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Litch's Law Log

Amendments to the Americans With Disabilities Act Expand Scope of Coverage

On Sept. 25, 2008, President Bush signed into law the Americans with Disabilities Amendments Act. These amendments, which went into effect on Jan. 1, 2009, expand the coverage of the Americans with Disabilities Act (ADA) and reverse two United States Supreme Court decisions that had previously narrowed the scope of the Act. This article will focus on the implication of these amendments for dental employers under Title I of the ADA. Employees of dental offices are protected under Title I if the office has 15 or more employees.

Under the ADA, disability means, with respect to an individual: (1) a physical or mental impairment that substantially limits one or more major life activities of such individuals; (2) a record of such an impairment; or (3) being regarded as having such an impairment.

Before the amendments, in *Toyota Motor Manuf. Kentucky, Inc. v. Williams*, 534 US 184 (2002), the Supreme Court held that to be substantially limited in a major life activity, the individual must have an impairment that severely restricts him or her from doing activities that are of central importance to most people's daily lives.

Also, in *Sutton v. United Air Lines, Inc.*, 527 US 471 (1999), the Supreme Court had further narrowed the definition of a disability by holding that consideration of measures that mitigate an individual's impairment should be used in determining whether an individual is disabled. For

example, if an employee had a hearing impairment but wore a hearing aid that corrected the problem, such an individual would not be considered disabled.

The U.S. Equal Employment Opportunity Commission (EEOC), which enforces the employment provisions of the ADA, summarized the amendments as follows:

“The Act makes important changes to the definition of the term “disability” by rejecting the holdings in several Supreme Court decisions and portions of EEOC’s ADA regulations. The Act retains the ADA’s basic definition of “disability” as an 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, it changes the way that these statutory terms should be interpreted in several ways. Most significantly, the Act:

- directs EEOC to revise that portion of its regulations defining the term “substantially limits”;
- expands the definition of “major life activities” by including two non-exhaustive lists:
 - o the first list includes many activities that the EEOC has recognized (e.g., walking) as well as activities that EEOC has not specifically recognized (e.g., reading, bending, and communicating);
 - o the second list includes major bodily functions (e.g., “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions”);
- states that mitigating measures other than “ordinary eyeglasses or contact lenses” shall not be considered in assessing whether an individual has a disability;
- clarifies that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active;
- provides that an individual subjected to an action prohibited by the ADA (e.g., failure to hire) because of an actual or perceived impairment will meet the “regarded as” definition of disability, unless the impairment is transitory and minor;
- provides that individuals covered only under the “regarded as” prong are not entitled to reasonable accommodation; and
- emphasizes that the definition of “disability” should be interpreted broadly.”

These new ADA amendments mean that:

- More employees will be considered disabled.

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- Defense attorneys will have less success prevailing on ADA claims with motions to dismiss and for summary judgment.
- The EEOC will take more efforts to investigate and enforce ADA claims.
- Anything but minor or temporary injuries or ailments are arguably a disability under the new ADA.
- Employers should take all requests for accommodation seriously and establish a procedure to come to a fair decision on whether a person's accommodation request is reasonable or not.
- Job descriptions should be accurate in setting out the exact criteria and abilities necessary to perform the job, including the mental, physical and environmental requirements.

If your office does meet the employment coverage threshold, a careful review of job descriptions and recruitment/hiring procedures for your office would be in order.

For further information, contact Chief Operating Officer and General Counsel C. Scott Litch at (312) 337-2169 ext. 29 or slitch@aapd.org.

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Updates in Brief

Two Recent ADA Reports of Interest

Percentage of Dentists Who Submit Dental Claims Electronically by Specialty, 2007

According to the recent American Dental Association report on 2007 Survey of Current Issues in Dentistry, pediatric dentists were the most likely to have submitted dental claims electronically. The survey, taken in late 2007, reports that 79.4 percent of responding pediatric dentists submitted dental claims electronically. Other specialties responding to the survey with data were general practitioners (62.5 percent), periodontists (58.8 percent), oral surgeons (55 percent) and orthodontists (36.7 percent).

For more information or questions regarding the ADA report on 2007 Survey of Current Issues in Dentistry please contact the ADA Survey Center at (312) 440-2568. ADA members can access this report free of charge from the ADA Library. Non members can place an order online from the ADA Web site at https://www.ada.org/ada/prod/survey/publications_issues.asp.

Legal Provisions for Delegating Intraoral Functions to Dental Assistants and Dental Hygienists

The American Dental Association report on 2007 Survey of Legal Provisions for Delegating Intraoral Functions to Dental Assistants and Dental Hygienists was recently published. The purpose of this survey was to collect information from all State Boards of Dentistry in the United States on whether or not dental assistants and dental hygienists are legally permitted to perform specific dental functions. The information was requested for functions that are generally considered to be expanded functions for either assistants or hygienists. Survey information, that may be of interest to pediatric dentists follows.

- Dental Assistants – removing excess cement from coronal surfaces of teeth
- Dental Assistants – scaling coronal surfaces of teeth
- Dental Assistants – cementing bands/bonding brackets
- Dental Assistants – performing pulp vitality testing
- Dental Assistants – placing temporary /interim restorations
- Dental Assistants – removing temporary /interim restorations
- Dental Assistants – placing amalgam restorations for condensation by dentist
- Dental Hygienists – placing amalgam restorations for condensation by dentist
- Dental Assistants – placing and condensing amalgam restorations by the Assistant
- Dental Hygienists – placing and condensing amalgam restorations by the Hygienist
- Dental Assistants – carving amalgam restorations
- Dental Assistants – placing and finishing composite resin restorations
- Dental Hygienists – carving amalgam restorations
- Dental Hygienists – placing and finishing composite resin restorations

For more information or questions regarding this ADA report, please contact the ADA Survey Center at (312) 440-2568 or online at <http://www.adacatalog.org>. ADA members can access this report free of charge from the ADA Library.