Property and Casualty News

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The New ADA

With everything else going on in Washington lately, many people might have missed the fact that the Americans with Disabilities Act Amendments Act of 2008 (ADAAA) went into effect on Jan. 1, 2009.

The ADAAA changes the way individuals may claim disability under the ADA in several significant ways. The intent was to reverse recent U.S. Supreme Court decisions that had defined covered disabilities more narrowly than many of the ADA's original proponents had intended. The new law explicitly states it is "in favor of broad coverage of individuals under this Act" and that a finding of disability under the new law should not require "extensive analysis".

The ADA requires employers to provide reasonable accommodation for disabled workers. The new law now defines a person as disabled if he or she 1) has a qualifying physical or mental impairment that 2) "substantially limits" 3) a "major life activity"; or 4) has a record of such an impairment; or "is regarded" as having such an impairment.

The definition of "major life activity" has been broadened, adding several new activities to the list of activities covered by the statute. Specifically added were sleeping, concentrating, thinking and communicating, as well as "the operation of major bodily functions", but the list is non-exhaustive, and broader interpretation is possible. The act also states that an impairment only needs to limit one major life activity in order to constitute a disability.

Also new, the ADAAA does not allow "mitigating measures", such as medications, prosthetics, corrective surgery, hearing aids and mobility devices, to be considered in determining whether an individual is disabled; impairments are to be evaluated in their unmitigated state. The only exception to this is eyeglasses. The new law also expands ADA protections to individuals with episodic impairments or conditions in remission, if the impairment would substantially limit a major life activity in its active state.

The Act also broadens what it means to be "regarded as" disabled in order to receive protection under the ADA. In the past an individual was protected if the employer regarded the person as having a mental or physical impairment that substantially limited a major life activity. Now, employees will meet the "regarded as" standard merely by showing that their employer perceived them as having a mental or physical impairment, even if that impairment is not an actual disability under the ADA. Excluded from the "regarded as" definition of "disability," however, are "minor and transitory impairments", defined as those with an actual or expected duration of less than six months. Still unclear is how a major impairment with a duration of less than six months or, conversely, a minor impairment lasting more than six months will be treated under this definition.

There is one part of the legislation that is favorable to employers. It clarifies that there is no duty to provide reasonable accommodations to individuals who are ADA protected under only the "regarded as" definition of disability, but are not actually disabled. And an individual without a disability cannot pursue a claim for reverse discrimination (on the basis of not having a disability).

Impact on Employers

The EEOC is in the process of drafting new rules to comport with the ADAAA's new, broader view. As expected, under the draft regulations proposed on September 23rd, many more individuals will now meet the definition of "disabled". The inevitable result of all this will be more lawsuits. Prior case law is now largely useless; the ADAAA's broader reach will result in many individuals not previously covered now being classed as individuals with disabilities.

Employers will need to change their approach to medical conditions in the workplace, and recognize that many common illnesses and impairments will now be ADA covered disabilities. This broader universe of covered individuals will, in turn, shift much of the focus to whether an individual with an ADA recognized physical or mental condition is otherwise qualified to perform essential job

functions, with or without reasonable accommodation.

Most Employment Practices Liability policies will cover ADA type claims. If, as one might reasonably expect, the plaintiff's bar jumps on this and there is an increasing frequency of claims under these new rules, underwriters will start looking more closely to see if employers have reviewed and updated their job descriptions, job qualification standards, and reasonable accommodation procedures to ensure that they are current, and defensible under the new ADA. As with any EPL risk, the goal is to avoid ADA cases altogether, or failing that to at least be in a position to defend and win those that cannot be avoided.

Need for Higher Uninsured Motorists Limits

The economy may be showing some small signs of life, but unemployment is still high, and even folks whose jobs are secure are tending to pinch pennies. One consequence of these conditions is more drivers on the road who are not carrying proper auto insurance.

The insurance industry keeps an eye on this sort of statistic. Their most recent survey showed that in the five states with the highest percentage of uninsured drivers, a quarter (that's right, 25%) of all drivers on the road were not insured. This is not limited to smaller or less populous states; California was one of the top five. At the other end of the scale, the five states with the fewest uninsured motorists still averaged six percent uninsured, one of every sixteen cars on the road.

Not insured means no insurance, at all. Not included in these statistics are drivers who might only carry low or even just minimum mandatory limits of insurance as required by each state. Required per person limits range from a high of only $50,000 (in just two states), to as little as $10,000 (three states) or $15,000 (nine). Most are in the $20-25,000 range.

These are pretty scary numbers. A Florida driver would count as properly insured with just a $10,000 limit per person for bodily injury, even though that entire amount could be used up in the first hours of medical care after just a moderately severe accident.

You cannot rely on other drivers on the road to be properly insured. The way to protect yourself is with the uninsured/underinsured motorists section of your business or personal auto policy. This is where you can buy protection that either 1) steps in when the other driver who causes your accident is not insured, or 2) supplements inadequate limits of insurance for those underinsured drivers who carry minimum or low limits.

The beauty of this coverage is that you can decide how much insurance you would like other drivers to carry, and then build it into your own policy. Sure, you are paying for it, but this coverage is still inexpensive, especially when you consider the number of uninsured or underinsured drivers on the road. This is not protection you should skimp on.

Doubts about Mandatory Health Insurance

Some industry observers have tied the facts discussed just above to an interesting observation about some of the mandates being discussed in the current debate on health insurance reform.

One feature that seems to be included in some form or another in all the options under discussion is some form of mandate requiring folks to buy health insurance. Some costs might be subsidized depending on income, but everybody will have to have it, at some cost to themselves.

This is not unlike the mandates that have long existed in most all states requiring all drivers to carry auto insurance. After decades of such requirements, and after many states have implemented coordination between insurance companies and their motor vehicle departments to enforce compliance, we still have problems with compliance as described earlier.

So…if we can't get all drivers to carry auto insurance, or carry enough of it…how much more successful can we expect to be enforcing requirements that everybody have health insurance?

MSA's Are Increasing WC Costs

Over the past year Medicare has stepped up efforts to make sure parties to workers' compensation settlements properly fund for future medical liabilities. Medicare secondary payer laws going back to 1995 have prevented Medicare from being the primary payer for future medical

expenses arising from workplace injuries, but until very recently enforcement was spotty. That's now changed.

Employers (or their insurance companies) are obliged to fund future expenses so that work injury related medical expenses won't be passed on to Medicare once an employee reaches retirement age. These potential future medical expenses are financed through Medicare set-aside (MSA) arrangements. Set-asides are required where workers' comp claimants are eligible for Medicare, nearing retirement age, or qualify for a Social Security disability insurance program.

Workers' compensation rules in some states do not allow the medical part of a claim to ever close; injured employees can always go back to the employer or insurance company for payment of future medical bills attributable to a work injury. Estimated costs for this were always included in claim values, so employers in these states should see no additional cost impact from Medicare's new aggressiveness. For all other states (the majority), you, or your insurance company, will now be seeing an additional amount added to the settlement value of claims to fund MSAs. How much additional? There's the rub; estimating reserves for long-term medical claims is far from an exact science.

When a case is close to settling your adjuster submits the medical information to a regional office of the Centers for Medicare & Medicaid Services (CMS). A CMS examiner reviews each case and assigns a dollar value for future medical costs. This amount, the MSA, is added to the settlement amount for the case and paid to the claimant, or their attorney. Anecdotal evidence is beginning to emerge that CMS tends to be conservative (i.e., high) in the values it assigns for future medical payments. This fits into the current narrative on health care; the government is seeking ways to show savings in Medicare costs, and this is one.

This approach has pitfalls for both the injured worker and the employer. Employees may regard this additional money as a windfall, but should the day come in the future when they incur medical costs related to a past work injury that CMS says they were already paid for through an MSA, Medicare will not pay. If the employee meanwhile has long since spent that money, they are out of luck, with no recourse to either Medicare or the employer.

For employers, the cost of settling workers' compensation claims has become more expensive. Industry observers are reporting that the cost of a claim requiring an MSA can increase by as much as 20%. Higher claim costs obviously means higher workers compensation premiums.

March is National Nutrition Month

Super Foods for Super Health

Dietary suggestions to maintain your youth

There are some things in life that you have no control over – death, taxes and too much reality television. Yet, slowing down the aging process is something that you can control by incorporating some "super foods" into your diet.
In fact, the foods you eat can make a significant difference in how your body reacts as you get older, from retaining strength and stamina to reducing the lines on your face. Consider incorporating these foods into your diet to make the aging process a bit more graceful:

Spinach and Kale
Strawberries
Curry Powder
Tomatoes
Almonds
Chocolate
Steak
Eggs
Oats
Lentils
Goji Berries
Wild Salmon
Apples
Buckwheat Pasta
Blueberries
Pomegranates
Chiles
Yogurt
Quinoa
Sardines
Tarragon
Avocado
Olive Oil

Click here to learn more about the nutritional benefits of each of these foods, and how they affect the aging process.

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