



# 2011 GULF COAST SYMPOSIUM ON HUMAN RESOURCE ISSUES

May 11-12, 2011 • Reliant Center • Houston, Texas

## The New Bermuda Triangle ADA / FMLA / GINA

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# ADA Amendments

- New Regulations Finalized
- Expanded Definition of What Constitutes a “Disability”
- Expanded Protection for Employees “Regarded As” Disabled



# ADA Protections

- Disability =
  - Serious Health Condition
  - Substantially Limits
  - Major Life Activity
- Qualified to Perform Essential Functions With or Without Accommodation



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# Is There a Disability?

- Serious Health Condition
- Consider Impairment Without Regard to Available Mitigating Measures
  - Ignore medication and medical devices
  - Free pass for employees to ignore own health
  - Exceptions: eyeglasses and contact lenses



# Is There a Disability?

- **Certain Conditions Listed in Regulations:**
  - Deafness; blindness; missing limbs; mobility impairments; HIV; cancer; MS; muscular dystrophy; major depression; OCD; bipolar; Schizophrenia
- **Episodic Impairments**
  - Can be disability even if in remission if would substantially limit a major life activity when active



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# Substantial Limitation?

- New Definition
  - “Not meant to be a demanding standard”
  - More inclusive
  - Benefit of doubt goes to employee
- Choice to Make:
  - Assume most conditions meet the standard, or
  - Expect more litigation over accommodation denials



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## Major Life Activity?

- Substantially Limits “Major Life Activity”
  - Nonexclusive list of presumed major life activities includes:
    - Caring for oneself
    - Performing manual tasks
    - Seeing
    - Hearing
    - Eating
    - Sleeping
    - Bending
    - Thinking
    - Concentrating
    - Communicating
    - Interacting with others
    - Working
    - Major body functions (i.e. immune system)



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## “Regarded As” Disabled?

- “Regarded As” or “Perceived” Impairment
  - Treating someone as if disabled
    - Don’t have to perceive disability as limiting major life activity
  - Perceived disability is one with actual or expected duration of at least 6 months
  - Much broader coverage, but no duty to accommodate perceived disabilities
  - OK to ask for medical documentation relating to absences and accommodations





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# New FMLA Regulations

- Clarified Rules Regarding Traditional FMLA Leave
- New Rules Regarding Military Caregiver Leave
- New Ruled Regarding Military Exigency Leave



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# Traditional FMLA Leave

- Serious Health Condition
  - Illness, injury, impairment or physical or mental condition and
  - Overnight stay in medical care facility or “continuing treatment” by HCP for condition that prevents performance of essential functions of job
    - “Continuing treatment” =
      - Incapacity for more than 3 consecutive days, or 1 HCP visit and continuing treatment [the first HCP visit must occur during the first 7 days] or
      - Incapacity due to pregnancy or a chronic condition [at least two HCP visits per year]



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## Traditional FMLA Leave

- Employer Notices
  - Company must provide FMLA notices within 5 days
  - Notices required:
    - General FMLA notice
    - Eligibility notice
    - Rights and responsibilities notice
    - Designation notice
  - HR has forms to use, should be automatic



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# Traditional FMLA Leave

- Employee Notices
  - Burden on employee to timely provide notice of need for FMLA leave
  - If employee submits incomplete information, Company must identify missing info and give time to resubmit
  - Employee must follow Company's usual and customary call-in procedures relating to absences (with some exceptions)
  - What if request for leave is ambiguous?



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## Traditional FMLA Leave

- Medical Certification Process
  - Person contacting employee's doctor must be HCP, HR professional, leave administrator or management official
    - NEVER the employee's direct supervisor
  - Cannot ask for info beyond what's required on certification form
  - If certification is incomplete or insufficient, Company must identify what is lacking and give employee 7 days to fix
  - Company can request recertification for ongoing conditions every six months
  - Fitness for duty
    - Company can require fitness for duty certification regarding ability to perform essential functions upon return from continuous leave
    - Company can require fitness for duty certification following intermittent leave if reasonable safety concerns exist



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# Genetic Information Nondiscrimination Act (GINA)

- Became Effective January 2011
- Employers Cannot:
  - Intentionally acquire genetic information about applicants and employees
  - Fire, refuse to hire, or discriminate based on genetic information



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# Confidentiality of Genetic Info

- Genetic Information Must Be Kept Confidential
- Must Be Maintained Separate From Personnel Records
  - Beware: Pre-employment physicals
  - Note: Legacy documents may stay where are, but can't disclose to third parties w/o consent



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## Requests for Medical Info

- Exceptions to General Prohibition on Requests
  - Inadvertent acquisition
    - Overhear conversation, unsolicited email, info provided in response to expression of concern
  - Publicly available information
    - See it in newspaper or on internet w/o looking for it
  - Request for medical information in connection with fitness for duty, leave certification or accommodation
    - Must instruct HCP or third party that has the info not to provide genetic information
    - Special language in the GINA regulations
  - Wellness programs



# “Real World” Hypothetical

- Margaret is placed on a performance improvement plan after she repeatedly misses deadlines and has conflict with co-workers. After getting the PIP from her manager, she comes to you and presents you with a note from a psychiatrist stating that she is being treated for a chronic disorder which may require her to take time off from work unexpectedly in connection with “episodes” and which may require her to communicate with co-workers by email rather than face to face.



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# Practical Issues

- You Are Not Doctors, Neither Are Your Managers
  - Request documentation from the employee's doctor
  - Ask questions about limitations rather than medical conditions
- Make Sure Job Descriptions Accurately Reflect Physical Requirements and Tasks
- Engage in Interactive Process Regarding Accommodation, and Document That Process



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# Practical Issues

- Educate Managers About General Leave Types
- Be Receptive to “Requests” for Leave
- Ask Questions About Need for Leave
- Track Processing of Leave Requests
- Pay Attention to Leave Start Dates
- Require Certification When Appropriate
- Require Fitness for Duty Certifications



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For more information about any of the topics addressed in this presentation, please contact Larry Stuart or Tonja K. King at (713) 337-3750 or by email at [lstuart@stuartpc.com](mailto:lstuart@stuartpc.com) or [tking@stuartpc.com](mailto:tking@stuartpc.com).

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