

The Americans with Disabilities Act Amendments Require Employers to Promptly Review Policies and Procedures to Ensure Compliance with Employee-Favorable Revisions

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On September 25, 2008, President George W. Bush signed into law legislation that substantially broadens the scope of disabilities covered under the Americans with Disabilities Act ("ADA"). Known as the ADA Amendments Act of 2008 (the "Act"), the stated purpose of the Act is to redress court decisions that have "created an inappropriately high level of limitation necessary to obtain coverage under the ADA." The Act becomes effective on January 1, 2009, so employers may have to act promptly to ensure that their policies and procedures are compliant.

Pursuant to the Act, an increased number of employees will be covered under the ADA. As explained below, for the most part, employers may no longer take into account mitigating measures, such as an employee's use of medication to control a disabling condition, when determining whether the individual is substantially limited in a major life activity. The Act also lowers the bar in other ways for determining whether a person is substantially limited in a major life activity or "regarded as" disabled.

Determination of Disability

The Act provides that as a general rule of construction, the definition of "disability" is to be construed in favor of broad coverage to the maximum extent permitted by the terms of the ADA. The ADA defines disability as (1) a physical or mental impairment that substantially limits one or more major life activity; (2) a record of such an impairment; or (3) being regarded as having such an impairment. The Act maintains this definition of disability but clarifies the meaning intended for each prong of the definition.

First, under the Act, a determination of whether an individual is substantially limited in a major life activity shall be made without regard to mitigating measures. The Act rejects the holding of the U.S. Supreme Court in *Sutton v. United Air Lines, Inc.*, which held that the effects of mitigating measures, such as medication, should be considered when determining whether an impairment substantially limits a major life activity. With the exception of common eyeglasses and contact lenses, the Act prohibits the consideration of measures, such as medication, medical supplies, equipment, prosthetic devices, hearing aids, mobility devices and others, when determining whether an employee is substantially limited in a major life activity.

Second, the Act rejects the Supreme Court's holding in *Toyota Motor Mfg., Kentucky Inc. v. Williams*, which held that the terms "substantially limits" and "major life activities" should be strictly construed, and that a disability must severely restrict or prevent the individual from "doing activities that are of central importance to most people's lives." The Act also rejects the regulations promulgated by the U.S. Equal Employment Opportunity Commission (EEOC), which defines the term "substantially limits" as "significantly restricted." Specifically, the Act provides that the EEOC's definition of "substantially limits" is "inconsistent with congressional intent, by expressing too high a standard." Unfortunately, while Congress has expressed that the standards set forth in *Toyota* and by the EEOC are too high, the Act does not precisely define the term "substantially limits" and instead directs the EEOC to revise its regulations to comport with the findings and purposes of the Act. Therefore, uncertainty is likely to exist with respect to the meaning of the term "substantially limits" until it is defined by the EEOC and interpreted by the courts.

Major Life Activity

The definition of "major life activities" is expanded under the Act, which now explicitly recognizes the following activities: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working. Major life activities also include the operation of a major bodily function, such as normal cell growth, immune system functions, endocrine functions, bowel and bladder functions, neurological functions, digestive functions, circulatory functions, respiratory functions and reproductive functions. The Act makes clear that an impairment need substantially limit only *one* major life activity to be considered a disability. Significantly, an impairment that is episodic or in remission (*e.g.*, cancer) is still a disability if it would substantially limit a major life activity when active.

These changes will likely increase the number of claims filed by individuals with injuries or conditions that limit their ability to perform the activities or bodily functions described above.

Regarded as Disabled

Under the Act, individuals satisfy the definition of disability if they establish that they have been subjected to prohibited action based on an actual or perceived physical or mental impairment. Under the "regarded as" prong of disability, the individual no longer need establish that the impairment substantially limits a major life activity.

However, employers are not required to make reasonable accommodations in cases falling under the "regarded as" prong of the definition of disability. In addition, a "transitory and minor impairment" (*i.e.*, an impairment with an actual or expected duration of six months or less) does not satisfy the "regarded as" prong of the definition of disability.

In short, under the Act, an employee meets the "regarded as" standard if an employer believes the employee has a non-temporary impairment even if the impairment does not actually restrict a major life activity.

What This Means for Employers

The number of individuals covered under the ADA will increase as a result of the Act. The expanded definition of major life activities in conjunction with Congress declining to precisely define the term "substantially limits" will likely lead to increased litigation concerning the parameters of the ADA. Furthermore, the prohibition on considering the effects of mitigating measures (with the exception of common eyeglasses and contact lenses) in determining whether an individual is substantially limited in a major life activity will greatly increase the scope of the ADA. Consideration of episodic impairments and impairments that are in remission also expand the coverage of the ADA.

The Act rejects the holding in *Toyota*, and until the new provisions of the ADA are interpreted by the federal courts, employers will be left without much guidance in interpreting the term "substantially limits." The term, however, is broader than previously thought, and "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."

Employers should expect to receive a greater number of requests for accommodations and should be mindful of the new and broadened scope of the ADA's coverage. Employers may want to review their guidelines for determining disability and, in a close case, seek legal counsel to review how the Act's expansion may impact the determination of disability warranting the offering of a reasonable accommodation.

While many state and local laws, such as those in California, New York and New Jersey, have long defined disability more broadly, thereby including many individuals within their reach who did not qualify for protection under the ADA, in certain respects, the Act's expanded "regarded as" standard may be broader than even the most employee-friendly state or local law.

For Further Information

If you have any questions about revising your ADA policies to comply with the Act's revisions to the ADA or would like more information, please contact any [attorney](#) in the [Employment & Immigration Practice Group](#) or the attorney in the firm with whom you are regularly in contact.