

PERSPECTIVES

Winter 2008/2009

A periodic newsletter from the Labor & Employment Law Group at Dickinson Mackaman Tyler & Hagen, P.C.

What Employers Need to Know About the ADA Amendments Act

by HELEN C. ADAMS

Employers need to become familiar with the Americans with Disabilities Amendments Act ("ADA 2008"), which was signed into law by President Bush on September 25, 2008. The ADA 2008 effectively invalidates the United States Supreme Court's interpretations of key terms of the Americans with Disabilities Act. The ADA 2008 proposes to restore the original intent of Congress that the ADA be interpreted broadly to include large numbers of individuals within its coverage, expands the definition of "disability" and rejects the notion that mitigating measures should be considered in determining whether an individual has a substantially limiting physical or mental impairment.

When Did the Amended Act Become Effective?

ADA 2008 became effective on January 1, 2009. It is anticipated that plaintiff employees will argue that ADA lawsuits pending on January 1 should be decided based on the ADA 2008 amendments.

What Does It Mean That the ADA 2008 Expands the Definition of "Disability"?

Currently, under the ADA, disability is defined as: 1) a physical or mental impairment that substantially limits one or more major life activities; 2) a record of having such impairment; or 3) being regarded as having such impairment. The courts, however, have narrowed the definition of disability through their interpretations of what medical conditions substantially limited a major life activity. In 2002, the U.S. Supreme Court held that the terms "substantially" and "major" should be construed to create a "demanding standard" for qualifying as disabled (*Toyota Motor Mfg., Ky., Inc. v. Williams*).

The ADA 2008 reverses this narrow approach and requires the courts to interpret the ADA expansively. The ADA 2008 also enumerates a lengthy laundry list of major life activities, such as "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working." Additionally, major life activities also include the operation of any major bodily function, including neurological, brain, respiratory, circulatory, endocrine, and reproductive. Under these amendments, many individuals not previously included within the definition of disabled may now fall within the coverage and be entitled to reasonable accommodations.

The ADA 2008 also clarifies that mitigating measures, including medication, prosthetics, and assistive devices, that reduce the impact of a person's impairment cannot be considered in determining whether an individual has a disability. In essence, the amendments reverse the U.S. Supreme Court's 1999 decision allowing the consideration of mitigating measures. Although eyeglasses can still be considered in determining whether vision impairments are substantially limiting, that is the exception rather than the rule. For example, it appears that correction provided by hearing aids cannot be considered when determining the severity of a hearing impairment.

The expanded definition of disability means that individuals with fertility-related disorders, learning impairments, eating disorders, hearing problems (even if corrected by hearing aids), and sleeping disorders may be considered disabled under the ADA. Under the amendments, episodic impairments and those in remission can be considered a disability as long as the impairments are sufficiently severe when in an active state.

What Impact Will the ADA 2008 Have on the "Regarded As" Prong?

The "regarded as" prong of the definition of disability also has been expanded. The amendments make it clear that an individual does not need to establish that his impairment substantially limits or is perceived to substantially limit a major life activity to demonstrate that the employer "regarded" that employee as being disabled and entitled to protection under the ADA. Now, an individual need only prove that the employer perceived him or her as having some mental or physical impairment, regardless of the substantial nature of the impairment. The ADA 2008 does establish that impairments that last or are expected to last for six months or less are too transitory or minor to qualify for protection under the "regarded as" prong.

EEOC Expected to Issue Further Guidance on the ADA 2008.

Under the ADA 2008, the EEOC has the authority to issue new or modified regulations further interpreting or fleshing out the parameters of the ADA as amended by the ADA 2008. Employers should look for these expanded regulations in 2009.

ADA 2008 Is Expected to Increase Litigation in Disability Cases.

It is anticipated that the amendments to the ADA will result in increased and more expensive disability discrimination litigation. Plaintiffs will file new cases after January of 2009 to test the parameters of the ADA 2008 and the court's interpretations of the new legislation. More disability cases will likely survive summary judgment motions and be decided by juries, increasing the costs and risks of an adverse verdict. The focus of the litigation is also expected to switch from threshold issues, such as "whether the individual has a disability," to liability issues, such as whether the employer failed to reasonably accommodate an individual with a disability.

Employer Notes: In preparing for the ADA 2008 to take effect, employers should:

- Review their policies to determine if any modifications need to be made.
- Establish written procedures and protocols to be followed with respect to reasonable accommodation requests. Train all employees on these procedures.
- Create a reasonable accommodation/interactive process checklist and compliance packet to be used to document the handling of accommodation requests.
- Make sure that job descriptions are accurate and current.
- Train supervisors on the new law and the company's procedures on handling accommodation requests.
- Watch for further guidance from the EEOC on the ADA 2008.

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