

**Changes in the Workplace: Recent Amendments to the
Americans with Disabilities Act**

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While 2008 will certainly be remembered by all Americans for the historic election we recently witnessed, a select group of us will also remember it for the expansion of employee rights in the amendments to two federal acts – the Americans with Disabilities Act ("ADA") and the Family and Medical Leave Act ("FMLA"). This article focuses on the more recent amendments to the ADA, but employers should always be aware that often the ADA and the FMLA overlap in their coverage of employees, particularly those employees requesting leave for personal health conditions.

The article will set forth the changes implemented by the ADAAA and the likely impact those changes will have on employers and employees. It will also discuss proactive steps that employers can take to ensure compliance with the ADAAA by January 1, 2009.

Introduction to the ADAAA

In 1990, Congress passed the ADA in an effort to protect disabled individuals from adverse employment actions. The ADA applies to employers with fifteen or more employees, and precludes employers from discriminating against qualified individuals in the context of employment. In addition, the ADA requires employers to provide reasonable accommodations to employees who qualify as disabled under the Act. Over the years, the Supreme Court has narrowly defined various portions of the Act, making it increasingly difficult for employees to qualify for the protections afforded by the ADA.

On September 25, 2008, President Bush signed legislation that significantly broadened the scope of protection of the Americans with Disabilities Act. This legislation, known as the ADA Amendments Act of 2008 ("ADAAA") was drafted, in part, to reject recent Supreme Court decisions that effectively narrowed the definition of "disability." Whereas under the ADA, the critical inquiry was whether an employee was a "qualified individual with a disability," as of January 1, 2009, the focus under the ADAAA will turn to whether covered employers have effectively accommodated disabled employees and applicants.

Likely Impact of the ADAAA

The overall effect of the ADAAA will be that more employees will be defined as having a "disability" and will qualify for reasonable accommodations and other protections under the Act. This will likely increase the number of disability discrimination lawsuits filed under federal law. In addition, it is likely that the focus of such lawsuits will move from whether a person is deemed to be disabled toward the questions surrounding the employer's actions and the motivations for such actions. The bottom line is that every long-term physical or mental condition may now be considered a disability, one which may require accommodation in the workplace.

Changes Resulting from the ADAAA

The ADA defines a disability as "(1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) a record of such impairment; or (3) being regarded as having such impairment." Although the amendments fundamentally maintain this definition, the ADAAA forces a broader interpretation of its key terms.

"Substantially limits": In deciding ADA cases, the Supreme Court had defined a disability as a condition that "substantially limits", or prevents or severely restricts, a major life activity. Under the ADAAA, Congress rejected this narrow definition, making it clear that it intended to apply a less demanding standard. Congress did not provide a new definition in the Act, but has directed the Equal Employment Opportunity Commission ("EEOC") to promulgate new regulations regarding the definition of a "disability" consistent with the ADAAA. The EEOC, given its stated purpose, has typically shown a tendency toward very broad interpretations of terms under the ADA, in favor of the employees.

"Mitigating measures": The Supreme Court narrowed the group of people covered by the ADA when it held that mitigating measures, such as medication or devices, are to be considered when determining whether a person's condition substantially limits him in a major life activity. The ADAAA rejects this finding, and states that the ameliorative effects of such measures are not to be considered in the analysis. The ADAAA makes one exception – for corrective eyewear. The practical effect of this is that while an employee with epilepsy or an allergy that is well controlled with medication would not be considered to have a disability under the Supreme Court's interpretation of the ADA, they will be protected under the ADAAA.

"Major Life Activity": While the Supreme Court had defined a major life activity as an activity that is "of central importance to most people's daily lives", the ADAAA has set forth a non-exhaustive list of such activities, including caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, working, and major bodily functions (including immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions). The ADAAA also clarifies that an impairment need only substantially limit one major life activity. Furthermore, a condition that is episodic in nature will be considered a disability if, while active, it impacts a major life activity. The bottom line is that almost every long term condition will now impact a major life activity.

"Regarded as": Under case law interpreting the ADA, an individual was "regarded as" having a disability, and therefore protected, only if he could show that the employer perceived the individual as having a substantially limiting impairment. The ADAAA drastically expands this definition by removing the requirement that the impairment be substantially limiting. The ADAAA states that a person is now "regarded

as" having a disability if he "has been subjected to an action that is prohibited under the Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." The ADAAA does note that the "regarded as" definition does not apply to conditions that are transitory (lasting 6 months or less) or minor. The practical effect of this is that even if an employee does not have a disability as defined under the ADAAA, but is perceived to have one by the employer, and the employer fires or demotes him based in part on this perception, this could be a violation of the ADAAA.

Though the ADAAA dramatically expanded the "regarded as" definition, it also provided a safe haven for employers by stating that an employer is not required to provide a reasonable accommodation to an individual who is covered only under the "regarded as" prong of the Act. Therefore, this section of the Act will most likely be impacted only in cases where an adverse employment action (i.e. demotion, termination) has occurred.

Proactive Steps to Take in Anticipation of the ADAAA

Review policies and job descriptions: Employers should review their current policies and procedures to ensure they comply with the ADAAA by January 1, 2009. In addition, employers should review the essential job functions described in each job description, and ascertain the core responsibilities that may require accommodation. Remember that if the disability is obvious, employers may need to provide an accommodation without it being requested by the employee.

In light of the new focus on reasonable accommodations, employers should know that the ADAAA has created a list of potential accommodations, including:

- acquiring equipment
- adjusting exams, training materials or policies
- providing qualified interpreters
- reallocating nonessential job functions
- permitting part-time or modified work schedules
- reassigning employees to vacant, equivalent positions
- considering unpaid leave

Record keeping: Employers should expect that regulations and subsequent case law interpreting the ADAAA will be forthcoming, and be aware that these regulations and case law may further expand employee protections. Employers should keep records of accommodation requests made and accommodations denied or provided, along with evidentiary support for the decisions made.

Training of supervisors: Employers may want to consider training supervisors and managers regarding the expansion of the Act and the need to engage in the interactive process with disabled employees. If this interactive process – sitting down with the employee to discuss his or her needs and possible accommodations – is done regularly

and properly, the employee will feel that his needs are being considered, and is much less likely to feel discriminated against, even if his accommodation request is denied.

Contact legal counsel: Finally, employers should consider contacting their legal counsel in situations in which the employer may be unsure about issues arising under the ADAAA, including whether an employee's condition would qualify as a disability or whether a requested accommodation is reasonable.

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