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## The unintended adverse consequences of the ADA

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When I was in college, I had an incredible professor who used to talk about the “unanticipated evil consequences of virtuous social action.” I had no idea what he meant but he sounded so regal that I wrote down what he said every time until it became indelibly etched in my mind.

I heard my professor’s voice when I read the EEOC’s new regulations on the ADA as amended. While the ADA is indeed virtuous social action, it is now even riskier than before to try to help an employee whom you suspect has a physical or mental problem unless he or she asks for help first and here’s why.

By way of background, a disability is a physical or mental impairment that substantially limits one or more “major life activities.” An employer cannot discriminate on the basis of: (i) current disability; (ii) past disability or (iii) perceived (regarded as) disability.

Perhaps the biggest expansion of the definition of disability relates to the “regarded as” disability prong. More specifically, the law now provides that an individual may be regarded as having a disability if he or she is subject to adverse action because of an actual or perceived physical or mental impairment, regardless of whether the impairment limits or is perceived to limit a major life activity.

This is a very easy standard to meet. Indeed, in its new regulation, the EEOC all but invites individuals to bring claims under the “regarded as” prong without having to prove that the individual actually has or had an actual disability as defined by the ADA. And, here’s where the unintended adverse consequences come into play.

Assume an employee’s performance is declining and you see what you believe to be is clinical depression based on personal experience or exposure. Ask the person if they are depressed and their depression may lift when they realize that they now may have a viable “regarded as” disability claim if they subsequently are subject to an adverse employment action. The well-intended question creates an issue of fact for the jury as to what was the employer’s true motivation for the adverse action.

Employers need to train their managers to focus on performance or behavioral deficiencies without inquiring or speculating as to whether there is a physical or mental cause. This counsel is particularly important for health care and social service employers whose managers “know”

that, at times, the workplace issue is but a symptom of some underlying physical or mental problem.

What should the manager do if the employee responds to counseling, discipline or an evaluation by disclosing a physical or mental accommodation?

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