Federal Labor Regulations Affecting Farm Employers

Presented by:

Christopher J. Schulte
CJ Lake LLC
Phone: (202) 465-3000
Email: cschulte@cj-lake.com

Joshua H. Viau
Fisher & Phillips LLP
Phone: (404) 240-4269
Email: jviau@fisherphillips.com
It’s all hypothetical …

- No admissions against interest, please.

- You should consult with your own counsel for legal advice so you can speak candidly and obtain counsel that is attorney/client privileged.

- What we’ll cover here are summaries and “heads up” comments and are not a substitute for advice from a lawyer as counsel to your business.
You Need Contingency Plans For HR Issues

- Anticipate predictable HR issues
- Plan your initial response
- Educate the possible first responders
- Identify your advisors/experts
- Successfully resolve the issues
- Minimize or avoid legal liability
Overview Of This Session

- ADA
- FMLA
- Civil Rights Laws – Harassment
- Your questions and comments welcome
The Americans With Disabilities Act
Americans with Disabilities Act ("ADA")

- Covers all employers with 15 or more employees.
- Prohibits discrimination in employment on the basis of a disability:
  - Disability defined as “a physical or mental impairment that substantially limits a major life activity.”
  - Can also have a record/history of disability or be regarded as having a disability.
  - Must also be qualified to perform the essential functions or duties of a job, with or without reasonable accommodation.
  - Employer obligated to provide a reasonable accommodation.
  - Must engage in the interactive process when applicant or employee requests a reasonable accommodation.
Scenario

Greg, a new employee, injures himself off the job in an accident while on his four-wheeler. He asks you to assign him to a job with light duty.

- What should you do now?
- What laws should you consider?
- What documents or policies should you review?
What Is A “Disability”? 

An individual with a disability is a person who has:

 A physical or mental impairment that substantially limits one or more of the major life activities

 A record of having such impairment

 Is regarded as having such an impairment
Not Impairments

- Physical characteristics
  - Eye color, hair color, etc.
- Personality traits
  - Bad temper, etc.
- Environmental, cultural, and economic characteristics
  - Poverty, lack of education, illiteracy, or a prison record
- Sexual orientation
Temporary Or Intermittent Conditions

- A temporary or intermittent condition is an impairment that is “episodic or in remission is a disability if it would substantially limit a major life activity when active”

- Examples:
  - Cancer
  - Epilepsy
  - Lupus
  - Asthma
Temporary Or Intermittent Conditions

- Temporary, non-chronic conditions of short duration that have little or no long-term or permanent impact are typically NOT impairments, for example:
  - Flu
  - Pneumonia
  - Broken bones
  - Appendicitis
  - Sprained joints
  - Concussions, etc.
Mitigating Measures

- Effects of mitigating measures shall **not** be considered when determining whether an impairment substantially limits an MLA
  - Other than ordinary eyeglasses or contact lenses
  - Still relevant to reasonable accommodation analysis
- Side effects of medications can create a disability
ADAAA Best Practices

- Don’t nit-pick whether the condition is a disability - it probably is
- Keep an open mind in the interactive process
- Focus on accommodations
- Request documentation from qualified medical personnel before making accommodations
- Every employee request and adverse job action based upon a medical condition should be considered as a potential ADA claim
Request For Accommodation

- The burden is on employer to recognize accommodation request
- No formalities required
- Accommodation requests need not come directly from employee
  - Spouse
  - Parent
  - Physician
  - Job coach
  - Union rep
Request For Accommodation

- There must be an individualized inquiry and an interactive process to determine what accommodations are appropriate and needed
- Recognize and handle accommodation requests
  - Do not say accommodation cannot be provided!
  - Refer to HR or other appropriate resource
  - Protect confidentiality
- Ensure employee who receives an accommodation is not mistreated by co-workers
Timing Of Requests

- Reasonable accommodation requests may be made at any time
- An employee does not lose the right to request an accommodation because s/he did not do so during the application stage
- Employees may make more than one request for reasonable accommodation
Reasonable Accommodation Examples

- Making existing facilities accessible to disabled individuals
- Acquiring or modifying equipment or devices
- Job restructuring
- Part-time or modified work schedules
- Reassigning to a vacant position
- Providing qualified readers or interpreters
- Adjusting or modifying examination, training materials, or policies
NOT Reasonable Accommodations

- Creating a new job
- Creating a light-duty position
- Bumping another employee
- Promoting the disabled worker
- Providing personal equipment (wheelchair, hearing aid, etc.)
- Eliminating essential functions
- Lowering production or performance standards
- Excusing misconduct
The Interactive Process

- Failure to engage in the interactive process has significant legal consequences
- Some courts have held such failure is a per se ADA violation
- Some courts have found employers’ failure to engage in the interactive process constitutes evidence of bad faith
Direct Threat Exception

An exception for employers who refuse to hire or employ persons who pose a “direct threat” to the health and safety of other employees or other persons associated with the business.
Factors For Meeting Direct Threat Exception

- Nature of risk
- Duration of risk
- Severity of risk
- Probability of harm
FMLA Basics
Family and Medical Leave Act ("FMLA")

- **General Provisions**
  - **Up to 26 weeks of leave** 12-month period
  - To care for child, parent, or spouse who is a covered servicemember and suffered a serious injury or illness in the line of active military duty

- **Who is eligible?**
  - The employee must have worked at least 1,250 hours during the 12 months prior to the start of FMLA leave.
  - The employer is one who employs 50 or more employees within a 75-mile radius of the worksite.
Family and Medical Leave Act ("FMLA")

- General Provisions
  - Up to 26 weeks of leave 12-month period
  - To care for child, parent, or spouse who is a covered servicemember and suffered a serious injury or illness in the line of active military duty
- Who is eligible?
Family and Medical Leave Act ("FMLA")

Eligibility:
- 1250 hours in most recent 12 months
- Birth/adoption, prenatal care
- Care for the employee’s spouse, child, or parent with a “serious health condition”
- Employee’s own “serious health condition”
- Military related time away from work needed
Family and Medical Leave Act ("FMLA")

- Points to consider:
  - Don’t ignore absences
  - Don’t play doctor
  - Start the clock running
  - Run leaves concurrently
  - Seek assistance early
  - Use right forms and follow company procedures
  - Only allow temporary light duty jobs
  - Document leave requests and respond to them in writing
  - Require appropriate medical information
  - Don’t encourage employee to “just quit!”
Scenario

Sue’s mother is suffering from a chronic medical condition. She requests FMLA leave to take her mother to Las Vegas before she is too frail and unable to travel.

- What should you do now?
- What laws should you consider?
- What documents or policies should you review?
Communication With An Employee’s Doctor

- After employer has given employee an opportunity to cure any deficiencies in the medical certification, the employer may:
  - Contact the employee’s health care provider for clarification and/or authentication
    - **Clarification** - Help in understanding the handwriting on the medical certification or the meaning of a response
    - **Authentication** - Requesting verification that the information was completed and/or authorized by the health care provider
Communication With An Employee’s Doctor

- Make contact through health care provider, HR professional, leave administrator, or management official
- Employers may not ask health care providers for additional information beyond that required by certification form
- It is employee’s responsibility to clarify a medical certification
- If employee or family member chooses not to authorize disclosure of health care information, employer may deny FMLA leave on grounds that certification is unclear
Fitness-For-Duty Testing

- If employee uses FMLA leave due to their own serious health condition, employer may require a fitness-for-duty medical certification as a condition to restoration.

- Best practice: Attach job description

- Similarly-situated employees must be required to provide such documentation

- Policy must be communicated directly to employee before FMLA leave starts
Fitness-For-Duty Testing

- What type of medical certification may be required?
- Address employee’s ability to perform essential job functions
- Employer should give employee a list of essential job functions and state that the certification must clear him or her to do those functions
Fitness-For-Duty Testing

- Employers may request fitness-for-duty certifications of employees on intermittent FMLA leave, up to once every 30 days, if there are reasonable safety concerns
- Employer may seek clarification or authentication from employee’s physician
- No second or third opinions
TITLE VII
OF THE CIVIL RIGHTS ACT OF 1964

• Summary
  - Applies to employers engaged in interstate commerce with at least 15 employees
  - Prohibits discrimination because of race, color, national origin, religion, sex, pregnancy

• Penalties
  - Employees or EEOC can sue for back wages, reinstatement, and attorney’s fees
  - For intentional discrimination, employees can sue for compensatory and “capped” punitive damages
  - Jury trial allowed
  - Rule 23 class action available
ADEA
Age Discrimination in Employment Act

• Summary
  ▶ Employers engaged in interstate commerce with at least 20 employees
  ▶ Prohibits age discrimination in employment, including benefits
  ▶ Covers employees 40 years of age or over

• Penalties
  ▶ Employees or EEOC can sue for back wages with jury trial
  ▶ Can sue for attorney’s fees
  ▶ Double damages if violation is willful
  ▶ Opt-in class action available
Hostile Work Environment

- Based on a protected characteristic.
- Objectively severe and pervasive enough to create a work environment that a reasonable person would find hostile or abusive.
- Hostile work environment cases are often difficult to recognize, because the particular facts of each situation determine whether offensive conduct has crossed the line from "ordinary tribulations of the workplace, such as the sporadic use of abusive language... and occasional teasing," to unlawful harassment.
Final Questions

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