
September 23, 2008

**CLIENT ALERT:
CONGRESS SIGNIFICANTLY EXPANDS THE
AMERICANS WITH DISABILITIES ACT**

In the next few weeks, the President is expected to sign into law a bill that significantly expands the reach of the Americans with Disabilities Act of 1990. The ADA Amendments Act of 2008 (ADAAA) passed the House of Representatives on September 17, 2008. The Senate had unanimously approved the bill the previous week. Once the President signs it, the amendments will become effective January 1, 2009. The full text of the bill can be found here: <http://www.govtrack.us/congress/billtext.xpd?bill=s110-3406>.

The legislation reverses what proponents of the bill perceive as overly restrictive judicial interpretations of the ADA, in particular the definition of “disability” — interpretations they contend have excluded many people who should have been covered by the original Act.

Here are the major changes to the ADA accomplished by the amendments:

- ***Mitigating measures out.*** One of the most significant changes is that when deciding whether an individual is disabled, courts no longer may consider the ameliorative effects of mitigating measures, such as medication, hearing aids, or prosthetic limbs. Thus, if a person has a condition that is fully controlled by medication or the effects of the condition are not substantially limiting because of the use of an assistive device, that person likely is not disabled under current law but will be disabled under the amendments. (The only exception is that courts still may consider the ameliorative effects of eyeglasses and contact lenses.)
- ***“Major life activities” defined and expanded.*** The Act includes a definition for “major life activities,” something previously left to EEOC regulations. And the ADAAA definition is broader than the EEOC’s definition; it includes a number of activities not listed in the EEOC’s regulation, including lifting, reading, and communicating. Moreover, the ADAAA specifically includes “major bodily functions” such as immune system, normal cell growth, respiratory, circulatory, and reproductive functions.
- ***Episodic conditions.*** Individuals who suffer from impairments that are episodic or in remission are now covered by the ADA even if their medical conditions are not active.
- ***Strict interpretation rejected.*** Although with the one exception discussed below the Act retains the requirement that an impairment must be “substantially limiting,” it rejects Supreme Court precedent requiring plaintiffs to meet a high standard to show that their condition is “substantially limiting.” It also rejects an EEOC regulation providing that an individual must show that he or she is “significantly restricted” in the performance of a major life activity before the impairment is considered substantially limiting. Congress directs courts to interpret the term “disability” and its

components broadly in favor of coverage. In fact, Congress said the primary focus should be on whether employers complied with their duties under the law, not whether the person has a disability.

- **“Regarded-as” disabilities.** Recall that the ADA covers not just people with actual substantially limiting impairments but also people who are “regarded” by an employer as having a substantially limiting impairment. The purpose of that provision is to prohibit employer actions based on myth, fear, and stereotype rather than actual medical concerns. Under current law, the test is difficult to meet because it requires that an employer mistakenly perceive an employee (or applicant) as having an impairment that is substantially limiting. Regarding someone as limited in an insubstantial way — such as believing an employee to be unable to perform a particular job — does not meet the current test.

The ADAAA fundamentally changes the regarded-as standard. Now, an individual will meet the test if he or she is subjected to a prohibited act because of an actual or perceived impairment “whether or not the impairment limits or is perceived to limit a major life activity.” It remains to be seen how the EEOC will elaborate on the new standard, but interpreted literally it seems almost boundless. If a person need not be perceived as limited by the impairment, and the standard covers not only perceived (*i.e.* mistaken) impairments but also real impairments, then there will be little need for anyone to try to meet even the new, expanded actual-disability standard. The only exception is that the impairment for purposes of the regarded-as provision must be one that is not transitory (lasting six months or less) or “minor” (an undefined term).

- **Accommodation and regarded-as.** Although a few minor provisions are written as though they are sensitive to employer concerns, the only true employer-friendly provision of the ADAAA is a section specifically providing that the duty of reasonable accommodation does not extend to an individual who is covered only by the regarded-as provision of the ADA. The courts are divided on that issue under the current law.
- **Vision testing.** The ADAAA amends the ADA provision governing the use of qualification standards or other criteria in employment screening to prohibit using such criteria based on an individual’s uncorrected vision unless the particular criteria is job-related and consistent with business necessity.

EMPLOYER SUPPORT. It bears mentioning that the ADAAA reportedly received significant support from business groups such as the U.S. Chamber of Commerce, the National Association of Manufacturers, and the Society for Human Resources Management. The political realities of an election season likely played a role in that support. Whatever the reason, there is no doubt that the bill will increase considerably compliance and litigation burdens and expenses for employers. On that ground alone, the support of employer-advocacy groups is surprising.

NET RESULT. Employers can expect more disability-discrimination lawsuits and a tougher legal battle defending them. By expanding markedly the group of persons who are considered disabled and expressly requiring that courts broadly interpret the new standard for disability, the amendments both increase the number of persons who can sue under the Act and make it tougher for employers to get cases dismissed on the ground that the employee or applicant cannot prove that she was “disabled.” Currently

that ground accounts for a large number of employer wins under the ADA. The bottom line is that employers are going to either lose or be forced to settle many more ADA cases than in the past.

ACTION ITEMS. What should employers do to reduce their chances of running afoul of these new amendments? The short answer is that in almost all cases employers should assume that an employee with a medical or mental condition is considered disabled under the ADA and act accordingly. Human resources personnel and managers need to understand that the reach of the ADA is much broader than before the amendments and what that means in terms of day-to-day handling of employee health-related issues.

QUESTIONS? If (or perhaps we should say when) you have any questions or concerns about your company's increased obligations under the ADA (or if there is any other legal matter that you need assistance with) we have the experience and expertise to help you. Please contact the Thompson & Knight attorney with whom you regularly work or one of the following attorneys below.

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