

THE ADA AMENDMENTS ACT: COMING SOON TO A WORKPLACE NEAR YOU

Following a summer of blockbuster releases in movie theaters across the country, Congress is delivering its own big-budget thriller to America's employers. The ADA Amendments Act of 2008 (ADAAA) was passed by Congress on September 17, 2008, and is expected to be signed by President Bush in the near future. Once it becomes law, the ADAAA will go into effect January 1, 2009.

Why is the ADA Being Amended?

When the Americans with Disabilities Act (ADA) was passed in 1990, Congress intended that it would "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." In hindsight, Congress further noted that it had intended the ADA to provide "broad coverage."

Over the course of the past decade, a number of United States Supreme Court decisions have narrowed the effective scope of the ADA. See, e.g., *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 119 S.Ct. 2139, 151 L.Ed.2d 615 (1999); *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 122 S.Ct. 681, 144 L.Ed.2d 450 (2002). In part, these cases have held that 1) mitigating factors could be considered in determining whether an impairment substantially limited a major life activity; and 2) as contained in the ADA's definition of "disability," the terms "substantially" and "major" should be strictly interpreted to create a "demanding standard" for qualifying as a disabled individual. Congress found that, as a result, many other courts had incorrectly excluded a number of individuals from coverage under the ADA.

Accordingly, in the text of the ADAAA, Congress stated that it rejected the above requirements enunciated by the Supreme Court, which it believed had created an "inappropriately high level of limitation necessary to obtain coverage under the ADA." Thus, the ADAAA was enacted to "reinstat[e] a broad scope of protection to be available under the ADA."

What does the ADAAA Change?

Commensurate with Congress' expressed intention that the ADA should be applied broadly, the ADAAA alters a number of key aspects of the ADA and its interpretation:

Broad Interpretation of "Disability"

First and foremost, the ADAAA broadens the scope of the term "disability" as it is used in the ADA. While the text of the definition remains essentially the same, Congress instructs that it "shall be construed in favor of broad coverage of individuals under [the ADAAA], to the maximum extent permitted by the terms of [the ADAAA]." Notably, the ADAAA also extends the definition of "disability" to impairments that are either episodic or in remission, provided that the impairment would substantially limit a major life activity when active.

Expansive Definition of "Major Life Activity"

To qualify as disabled under the ADA, an individual must show that an impairment substantially limits a "major life activity." While the ADA did not previously include any examples of such activity, the ADAAA contains a non-exhaustive list of examples. "[M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." Additionally, Congress included "the operation of major bodily functions" as a "major life activity," and included a non-exhaustive list of such functions in the statute as well. Major bodily

functions include, but are not limited to, “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”

Since Congress intends the statute to be construed broadly, it is conceivable that any number of other activities and bodily functions may be included in these categories. While this issue will undoubtedly be explored in judicial opinions interpreting the new statute, employers should consider proceeding conservatively in deciding what constitutes a “major life activity” or a “major bodily function” for the purposes of the ADAAA.

Mitigating Factors are Not Considered

In the past, employers were permitted to consider the ameliorative effects of mitigating factors (such as prosthetics, medication, or hearing aids) when determining whether an individual’s impairment substantially limited a major life activity. With the advent of the ADAAA, employers are now prohibited from considering these factors in determining whether an individual is disabled. Examples of mitigating measures listed in the ADAAA include the following: “(I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies; (II) use of assistive technology; (III) reasonable accommodations or auxiliary aids or services; or (IV) learned behavioral or adaptive neurological modifications.” As a result, many more individuals will likely qualify for coverage under the ADA, thereby increasing compliance obligations on employers.

Fortunately for employers, there is one notable exception under the ADAAA. Specifically, “the ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses” may be considered in determining whether an individual is disabled. Otherwise, an enormous amount of individuals with bad (but correctable) vision could have been included within the scope of the ADA on that basis alone.

Lower Standard for Individuals “Regarded As” Disabled

Congress did not limit the broad application of the ADAAA to individuals who are actually disabled. In the past, the ADA provided protection to individuals who were “regarded as” disabled by their employers. However, in order to assert a claim, courts required an individual to establish that an employer regarded him or her as substantially limited in a major life activity.

The ADAAA lowers this standard. Under the new law, an individual only needs to establish that he or she was subjected to a prohibited action because of a perceived mental or physical impairment, regardless of whether it is “perceived to limit a major life activity.” However, the above prohibition does not apply to impairments that are “transitory and minor.” “Transitory” impairments are defined as those “with an actual or expected duration of 6 months or less.”

What Can Employers Expect?

As a result of the ADAAA’s lowered standards and inclusive scope, employers can expect an increase in the number of employees claiming disability status under the law. Consequently, employers will likely receive more frequent requests for accommodation from employees claiming disability status. This will entail more determinations as to whether a qualifying disability exists, as well as a greater number of dialogues regarding potential accommodations.

In tandem with the additional number of accommodation requests, employers should also expect to receive an increased number of disability-related discrimination claims. In the past, claims under the ADA were generally regarded as more difficult to assert than other forms of discrimination. The expansive language of the ADAAA, however, will likely embolden potential plaintiffs to assert more claims against employers. Nevertheless, in what is regarded as a benefit for employers, the ADAAA does not provide the basis for a claim of reverse discrimination on the basis of a disability.

Employers can also expect new regulations from the Equal Employment Opportunity Commission (EEOC), the federal agency charged with implementing and enforcing the ADAAA. Specifically, Congress has enunciated an expectation that the EEOC will revise its definition of “substantially limits” to conform to the ADAAA’s lower standard. In conjunction with the new regulations, the EEOC may also increase enforcement efforts under the ADA.

What Can Employers Do Now?

Although the new law will not take effect until January 1, 2009, employers should begin taking steps now to ensure that they are in compliance on that date. Knowledge is an essential aspect of compliance, and employers should consider educating their human resources professionals and management regarding the ADAAA and its requirements.

Additionally, employers should consider examining any paperwork they use in connection with the ADA and accommodation requests, and assess whether it complies with the ADAAA. For example, where appropriate, paperwork should note that mitigating factors are not to be considered in determining disability status under the ADA.

Moving forward, employers should also evaluate their general approach to disability claims and requests for accommodation. Given the expansive nature of the ADAAA, employers may wish to adopt a more conservative approach to considering such claims and requests until the courts and the EEOC provide additional guidance.

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