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# AMERICANS WITH DISABILITIES ACT NEWSLETTER

FEBRUARY 2010

This newsletter is intended to provide an update of developments affecting compliance with the ADA and the 2008 ADA Amendments Act. This information is provided by David K. Fram, Esq, Director, ADA & EEO Services for NELI, as a courtesy to those in the employment community who have utilized NELI's ADA training services. Mr. Fram may be reached at NELI at 303-861-5600 or by email at [neli@neli.org](mailto:neli@neli.org) to respond to questions and to schedule in-house trainings. Nothing in this newsletter is to be construed as legal advice from Mr. Fram or NELI.

## 2010 ADA & FMLA COMPLIANCE UPDATE

CHICAGO • APRIL 8-9  
SAN FRANCISCO • APRIL 15-16  
WASHINGTON, D.C. • APRIL 22-23

- *Latest significant ADA cases*
- *EEOC's latest policies*
- *The impact of the ADA Amendments Act*
- *EEOC's proposed regulations*
- *Breaking FMLA issues*
- *Recent DOL regulations*
- *ADA/FMLA Overlap*

### Update on the EEOC's Proposed ADAAA Regulations.

On September 23, 2009, the EEOC published in the Federal Register proposed final regulations on the ADA Amendments Act. These proposed final regulations were similar in most respects to the proposed regulations they submitted in June 2009 to the White House Office of Management and Budget (OMB). As you might remember, I discussed these proposals extensively in my August 2009 newsletter. Surprisingly, the EEOC received only 28 public comments during the 60-day "notice and comment" period, which ended in mid-November. Now, the EEOC is in the process of considering those comments and resubmitting proposed final regulations to OMB (which will again review the proposals).

Although I originally thought the EEOC would finalize regulations in early 2010, they now say they are aiming to have final regulations by July 2010. I think a big part of the delay is that the Commission is down to two Commissioners, so there is not even a quorum to pass final regulations. The President submitted three nominees to the U.S. Senate

for approval and the Senate held hearings, but has (for some reason) failed to vote on the nominations.

Importantly, the world doesn't stop just because the EEOC has not issued regulations. Rather, the vacuum created by the lack of EEOC regulations opens the door for courts to decide the scope of the ADAAA. This, of course, means that plaintiffs and employers can make informed, creative arguments to the courts, using the existing case law combined with ADAAA legislative history.

At NELI's ADA/FMLA Compliance Update in April in Chicago, San Francisco and Washington D.C., our panel will discuss these proposed final regulations and an analysis of what is likely to be in the final regulations. We will also focus on arguments that can be advanced in the courts both before and after regulations are issued. EEOC counsel will be on hand to provide their perspective.

### The Current "Hot" Issues.

As I said in my August 2009 newsletter, I think the hottest ADA issue is what it means to be "substantially limited." Since

the EEOC punted on this definition in its proposed regulations, the issue is not likely to be substantively addressed in the final regulations. So, it will be up to the courts to decide how serious is serious enough to be considered “substantially limiting.”

Courts also have weighed in on other important ADA issues over the past few months. For example, courts have discussed whether attendance can be considered an “essential function” of a job. Although EEOC has generally said attendance is not a job function, courts have held otherwise. Late 2009 decisions from the Eleventh and Second Circuits support employers who want to argue that attendance is essential. There also have been interesting cases, helpful to employers, on issues such as whether employers can add to or change job functions of existing positions. In one recent Tenth Circuit case, the court held that the employer could make needed changes, even though the employee with a disability claimed his disability prevented him from performing the new functions.

Employers also frequently ask me about the actual steps they should take in the reasonable accommodation “interactive process.” New cases from the Third and Seventh Circuits discuss the necessary hoops, including meeting with the employee, requesting relevant information, and discussing alternatives. In

addition, I always tell employers that documentation of these steps is not only a smart idea, but indeed a necessity (in case of litigation).

I still continue to think that the most difficult reasonable accommodation issues include whether “cost/benefit” is appropriate in deciding whether an accommodation is reasonable, and whether non-competitive **reassignment** is required.

We will be discussing all of these issues at the April ADA/FMLA program. In addition, we will be analyzing a number of fast-breaking FMLA issues in light of the recent DOL regulations and case developments, including managing intermittent leave abusers, how to best utilize DOL forms, appropriate and effective contact with the employee's health care provider, and more.

I hope you will join us!  
D.K.F.

## 2010 ADA WORKSHOP

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- Resolving ADA Workplace Questions, 28th Edition
- The Human Resources Guide to Answering ADA Workplace Questions, 6th Edition

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