ASSOCIATION OF CORPORATE COUNSEL

TITLE: **ADA Amendments Act – Is Your Company Ready?**

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PRESENTED BY: **ACC Employment and Labor Law Committee**

SPONSORED BY: **Jackson Lewis**

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Operator: Welcome to this ACC Webcast. (Kevin), please go ahead.

Kevin Menke: Thank you, and good day, everyone, and welcome to today's ACC Webcast. The title for today's Webcast is the "ADA Amendments Act, Is Your Company Ready." My name is Kevin Menke, and I'm the – a Subcommittee Co-Chair on the ACC's Employment and Labor Law Committee.

I am Senior Counsel, Employment and Labor, for International Paper Company in Memphis, Tennessee, and my company has about 60,000 employees. And I'm delighted to be the Moderator for today's Webcast.

I first want to address a couple of logistical items, and then I'll have the pleasure of introducing today's speakers. Today's Webcast, obviously, will address the recent amendments to the ADA signed into law in September of this year.

As you know employers historically prevailed in more than 95% of all ADA lawsuits, but this will likely change at the beginning of 2009. And is your company ready? In enacting the ADA Amendments Act Congress expressly overturned several landmark ADA Supreme Court decisions and District Courts, and directs courts to interpret the term disability, very broadly. It will make disposing of ADA cases prior to trial more challenging, and I'm certainly a little worried about it for our company.

Today's speakers will review the changes to the law and then focus the majority of today's discussion on the practical implications these significant changes will likely have on our corporate counsels' day-to-day advice on these issues.

Please note that we may not be able to get through all of the hypotheticals at the end of the slide deck, but we wanted to put them all in there for your consideration, and we think that the coverage and the discussion of the previous slides will enable you to answer those hypotheticals, if we don't get to all of them at the end.

We would really like this presentation to be I guess as interactive as possible, although you can't ask oral questions, so you'll be able to ask questions online. To do this, if you have your screen open, you should have at the bottom left-hand corner a box which says, chat. You can type in

your questions there, and click send. You can enlarge that box, if you need to. You may type questions at any time during the Webcast.

We will see your questions as they are submitted, and we'll get them over to the speakers as we make our way through the slides, and we will likely wait until the end of the slide presentation, and we'll definitely work to reserve time for questions.

Please understand that we may not get to all questions submitted, and if we don't we will attempt to provide answers to your questions and post them on the Committee Web site at a later date. One other matter, which is important to the ACC and the Employment and Labor Law Committee, is the evaluation form which you are asked to complete. You'll see in the middle of the left-hand side of your screen, a link to Webcast evaluation, it's the number 5 item in that box. We would very much appreciate it if you would take a few moments at the end of the Webcast to complete an evaluation form.

Please note that this Webcast is being recorded and will be made available on the ACC Web site for a year following today's date. And remember if you have technical difficulties during the session, you can e-mail ACC Webcast at commpartners.com, and note that there are two M's in commpartners.

Allow me, now, to introduce our presenters, and we'll begin the presentation. Betsy Stivers is Assistant Vice President and Senior Counsel for UNUM Group. UNUM is a disability insurance company that employees over 9,000 employees. She advises on employment law matters, including recording and monitoring privacy, employee relations, ADA, FMLA, workers comp, (interplay) and compliance, et cetera.

Following graduation from law school, Ms. Stivers had a judicial clerkship, and was then in private practice for 16 years. And her private practice did include counseling on unemployment law. And she joined what is now UNUM's Law Department in 2000.

Frank Alvarez is a Partner in the White Plains, New York Office of the National Workplace Law Firm of Jackson Lewis. Mr. Alvarez is the National Coordinator of Jackson Lewis' Disability Leave and Health Management Practice Group, which assists employers in meeting the legal and practical challenges posed by Federal and State laws, protecting injured and ill employees.

He has represented employers and counsels, hundreds of employers each year, and he has represented employers as Lead Counsel in both trial and appellate courts, and has successfully tried employment discrimination claims to verdict.

I'd like, now, to turn it over to Frank.

Frank Alvarez: Thank you, Kevin.

To understand the implications of the ADA Amendments Act, we thought it would be helpful to start by looking back a bit, to see how we got to where we are today. As many of you may recall, the ADA was first enacted on July 26, 1990. There was a two-year period for employers to get ready for it. It became effective on July 26, 1992 for employers with 25 or more employees, and there was an additional phase-in period thereafter for even smaller employers.

When it was signed into law it was heralded as the Emancipation Proclamation of the disabled, and in the legislative findings, itself, there was a reference to the fact that there would be 43 million Americans who would likely be covered by this new law.

No one really expected when the ADA was signed in 1990 that it would be difficult for people to gain protection of this law. They ended up being wrong. As the cases developed the scope of protections were increasingly narrowed under the law. The Supreme Court had several cases

come before it that narrowly construed the ADA's disability definition, and despite the reference to their being 43 million Americans covered by this law and there being a discreet (miniscule) minority of people who would be protected by this law, all of a sudden you had many people who were no longer being considered disabled under the ADA.

With time, the disability community began taking steps to seek an amendment to the law. In fact, in December of 2004 the National Council on Disability issued a report, called "Writing the ADA," and requested that Congress pass what was then referred to as an ADA Restoration Act. And the goal being to purportedly restore the ADA's original intent and shift the focus away from whether people were disabled under law to the fact of whether individuals were subjected to discrimination.

Ultimately after several bills working their way through Congress, the ADA Amendments Act was passed in September of 2008. What's important to note is that the bill that President Bush signed into law is s3406, not H.R.3195. Both of those bills were referred to as the ADA Amendments Act. There was some minor changes, but important changes that occurred when the bill went to the Senate. So there's been some confusion I think because people have occasionally been looking at H.R.3195, you should be focused on s3406, that's the operative bill that was signed into law.

It becomes effective on January 1, 2009. There is some question as to whether the changes will be applied retroactively. I think that that question is not specifically addressed in the law, but counsel should be aware that there may be arguments that people would attempt to argue for retroactive application of the changes in the law, in particular because some claim that this restores the original intent of the ADA.

But, with that by way of background, let's move on to a discussion of what the ADA Amendments Act changes. It really doesn't change as much as many people think from a technical standpoint. The change, in the beginning of the statute there are amendments to the congressional findings and purposes of the ADA, and on the screen, page 6 of the slide presentation right now, we have some language that's directly from the amendment.

And it states that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis. And the definition of disability shall be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA.

In many ways, this is the critical concept to understand, when you are focused on the implications of the ADA Amendments Act. It's really a statutory construction statute in many ways, and it's really directing the courts not to put as much focus on the discerning analysis of whether somebody is, in fact, disabled under the ADA.

And historically statistics showed that there was different studies, but by and large most studies showed that employers were winning more than 90% of cases under the ADA, and they were really winning them as a result of people being unable to prove that they had a disability under the ADA.

To me, in my judgment, those days are over. Courts are going to be much less likely to find that people are not disabled under the ADA, and it really doesn't depend so much on the technical changes to the definition of disability under the ADA.

On slide 7, we have what is the definition of disability under the ADA Amendments Act. And you'll see it's not very different than the definition that exists right now under the ADA.

There's still three prongs to the disability definition. The first prong is the same, a physical or mental impairment that substantially limits one or more major life activities of such individuals.

The second prong is the same, it's a record of such an impairment. Or the third prong is similar but a little bit different, and we're going to go in greater detail on that.

It's still being regarded as having such an impairment but there's an additional reference in the statute to regarding someone as being disabled, and now the definition of disability expressly cross-referenced that by including the language that's shown on slide 7, as defined in paragraph three.

So the changes to the disability definition really lie in the changes to the concepts that are embraced in the definition, not the definition, itself. Substantially limits, is one, which we'll talk about in great detail. And essentially there, one of the major issues is that you can no longer consider the impact of mitigating measures and major life activities has been revised, and, finally, as I alluded to already, the regarded as a prong of the disability definition has seen some changes.

On substantially limits, let's review those changes briefly. First of all, the term substantially limits was initially defined through the EEOC's regulations, but the ADA Amendments Act states that that term was incorrectly interpreted by the Supreme Court and the EEOC, and the EEOC has been directed to issue new regulations, redefining the concept of substantially limits.

In addition, the statute directs that an impairment that is episodic or in remission is a disability or should be a disability if it would substantially limit a major life activity when active. Some courts have looked to the fact that some impairments were in remission and found that, therefore, there was not a substantial limitation as a matter of law.

The statute speaks to those circumstances and directs the courts and the EEOC to view it much differently going forward. Also, an impairment that substantially limits one major life activity need not limit other major life activities to be considered a disability.

In terms of mitigating measures, on slide 10 we've noted that the major changes, except for ordinary eyeglasses and contact lenses the ADA Amendments Act prevents courts and employers from considering mitigating measures and an individual may be using when determining whether the individual is disabled.

This is the change that flowed from the Supreme Court's decision in this (Sutton) trilogy of cases, which involved plaintiffs that did wear eyeglasses and had sought positions as commercial airline pilots. But the reality is is that despite that narrow factual circumstance which is retained or continues to be addressed through the amendment, the ADA Amendments Act essentially overturns the holding in the (Sutton) trilogy of cases and instructs courts that mitigating measures should not be evaluated when determining whether individuals are disabled.

Therefore, as a result, it's quite likely that literally tens of millions of individuals with conditions, such as diabetes or high blood pressure or carpal tunnel syndrome and cancer, all of which are treatable and may be mitigated significantly through that treatment or other measures, will now have a disability under the ADA even if the conditions are well controlled.

On slide 11, we've included the reference to the types of mitigating measures that are alluded to in the statute, and these are things that employers should look at closely to evaluate whether the conditions that they are managing through with employees are sufficiently severe as to be considered disabilities under the ADA Amendments Act.

With that, I'd like to turn it to Betsy to talk a little bit about major life activities.

Betsy Stivers: The changes in the ADAAA included the change in definition to major life activities. Basically what Congress did was it directly placed into the ADA a non-exhaustive lists of major life activities that include, but are not limited to, caring for one's self, performing manual tasks,

seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

Some of these are new. When you look nationally, some circuits may have said that work was a major life activity. However, if you can't work, there is some question about whether you're qualified, but bending, reading, concentrating, thinking, and communicating are all relatively new.

Congress also added a list of major bodily functions, that if they're impaired are considered to impact major life activities, so they defined major life activities in the major bodily function area as including but not limited to functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions.

So basically you're adding in heart disease, infertility, Crohn's Disease, diabetes, epilepsy, all of these types of conditions or illnesses which may not have been a – considered a major life activity are specifically and explicitly included in the amendment.

When you go to page 13, you'll see a list of such illnesses and also injuries, which previously were debatable. For example, broken bones that don't heal properly are likely to be an ADA disability, back impairment, cumulative trauma disorder, and depression. However, just to be clear, ordinary conditions associated with transexualism, sexual orientation, gender identity, transvestism, and certain sexual behaviors and disorders are still excluded from ADA protection.

Also expressly excluded remain the list of conditions, like kleptomania, compulsive gambling, pyromania, pedophilia, those sorts of things, which were previously listed, are still there. So the ADA Amendments Act does not help people who would bring your company down or steal your things, which is good news.

The last area of definition of a disability that's been changed in my view is really the most significant. In the world of regarded as claims, it used to be that an individual would have to demonstrate that they're perceived as having an impairment that substantially limits a major life activity.

However, under the ADAAA, individuals can establish if they're regarded as disabled by showing that they've been subjected to adverse action under the ADA because of an actual or perceived physical or mental impairment.

That impairment doesn't have to actually limit a major life activity. The definition is subject to two important limitations. First, individuals with impairments that are transitory and minor are excluded from eligibility from the protections of the ADA under this regarded as prong. And that word, and, is very important.

Congress defined transitory for us as being an impairment with an actual or expected duration of six months or less, but minor is undefined. So the EEOC is going to have to give us regulations as to what really minor means.

Now, if you go to slide 15, you will see that Congress clarified that employers do not have to provide reasonable accommodations to those who qualify for coverage under the ADA solely by being regarded as disabled.

These changes in the regarded as claims are going to impact the protection for many, many work related injuries, specifically carpal tunnel.

I'm going to hand it off to Frank for a description of the findings in EEOC v. Rockwell International and how that might be affected by these changes.

Kevin Menke: Before you do that, I'm sorry, this is (Kevin), there was a question before I got knocked out of the connection again, that's kind of related to this section, Betsy, that somebody asked. So if an employee has headaches then they're going to be disabled now?

Betsy Stivers: Well, I think that that would lead you to ask are they minor or are they major? I think if they're migraines and they're debilitating migraines, and there's a history of migraines that completely knock a person out, I think it's likely to see that they will be considered disabled under this. However, the passing headache that you have just because you're stressed out may be considered minor, it all depends on what the EEOC does.

Frank Alvarez: I tend to agree with that. I think what we often see is people with migraine headaches, and as Betsy alluded to I think those are conditions that we see in FLMA situations commonly, and they are ongoing life, almost a lifetime or indeterminate type of condition. So if you get past this six months' rule under the regard as claims it certainly would think, it would seem as though you will be covered under disabled under the ADA or at least you'd have to approach that situation with some great care, with the expectation that there's a reasonable basis for claiming protection under the ADA.

Betsy had alluded to the EEOC v. Rockwell International Case. First of all, let me give you a cite for this, it's 243 F.3rd 1012, and it's a 7th Circuit Case from 2001. The reason we thought we might just include this is because in that case, which as you can see, the EEOC thought important enough to bring. They challenged certain testing programs that were used to evaluate whether people had carpal tunnel syndrome or were susceptible to carpal tunnel.

And because these people were claiming that they were qualified under the ADA, they were arguing that they were merely regarded as being disabled and that they actually could perform the jobs that they sought, and ultimately were denied employment based upon unfounded concerns about people's fears about the potential carpal tunnel liability, which is another way of alluding to workers comp liability.

Well, the theory that was pursued was that they were regarded as being disabled, but the proof that was required to establish that theory was that the employer, that you needed evidence, the EEOC needed to produce evidence that the employer not only perceived that they had an impairment but had perceived that that impairment was substantially limiting of major life activities. And the court found that there was a lack of evidence on that point.

Now, what has happened because of the change in regarded as theory under the ADA through the ADA Amendments Act, and I'll just go back briefly to slide 14, on the last bullet you'll see that the plaintiffs now only need to prove an adverse action was taken as a result of a mistaken belief about an impairment or about the individual's ability to perform his or her job.

There's no longer a need to prove what the employer's mindset was in terms of perceiving someone as being substantially limited in major life activity. It makes the burden of proof much easier for employees under the regarded as theory, and this case, EEOC v. Rockwell International, would be governed by a different analytical framework going forward under the ADA Amendments Act.

So we thought that was a good example of the significance of this change, so we wanted to include that.

Kevin Menke: So you're saying that it may be a little more riskier in the new environment to do these types of pre-employment evaluations?

Frank Alvarez: Yes, I do think there would be to the extent that people are relying upon the fact that people with those types of conditions are not going to be disabled under the ADA, I think that they

should be on notice that that is going to be a much more difficult position to maintain going forward.

There's still a lot of good reasons to do those types of evaluations for people. You certainly don't want to hire people who are going to pose a direct threat to themselves in the course of their employment.

But I think you have to be realistic about the notion that many people will be much better able to prove that they are protected by the law, and one important thing, again, to highlight is that people who are merely regarded as being disabled are not entitled to reasonable accommodations under the ADA.

We thought we'd just end this section before we got to some more practical discussion, with the note that the EEOC has posted on its own Web site a notice on the ADA Amendments Act, and there's a link on slide 16 to that portion of the EEOC's Web site, that contains it. Slide 17, 18, and 19, we've kind of repeated the text, what's on the EEOC's Web site.

But, as you'll see, they focus on much of what Betsy and I have talked about thus far in terms of the major changes in the law, really focusing on the impact of substantially limits and the change in the definition of major life activities and ultimately the notion of regarded as disabled, as well.

So we thought that that would be a good resource for everyone listening to take a look at, and it's a good – provides a nice, concise summary of the changes, as well.

So, with that, I think it's time to take these changes and talk a little bit more about practical issues. (Kevin)?

Kevin Menke: Right. That's, I think what most of us in-house want to know, so how do we deal with this? I mean I think what some of the major points that you've made so far is that whether someone has a disability is not really going to be much of a question anymore, and we've got to watch out now, even if they don't have one, if we regard them as having one, we might be at risk for a discrimination claim.

So I'm certainly interested to hear what are some of the practical things that we, as in-house counsel, should consider doing to better protect ourselves as best we can from these, what I expect to be more ADA claims, starting in January?

Betsy Stivers: Well, we are going to see given that many, many, many more individuals will likely be considered as having a disability, that the affirmative obligation to provide reasonable accommodation will increase.

If they don't want you to have, to do an extensive analysis about whether a person is disabled, and if they're going to ask you to construe in favor of the employee, the definitions in the Act, then you're going to have a significant number of individuals who previously may not have been considered as disabled who now you, at a minimum, are going to need to interact with.

Now, obviously, the obligation to interact is a cornerstone of the ADA, and ultimately you're going to need to follow your processes around the interactive process, and do the individualized assessments and provide accommodations where they are found to be reasonable. If you don't do that, it may be an independent ADA violation.

The people on the front line are going to need to be trained or retrained to refresh them on the obligation to interact, the company is going to have to have a clear individualized assessment procedure for injured and ill employees.

Managers, in particular, are going to have to be coached on how important it is not to get into the person's diagnosis or condition, just keep them to the restrictions of limitations. We're going to see a greater need for managers to put effort into documenting legitimate, nondiscriminatory reasons for adverse employment actions, like performance management and terminations when you have a person who has a disability.

Now, looking at page 22, it is clear we're going to have to focus less and less on whether someone meets the ADA definition of disability. It may be something that you want to raise at the time of litigation, but at best it's going to be a loser, really.

Given what Congress has said the intent is going to be you're going to be focusing much more on what are the essential functions of the job, what – how are you going to find out what the employee wants, how are you going to address reasonable accommodations requests, and have your forms and your templates and guidelines already set-up so that you can communicate in away so that you're not letting anything fall through the cracks.

For example, if you have a company that says, "We'll keep your job for you if you're out on leave for a certain period of time but then we're going to have to fill your job," you have to make sure that you're interacting with that employee out on leave to find out are you going to be coming back soon, we're going to need to fill your job. Do you have a return to work date?

If it's an indeterminate return to work date, then you're fine, because you don't have to accommodate those, they're almost per se unreasonable, if the employee can't tell you when they're going to come back to work and you've waited, consistent with your company policy.

The other thing that's going to be very important is to remember your state law obligations. That's not in the presentation, but there's certain states that have even still a slightly higher threshold for finding a person disabled, or perhaps it's a lower threshold. It's easier in certain states.

My State, the State of Maine, is one of those. California may still have some issues that are more generous than the ADA, so if you're in one of those states, you really need to know what your state obligations are.

On page 23, there are areas of pitfalls where you may have an ADA obligation or some exposure under the ADA that were not previously obvious. For example, if you have a person who has performance or conduct problems that are or appear to be caused by medical limitations, your managers are going to have to know how to document it, how to go about the interactions, so that the person is getting the appropriate measure of protection under the ADAAA, but you are also following the road to appropriate performance management.

You need to be able to explore reasonable accommodations with people on STD, short-term disability, or workers comp programs to enhance the return to work effort. Some STD products have an accommodation provision and will pay up to a set amount for an accommodation that will help an employee return to work, get off disability and get back to work. Check your policies, maybe you have one of those.

When you're settling workers compensation cases, if you're not securing a resignation from the employee, and you're not getting a release of any ADA claims that they may have up to a certain point, then your ADA settlement may not protect you from an ADA claim just when you settle the workers comp claim.

Some companies, many companies, I would say most companies that I have had contact with back in the day when I practiced workers compensation, required that employees resign. That may or may not be problematic under your state's act, but if you're resolving it and the person is gone, you must have specific language that releases ADA claims, if you're going to really be done with it.

Frank Alvarez: Betsy, this is Frank. A couple of observations and thoughts on the points you're raising.

First of all, it seems to me that employers have to almost get over the notion that people with injuries or illnesses or who are having difficulty performing work because they're claiming to be injured or ill, whether it's an attendance issue, whether it's a performance or a conduct issue. I think in the past many people have said, "Well, these people are not disabled under the ADA, so I don't have to get into the nitty gritty of giving them a break or varying my uniform consistent approach to performance management."

I think those days are over, because I think in this environment you need to at least be able to tell the story that you have stopped and approached anyone who is claiming that they, their ability to do a job successfully or the way you'd like it is impacted by an injury or an illness, to talk to them and say, "Well, tell me what you want to do, tell me how we could make you successful"? And at least have an open ear to that.

I think that there's still a need to have that interactive dialogue unless you really want to roll the dice and take the position that people are not going to be disabled, and focus on what I call the disability status question. I think it's very important that employers think long and hard about whether they just want to deal with those employees, and let's assume for argument's sake that they are trying to catch a break when they really may not deserve one, they're the problem cases.

I think in those cases employers would be well served to stop and still have an interactive dialogue with them. If nothing else it puts the employer in a position of availing itself of the affirmer's defense that it still exists under the ADA to compensatory and punitive damages by showing that they engaged in a dialogue about in good faith about reasonable accommodations, even if they ultimately chose not to provide it.

So I think that there's – while there understandably is resistance to get involved in deep details about reasonable accommodation and interactive dialogue, because it takes so much time and nobody has the time to do it, if you're putting all your eggs in that basket, that the person is not going to be disabled, I think you're going to be living in a much more risky world.

The other thing I would just add is on the workers comp and STD side, to it, what I often see is that there's a focus on people in the workers comp end when they reach permanent or stationary status or maximum medical improvement, that somebody figures that they now have current restrictions and then I can start the accommodation process.

And I think one of the things that is going to be important is to engage in an interactive process much earlier on, when somebody is out on STD or workers comp, because those people are going to be much better able to say that they have an ADA disability, and it's no excuse that you're out on a leave of absence to failing to engage in a dialogue about reasonable accommodations that would eliminate the need for a leave of absence in the first place.

So I think there's some processes that may be owned by risk management or benefits that need to be integrated with traditional ADA reasonable accommodation, best practices, and is a way of reducing exposure going forward.

Betsy Stivers: I completely agree. We are really at the place of – I find it useful to think of STD and workers comp as being schemes that allow for wage replacement when a person is out, but you still have to look at the person and see what their condition is, and interact with them if you want them to come back. So I'm completely onboard with that.

Kevin Menke: But I'll tell you, from a manufacturing company that the problem we've had under the old ADA is everybody wants a full release to return to work. Oh, you can't come back until you've got a full release. Well, even in the current state of the ADA we know that that's really not the

standard. I mean you have to assess can they do the essential functions of the job without a reasonable accommodation.

I think we've gotten away with a lot because of the way the ADA has been interpreted narrowly, and I'm afraid that things that I'm not even aware of are going to start coming out of the woodwork when people apply this same standard that they thought you know that they got away with before. And that's just the practical fear I have in dealing with the large manufacturing company.

Betsy Stivers: I think that's where your job descriptions with essential function analyses are going to be important, because it is not unreasonable to say it's an essential function of this job to be a fulltime worker. It's an essential function of this job to show-up at the beginning of a shift, if that is the type of job you have.

And for jobs in manufacturing, jobs in call centers, jobs in – or receptionists, being able to have reliable, regular attendance and show-up on time and work 40 hours may be essential functions. You'll have to go with the analysis for your particular jobs, and it's – it may be reasonable to only allow a part time return to work, a ramping up process, if you will, for a limited period of time in those jobs.

But I think that your best defense is to have a legitimate set of essential functions, and if the person can't perform the essential functions of the job with or without reasonable accommodations they're not qualified. And I don't think that has changed under the ADA.

Kevin Menke: No, and I think that's a good point. And with that, maybe we should move into maybe the first scenario, on slide 25?

Betsy Stivers: Oh, right. This is one of those scenarios where it has a little bit of everything, a little bit for everybody.

We're starting off with Jeremy who is a job applicant, who comes in and discloses that he has ADD, attention deficit disorder, and requests an accommodation in the hiring process to be able to fill out his application in a quiet room. Do you have to accommodate this request?

Now, previously, concentration may not have been viewed as a major life activity, but now that it is, the answer to this question is likely you would have to accommodate the request. Just follow the protocol developed by your company in accepting requests for accommodations and analyzing them for reasonableness. I think that was – that's a pretty short, yes, you do.

Frank or (Kevin), do you have any additional insight into that?

Frank Alvarez: No, I think that that's fairly straightforward. I agree, it's – there's many people who were not considered disabled by virtue of certain learning disabilities, such as ADD, and I think that that's certainly going to change.

And we are – we should mention that the fact that the EEOC's regulations on substantially limits are forthcoming, and we don't really know exactly what they're going to say. What we know is that the EEOC has been directed to say something different than it has in the past.

What I think is kind of interesting about that is that much of what they said in the past, I think we've tracked closely to the legislative history, but it was the means by which people were excluded from the definition, from the protections of the ADA.

So the EEOC will have to come up with something different to describe, to define substantially limits, but I think it's going to be very perilous to take issue with somebody who claims to have a learning disability and not accommodate them when they present themselves as an applicant or an employee.

Betsy Stivers: I agree. So you accommodate him, he passes with flying colors in your application process, and you hire him. Then within a few months you find out that he's been coming to work with alcohol on his breath. You immediately schedule a meeting with Jeremy and his supervisor, Karen, but just before the meeting Jeremy cancels, saying that he needs to leave to attend inpatient treatment for alcohol addiction.

The first question is do you have to grant the leave? You haven't been employed long enough to have any leave protection under state or federal laws.

Well, this is interesting because it doesn't say that at the moment he has alcohol on his breath. There are certain medications that make it smell like you have alcohol on your breath.

So what you have here are two separate issues within, buried in one scenario. One is the conduct issue, are you going to deal with his conduct before he requested the accommodation? And that depends on your company policy. You would have to investigate, and if you want to I think that one of your options is to terminate him if you're considering the treatment of misconduct applicable to all, and that is misconduct verified prior to a request for accommodation. If you have that kind of a policy.

I think, though, that what you really end up needing to look at in this scenario is the request for accommodation. Time off for treatment would probably be a reasonable accommodation if you decide not to fire the person, and because alcohol dependence is considered a disability under the ADA, that hasn't changed.

There's no time in job requirement for an ADA accommodation, and that hasn't changed either. So the fact that the person doesn't have FMLA protection or state leave law protection necessarily doesn't change your analysis under the ADA.

Frank and Kevin, do you have any further insight into this one?

Kevin Menke: Well, I want to hear what Frank has to say, but I would just say I'd be worried about the whole timing of everything, and I'm sure that's what the hypothetical is pointing out. We have you know what information do we have that he's been coming to work with alcohol on his breath, how much real evidence do we have of the guy coming to work under the influence?

Maybe there's been some reports, people think they've been smelling alcohol, and then all of a sudden we schedule a meeting to talk about it, then he goes out for inpatient treatment for alcohol addiction, it's just certainly academically it looks like, well, maybe OK, we could terminate because we knew about this before, the conduct before this, he went out, but I'd be worried about it, I don't know.

Frank Alvarez: I would be worried, too. I would be worried, too. And, in fact, I think the whole notion of if you scheduled a meeting to talk about it, and if you, those people who were going to be in the meeting were deposed, they'd probably say, "Well, why'd you have the meeting"? "I had the meeting to figure out what the facts were, because we didn't know enough at that time to make a judgment as to whether it was appropriate to terminate somebody."

So I think it's just one of those exceedingly frustrating circumstances operationally, where you have a short-term employee who is now engaging in conduct issues at work. You call him in, you try to do the right thing, you try to have a little industrial due process, and then the person goes out on leave before you can do it.

And they're not even protected by the FMLA, and I think that's one of the big takeaways here is that one of the potentially unintended affects of, or consequences of the ADA Amendments Act is

that it really extends leave protections for many people who would not be entitled to leave under the Family Medical Leave Act.

Here, this person is a short-term employee, but as Betsy noted there's no length of service and, in fact, there's no upper limit of 12 weeks, like there is under the FMLA, and leave is one of the most frustrating things that employers have to deal with, and the EEOC is very clearly with support from the courts taken the view that leave is a form of reasonable or can be a form of reasonable accommodation absent showing of undue hardship.

So I think this, even though alcoholism was always considered a disability under the ADA, I think what you can think about or have your mind quickly go to is the notion of many disabilities that were not protected and many conditions that were not protected as disabilities under the ADA.

People need time off that's one form of reasonable accommodation that might be required, that would not have been required under the ADA right now, because there's a definition of disability and how it's been interpreted by the Supreme Court.

So I think that's an unintended implication potentially of the ADA Amendments Act. I think most employers in this case would swallow hard and have a conversation when the person came back.

And I guess the other practical tip that I might offer on this is that because you don't know how long this leave is going to last, I would probably send the signal sooner rather than later that there's something to talk about when the person gets back to work, with regard to some suspicion of alcohol use on the job, because you still may want to terminate the person if you find out they violated a work rule by being under the influence of alcohol when they returned.

Kevin Menke: Yes, and I know we're running kind of short. I want to make sure we get to questions in our last slide. Can we jump real quick to slide 27, Frank? Can you cover that one real fast?

Frank Alvarez: The litigation implications?

Kevin Menke: Or, no, the scenario confronting workplace safety risks?

Frank Alvarez: OK, let's see. Real quickly, this is just – we wanted to offer a scenario that focused on people who are presenting themselves at work and in a manner which raises some concern about potential direct threat here. And your supervisor calls to tell you that Andrew recently seems to be stressed out, he's scaring coworkers, who are coming to the supervisor, and the supervisor wants to know what to do.

The – when asked, Andrew tells his supervisor that he's been diagnosed with acute stress disorder and borderline major depressive disorder. He's also told the supervisor that the machine he operates has been talking to him and telling him to do bad things. I've actually had situations like this, or clients that have had situations like this, where they've had to deal with these situations.

And he explained he's not taking his prescribed medication because it makes him sleepy, and he's concerned about his ability to operate equipment if he takes it.

Now, should the (intent), it's like one of those situations where when you sit down with the employee and ask them if they're having some issues and if everything is OK, you're scared to get the answer.

But I think the manager should have asked. I think the manager had some notice that people were concerned about his conduct. I think those are the types of situations that often drive claims of regarding someone as being disabled, and if the person is actually a threat you want to deal

with that threat as a reasonable person would, because you don't want to be accused of some negligence down the road.

But I think here the way to respond, which is the second question, is to immediately take the person out of work because there's some reason to believe that the person is no longer fit for duty at that time, and to have them evaluated as you normally would under the (EDA), with getting some medical input from the employee's treating physician, potentially a second opinion from a specialist if necessary, to evaluate whether this person does pose a direct threat of harm.

And I think that's the gist of this scenario on slide 27, but it'll become more and more important for employers to have a process in place for addressing concerns about direct threat, even with people who don't have psychiatric conditions but have physical injuries, that may be bad backs or carpal tunnel, or something else that raise concerns about this continuing safety of that individual or others based upon the condition.

Kevin Menke: Thanks. Can we – why don't look at, real fast, slide 29 and 30, and then we'll answer a couple of questions.

Frank Alvarez: Yes, on litigation implications, on slide 29, it's a transition slide, and then we go to slide 30, I think here what we wanted to end with is the notion that whereas in the past there's more than 90% of ADA lawsuits have been won by employers, usually based upon an employee's or a plaintiff's inability to prove disability under the ADA. That's all going to change.

And what that may lead to and employers may not fully appreciate that is that now you're going to start to have to litigate the more difficult ADA issues, that have always been out there but we've never had to deal with in litigation because a plaintiff has never gotten past first base in proving that they're disabled.

So issues like what is the scope and meaning of reasonable accommodation, undue hardship, or what's an essential job function? Those will begin to bubble up, and employers need to be prepared to deal with that.

The EEOC in September of 2008 has issued a guidance on the ADA's application to conduct and performance standards. It is a very extensive discussion in that guidance, which you can get on the EEOC's Web site, to when workplace standards are job related and consistent with business necessity.

These are the types of almost direct disparate impact cases or direct threat cases that will emerge under the ADA, and as I alluded to in that prior scenario the whole notion of what workplace risks need to rise to in order for them to be a direct threat of harm under the ADA, which is the qualification standard that relates to health and safety under the ADA, is something that we will begin to see litigated much more aggressively.

And these are fascinating questions, at least for lawyers, if not troublesome ones for employers, and I think that employers have to begin to set the stage, too, in what they're doing as a practical matter in the individualized assessment, in getting input from doctors so that they can, their judgments can stand a much better chance of withstanding scrutiny in ADA litigation.

Kevin Menke: Thanks. We have a few minutes left where we can take some questions, and I will remind everybody if you want to ask a question go to the chat box in your lower left-hand corner and type it in, and we'll see it. And before I was last kicked off again from the Web site I wrote down some of the questions that were there.

One of them, and I – you sort of touched on it, Frank, but it's the big question I think that we all want to know, what's your prediction? Do you think that these amendments will be applied retroactively? We all, many of us have cases outstanding now, what do you think about that?

Frank Alvarez: I think it's going – there's nothing in the statute that kind of speaks to it directly, and I think there is some law out there that favors a presumption in favor of retroactivity. I think it's – I really don't have a great feel for how it's going to come out, in all honesty, (Kevin).

I think that employers need to be prepared for it, and I think the argument that favors it is that in many ways the statute has not been changed. It's principles of construction in the statute that have been changed, and I think that may lend some credence to the fact that employers have had – been on sufficient notice of obligations.

And the other thing that could happen here is that without even labeling something as being retroactively applied, courts can just adopt a view of the disability definition that's much more expansive. Taking judicial notice of what the original intent of the ADA was intended to be, and that might be an interesting way to sidestep the entire issue.

Kevin Menke: Interesting.

One other question that was there, many of us for workers comp injuries we try to hurry up and get an employee back to work under what we call light duty you know sort these paperclips, whatever you can do to get them back to work and off the workers comp payments.

The question is focused now under the ADA Amendments Act should we stop doing this? Has anything really changed with respect to that? Or there any watch outs for either one of these?

Frank Alvarez: Well, I think transitional work programs are very important. I think you always have to evaluate not only the employment law risk but the other operational risks, including workers comp liability. I think transitional work programs can save that employees who otherwise would never get better and return to full productive work. So I don't think there's any reason to stop them.

I think that employers must be mindful in terms of the priority of responses, however, to injured workers. And that they shouldn't jump necessarily to light duty without first evaluating whether reasonable accommodations could keep somebody fully employed, performing their essential job functions.

Betsy repeatedly made the point about the importance of functional job descriptions, and I think that that is particularly relevant in the context of transitional work programs, return to work programs.

Betsy Stivers: I think when you – I'm sorry – when you have a transitional work program or something that is a work hardening type program, one of the risks is that you're going to have a supervisor out there that keeps stringing it along and along, and along and along. And then they start to lose their minds, saying, "I can't do this anymore."

And to some extent they have demonstrated a reasonableness of having a part time or a light duty set of functions in that given job, so one of the manager, pieces of manager training that you need to do is to make sure that they understand that these are transitional, they're designed to be short-term, this is not a part time job, it is a fulltime job.

And if the person can't perform, if they can't get up to fulltime then you have some decisions to make, but you don't want to have managers stringing that along unnecessarily. And you don't want them substituting their own judgment for that of physicians.

Kevin Menke: Absolutely.

And on that note we have to end our Webcast today. I tell you, 60 minutes just never is enough time. We really appreciate our speakers, Frank Alvarez from Jackson Lewis, and Betsy Stivers, from UNUM.

I know there were other questions. We will try to answer as many of those and post those answers on the Web site.

On behalf of the Employment and Labor Law Committee I want to thank our speakers and thank the listeners, and especially thank Jackson Lewis, which is our Committee Sponsor, for supporting this Webcast and continuing to support the ACC and our Committee.

Thanks, everyone, and look for an FMLA Webcast in the near future on the FMLA changes to the regulations. Thanks, everyone.

END