



***So far, the new Administration has kept to its word...changes to the commitment of health and safety in the workplace have been made and more are in the works. But the impact on businesses (especially in Texas) could prove to be more hassle than help...***

## **Driving Isn't ADA Major Life Activity**

With the enactment of the new ADAAA in January, current court decisions are critical in understanding how the courts will interpret the new legislation and EEOC regulations.

In April 2009, the Seventh Circuit U.S. Court of Appeals held that a nurse with attendance problems resulting from driving-induced panic attacks couldn't file suit under the ADA. She was a public health nurse whose job required her to drive to clients' homes and evaluate their health conditions. After an automobile accident, however, she was diagnosed with posttraumatic stress disorder, which caused her to have panic attacks every time she got in a car.

### **Key Actions:**

- Her claim that her employer failed to accommodate her under the ADA failed because driving isn't a major life activity under the ADA.
- Rationale strongly suggests that the outcome would be identical under the ADAAA, effective January 1, 2009. The court found that driving is distinguishable from the nonexclusive list of major life activities in the EEOC regulations (which are now part of the ADAAA text).
- The EEOC listed Major life activities, unlike driving, do not depend on where a person lives. It was noted that "Manhattanites" drive only rarely, while residents of more rural areas rely heavily on their autos.
- Finally the court noted that while the listed activities protect fundamental rights (the right to care for oneself, the right to think, the right to work, etc), no one has the right to drive.

### **Business Impact:**

*While this decision represents a victory for employers (at least those operating in the Seventh Circuit), Employers should still:*

- Exercise caution before taking adverse action against an employee whose medical condition renders him/her unable to drive.
- Review steps to take to ensure compliance with the ADA when an employee requests an accommodation based on an inability to drive.
- Employers can avoid liability by reviewing and revising job descriptions to make sure that essential job functions are stated accurately and completely.

## **Jury Verdict Against Employer Who Accessed Employee's MySpace Page**

A recent case in the U.S. District Court in the District of New Jersey is the perfect "flare-gun" case-sending a poignant warning to employers considering similar actions. In *Pietrylo v. Hillstone Restaurant Group*, a waiter at the employer's Houston's restaurant created a MySpace page and group. The group was private (password protected) and the page was devoted to the daily happenings at the workplace. As one might imagine, out of the sight and earshot of management, the employees engaged in a good deal of "venting" and petty griping on the page.

### **Key Notes:**

- An invited member permitted one of the managers to view the site while she was logged in under her legitimate credentials
- The manager was not amused and reported the page to the other managers.
- Management requested the employee's password so they could access the site without her present.
- Houston's fired the site's creator and an invited member for a violation of company policy involving "professionalism and a positive attitude".

- The terminated employees sued and won. In June of 2009, a federal jury found that the managers violated state and federal laws that protect the privacy of Web-based communications.

***What's it all mean?***

The jury determined that the way management gained access to the site violated the Stored Communications Act. Assuming that management “coerced” the log-in information from the employee, then it was not an “authorized user” of the site, regardless of whether it had a password or not.

Employers should not log into an employee’s social-networking site under false pretenses or by coercing another employee to grant them access they would not otherwise be able to obtain.

***Business Impact***

Accessing an employee’s restricted social networking site without authorization could run you afoul of the law.

Employers should consider policies that deal with employee work-related postings on social networking sites. The company has a right to protect its confidential and proprietary information and to protect employees from being bullied, harassed or intimidated.

**So What's Next in 2009?****On the National Level-*****Return of Employment Non-Discrimination Act (ENDA)***

The 2009 version of the ENDA has been filed in Congress. Similar to prior versions, the bill prohibits employment discrimination based on sexual orientation and gender identity (defined as the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual’s designated sex at birth).

Employers should know that the bill allows them to uniformly enforce dress & grooming standards so long as employees who provide notice are allowed to adhere to the gender they are transitioning from/to during that process.

***Respect for Marriage Act (H.R. 3567)***

This Act was introduced on September 15, 2009 in the U.S. House of Representatives.

- The Act would repeal the Federal Defense of Marriage Act
- Require that all marriages that are valid under state law would be valid and recognized under federal law
- Same-sex marriage performed in a state where legalized would be recognized for all purposes of federal law

Employers should take note, because, if enacted, the bill would significantly change the federally mandated benefits available to employees and their same-sex spouses. For example, employers with pension or 401(k) plans would be required to recognize same-sex spouses for purposes of determining the surviving spouse annuities or other death benefits under these retirement plans. The federal income tax treatment of health coverage for an employee’s same-sex spouse would change such that employees would no longer have to be taxed on the income imputed for the employer’s contribution to the same-sex spouse’s coverage. Employers also would be required to permit employees to take family and medical leave to care for the illness of a same-sex spouse.

***Employee Free Choice Act (EFCA) Update:***

If you already celebrated the death of the EFCA it may have been a bit premature. It was recently announced by former Republican, now Democratic Senator, Arlen Specter that a deal had been reached on the EFCA that would have the 60 votes needed for cloture in the Senate. The rewrite of the EFCA would drop the “card check” provision and be replaced with an expedited election schedule (election to take place within 5 to 21 days). Currently an election is typically six to eight weeks after the union files a petition with the NLRB. Mandatory arbitration will remain in the compromise bill, but instead of allowing a government mediator to set contract terms, the revised bill may go with “last best offer arbitration.” In this type of arbitration, the mediator has to pick either the union’s or the employer’s offer.

### On the State level:

Texas Disability Discrimination (House Bill 978, effective 9/1/09) amends the disability discrimination provision of the Texas Labor Code to make the Texas statute compatible with the federal ADA. Determination under state law of whether an impairment substantially limits a major life activity must be made without regard to the effect of mitigating measures.

“As a business owner or manager, Human Resource management and compliance can be an overwhelming challenge and a miss-step in this area can be very costly for your business and in some cases you personally. Given all of this it's not surprising that the analysis firm Gartner Group has found that HR ranks number one among outsourced business processes. At TCOR we understand the challenge and continue to seek to serve and support our clients at the highest level. If you need additional information, support or service on the topics of this newsletter or any other HR issue please contact us. Additionally, you can visit our website for more information on TCOR's HR support and services. And - if you would like the latest breaking HR news, Legislation and events follow me on Twitter. You can find me at HRData.

Until our next visit...



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### OSHA's Site-Specific Targeting 2009 (SST-09) Program

The [Occupational Safety and Health Administration \(OSHA\)](#) announced on September 4 that it will perform comprehensive safety inspections at nearly 4,000 high-hazard workplaces. These inspections are part of OSHA's Site-Specific Targeting 2009 (SST-09) program, which helps direct enforcement resources to the types of workplaces that have the highest rate of injuries and illnesses.

OSHA will choose the workplaces to inspect based on its 2008 Data Initiative Survey of 80,000 employers, which provided data on workplace injuries and illnesses. The employers surveyed had 40 or more employees and were involved in industries with historically high injury and illness rates.

OSHA has divided the primary list of workplaces scheduled for inspection into three areas — manufacturing, non-manufacturing, and nursing homes. Instead of using the same minimum injury and illness rate for all three groups, OSHA has established a minimum rate for each group. It believes that using three different rates will allow it to inspect more work sites over the minimum rate in each area.

Although OSHA will inspect the workplaces with the highest injury and illness rates based on the 2008 survey, it will also inspect work sites that failed to answer the survey. By including such employers in its inspection list, OSHA wants to discourage employers from trying to avoid inspections by not responding to its communications.

### OSHA to Begin National Emphasis Program on Recordkeeping

Starting August 2009, OSHA will begin its new National Emphasis Programs (NEP) on injury and illness recordkeeping inspections being conducted at employers' establishments with low incidence rates in historically high rate industries, as well as inspection of a sample of construction firms.

The NEP was developed after 2008 congressional hearings on the perceived problem of injury and illness underreporting and is consistent with Secretary of Labor Hilda Solis' enforcement-oriented approach to occupational safety and health. The inspections will be conducted over the next 12 months, and it is expected that the NEP will be expanded after the initial data is analyzed. Although the NEP is limited to stated under federal OSHA's jurisdiction, state plan OSHA programs are encouraged to conduct their own recordkeeping enforcement initiatives.

The inspection will include a review of medical files for occupational and non-occupational cases for 2007 and 2008, including 301 forms, workers compensation forms, absentee reports and audiograms, for a selected sample of employees. Compliance officers will interview employees and members of management to determine whether the employer has an effective system in place for reporting injuries and whether incentive programs discourage employees from reporting new cases. Facility record keepers will be questioned to determine their level of training and knowledge of the recordkeeping regulations, and health care providers will be asked whether the employer has tried to influence the treatments provided and the recordability of cases. In addition a limited walk-around inspection of the employer's facility will be conducted to determine if the hazards in the facility are consistent with the injuries and illnesses on the 300 Log, and citations may be issued for any violations that are observed.

## OSHA Log Basic Requirements

You must consider an injury or illness to meet the general recording criteria, and therefore to be recordable, if it results in any of the following: death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, or loss of consciousness. You must also consider a case to meet the general recording criteria if it involves a significant injury or illness diagnosed by a physician or other licensed health care professional, even if it does not result in death, days away from work, restricted work or job transfer, medical treatment beyond first aid, or loss of consciousness.

An employer must keep OSHA Form 300 in each work establishment or worksite expected to be in operation for 1 year or longer. An employer must enter on Form 300 all recordable occupational injuries and illnesses no later than 7 calendar days after their occurrence.

## Workers Comp State Legislative Update

*House Bill 2547*, effective September 1, 2009, amends workers' compensation provision of the Texas Labor Code to allow treating physicians to request from employers certain information needed to "facilitate an injured employee's return to employment" such as:

- Contact information for the employer/representative
- Job description of injured employee

## So What's Next in 2009?

Federal agencies are sharply increasing their oversight of pollution and other public health threats in Texas, in a particularly focused example of the Obama administration's promise of stricter regulation of business. The U.S. Department of Labor has also beefed up enforcement in Texas. After Labor Secretary Hilda Solis questioned the state's worker safety record during a speech in San Antonio in June, the Labor Department dispatched extra inspectors to Texas from other states. The special initiative yielded a 60 percent increase in construction site inspections and an 85 percent increase in citations, according to Labor Department figures.

"I realize that in today's market every dollar is important to companies, so I will work to lower your total cost of risk. With new legislation coming down the pipes everyday, it is my commitment to TCOR clients to keep you on top of new safety issues and workers compensation legislation. Employers have enough on their plates today with running their businesses; my goal is to provide you with the tools necessary to minimize the risk associated with employee safety and to make sure your risk containment program has as few leaks as possible.. I'll be in touch with our Risk Control Alerts in the coming months with more updates on what's going on in your workplace.



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