

ADA AMENDMENTS: EXPANDED DEFINITION OF DISABILITY INCREASES OBLIGATIONS OF EMPLOYERS

by Tricia Bellich

The Americans with Disabilities Act (ADA) requires certain employers to provide "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship." 42 U.S.C. §12112(b)(5)(A).

In September 2008, President Bush signed a significant amendment into law passed by Congress called the ADA Amendment Act of 2008. Why is this amendment important to employers? This new law actually broadens the scope of coverage to protect workers with physical and mental disabilities from discrimination. Congress broadened the definition of disability under the ADA so that it "would be interpreted consistently with how courts had applied the definition of 'handicapped individual' under the Rehabilitation Act of 1973[;]." Employers can now expect a greater number of ADA claims and can expect courts to enlarge the number of people who may successfully make ADA claims.

Congress targeted two U.S. Supreme Court cases (and their respective progeny) which had narrowed the broad scope of ADA protection. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002). Congress, in effect, overruled the Supreme Court.

In *Sutton*, two claimants applied for positions as global airline pilots. Although their uncorrected vision was worse than 20/200, with corrective eyewear, their vision was 20/20. Nevertheless, the airline required its global pilots have uncorrected vision no worse than 20/100. The Supreme Court determined that the claimants were not disabled since their corrected vision was 20/20. They were not disabled under the ADA because the pilots did not have a physical impairment that substantially impaired them in any major life activity. Further, the Court found that the applicants qualified for other pilot positions with the airline (e.g., regional pilot). The Court concluded that the airline had not treated them as disabled due to their condition. Under the 2008 Amendment, it is clear that these pilots would be considered disabled and afforded protections of the ADA.

Congress disapproved of the *Williams* decision because it concluded that the Court interpreted the term "substantially limits" as requiring a greater degree of limitation than Congress originally intended when it passed the ADA. The real problem for Congress was the heart of the Supreme Court's unanimous decision saying that a claimant must show more than an inability to perform the tasks associated with his specific job. The Court said the claimant must also show an inability to perform the variety of tasks central to most people's daily lives. Now

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INDEPENDENT CONTRACTORS UNDER THE INDIANA WORKERS' COMPENSATION ACT - Part 1

by Douglas Meagher



The Indiana Worker's Compensation Act (the "Act") is contained in Title 22, Article 3 of the Indiana Code. The Act applies to all employers and employees engaged in an express or implied contract for the performance of services that are under the jurisdiction of the State of Indiana. If an Indiana employment relationship exists, the Act applies even if the employee's injury occurs while working outside of Indiana and/or if the employer is not necessarily based in Indiana.

Employers and employees are defined for purposes of the Act in Indiana Code §22-3-6-1. Subsection (a) describes employers as:

"[T]he state and any political subdivision any municipal corporation within the state, any individual or the legal representative of a deceased individual, firm, association, limited liability company, or corporation or the receiver or trustee of the same, using the services of another for pay."

Subsection (b) describes employees as:

[E]very person, including a minor, in the service of another, under any contract of hire or apprenticeship, written or implied, except one whose employment is both casual and not in the usual course of the trade, business, occupation or profession of the employer.

The Act exempts certain railroad employees, members of a fire department or police department of any municipality (unless the municipality elects to come within the provisions of the Act and purchases worker's compensation insurance), casual laborers, farm or agricultural employees, and household employees. The Act provides for limited benefits for student workers.

A casual laborer is an employee whose employment is both casual and not in the usual course of the trade or business of the employer. To demonstrate, a casual laborer may be someone hired to mow a lawn or perform minor services without a formal contract. The Indiana Worker's Compensation Board is generally reluctant to exclude an employee from coverage under the Act by classifying them as a "casual laborer".

Any employment relationship involving a minor child should be carefully considered. For example, a newspaper carrier may be considered a casual laborer under some arrangements and the parties not subject to the Act. However, it is important to consider the provisions of Indiana Code §22-3-6-1 which specify that double compensation may be awarded to a minor employee who is working without the proper labor permits. Newspaper carriers are often minors and, if in a bona fide employment relationship, should be employed with the proper permits. Under Indiana case law, newspaper carriers are generally regarded as independent contractors. *Dague v. Fort Wayne Newspapers*, 647 N.E.2d 1138 (Ind. Ct. App. 1995).

Independent contractors are not employees and are exempt from the Act. In determining if someone is an independent contractor, the Worker's Compensation Board uses the list of criteria issued by the Internal Revenue Service (IRS)

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NEW WC BOARD FORMS

Effective immediately, the **Indiana Worker's Compensation Board** has instituted new forms. They are available on the Worker's Compensation Board website at www.in.gov/wcb. Please note the new version of the 38911, which you should replace with your existing 38911. Also, you will find a form for claim denial entitled Notice of Denial of Benefits State Form 53914. The Board has informed us they will accept the old forms for a short transition period until all are up and running with the new versions. Please contact any member of our team for assistance. ♦

TOP 10

TIPS FOR EMPLOYERS & ADJUSTERS ON DETECTING FRAUDULENT CLAIMS

- 1) Employee is hard to contact
- 2) New employee
- 3) Identification problems-bad home address, SSDI, etc.
- 4) Accidents on Fridays, Mondays or after interruptions of work
- 5) Absence of witnesses
- 6) Incident happens where the worker is not normally supposed to be
- 7) Disgruntled employee
- 8) Employee is overly familiar with workers' compensation lingo
- 9) Varying versions of account of accident
- 10) Failure to complete doctor's prescribed course of treatment



ILLINOIS LEGAL CORNER

REPETITIVE TRAUMA CLAIM DENIED FOR ODD LOT PERMANENT TOTAL DISABILITY BENEFITS

In *Martha Aragon v. University of Illinois*, handled by attorney Cecil Porter of the KDPE Chicago office, the Petitioner claimed to develop bilateral carpal tunnel syndrome from her years as a building services worker, performing janitorial duties at the University of Illinois. Her medical treatment included multiple surgeries and she was found at maximum medical improvement with permanent restrictions. She argued that she was unable to return to work at the University and was unable to find alternative employment because of her permanent restrictions, lack of education and limited ability to speak English. Her claim was supported by her treating physician, Dr. John Fernandez, and vocational expert, Joseph Belmonte.

The University offered the Petitioner a job within her restrictions which she refused. The Arbitrator denied her claim for odd lot permanent total disability benefits because the Petitioner voluntarily removed herself from the workforce and made no attempt to return to work at the University or find alternative work. The Arbitrator also gave more weight to the Respondent's expert because the Petitioner's treating physician had not had the benefit of her complete medical file. As a result, she was only awarded benefits based on a standard claim for carpal tunnel syndrome, instead of the permanent total disability benefits that she requested.

The Petitioner has filed an appeal to the Illinois Workers' Compensation Commission. ♦

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to determine status. The criteria are the nature and duration of the services provided to the employer; the extent to which the independent contractor maintains his or her own business; the method of payment between the contracting parties; their belief that an employee-employer relationship exists; who provides the tools, equipment or supplies; whether an independent contractor performs services exclusively or primarily for a single customer; and, whether the independent contractor has little or no capital investment in his or her independent contracting business (no separate office, no significant equipment, etc.).

Information contained on the IRS website states:

In determining whether the person providing service is an employee or an independent contractor, all information that provides evidence of the degree of control and independence must be considered.

Facts that provide evidence of the degree of control and independence fall into three categories:

1. Behavioral: Does the company control or have the right to control what the worker does and how the worker does his or her job?

2. Financial: Are the business aspects of the worker's job controlled by the payer? (These include things like how the worker is paid, whether expenses are reimbursed, who provides tools/supplies, etc.)

3. Type of Relationship: Are there written contracts or employee benefits (i.e. pension plan, insurance, vacation pay, etc.)? Will the relationship continue and is the work performed a key aspect of the business?

Businesses must weigh these factors when determining whether a worker is an employee or an independent contractor. Some factors may indicate that the worker is an employee, while other factors may indicate that the worker is an independent contractor. There is no formula which

designates the worker an employee or an independent contractor, and no one factor stands alone in making this determination. Also, factors that are relevant in one situation may be irrelevant in another.

The keys are to look at the entire relationship, consider the degree or extent of the right to direct and control, and finally, to document each of the factors used in making the determination.

People such as lawyers, contractors, subcontractors and auctioneers who follow an independent trade, business, or profession in which they directly and individually offer their services to the public, are generally not employees. However, whether such people are employees or independent contractors depends on the facts in each case.

The general rule is that an individual is an independent contractor if you, the person for whom the services are performed, have the right to control or direct only the result of the work and not the means and methods of accomplishing the result.

The Act allows some, otherwise specifically exempt, employers and independent contractors to elect coverage under the Act. Upon submission of proper notice to the insurance carrier and the Board, partners in a partnership, managers in a limited liability company and sole proprietors may elect coverage under the Act (Ind. Code §22-3-6-1(b) (4), (5), and (9)). Executive officers of corporations are statutorily defined as employees subject to the Act and do not need to make any election. Some owner-operators of trucks engaged in interstate commerce may also elect coverage under the motor carrier's policy or its self-insurance program if the owner-operator pays the premiums as requested by the motor carrier (Ind. Code §22-3-6-1(b) (8)). Real estate agents paid by commission are considered independent contractors and not employees subject to the Act (Ind. Code §22-3-6-1(b) (6)). ♦

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since the 2008 Amendments, it is clear that a claimant carries a lighter burden of proof of substantial limitation by establishing that she is unable to perform the manual tasks based solely in reference to work activities.

So, what happens next and what should an employer keep in mind? The courts will now need to reassess the breadth of protection to disabled individuals under the Act. Congress also expressed a desire for the EEOC to revise its regulations to be consistent with the new Amendment. Employers should recognize that it will be far easier for claimants to establish that a particular impairment is "substantially limiting." Plus, employers should take note that mitigating measures may no longer bar a claimant's qualification for ADA protection. Lastly, the Amendment specifically noted that an impairment that is episodic or in remission is still considered a disability if it substantially limits a major life activity when active. ♦



INDIANA LEGAL CORNER

EMPLOYER NOT RESPONSIBLE FOR TRAVELING SALES REPRESENTATIVE'S HOTEL INJURY

In *Burmeister v. Midwest Logistics*, 2008 Westlaw 1746916 (Ind. App. 2008), which was handled by Crown Point partner Tricia Bellich, the question presented was whether an employee's injury occurred in the course and scope of her employment. The employee was a sales representative who sold trucking loads for her employer, our client in this case. The employee resided in Mishawaka, but her territory included the southern half of Michigan and parts of northern Indiana. When the employee had been on the road for her employer she would be reimbursed for her expenses. Evidence showed that the employee was usually on the road Mondays, Tuesdays and Wednesdays.

On a Monday, the employee checked into a Holiday Inn Express in Grandville, Michigan, southwest of Grand Rapids. Thereafter, the employee claimed she made business calls, watched television and ran on the treadmill before swimming in the motel pool. After swimming, she did some work and then went to bed. She testified that she awoke in the middle of the night with a headache, sore throat, shortness of breath and inability to speak well. The employee claimed the symptoms were a direct and proximate result of an excessive amount of bromine placed in the pool by motel staff.

In 2007, a Single Hearing Member found that the employee was not injured in the course and scope of her employment. The Full Board adopted the Single Hearing Member's ruling. On appeal, the court affirmed the Full Board's conclusion and held that the employee was at the Holiday Inn Express for personal reasons and not for business. Critical testimony from the employer demonstrated that the employee had not documented any itineraries, schedules, or customer rate requests, as required by the employer, the week the incident occurred. The documents would have verified her contention, that she was traveling for business purposes. Furthermore, the employer testified that obtaining a motel room, within driving time of three hours or less from home, to avoid marital conflicts was an abuse of the employer's reimbursement policies. ♦



Where To Go

- July 19-21 ICLEF Masters Series Convention
French Lick, IN
- July 21-23 29th Annual National Workers' Compensation and Occupational Medicine Conference
Cape Cod, MA
- August 6 IWCI Annual Seminar
Indianapolis, IN
- August 17-18 DRI's Workers' Compensation Review - Gaining Ground in a Changing Environment
Orlando, FL

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