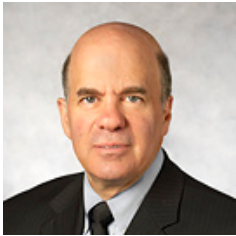


## NEW DISCLOSURE REQUIREMENTS FOR RETIREMENT PLAN PARTICIPANTS

ROBERT BRANT & STEVE KISLING



The Department of Labor has issued two new rules regarding retirement plan disclosures. The first rule relates to fee disclosures to plan fiduciaries by service providers. The second rule requires retirement plan fiduciaries to make certain disclosures to plan participants so they can make informed decisions regarding the management of their individual plan accounts. The following is a brief summary of these new rules:

### A. DISCLOSURES FROM SERVICE PROVIDERS

This rule requires that retirement plan fiduciaries (such as employers) receive in writing from certain plan service providers (such as registered investment advisors and record keepers) the information they need to assess the reasonableness of the fees paid to such service providers from the plan. These rules apply to most retirement plans (including profit sharing/401(k) and defined benefit plans) but do not apply to IRAs, SEPs and non-ERISA 403(b) plans. Non-compliance with these rules could result in fiduciary violations and prohibited transactions which could have adverse consequences on the service providers and even the employer. This rule is scheduled to become effective January 1, 2012.

### B. DISCLOSURES TO PLAN PARTICIPANTS

This rule only applies to defined contribution plans (e.g. profit sharing, 401(k) and ERISA covered 403(b) plans) which allow participants to direct the investment of their accounts. The information that must be disclosed to participants includes an explanation of (1) plan fees and expenses paid from plan assets and (2) the specific investments offered under the plan.

This rule is effective for plan years beginning on or after November 1, 2011. Therefore, for calendar year plans, compliance will generally be required on January 1, 2012.

However, the Department of Labor has provided a transition rule pursuant to which the initial participant disclosure notice must be provided within 120 days of the effective date (e.g. April 30, 2012 for calendar year plans).

If you have not yet received any information regarding these new rules, you should contact your plan record keeper, plan investment advisor or us to commence the process of complying with the required disclosures by the effective dates described above.



- Sheri Auttonberry organized and led the second highest grossing team in the First Annual Dress for Success Power Walk on April 30. Dress for Success is an international not-for-profit organization that promotes the economic independence of disadvantaged women by providing professional attire, a network of support and the career development tools to help women thrive in work and in life.



Dress for Success Power Walk "KatzWalkers" (from left to right):  
Cindy Taylor; Sharon Nordloh; Sheri Auttonberry;  
Jill Pinotti; Amber Moss

- Andy Berger has been named President-Elect of the Jewish Federation of Cincinnati, which convenes the Jewish Community's leaders and serves as a voice for the community. The Federation mobilizes the resources needed to address local and global needs, raising and distributing over \$6 million each year to key social service, educational and cultural organizations. Andy has also been appointed to the Executive Committee and as a Chair of (INSIDE KTBH, pg. 3)

## ADA AMENDMENTS ACT REGULATIONS FINALLY FINAL MATT RICH



This is not the first time the Americans with Disabilities Act Amendments Act (“ADAAA”) has appeared in the Reporter, nor will it likely be the last. But now we know what we’re working with: the regulations implementing the ADAAA

were finally announced by the Equal Employment Opportunity Commission in March and are effective as of May 24, 2011.

The overall upshot of the ADAAA has not changed from its earliest iteration: the Act clarifies the definition of disability in the Americans with Disabilities Act (“ADA”) to cover more American workers, a reaction to a series of Supreme Court decisions limiting the protections of the ADA for individuals suffering from conditions like cancer, diabetes and epilepsy.

Under the ADAAA, courts must now construe the definition of disability broadly in a way that would favor coverage under the ADA. While the words used to define an actual disability remain the same – a physical or mental impairment that substantially limits one or more of that person’s major life activities – the interpretation of almost every aspect of the definition has been broadened to cover more workers.

Impairments that are transitory and minor in nature still fail to qualify, but many other episodic or intermittent conditions will now meet the definition of a disability. Specifically, the following regulatory clarifications have made it easier to gain coverage:

- A broader definition of physical impairment that includes physiological disorders or conditions, disfigurement or loss of a body part and that affects one or more of the systems of the body;
- A broader definition of mental impairment that includes any mental or psychological disorder, such as intellectual disability, organic brain syndrome, emotional or mental illness or specific learning disability;
- A lower threshold for finding a substantial limitation to a major life activity – a disability does not have to prevent or be a significant or severe restriction of a major life activity to be substantially limiting;
- Major life activities have been expanded to include bodily functions and the operation of individual bodily organs;
- Other than eyeglasses and contact lenses, medications or other measures taken to treat the physical or mental impairment cannot be considered when determining whether an individual is substantially limited in a major life activity (thus, the question becomes “Without this medication, would the employee be substantially limited in a major life activity?”); and

- Conditions, diseases, disorders or other impairments that are episodic or in remission qualify as actual disabilities if they would be substantially limiting when present.

Additionally, the ADAAA addresses coverage for those employees who do not have an actual disability, but who are “regarded as” disabled by their employers. An individual without an actual disability may still qualify for coverage under the ADA if he or she “[i]s regarded by the covered entity as an individual with a disability; [i.e.,] the individual has been subjected to a prohibited action because of an actual or perceived impairment that is not both transitory and minor.” The ADAAA clarifies that individuals who are “regarded as” disabled do not need to be offered a reasonable accommodation (because there is no true limitation or disability to be accommodated), but can avail themselves of the anti-discrimination protections of the ADA based on their employers regarding them as having a disability.

“While the words used to define an actual disability remain the same...the interpretation of almost every aspect of the definition has been broadened...”

Practically speaking, the ADAAA will lead employers with over 15 employees (the coverage limit for the ADA) to spend less time determining whether an individual has a disability that would warrant protection, and more time determining whether the disability may be reasonably accommodated without undue hardship to the business. Remember that the touchstone question in this area is whether the employee may perform the essential functions of his or her job with or without a reasonable accommodation. If the answer to that question is no, then there is no obligation to hold the employee’s position open or to retain the employee, but that is not an answer that should be reached lightly or without careful deliberation. In this area, as in most areas of employment law, an ounce of prevention is worth a pound of cure.

Because the essential functions of the position are often bolstered by clear and comprehensive written job descriptions, and because essential functions/reasonable accommodations analyses will be more frequent given the ADAAA, employers may want to prepare or update their written job descriptions. If you would like assistance with your job descriptions or have any questions regarding the ADA or ADAAA, please contact us.

## INSIDE KTBH (CONT.)

- the Audit Committee of Hebrew Union College - Jewish Institute of Religion, which has campuses in Cincinnati, New York, Los Angeles, and Jerusalem.
- Since our last publication, Bob Brant has received multiple awards for leadership and philanthropy. He is the 2011 honoree of the Jewish Community Center Adams Golf Classic, which honored Bob for his significant leadership for both the JCC and the Jewish community. In addition, Bob was recognized by the Greater Cincinnati Planned Giving Council as a recipient of one of the Council's Voices of Giving Awards for his work in advising and structuring planned gifts on behalf of his clients.
- In July, Brad Haas will begin his third year as Chairman of the Board of Big Brothers Big Sisters of Greater Cincinnati. Big Brothers Big Sisters serves over 1300 children locally and strengthens their lives and our communities by making meaningful, monitored matches between adult volunteers (Bigs) and children ages 6 to 18 (Littles). During his tenure, Brad has overseen two golf outings, a Roast, two 5k runs, a host of other fundraisers, as well as some new fundraising initiatives for the organization, including Bowl for Kids' Sake events and a corresponding event for local law firms sponsored by Lexis-Nexis.
- Jody Brant, Bill Russo, Brad Haas and Mark Jahnke presented at the Next Generation Institute at the Goering Center at the University of Cincinnati College of Business. The Next Generation Institute is an intensive 12-month program to help family businesses plan for succession of ownership and management.
- Dan Utt and Matt Kitchen represented Cincinnati Children's Hospital Medical Center in the lease transaction involving the historic Vernon Manor Hotel property. The Vernon Manor Hotel was converted into a new office building, with adjoining parking garage, that is now being leased by Cincinnati Children's Hospital for offices and support functions. The lease transaction was a collaborative effort involving Cincinnati Children's Hospital, Al Neyer, Inc., Real Estate Enterprises for African American Leaders, LLC, PNC Bank and the City of Cincinnati.
- Tedd Friedman helped our client Viking Partners acquire and restructure debt on a shopping center in Michigan and an office building in North Carolina.
- John Gierl recently represented BridgeStreet Worldwide, Inc. in connection with a corporate restructuring and amended credit facilities with its senior lenders Credit Suisse and Longacre Capital. Based in Virginia, BridgeStreet is a leading international provider of serviced apartments.
- Mark Jahnke and his wife, Karen, have been appointed as Co-Chairs of United Way's Success By 6 program. Success By 6 is the largest funded United Way effort and coordinates programs designed to assure that students in our region are prepared for kindergarten. Mark and Karen welcomed their third granddaughter, Valerie Rath, on January 1, 2011 (a great and easily remembered birthday, 1/1/11).
- Wijdan Jreisat and her husband, Patrick Points, were featured in an article in Venue Magazine as part of their work with Social Venture Partners, a non-profit they helped found. Aside from the great work of SVP, the article's photos have drawn comments. Of particular note was the American Gothic-style pose the two struck at Gorman Heritage Farm (complete with pitchfork for Patrick and poultry for Wijdan, who had rushed from a court appearance and needed to "farm" up her outfit...hence, the live chicken she was holding in the photo).
- Wijdan Jreisat and Matt Rich successfully defended an age discrimination claim in which the plaintiff sought over one million dollars in compensatory damages, winning a summary judgment motion in Kentucky federal court that resolved the case in favor of the employer without the need for a trial.
- Matt Rich and his wife, Cathy Howard, welcomed their first child, a boy named Ethan Elliott, on December 2, 2010. Ethan actually chose one hour before the oral argument in the above-mentioned age discrimination case to make his appearance, a fact that was duly noted on the record that morning.
- Bill Russo recently completed his second year of teaching Federal Income Tax at the University of Cincinnati College of Law. Bill has been an adjunct faculty member at his alma mater for the last 15 years.
- Turning 50 is a big deal at Katz Teller. Many brave Katz Teller attorneys risked life and limb (okay, maybe just a few welts and some stained clothes) to celebrate Dan Utt's 50th birthday with a rousing game of paintball, followed by a private outdoor reception at Montgomery Inn. To honor Dan's love of the open water, Dan is now also the proud owner of his own ship captain's hat and a themed flag for his vessel (his fellow attorneys were even kind enough to propose several options for his consideration).
- In his spare time, Dan Utt is actively involved in the Southern Ohio lacrosse community. He has coached lacrosse for the past six years and his Mariemont MS girls' team recently completed an undefeated season. This summer he is coaching a U-15 girls' all-star team composed of players from the Southern Ohio area that will compete in tournaments in Raleigh, NC and Orlando, FL.

**SMOKERS LIGHTING UP AT THE PROSPECT OF PROTECTION UNDER THE ADA**

**MATT RICH**



**W**ith the advent of the Americans with Disabilities Act Amendments Act (“ADAAA”) comes the possibility that smoking and people who enjoy it may finally have legal protection under federal law.

One expected outgrowth of the ADAAA is that previous judicial decisions holding that nicotine addiction is not a disability, whether because that finding would render almost 25 to 30 percent of the American public disabled (per one Maryland court) or because it does not, in and of itself, constitute a physical impairment (per a New Hampshire court), might be undermined by the new, more expansive definition of disability ushered in by the ADAAA.

The argument would go like this. The ADA provides that employers may not discriminate against qualified individuals with a disability because of that disability, whether in job application procedures, hiring, advancement, discharge, compensation, job training or other terms, conditions and privileges of employment. After the ADAAA, a plaintiff may argue that nicotine addiction is a physical or physiological (possibly even psychological) impairment that affects the respiratory system and can substantially limit the major life activity of breathing or that affects the central nervous system and can substantially limit the major life activity of concentrating (or any number of other combinations). Courts have now been instructed to interpret all of these terms broadly in favor of coverage. Thus, where it was once clear that coverage would be denied, it may now be more of an open question.

In addition to potential discrimination claims, there is also the possibility that if nicotine addiction is a disability, employers may have a duty to reasonably accommodate what comes with the

addiction (i.e., the need to smoke) in some way that does not violate existing smoke-free workplace policies (e.g., allowing an employee a break, off-the-clock, to smoke in his or her vehicle). If there is support for the position that nicotine addiction is a disability, employers can expect employees to start making these types of requests and will need to determine on a case-by-case basis whether the requests are reasonable in nature.

For smokers, this potentially favorable change in the law could not have come at a better time. Rising health insurance costs have led some companies (in the 21 states that do not protect smokers from discrimination as a matter of state law, including Ohio) to ask applicants whether they smoke and to refuse to hire or otherwise disfavor in hiring those who answer that question in the affirmative. A New York Times article from earlier in the year cites hospitals in Florida, Georgia, Massachusetts, Missouri, Ohio, Pennsylvania, Tennessee and Texas as having adopted a practice against hiring smokers. Kentucky law currently prohibits such discrimination, but does allow employers to treat smokers differently in the portion of health insurance costs employees must pay themselves.

One thing that remains clear is that employers are free to adopt policies regarding smoking in the workplace. However, whether the practice of disfavoring smokers in hiring will stand up to scrutiny now that the ADAAA regulations have become final is a question the courts will decide. At present, no such cases have made their way through the system, given that the regulations only became final and effective on May 25, 2011. That said, regulating employee (or applicant) smoking outside of the workplace or treating those who smoke adversely because they smoke could be dangerous if courts prove willing to entertain disability claims by smokers after the ADAAA.

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