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# Employer Beware: 2009 to Bring Significant Employment Law Changes

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Healthcare employers will encounter significant changes in the legal landscape as new legislation giving more rights to employees become effective in 2009. Some of the more significant are discussed below. We can also anticipate that the trend of granting employees additional protections will continue and even accelerate in 2009 with the changing of the guard nationally.

### Americans With Disabilities Amendments Act

The Americans With Disabilities Amendments Act of 2008 (ADAAA), effective as of January 1, 2009, will significantly broaden the scope and impact of the ADA. While the term "disability" will continue to be defined as an impairment which substantially limits one or more major life activities, a record of such impairment or being regarded as having such an impairment, the ADAAA makes significant changes to the definition of the key terms "substantially limits" and "major life activities." The legislation does not define "substantially limits," but it expressly rejects the U.S. Supreme Court's definition as requiring an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily life. According to Congress, this threshold is too high. The ADAAA directs the EEOC to issue regulations consistent with this viewpoint. So far the EEOC has not been able to do so, but we can anticipate a much lower standard requiring limitation of only one major life activity, which limitation may or may not impact the individual's employment. With regard to covered "major life activities" the non-exclusive list of such activities has been broadened and includes reading, lifting, bending, communicating and thinking among others. Major life activities also include "the operation of a major bodily function" which non-exclusively includes normal growth, bowel and bladder, respiratory, immune, neurological and brain, circulatory, endocrine and reproductive functions.

In addition to the ADAAA's expansion of the definition of "disability," the legislation expressly states that: (1) "mitigating measures" (like medication, equipment, learned behavior, and devices (other than eyeglasses or contact lenses) etc.) are not to be considered in determining whether someone has a disability; and (2) an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. In other words, all conditions are to be evaluated in their active, untreated state, regardless of the actual abilities of the individual.

The ADAAA also requires that "disability" be interpreted broadly. This broadened definition of "disability" also applies to other sections of the ADA including public accommodation and transportation, as well as the Rehabilitation Act. With the expanded definitions of "disability" "major life activity" and "impairment" Congress is moving in the same direction as the expansive Washington Law Against Discrimination (WLAD), but the WLAD goes further in covering a person who has a con-

dition that is not currently a disability, but which with reasonable medical likelihood would become substantially limiting without the proposed accommodation.

**Family and Medical Leave Act Amendments**

In 2008, Congress amended the Family and Medical Leave Act to permit a spouse, son, daughter, parent or next of kin to take up to 26 work weeks of leave to care for a member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is on outpatient status, or is otherwise on the temporary disability retired list because of a serious injury or illness incurred in the line of duty. The individual for whom care is provided may not be a former member of the military. This leave may be taken once per service member per caregiver unless he or she has a new covered condition. An employee may take an additional 26 week leave in a different 12 month period to care for another covered service member or the same service member with a new covered condition. Leave to care for the covered service member together with any other FMLA leave taken during the 12 month period may not exceed 26 weeks.

Amendments to the FMLA also permit an employee to take regular FMLA leave for "any qualifying exigency" arising out of the fact that a spouse, son, daughter or parent of the employee is on active duty in the Armed Forces (or has been notified of an impending call or order to active duty) in support of a contingency operation. The Department of Labor was charged with defining "exigency" and has done so by regulations effective on January 16, 2009. The regulations provide that "exigency" means to address events which arise out of the military member's active duty status, like making arrangements for childcare or schooling, attending programs, certain rest and recuperation activities, and additional events if the employer and employee agree that the event is an exigency and agree to the timing and duration of the leave. The new regulations also address issues regarding regular FMLA leave and contain new certification and other forms.

**Domestic Violence Leave Law**

Passed in 2008 and effective on April 1, 2008, the Domestic Violence Leave Law (RCW 49.76) allows victims of domestic violence, sexual assault or stalking to take reasonable leave from work (paid or unpaid) to take care of legal or law enforcement needs and to ob-

tain health care including counseling and participate in safety planning including relocation. Family members may also take leave to assist the victim. This law applies to all employers, regardless of size. The employee is entitled to restoration to pre-leave position upon return and maintenance of health insurance benefits during the leave. Retaliation against an employee for exercising rights under this legislation is prohibited. The legislation contains no limitation on the duration of the leave.

**409A Deferred Compensation**

Section 409A of the Internal Revenue Code made significant changes to tax rules governing non-qualified deferred compensation plans—which includes any plan agreement or arrangement between an employee and employer in which there is a legally binding requirement for compensation that is or may be payable in a later tax year. Transitional regulations effectively delayed the date most employers needed to be in compliance to January 1, 2009. However, as of January 1, 2009, all 409A transition relief expired and all formerly non-compliant plans must be in full documentary compliance. Failure to comply (either operational or documentary) may subject affected employees to immediate taxation on amounts payable plus penalties and interest. On December 5, 2008, the IRS issued new guidance under Section 409A that dealt with (1) calculation of amounts includable in income under, and additional taxes imposed by, Section 409A; and (2) correction methods for specific types of failures, though at this time not plan document failures.

**Mental Health Parity**

As part of 2008 bailout legislation, Congress passed and President Bush signed the Mental Health Parity and Addiction Equity Act of 2008. The law becomes effective on January 1, 2010. This law was designed to end the disparity in insurance benefits between mental health/substance abuse disorders and medical/surgical benefits for group health plans with more than 50 employees. This financial requirements (deductibles, copays, etc.) and treatment limitations (frequency, number of visits as well as annual and lifetime limits). There is a provision allowing a plan to elect temporary exemption from the parity law if the group health plan experiences an increase in actual total costs under defined circumstances.

The foregoing is only a general summary of the new legislation, portions of which are very complex. Employers are advised to consult with legal counsel regarding requirements in any particular situation.

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*Williams Kastner has been providing legal service to health care providers and other clients since 1929. It has offices in Seattle and Tacoma, Washington and Portland, Oregon.*

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