BusinessManagement DAILY

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Could smoking be an ADA-protected disability?

Twenty-nine states and the District of Columbia have so-called “smoker protection” laws—laws that elevate smokers to a protected class and make it illegal to discriminate against employees because they smoke.

But in many states, there is nothing illegal about making employment decisions based on someone’s status as a smoker. In fact, many employers are attempting to curb rampant health care costs by implementing workplace “smoke-outs,” totally prohibiting the employment of smokers as a class.

Before the ADA Amendments Act (ADAAA) became effective on Jan. 1, 2009, I was optimistic that these smoke-outs were legal. After the ADAAA, however, I have reservations.

The ADAAA’s stated intent is to make it “much easier for individuals seeking the law’s protection to demonstrate that they meet the definition of ‘disability.’ …”

It accomplishes that goal by expanding the definition of the term “disability.” In fact, the definition of “disability” may now be so broad that it covers conditions such as nicotine addiction.

If that’s now true, has the ADAAA created a new protected class for smokers?

Disability reinterpreted

Before we can answer that question, we first have to look at how the ADAAA affected the definition of “disability.” The core definition of disability remains largely unaltered. An ADA-protected disability is still defined as:

1. A physical or mental impairment that substantially limits a major life activity, or
2. A record of a physical or mental impairment that substantially limited a major life activity, or
3. When an employer takes an action prohibited by the ADA based on an actual or perceived impairment.

What has changed under the ADAAA is how these definitions are interpreted and applied.

“Major life activities” fall under one of two categories:

- *Category One* includes examples such as caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, thinking, communicating and working at a type of work.
- *Category Two* covers the operation of major bodily functions, including functions of the immune, digestive, neurological, circulatory, respiratory, endocrine, hemic, lymphatic and musculoskeletal systems, as well as normal cell growth, bowels, bladder, brain, special sense organs and skin, genitourinary, cardiovascular and reproductive functions.

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Substantial limitations

To have a disability, an individual must be substantially limited in performing a major life activity, as compared to most people in the general population. An impairment need not prevent or or restrict the individual in performing a major life activity to be considered “substantially limiting.”

Determining whether someone is experiencing a substantial limitation in performing a major life activity is a common-sense assessment based on comparing the person’s ability to perform the activity with that of most people in the general population.

Different than an actual impairment, an employer “regards” an individual as having a disability if it takes a prohibited action based on an individual’s impairment or on an impairment the employer believes the individual has. No longer does an employee have to show that the employer believed the impairment (or perceived impairment) substantially limited performance of a major life activity. Employers have no obligation to provide reasonable accommodation to an individual who meets only the “regarded as” definition of disability.

Ready for court?

What does all this mean for employers that want to employ only nonsmokers?

Employees can claim that anti-smoking policies violate the ADA. Addiction is a protected disability. Diseases related to or caused by smoking (cancer, lung diseases, asthma and other respiratory conditions, for example) are also protected disabilities. Employees will claim that an adverse action taken pursuant to an anti-smoking policy is being taken because the employer regards the employee as disabled.

This is not to imply that employers cannot and should not have workplace anti-smoking policies. After all, it is not against the law in many states to prohibit employees from smoking at work.

Having said that, taking adverse action against employees because they smoke should now be viewed as high risk, at least until courts begin weighing in on the issue. Small and midsize businesses must ask themselves if they’re willing to be the business that risks being an early test case. After all, there’s nothing wrong with taking aggressive HR positions and testing the bounds of permissible policies.

But make no mistake; it’s not a question of whether an employee terminated for being a smoker will sue, but when. You’d better be prepared to defend your anti-smoking policy in court.

In other words, as a small or midsize employer, are you better off taking a risk and implementing a policy banning employees from smoking—or letting larger businesses test the bounds of the law and follow their lead?

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