance our effectiveness in our professional lives. Through networking, we can draw on the experience and knowledge of others to help us solve problems and find resources. Through networking, we can build relationships by helping others solve their problems and locate resources. In addition to cocktail parties, social clubs, golf outings, etc., the Internet has given birth to a new forum for social networking.

While not the first such network, Facebook, seemingly more than any other e-network, has brought social networking into the lives of the average person. Electronic social networks have changed, and continue to change the way in which most of us do business and communicate with friends, family and business associates. More recently, some e-networks have attempted to differentiate themselves by

appealing to a particular user stratum. For example, LinkedIn promotes itself as the social network for business.

E-networks, however, pose risks along with the benefits they offer. When we join an e-network, we post personal information on that network. Unless we restrict access, everyone else on that network can see our personal information. Classic horror stories include folks posting future vacation information only to find their homes broken into upon their return.

Some networks, such as Facebook, tend to "default" to general visibility unless the user limits access. Many folks either don't establish the visibility limits, or they do so in such a manner that makes sufficient protection impossible. And many of us may not want our professional information posted on a general e-network, preferring to share that information only with others in our profession.

Many NEOACCA members do not know that ACC maintains an electronic social network on its website. Called "Member-to-Member" and accessible from the ACC homepage, it has a touch and feel similar to Facebook, with access limited to ACC members. Users can feel confident that the general public won't have access to the ACC site and the personal information a user posts there.

Member-to-Member lets a user stratify who can see what. On Member-to-Mem-

ber, you can allow some people to see everything you post, restrict others to only selected categories of information and preclude everyone else from seeing virtually anything at all.

As a Member-to-Member user, you can create a virtual Rolodex, much in the way Facebook does. Like other networks, Member-to-Member has a postings feature; you can go to the various eGroups that have formed within Member-to-Member, looking at postings on various issues and questions, and can reply to these groups or individual senders. You and others can form your own eGroups to exchange information and postings on matters critical to you. You can download and upload files and postings easily, quickly, and in most cases, without the necessity for a request. And, you can forward postings — a useful tool.

You can create and use signatures on Member-to-Member, and can attach them to your postings, as well as to your communications. An embedded calendar feature allows you to see all ACC events, or drill-down on chapter events or a particular type of event, such as webcasts, etc. You can also maintain a personal calendar and share events with your contacts.

Limited search capability has hampered the use of Member-to-Member in the past. ACC has now eliminated many of these limitations. One particularly bothersome

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Extend Your Network Through Networking

By Veta T. Richardson, ACC President & CEO

We all know it's important. It's a part of our professional (and sometimes personal) lives. Meeting people who do what we do, what we hope to do, and even what we've done is necessary for our continued growth. You know what "it" is: networking.

While networking is a good idea when looking for a job or an opportunity to advance your career, this activity is more than just a good idea for in-house counsel — it's essential.

Many of the jobs that you would be interested in never make it to newspaper ads or online job posts. Word of these positions often come from other in-house counsel either working within the company's legal department, or who have had conversations with colleagues connected to the department. How will you get in on the conversation if you're not at the event mingling with the people doing the talking?

Here, I will offer a few tips for successful networking — in the real and virtual worlds — while further exploring how this activity can benefit not only your career, but your social circle as well.

A few networking tips

If you happen to be between in-house positions, looking for a full-time position can often feel like a job itself. If you are also working in-house you're, well, busy working. However, you should never be too busy to grow your connections and opportunities. To get it all done, you need to network smartly. Here's how:

Choose carefully

There is no shortage of networking happy hours, socials, dinners, outings — whatever the invite says next to "networking." You don't need to attend every one of them. Take a little time to research the event: Who else is on the invite list? Where is it being held? Who is the event host, company or sponsor? Asking yourself these few questions can help you weed out those events that may not be the best use your time. Of course, any networking event held by the professional organizations of which you are a member should be at the top of your list: Your local ACC chapter hosts networking events almost monthly. Find a listing of upcoming events on your ACC chapter page (www.acc.com/chapters) and view the "All Chapters Events" calendar at www.acc.com/chaptereventscal.

Remember, networking doesn't only occur during happy hours

Some of your most valued connections can come from the most unlikely sources. Do you volunteer with a not-for-profit or coach your son's baseball team? You never know who is volunteering or carpooling beside you: Strike up a conversation and keep your business cards close at all times. For example, at one time in my professional life, I was looking to perhaps use my law degree and background in art history to run a museum. At a cocktail party at the home of a friend of a friend, I shared out loud my interest in museum management. The person I was speaking with told me about a then-newly-under-construction Museum of African American History in the Midwest, and said he heard they were looking for a deputy director. Through that initial lead, I tracked down the museum's head of HR, threw my hat in the ring, interviewed and was offered the position. I ended up not accepting the job for complicated reasons that really don't matter for purposes of this article. The point is that opportunities arise in unlikely ways.

What's your motivation?

Before attending any networking function, figure out what you want to gain from it. Are you going to find a new in-house position or do you feel like your in-house Rolodex needs a little updating and tending to? Are you a new corporate counsel and looking to raise your profile among your in-house peers, or are you looking for a possible mentor to help you navigate the unpredictable world of an in-house legal department? What you wish to accomplish over cocktails and business card exchanges affects the way you network, as well as what events you should attend. Some meetings are more social than others, focused on fostering connections, while others are more formal, focused on helping attendees secure a professional opportunity.

Be genuine and confident

Walking into a room of your successful peers, many already engaged in conversations, can be a bit intimidating. Don't worry about butting in on a conversation or talking too much; just be yourself and remember why you are there. I always remind myself that everyone is here for the same reason and that's to network and meet new people. Sometimes I look for the people who are standing alone and choose them as a starting point for joining the group and establishing that first essential new contact.

Ask a lot of questions

You've likely done a lot in your career. You sit on this board; you're licensed to practice in five states; and your local chapter named you "GC of the Year." These are all great accomplishments, but good networking is about getting and sharing information. So ask your new in-house friend what she is currently working on in her department. Perhaps, bring up an issue in your own department and ask if her department has dealt with a similar issue, and if she has any solutions to offer. These types of exchanges open up the door to continued conversations and connections.

Follow up

This is a given. However, in our busy lives we can forget to follow up with the new connections we've made, losing the cards collected in the dark abyss of our suitcases. Set goals for yourself both before and after the event. Leaving a networking event with 20 cards can be a bit overwhelming, so go into it thinking, "I want to connect with 10 people at this event." Make your next goal to send a "Nice connecting with you!" email to all 10 connects within a week of the event. Your next goal may be to follow up with all connects from events attended, like ACC chapter meetings, the ACC Annual Meeting (www.acc.com/education/am11) etc., monthly or bi-monthly. It may seem like a lot, but you can't grow relationships without communicating, and networking is, fundamentally, about building relationships.

Join and volunteer with organizations in your field

A great way to enhance your networking is to become active in groups that expand professional connections. You're already a member of an association dedicated to your professional needs. Take advantage of all of the networking opportunities ACC presents through your chapters, our educational meetings and committees — perhaps volunteering where you can. Also, join other professional associations and organizations targeted at your individual interests and needs. For example, attorneys of diverse backgrounds or even majority males with an interest in advancing diversity might enjoy an organization like the Minority Corporate Counsel Association (www.mcca.com), and whether you are a straight ally or gay, the LGBT Bar Association (www.lgbtbar.org), offers great programs and opportunities to connect professionally. Alternatively, you can choose to network

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in your practice area, industry trade association or even around pro bono service. Just do it!

Social media and online networking

You likely have several (or at least one or two) online profiles in communities that are frequented or made up by your in-house peers. Hopefully, you've checked out ACC's Member-to-Member benefit and built your online profile.

At <http://community.acc.com/home>, you can find many solutions to challenges you may be facing in your legal department, all from your in-house peers. This peer-to-peer network puts your favorite ACC resources in one place, including: ACC announcements, eGroup forums, a member directory, mentoring opportunities and a shared file directory — allowing you to connect with people and resources particular to your in-house career.

There are also sites like LinkedIn, Twitter, and Facebook where you can grow your professional and social networks right from your computer. Be sure to first check out the ACC presence on each. On these sites the same rules of in-person networking apply. Also, make sure you have an updated picture of yourself in your profile. Nothing screams: "I don't understand this or have time for it" like not having your own picture associated with your profile. Your online profile should be as updated as your resume. For example, make sure you join online communities that make sense based on your objectives. If you want to connect with old friends, Facebook may be for you, but if you want to further your professional reach and network, LinkedIn may be where you choose to spend your time. Remember the idea of goal setting? Online networking shouldn't just be about how many connections, followers or friends you have. Make the connections count — target the leaders in your field and follow, friend and connect to them. Once the connection is made, start the conversation, perhaps suggest an in-person networking event to meet up at, and follow up. Further, make sure that you are adding to the community that you join by posting useful resources and posing questions that start conversations. Join groups that focus on your area of practice and interest. Like I said, it's no different than networking in the "real" world.

Benefits

You know the benefits of networking: connecting and reconnecting with people who may aide you, and vice versa, in getting a new position down the road; fostering a network that will be useful not only to you, but to a future employer or client; building relationships with people who

can act as a mentors, advisors, supporters and professional cheerleaders for you (and to whom you could return the favor) and more.

Keeping current

So you may be in a great in-house position, and your network is pretty big and growing. Networking with those peers, both new and not so new, is still very important to your in-house career. You need to know what everyone is talking about. Perhaps you're leading the company's major acquisition (or maybe you're a legal team of one), logging long hours in the office and haven't had the time to keep up on the latest developments related to Dodd-Frank. Attending networking events and taking a few minutes out of your day to skim your twitter feed can help keep you current.

Building your career

Whether you're currently in your dream in-house position or looking for it, networking with your peers is an excellent way to build your career. You never know where that next opportunity will come from, or how a new contact can add value to your current position.

Opening up relationships with people who can be mentors, advisors, supporters and cheerleaders

No matter where you are in your career, having a support system is key. Having a mentor or advisor who you can approach with concerns and questions often gives you that needed push and confidence to tackle whatever the issue is. A way to meet these people, and to perhaps become one yourself, is through networking. Further, I have connected with many young attorneys through events held by MCCA and ACC, becoming that mentor and advisor, and giving back to the in-house community that has offered me so much.

Online social networks make staying in touch easier than ever

There is nothing like face-to-face contact. You get to look into your peer's eyes, shake her hand and take her card. However, as we already discussed, keeping in touch after the initial meeting can prove challenging. As suggested, following up with your connections is crucial to worthwhile networking. Now, you can do that with more than an email. Sending a tweet or retweeting something they've said online can keep you connected easily, allowing you to continue and start conversations.

There's an old saying that people make time for what's important to them. I know that your in-house career is important to you, as is connecting with old and new friends. Being an active

participant in networking opportunities is an excellent way to make business and personal connections. I think it is worth you time and effort to engage in some form of networking — be it at an ACC Chapter meeting or through your LinkedIn profile. Start the conversation, continue it, and pass it on.

Resources to Consider

In-house JoblineSM

With more than 1,000 corporate counsel positions listed every month, In-house Jobline is the one place to find your next position, post your resume, or hire legal staff. Find your next employment opportunity at <http://jobline.acc.com>.

The ACC Community

This one link directs you to "My ACC" where you can build your online profile, Member-to-Member, eGroups, Pro Bono and Diversity opportunities, Law department leaders, CLOs, The ACC Blog and more. www.acc.com/community

ACC Top 10

- **Top Ten Tips for Online Professional Networking in the Legal Community (April 2009).** www.acc.com/legalresources/publications/topten/Top-Ten-Tips-for-Online-Professional-Networking-in-the-Legal-Community.cfm

ACC Presentations

- **Seven Secrets of Landing Your Next in-House Job (Nov. 2010).** www.acc.com/legalresources/resource.cfm?show=1268882
- **The Girlfriends' Guide to the Good Ol' Boy Network: What They Never Told You About the Life in the Big Corporation (Oct. 2009).** www.acc.com/legalresources/resource.cfm?show=730583

ACC Docket

- **Networking 2.0 (Oct. 2009).** www.acc.com/vl/membersonly/ACCDocketArticle/loader.cfm?csModule=security/getfile&pageID=637826
- **Online Social Networking and Your Career: Are You Staying Ahead of the Game? (July 2008).** www.acc.com/legalresources/resource.cfm?show=16821
- **Hands On: Taking Charge of Your Career: Best Practices for Women Lawyers (July 2006).** www.acc.com/legalresources/resource.cfm?show=14635

ACC Article

- **Rules of Engagement for Online Networking (Nov. 2008).** www.acc.com/legalresources/resource.cfm?show=140897

Forbes.com

- **Networking Survival Tips (Jan. 2010).** www.forbes.com/2010/01/06/networking-event-conversation-forbes-woman-net-worth-relationship.html

Three Big Labor and Employment Issues In 2011

1. The U.S. Department of Labor Is Partnering with Plaintiffs' Attorneys to Sue Employers.

Yes, you read the headline correctly. The biggest and most shocking concern for employers in 2011 is that United States Department of Labor (DOL) is partnering with plaintiffs' attorneys to sue employers.

On Dec. 13, 2010, DOL's Wage and Hour Division initiated a radical change to its handling of employee complaints under the Fair Labor Standards Act (minimum wage and overtime) and the Family and Medical Leave Act. In cases where DOL decides not to pursue a worker's complaint, DOL will provide a referral to plaintiffs'-side, ABA-approved labor and employment attorneys. In other words, DOL is not remaining neutral; it is operating a plaintiffs' and plaintiffs' attorney referral service — to the detriment of employers. (Rest assured, DOL does not operate a program to help targeted employers find competent defense counsel.) In PC-speak, DOL is calling this its "Bridge to Justice" program. (Apparently, only employees — not employers — need a "Bridge to Justice.")

Here is how the program works: When DOL decides not to pursue a complaint, it will provide the employee with a toll-free number for an ABA-approved network of lawyers to help pursue her FLSA or FMLA claims against the employer.

If the referral system was not bad enough, DOL is not stopping there. It will also provide employees and their counsel with the DOL's investigative materials. Thus, DOL will provide employees and their attorneys with valuable information and a significant advantage in pursuit of their claims against employers. And, that valuable information may very well include damaging information employers have been forced to provide DOL as part of their duty to cooperate. Last, but not least, DOL is developing a "special process" for employees and their attorneys to quickly obtain "relevant case information and documents."

Announcing the program, DOL stated: "[T]he Wage and Hour Division will now connect these workers to a local referral service that will, in turn, provide the

workers with access to attorneys who may be able to help. This collaboration will both provide workers a better opportunity to seek redress for FLSA and FMLA violations and help level the playing field for employers who want to do the right thing."

Despite the DOL's announcement, this lawyer agrees with *The Wall Street Journal's* assessment: The partnership essentially "helps plaintiffs' attorneys hunt for clients ... let the suing commence."

2. The U.S. National Labor Relations Board Plans to Require That Employers Notify Employees of Their Union Rights.

You read this second headline correctly, too. On Dec. 22, 2010, the National Labor Relations Board — the federal entity responsible for governing unionization and *private* union-employer relations — announced a proposed rule that would require private employers to educate employees about their "rights as employees under the N[at]ional L[abor] R[elations] A[ct]." The "rights," which would have to be explained, include employees' right to act together to address their wages and working conditions; their right to form, join and assist a union; and their right to collectively bargain with the employer. The required notice would also provide employees with examples of illegal employer conduct and instructions on how to report complaints to the NLRB. The notice would have to be posted in a conspicuous place. Employers who customarily communicate electronically will have to email the notice to their employees or prominently post the notice on the company website.

Although the proposed rule is not yet in effect and is subject to a 60-day period for public comment, this lawyer is convinced the NLRB has made up its mind and will enact the proposed regulation as soon as legally possible.

3. The NLRB Will Likely Protect Employees Who Badmouth Their Employers on Facebook.

The third significant development for 2011 is the NLRB's action to protect employees who badmouth their employers on Facebook or other electronic media. Last

November, the NLRB filed a complaint against an employer for firing an employee who posted negative comments about her supervisor on Facebook. The matter is currently pending and set for hearing before an Administrative Law Judge.

Significantly, this development is not as concerning as the first two developments. While this third development may be surprising, it is not a significant legal change — just the application of 20th century law to 21st century technology.

Under the NLRA, employees are entitled to engage in "concerted activity" — activity in the common interest of employees, or matters that affect a group of employees. However, "concerted activity" does not extend to *purely individual concerns*, nor does it protect concerted activity expressed in plainly improper ways — such as violence or extremely vulgar language, such as the proverbial "f-bomb."

Practically speaking, employers simply need to avoid mindless, off-the-shelf social media policies, and remember what they can prohibit and what they cannot prohibit under the NLRA. For example, employers cannot prohibit employees from complaining about how the company or its supervisors treat a group of employees. (e.g., "Joe doesn't know how to run the shop"; "Marie treats her subordinates like crap"; or "The company screwed us out of raises.") In contrast, employers can prohibit employees from purely personal complaints and complaints that are clearly improperly expressed (e.g., "Joe is a mo___r-fu___r who can suck my ___"; "Marie is a f___ing b___tch"; or "I got screwed out of my raise.")

The material appearing in this article is meant to provide general information only and not as a substitute for legal advice. Readers should seek the advice of their attorney or contact Barry Y. Freeman at bfreeman@bdblaw.com or 1-888-843-2825.

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Find a Mentor in ACC's New Mentor Program

Accessible through our new Member-To-Member online community, ACC's new web-based mentor program allows members to sign up as mentors or mentees and connect with each other based on geographic location and practice area expertise. Formal mentor relationships last one year, but we hope our new mentor program will facilitate the development of long-term relationships that grow our members' careers for years to come. To sign up, go to <http://community.acc.com/Home>, log in, and click on the "Mentoring" tab. For questions about the program, read the FAQs in this section or contact ACC's membership department at 202.293.4103, ext. 360.

Join your Local Chapter During ACC's National Community Service Month

Throughout September, October, and November, ACC chapters all over the country will support National Public Lands Day (npld.com) and National Service Day (www.nationalservice.gov) by participating in their own community service events around the country. ACC and its chapters will join other volunteers this year to paint and frame houses, plant trees, and help their local communities in other ways.

This is the fifth year that ACC chapters voted overwhelmingly to participate in ACC Community Service Month. Originally conceived by James (Jim) Patton, former ACC board member and former

president of the South Florida Chapter, now national director of legal projects at Robert Half Legal, the National Community Service Month was envisioned to give ACC members an opportunity to give back to the community that has given them so much and to demonstrate that lawyers care about their local neighborhoods and parks. All too often, members don't find opportunities to do something good for the community and in the past, there were even less opportunities to perform family friendly community projects through their local bar associations. National Community Service Month has helped to change this. To join on your local chapter for its event, visit the chapter pages at www.acc.com/chapters.

ACC's Member-to-Member

Looking for important ACC updates? Want to connect with peers in your practice area? Have a sample contract you'd like to share?

Log in to ACC's newly launched *Member-to-Member* online community and join the conversation with thousands of your in-house peers. Discuss challenges, get important ACC updates, and share files — everything you need is right here!

Member-to-Member offers

- eGroups discussion forums for sharing ideas and addressing challenges with practice-area peers, fellow chapter members, or open groups.
- ACC Announcements that keep you informed about the latest resources, upcoming events, hot topics, blog posts, and more.

- A shared file directory for immediate access to sample forms, policies, contracts and other resources uploaded by in-house peers.
- Networking options and a member directory that let you connect with other in-house counsel by location, law school, specialties, personal interests and many other choices.

Log in to Member-to-Member at www.acc.com/m2m. Complete or update your profile, and start enjoying the benefits of the world's largest community of in-house counsel.

Sign up for Large Law Membership and Save

Does your company have nine or more attorneys? If so, there is no better way to save money than by promoting the large law membership dues package. The large law department fee schedule can save you anywhere from hundreds to thousands of dollars depending on the size of your department. With budgets getting tighter, the need for ACC resources (rather than using outside counsel) is more critical than ever. And with our large law membership rates, we make the savings even more valuable! For more information, go to www.acc.com/aboutacc/membership/lawdepartment.cfm or contact Danielle Boshart, director of membership operations, at 202.293.4103, ext. 307 or boshart@acc.com.

Welcome New Members

Atossa Alavi, Alphamicon Inc.

Michael Cole, KeyBank
National Association

Patricia Decensi, Medical
Mutual of Ohio

Rachel Feinleib, Education
Management Corporation

George Frankovich,
Sterling Jewelers Inc.

Amy Gilchrist, Philips Medical Systems

John Heer, Electrolux
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Patricia Jacobson, Integra
LifeSciences Corporation

April Miller Boise, Veyance
Technologies, Inc.

Lawrence Muscarella,
MTD Products Inc.

Kevin Peinkofer, Progressive
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limitation, a daily limit on the number of profiles you can search, recently went by the boards. Additional profile information will soon become searchable (subject to user controls, obviously), such as the industry in which the user works.

If you do not currently use Member-to-Member, please give ACC's newly enhanced version a look. If you do use it, check out the enhancements that have come online recently. Member-to-Member is just one of the many advantages to membership in NEOACCA.

Sincerely,
Woodrow Ban

Calendar of Events

October 27: CLE seminar addressing Exports, presented by Thompson Hine LLP

November 17: Annual Legal Ethics, Professionalism and Substance Abuse CLE seminar presented by Porter Wright. Followed by NEOACCA Annual Meeting and Election of Officers and Directors.

December 15: CLE seminar "Corporate Governance Matters and SEC Rule Changes" presented by Squire, Sanders & Dempsey; co-sponsored by RR Donnelley.

EEOC Releases New ADA Regulations, Implementing 2008 ADA Amendments Act

The Equal Employment Opportunity Commission has released long-awaited Final Regulations implementing the ADA Amendments Act (ADAAA). The ADAAA was signed into law on September 25, 2008, and became effective on January 1, 2009. The Final Regulations will become effective on May 24, 2011, 60 days from the date they were published in the Federal Register.

Ohio courts typically turn to the ADA when assessing disability discrimination claims under Ohio law. Because the ADAAA is not retroactive, Ohio courts have had limited opportunity to apply the ADAAA. However, commentary in recent opinions makes it clear that Ohio courts will adopt the ADAAA's analysis for Ohio law claims arising after January 1, 2009.

Rules of Construction

The Final Regulations reaffirm the purpose of the ADAAA: to make it easier for individuals with disabilities to obtain the ADA's protection. The ADAAA made clear that the primary focus in ADA cases should be on whether employers complied with their obligations under the statute and whether discrimination occurred, not whether individuals are disabled under the law. Accordingly, the Final Regulations follow Congress's lead by providing "rules of construction" to evaluate ADA-coverage issues. These "rules of construction" are as follows:

- The term "substantially limits" is to be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA.
- Whether an impairment "substantially limits" a major life activity should not demand extensive analysis.
- An impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population; this usually will not require scientific, medical, or statistical analysis.
- An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting.
- "Substantially limits" is to be interpreted and applied to require a degree of functional limitation that is lower than the standard for "substantially limits" applied prior to the ADAAA.
- With the exception of ordinary eyeglasses and contact lenses, the "substantially limits" analysis is to be made without regard to the ameliorative effects of mitigating measures.

- An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
- To be a "disability," an impairment need only substantially limit one major life activity, even if there are no substantial limits on other major life activities.
- The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting.

Predictable Assessments

While careful to state that not all impairments are disabilities and an individualized assessment is required, the Final Regulations list certain impairments which, in "virtually all cases," will be covered by the ADA, including: deafness, blindness, intellectual disabilities, partially or completely missing limbs or mobility impairments requiring the use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia.

"Regarded As" Coverage

The most far-reaching provisions of the Final Regulations may arguably be "regarded as" provisions. The Final Regulations clarify that an individual is "regarded as having such an impairment" if the individual is subjected to a prohibited action because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity.

Prohibited actions include refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, and denial of any other term, condition, or privilege of employment, among others.

In practice, an individual is covered under the "regarded as" protections if his or her employer takes a prohibited action against the individual because of an actual or perceived impairment, even if the employer asserts a defense to such action. This highlights the ease with which individuals can now obtain ADA coverage. However, coverage alone does not mean the employer has violated the ADA. Liability is established only when an individual proves that an employer discriminated on the basis of disability, which, in turn, requires an analysis of whether the individual was qualified for the position sought or held.

Practical Implications

From a day-to-day management perspective, many more individuals will be entitled to reasonable accommodations. Employers should expect that ADA cases will proceed to a point where they must defend decisions by showing individuals were not “qualified” because they could not safely or successfully perform essential job functions, with or without reasonable accommodations, or that the employers offered or attempted unsuccessfully to offer reasonable accommodations.

Every adverse employment decision that is based on an individual’s inability to perform due to an injury or illness has the potential to lead to a contested ADA case. Because the ADAAA has been in effect since January 1, 2009, employers, as a practical matter, should begin complying with the Final Regulations immediately.

Practically, employers should presume any injured or ill employee may be covered under the new ADA. Cases will now turn the employer’s processes and decisions, and not whether an employee is disabled. Employers should review their policies and procedures for addressing disabilities and reasonable accommodation, and be sure to document each step in the interactive process.



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