Dear Client,

As part of our commitment to provide you with a legal resource that can offer cogent day-to-day advice and clear strategies for a secure future, we offer our pledge to also be your partner in information. We recognize the need for you to be immediately responsive to the changing requirements of the law, government regulations, and community needs. As such, our office will prepare *Action Papers* in response to the ever-changing laws and regulations affecting public education. Receipt of an Action Paper is an indication that your School District may want to consider changing a practice or policy. It also may indicate that your District is required by law to initiate or discontinue a practice or policy.

RE: ADAAA's FINAL REGULATIONS MADE PUBLIC

Forewarned, forearmed; to be prepared is half the victory. Miguel de Cervantes

The EEOC's final regulations were published on March 24, 2011 and will become effective on May 24, 2011. As anticipated the regulations have made and will continue to make defending ADA claims more difficult. The EEOC regulations are entitled to deference by the Federal Courts, but do not have the force of law. See Chevron U.S.A Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-45, (1984). Employers should review their policies and practices to ensure compliance with the ADAAA and final regulations. Importantly, for our school clients the ADAAA applies equally to 504 determinations. The attorneys at Andrews & Price are specifically prepared to assist you in ADA/504 compliance reviews and administrator training.

The most important thing to keep in mind is that the definition of "disability" has drastically changed. Final regulations make clear that the ADA's scope of coverage is much broader than it was in the past. The provisions for anti-discrimination, requirements for reasonable accommodations, and confidentiality of medical information remain unchanged. As a practical matter the change to employers is that the focus will no longer be on whether the employee is disabled or not. The focus will be on whether the employer has met its obligations to accommodate the employee. Though, the ADAAA does not change the ADA's basic definition of disability as a "physical or mental impairment that substantially

limits one or major life activities", it provides that the basic definition of disability "shall be construed in favor of broad coverage of individuals… to the maximum extent permitted by the ADA."

The regulations provide nine "rules of construction" to apply in determining whether a "substantial limitation" of a major life activity exists:

1. The term should be construed "broadly in favor of expansive coverage." Status of disabled is not to be a demanding standard.
2. An impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting.
3. The primary focus for the courts should be whether the employer complied with its obligations and whether discrimination occurred, not whether the individual is substantially limited in a major life activity.
4. The individualized assessment to determine if someone is substantially limited should require a degree of functional limitation that is "lower" than the prior standard.
5. The analysis of whether an individual's performance of a major life activity as compared to most people in the general population usually will not require scientific, medical, or statistical analysis.
6. The determination of whether a substantial limitation exists shall be made without regard to the ameliorative effects of mitigating measures (except for ordinary eyeglasses and contact lenses).
7. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
8. The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting. Conditions of short duration (e.g. a few months) can meet this definition.
9. An impairment that substantially limits one major life activity is sufficient.

The regulations make clear that a "major life activity" is not required to be "one that is of central importance to daily life." Additionally, the final regulations include a list conditions that "in virtually all cases" will satisfy the definition of "disability" due to certain characteristics associated with the impairments. Included in this list autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar order, post-traumatic stress disorder, obsessive-compulsive disorder, and schizophrenia.

Employers should expect courts to find more conditions, even episodic conditions, to be disabilities, and should take seriously their duty to engage in the process of determining whether and what reasonable accommodations may be available. To avoid liability the employer must proceed on the assumption that the employee is "disabled" and covered under the act and ensure that employment decisions are handled fairly and defensibly. Reasonable accommodations are mandated by the ADA and involve changes to the job that the employer actually needs to have performed so that a person with a disability can perform the essential functions of the job. An employer cannot impose a time frame or establish a maximum number of reasonable accommodations. Reevaluate your procedures for requesting medical information making sure to avoid making the process unduly burdensome. With the expanded coverage the medical information is important to verify the condition actually exists. As always ensure that employment decisions are based upon objective facts without regard to an individual's impairment in the workplace.

Should you have any questions on the ADAAA final regulations and their impact on you as an employer or any other employment related issues, please contact the attorneys of Andrews & Price.

Best regards,

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