

## Employment Alert: Congress Passes ADA Amendments Act of 2008 and EEOC Issues New ADA Guidance

9/19/2008

On September 17, 2008 the United States House of Representatives passed the ADA Amendments Act of 2008 (S. 3406, the "ADAAA" or the "Legislation"), clarifying that the Americans with Disabilities Act of 1990 ("ADA") is intended to provide broad coverage for protecting individuals with disabilities from discrimination. The Senate unanimously passed the identical bill on September 11, 2008. The White House has signaled that President Bush supports the ADAAA and he is expected to sign it into law in the coming weeks.

The proposed law, set to become effective January 1, 2009, was crafted in response to United States Supreme Court decisions that narrowed the scope of the ADA's protection. The Legislation reflects a compromise between management-side representatives and disability advocates, who worked together with legislators to attempt to strike a balance between the needs and interests of employers and employees.

### Background

The ADA makes it unlawful to discriminate against a qualified individual with a covered disability, provided he or she can perform the essential functions of the job, with or without reasonable accommodation. "Disabilities" include: physical or mental impairments that substantially limit one or more major life activity; a record of such impairment; or being regarded as having such an impairment.

### Key Changes and Clarifications to the ADA

**Definition of Disability:** The ADAAA makes clear that the ADA is intended to provide broad protection to anyone who faces discrimination on the basis of disability by rejecting a strict interpretation of the definition of disability. The Legislation does retain, however, the requirement that an individual's impairment must substantially limit a major life activity in order to be covered as a disability under the ADA.

**Clarification of "Substantially Limits":** In rejecting the demanding standard enunciated by the Supreme Court, as well as EEOC guidance that the term "substantially limits" should be defined as "significantly restricted," the Legislation restates that the definition of "substantially limits" should be consistent with Congress' intent of broad coverage under the ADA; however, it does not provide further definition or clarity. Presumably this issue will be left for the courts to interpret once again.

**Protection for Mitigating Measures:** Significantly, the ADAAA overrules Supreme Court decisions holding that "mitigating measures" must be taken into account when determining whether an individual has a disability covered under the ADA. Specifically, the U.S. Supreme Court has held that if a mitigating measure, such as medication, assistive technology, equipment, devices or the like, alleviates the impairment, the condition is not a disability covered under the ADA. Under the Legislation, mitigating measures (other than vision-correcting eyeglasses and contact lenses) may no longer be taken into consideration in evaluating whether an individual has a covered disability. With this change, individuals with disabilities will be protected by the ADA even if their conditions are mitigated with medication or assistive technology. As a side note, this new interpretation of the ADA parallels the decision in *Dahill vs. Police Dept. of Boston*, in which the Massachusetts Supreme Judicial Court held that the Commonwealth's antidiscrimination statute did not require consideration of mitigating or corrective devices in determining whether the employee had a handicap.

**Expansion of "Major Life Activities":** The ADAAA increases the scope of "major life activities" and adds a section with specific examples of "major bodily functions," including functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

**"Regarded As" Prong Narrowed:** The ADAAA covers individuals who experience discrimination based on a perception of impairment, regardless of whether the individual experiences disability. It makes clear, however, that employers do not need to make accommodations for someone who is disabled solely because he or she is "regarded as" disabled. The Legislation also specifically excludes minor conditions or transitory conditions lasting six months or less from protection under the "regarded as" prong.

**Coverage for Remission/Episodic Conditions:** Under the ADAAA, a condition that is in remission or is episodic is covered as a disability if the condition would substantially limit a major life activity when active.

### New EEOC Guidance

On September 3, 2008, in an apparent response to the House's earlier version of the ADAAA, the Equal Employment Opportunity Commission ("EEOC") published what it describes as "a comprehensive question-and-answer guide addressing how the Americans with Disabilities Act (ADA) applies to a wide variety of performance and conduct issues." In addition to laying out general legal requirements and definitions, the guidance takes employers through 30 questions and answers on various ADA-related subjects, including performance, conduct, and attendance issues, dress codes, drug and alcohol use, and confidentiality. Included with these answers are several generally applicable practice points for employers.

The EEOC's new guidance is not legally binding, but it can be a helpful resource on the complicated issues that arise when disabilities and performance/conduct problems intersect. An important take-away for employers is that disabled employees can be held to the same standards of performance and conduct, whether quantitative or qualitative, as non-disabled employees in the same position.

This EEOC guidance can be found online [here](#).

### Where Does the ADAAA Leave Employers?

Globally, the ADAAA expands the scope of disability coverage and, as a result, increases the number of applicants and employees protected under the ADA. Employers can expect an increase in the volume of reasonable accommodation requests and, possibly, a surge in disability-related claims and lawsuits. Furthermore, in light of Congress' directive to the EEOC, we can expect to see revised regulations promulgated in the near future regarding the definition of "substantially limits." Employers must, therefore, continue to be vigilant about complying with ADA standards and EEOC guidance.

This alert provides a brief overview of the ADAAA – all employers should familiarize themselves with these amendments on a more comprehensive level and seek guidance on how the changes could impact their particular policies and practices. With that said, the fundamental provisions of the ADA will not be substantively different, so employers also should take this opportunity to ensure that their managers and human resources personnel management are briefed on their legal obligations and equipped to address accommodation requests appropriately.

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