

EFCA, ADA & FMLA

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Employee Free Choice Act

- Focus of union supporters for many years
- Passed in the House in 2007, but was held up in the Senate
- Then-President Bush vowed to veto EFCA
- President Obama, a co-sponsor of EFCA while in the Senate, says he will sign EFCA
- If passed and signed, EFCA will radically alter labor law governing representation rights

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Overview of Current Law

- Employers presented with signed authorization cards can require a secret ballot election
- Six-week campaign gives employers time to educate employees on benefits of remaining union-free
- If majority of employees vote for union, then employer and union begin bargaining
- Bargaining does not require “agreement”
- Penalties for unfair labor practices include postings, reinstatement, back pay

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If EFCA Becomes Law

- Union is certified as employees’ bargaining representative if a majority of workers (50 percent plus one) sign union authorization cards
- Employer does not have six week period to educate employees
- No secret ballot election is conducted by the NLRB

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If EFCA Becomes Law (cont.)

- Expedited contract negotiations
 - Begin bargaining in 10 days
 - Mediate if no agreement in 90 days
 - Arbitrate if no agreement in 120 days
 - Two-year contract. No appeal.
- Increased penalties for unfair labor practices
 - Discharge: Back pay plus two times that amount as liquidated damages
 - \$20,000 penalty per willful/repeat violation

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Union Effects on Workplaces

- Unions adversely affect production, efficiency and, therefore, profitability
- Flexibility is lost under union contract provisions establishing wage scales, seniority systems, bumping rights, work preservation clauses, and overtime restrictions
- Unions mean increased time handling issues such as bargaining, grievances (oftentimes petty), work slowdowns and stoppages

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Union Effects on Workplaces

- Employee morale and teamwork diminishes due to the confrontational “us versus them” climate a union brings
- Unions are more often concerned about protecting the worst employees than rewarding the best employees
- Unions don’t help companies succeed, they help them fail. Just look at Detroit’s auto industry.

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Employee Reasons to Unionize

Reason

- Feeling of insecurity
- Unfair or unequal treatment
- Wages and benefits below area or industry standards; not kept up with cost of living

Union pitch

- Job security; restrictions on layoffs and discharges
- Grievance and arbitration procedure; elimination of certain supervisors
- Promises of increased wages and benefits; keep up with cost of living; definite increases at definite times

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Employee Reasons to Unionize

Reason

- Ignored grievances
- Disregard for experience or seniority
- Lack of clearly defined duties and responsibilities

Union pitch

- Grievance procedure; union representative to fight for employee
- Seniority system
- Promises of limits on duties and responsibilities – specific job descriptions

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Employee Reasons to Unionize

Reason

- Lack of written policies and procedures
- Lack of individual recognition
- Lack of meaningful communication with supervisors and managers

Union pitch

- A written contract
- Stewardships, committees, negotiating team
- Union representatives who “care”

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Signs of Union Organizing

- Employees ask for home addresses and telephone numbers of other employees, or records “disappear”
- Employees write down names of the other employees by copying them from the time cards
- Employees abruptly stop talking when supervisors approach
- Employees begin gathering in unusual places and outside of work
- Employees from different departments or different jobs begin meeting and talking. Some employees circulate from department-to-department

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Signs of Union Organizing

- New cliques are formed, with new informal leaders
- Non-union employees begin meeting and talking with known union supporters
- Unusually intense conversations occur during breaks or lunch periods
- Employees start leaving the premises for lunch or are absent from customary social “get-togethers”
- Employees who are normally friendly and talkative become quiet and uncommunicative
- Employees avoid being seen with management

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Signs of Union Organizing

- A former employee who left on bad terms shows up to talk with former coworkers
- Strangers appear in the parking lot or in work areas
- The "rumor grapevine" shuts down between supervisors and employees, or there is an "explosion" of rumors
- The nature of employee complaints changes, or the frequency of complaints increases
- Complaints begin to be made by a delegation, not by individual employees
- Some employees become much more militant and start "demanding" their rights

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Signs of Union Organizing

- There is an increase in questions about the employer's rules, policies, practices, benefits, etc.
- A surge of anti-employer or anti-supervisor graffiti appears in restrooms, locker rooms, cafeteria, etc.
- Easygoing employees suddenly become "activists" or use buzz words such as "seniority" or "grievance"
- A previously popular employee suddenly becomes unpopular and is needed by co-workers
- An employee says there is organizing, even if the employee claims the union doesn't have a chance
- Authorization cards, handbills, or leaflets appear on the premises and parking lot

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Establishing a Non-Union Culture

- Build an engaged workforce
- Create an ownership mentality
- Develop a culture of respect, dignity, and pride
- Ensure open communication
- It is the responsibility of everyone in management – from executive leadership to front-line supervisors

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What Supervisors Can Do

- Promptly report any signs of union organizing
- Properly represent the company
 - Use your strong 1-on-1 relationship with employees to effectively present the company's position
 - Know your employees and their concerns
 - Know what arguments and issues will sway them
 - Consider the issues from *their* perspective, not yours
 - Show dignity and respect

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What Supervisors Can Do

- Be fair, be firm, and consistent
- Instill in employees a feeling that the company cares about their future—because it does
- Make them feel good about their jobs and the importance of what they contribute to our overall success
- Develop a sense of employee ownership in “their” company. Doing so will make any union seem like a threat to something they hold dear, not a benefit

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What Supervisors Can Do

- If an employee asks about unions, communicate:
 - Our employees don’t need a union because we have a great place to work. We trust and respect each other and don’t need a third party coming between us
 - Every employee here can speak for him/herself without having to pay union dues in order to be heard and have issues resolved
 - Unions create an “us versus them” atmosphere
 - Unions don’t help companies succeed and prosper
 - When issues arise, we can best handle them by working together, not against each other with a union

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What Supervisors Can Do

- Remember “FOE” and “SPIT”
 - Do be a “FOE”:
 - Facts
 - Opinions
 - Examples
 - Do Not “SPIT”:
 - Spy
 - Promise
 - Interrogate
 - Threaten

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Background of ADAAA

- Purpose: broaden definition of “disability” and reject Supreme Court decisions that had narrowed the scope of protection
- Signed into law by President Bush on 9/25/08
- Goes into effect on 1/1/2009

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Why the change to the definition of “disability”?

- Congress intended the ADA definition to be construed broadly (based on Section 504 of the Rehabilitation Act of 1973)
- Supreme Court’s decisions in *Sutton v. United Air Lines, Inc.* (1999) and *Toyota Motor Mfg., Ky v. Williams* (2002) construed the term “disability” narrowly
- EEOC’s regulation defined “substantially limits” as “significantly restricted,” which Congress believed was too high a standard

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How did the definition of “disability” change?

- ADAAA:
 - Retains the basic definition of “disability”
 - Rejects the term “substantially limits” as defined by the Supreme Court and EEOC
 - Provides illustrative list of major life activities that includes for the first time “major bodily functions”
 - Excludes impairments that are transitory (last less than six months)

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How did the definition of “disability” change? (cont.)

- ADAAA (cont.)
 - Makes clear that mitigating measures (*other* than ordinary eyeglasses or contact lenses) cannot be considered in determining “disability”
 - Expressly states that an impairment can be disability even if episodic or in remission
 - Redefines “regarded as”

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Major Life Activities Under the ADAAA

- Contains two non-exhaustive lists:
 - General: includes those recognized by courts and EEOC in past, plus others such as bending, reading, and communicating
 - Major bodily functions: functions of the immune system, normal cell growth, digestive system, bowel, bladder, neurological system, circulatory system, and reproductive functions

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“Substantially Limits” Under the ADAAA

- Cannot take into consideration the ameliorative effects of mitigating measures
 - Medication, medical supplies, equipment, prosthetics, hearing aids, and cochlear implants
 - Use of assistive technology
 - Reasonable accommodations or auxiliary aids or services
 - Learned behavioral or adaptive neurological modifications

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Ordinary Eyeglasses or Contact Lenses

- “Shall” be taken into account in determining disability
- Definition: “lenses that are intended to fully correct visual acuity or eliminate refractive error”
- Distinguished from mitigating measures: “low vision devices” defined as “devices that magnify, enhance or otherwise augment a visual image”

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ADAAA's Significance for Employers

- More people qualify as disabled
 - More litigation: Can no longer rely on SJ on question of whether plaintiff is disabled
 - More requests for accommodation
 - More focus on whether the employee is “qualified”

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Reasonable Accommodation and the Interactive Process

Reasonable accommodation: Any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities

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Interactive Process

- Employer must make a good faith effort to engage in interactive process
- Juries will judge the employer on what they believe is fair

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Interactive Process

- Was there a request?
- Is there a disability?
- Is the requested accommodation necessary because of the disability?
- Is there an undue hardship or direct threat that prevents the accommodation?

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How does the ADAAA affect the Interactive Process?

- Employee still has duty to request accommodation
- Avoid rejecting requests for accommodation based on belief that the person requesting is not disabled
- Essential functions will be more important

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Interactive Process: The Disability

- Does the applicant or employee actually have a disability
 - Do not have to accommodate “perceived” disabilities or “record of” disability
- When disability is not obvious, employer may request additional information from health care provider or vocational rehab professional about the disability and functional limitations

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Interactive Process: “Necessity”

- The employer is obviously entitled to know why the accommodation is needed
- There must be some relationship between the disability and the need for the accommodation

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Undue Hardship

- Undue Hardship means significant difficulty or expense incurred by the “employer” taking into consider a number of factors

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Undue Hardship

- Undue Hardship Factors:
 - The nature and net cost of the accommodation, taking into consideration the availability of tax credits and deductions, and/or outside funding;
 - The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources

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Undue Hardship

- Factors (Cont.):
 - The overall financial resources of the employer, the overall size of the employer with respect to the number of its employees, and the number, type and location of its facilities;
 - The type of operation or operations of the employer, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the employer; and
 - The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's

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Direct Threat

- *Direct Threat* means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.
- Assessment
 - Must be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job.
 - The assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.

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Direct Threat

- Direct Threat Factors:
 - (1) The duration of the risk;
 - (2) The nature and severity of the potential harm;
 - (3) The likelihood that the potential harm will occur; and
 - (4) The imminence of the potential harm.

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“Essential Functions”

- Having a clear description of the essential functions of the job that is communicated to employees is the key factor in defending a failure to hire or accommodate
- Essential job functions must be defensible
 - must actually reflect what is done on the job

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“Essential Functions”

- Essential Functions
 - Regular attendance
 - Repeated and unpredictable absences
 - Rotating shifts
 - Ability to work overtime
 - Lifting a minimum amount of weight
 - Ability to drive to make calls to customers

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Reasonable Accommodations: Documentation

- Document, document, document
 - Employee's requested accommodation and reason for request
 - Other potential accommodations offered to employee
 - Interactive process
 - Which accommodation was ultimately chosen and why

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Application Process: Disability Based Inquiries

- Generally the employer must evaluate the ability of an applicant or employee without regard to his/her disability
- Employer must not ask disability or medically-based questions of an applicant before making a conditional offer of employment

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Application Process: Disability Based Inquiries

- Pre-offer medical inquiries and examinations
 - Proper and improper pre-offer inquiries
 - The general rule
 - Permissible questions

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Permissible Questions

- Can you perform the job?
- Demonstrate how you would do the job?
- Do you currently use illegal drugs? (not addiction)
- Can you meet attendance requirement?

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Impermissible Examinations

- Test administered by a health care professional
- Test interpreted by a health care professional
- Test designed to determine applicant's impairment
- Invasive test
- Test normally given in a medical setting
- Test using medical equipment

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Post-Offer, Preemployment Medical Inquiries and Examinations

- The general rule
- Rescinding offer due to medical exam

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Eligible Employees

- 12 month, 1,250 hour requirement remains
- If there is a break in service of 7 years or more, prior service not counted toward 12-month requirement
 - Because employers are only required to keep records for 3 years under the FMLA, the *employee* should submit proof of eligibility based on prior service when requesting leave
- Exceptions to break in service limit:
 - Break due to National Guard or Reserve service
 - Written agreement regarding employer's intention to rehire the employee after the break in service

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General Rights Notice

- Even if no eligible employees
- The FMLA Poster
- Notice may be electronic
- Notice must be given at time of hire
- Notice must be in any handbook
- Foreign language

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Eligibility Notice

- Send within 5 business days (increased from 2 days) to notify the employee of leave eligibility
- If employee ineligible for leave, the notice must state at least one reason why
- WH 381 Form
- Includes Rights and Responsibilities

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Designation Notice

- WH 382 Form
- Due 5 business days (increased from 2 days) upon satisfactory medical certification
- If employer will require a fitness-for-duty certification upon return from leave, it *must* provide notice of this requirement with the designation notice

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Employee's Notice Obligation

- Foreseeable leave—employee must give at least 30 days advance notice of need for leave
- Unforeseeable leave—employee must provide notice of leave “as soon as practicable,” which generally means “within the time prescribed by the employer’s usual and customary notice requirements applicable to such leave”
- Employee may be required to provide timely notice and follow the employer’s standard notice procedures

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Medical Certification

- The new regulations increase the employer’s timeframe to request certification from 2 days to 5 days after the employee gives notice of the need for leave
- The employee must provide the requested certification within 15 calendar days of the request
- Certifications may be required when paid time off (vacation, sick leave, PTO) is used concurrently
- WH 380E and 380F

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Recertification

- For continuing, open-ended conditions, employers can request medical recertification every 6 months
- Employers may request on a more frequent basis if there are other changes in circumstances or reason to doubt the continuing validity of the leave
- No second or third opinions

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Fitness for Duty Certification

- Employers may ask for more than a “simple statement” of the ability to return to work, and may ask if the employee can perform the essential functions of the position
- Employers may also now ask for fitness for duty certifications for *intermittent leave every 30 days*, but only when reasonable safety concerns exist
- No second or third opinions

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Incomplete/Insufficient Certifications

- If initial certification, recertification, or fitness for duty certification is incomplete or insufficient, employer must notify employee *in writing* of the deficiency and give the employee 7 calendar days to fix the deficiency
- FMLA rights may be denied if deficiency not cured

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Authentication and Clarification

- The employer's health care provider, HR professional, leave administrator or management official may contact employee's health care provider
- Employee's direct supervisor prohibited from contact

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Production/Attendance Bonuses

- Bonuses, awards, payments for achievement of specific goal may be denied if employee has not met the goal due to taking FMLA leave
- Employer must treat employees on non-FMLA leave the same way

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Family Military Leave Provisions

- Qualifying Exigency Leave (12 weeks)
- Military Caregiver Leave (26 weeks)
- Must continue group health benefits
- Intermittent leave is specifically permitted
- Job restoration is required

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Qualifying Exigency Leave

- Short-notice deployment
- Military events and related activities
- Childcare and school activities
- Financial and legal arrangements

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Qualifying Exigency Leave (cont.)

- Counseling
- Rest and recuperation
- Post-deployment activities (90 days)
- Additional activities to address other events which arise out of the servicemember's active duty or call to active duty status

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Military Caregiver Leave

- Applies to family members of a member of the Armed Forces, including National Guard or Reserves
- 26 weeks
- Not the same as serious health condition
- WH 385 certification form

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Family Members and Next-of-Kin

- Spouse, parent, son or daughter
- Son or daughter can be any age
- Servicemembers may specifically designate in writing another blood relative as his/her nearest blood relative for purposes of caregiver leave
- With no such designation, all family members at same level of relationship considered eligible to take this leave

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