

C-Suite, employment law, human capital and talent development professionals must take heed to maintaining a knowledge bank of internal and external resources to stay compliant with the ADAAA, FMLA and GINA laws outlined by the EEOC. Below are ongoing training topics that should stay on top of mind within the company to reduce the common mistakes and pitfalls surrounding ADAAA, FMLA and GINA.

ADAAA is the new ADA

The Americans with Disabilities Act (ADA) Amendments Act of 2008, hereinafter "ADAAA", became effective January 1, 2009, and expands "major life activities". Disability means a physical or mental impairment that substantially limits one or more major life activities, a record of such an impairment or being regarded as having such an impairment.

The definition of 'Major Life Activities' was expanded by including two non-exhaustive lists:

- 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);
- 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");

First, the ADAAA states that mitigating measures other than "ordinary eyeglasses or contact lenses" shall not be considered in assessing whether an individual has a disability. Second, the ADAAA clarifies that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. Third, the ADAAA changes the definition of "regarded as" so that it no longer requires a showing that the employer perceived the individual to be substantially limited in a major life activity, and instead says that an applicant or employee is "regarded as" disabled if he or she is subject to an action prohibited by the ADA (e.g., failure to hire or termination) based on an impairment that is not transitory and minor. Fourth, the ADAAA provides that individuals covered only under the "regarded as" prong are not entitled to reasonable accommodation. (This ADAAA section is summarized from <http://www.eeoc.gov/laws/statutes/adaaa.cfm>).

FMLA

Under the Family Medical Leave Act (FMLA), as amended, an "eligible" employee may take up to 12 work weeks of leave during any 12-month period for one or more of the following reasons:

- (1) The birth of a child, and to care for the newborn child;
- (2) The placement of a child with the employee through adoption or foster care, and to care for the child;
- (3) To care for the employee's spouse, son, daughter, or parent with a serious health condition; and
- (4) Because a serious health condition makes the employee unable to perform one or more of the essential functions of his or her job.

During FMLA leave, an employer must maintain the employee's existing level of coverage under a group health plan. At the end of FMLA leave, an employer must take an employee back into the same or an equivalent job. (This FMLA section is summarized from <http://www.eeoc.gov/policy/docs/fmlaada.html>).

ADAAA Compliance When the FMLA Applies

If an employee requests time off for a reason related or possibly related to a disability (e.g., "I need six weeks off to get treatment for a back problem"), the employer should consider this a request for ADA reasonable accommodation as well as FMLA leave. The employer may require FMLA certification and may make additional disability-related inquiries if necessary to decide whether the employee is entitled to reasonable accommodation because s/he also has a covered disability. However, if the employee states that s/he only wants to invoke rights under the FMLA, the employer should not make additional inquiries related to ADA coverage. (This example can be found at <http://www.eeoc.gov/policy/docs/fmlaada.html>).

What About GINA?

The Genetic Information Nondiscrimination Act (GINA) protects Americans against discrimination based on their genetic information when it comes to health insurance and employment. GINA became effective November 21, 2009 and applies to any private sector employer that has at least 15 employees. <http://www.eeoc.gov/laws/statutes/gina.cfm>. GINA Title II prohibits employers from requesting, requiring, or purchasing genetic information, with very limited exceptions and requires that genetic information be kept confidential, with very limited exceptions. <http://www.eeotraining.eeoc.gov/images/content/5F%20adaaa%20and%20gina.pdf>

So Why GINA & ADAAA?

GINA prohibits discrimination based on the possibility that someone **will acquire** a condition in the future. ADAAA protects individuals **who currently have** impairments or who are perceived as having impairments, if they meet the definition of "disability". <http://www.eeotraining.eeoc.gov/images/content/5F%20adaaa%20and%20gina.pdf>

Ensuring ADAAA & GINA Compliance when requesting FMLA Certifications

Under the ADAAA, employers should continue to keep medical and personnel records separate. Under GINA & FMLA, employers should not request more detailed information about an employee's medical condition than is required to substantiate the need for leave.

CONCLUSION

Employers should frequently visit the websites of EEOC and the Department of Labor Wage and Hour Division to become familiarized with statute amendments. In addition, employers should team with a human resources consultant and/or employment law attorney to train staff regularly on any regulatory mandates. Finally, employers should review internal policies and procedures thereby reducing the risk of future litigation.