

Employer Alert! Amendments to the ADA Take Effect January 1, 2009

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On September 25, 2008, President Bush signed into law the ADA Amendments Act of 2008 ("ADAAA"). The ADAAA took effect on January 1, 2009. The ADAAA significantly expands the scope of the Americans With Disabilities Act ("ADA") by overturning several recent US Supreme Court cases that sought to narrowly define what constitutes a "disability" under the ADA.

The ADA prohibits covered employers (those with 15 or more employees) from discriminating against individuals based on a disability in employment, public accommodations, and other areas. It defines a disability as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual." In the past, much of the debate (and litigation) centered on whether an individual met the ADA's definition of "disabled." The US Supreme Court previously clarified that corrective or mitigating measures and devices (for example a hearing aid or medication) must be considered in determining whether an individual was "disabled" under the ADA. For example, if an individual could effectively treat her impairment through medication, she was not "disabled" under the ADA. Additionally, the US Supreme Court narrowly interpreted when an impairment "substantially limited" a major life activity. As a result, individuals often had a difficult time meeting the definition of "disability."

The ADAAA changes much of this analysis, and lowers the bar significantly for determining when an individual is "disabled." Specifically, the ADAAA makes three significant changes to existing ADA court precedent:

- It provides an illustrative list defining "major life activities," a term which the ADA left to the courts to define. Under the ADAAA, "major 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." The ADAAA also includes major bodily functions within this definition, with the intent of including certain kinds of diseases and cancers within the definition of a "disability."
- It overturns US Supreme Court precedent that strictly defined "substantially limits" as an impairment that "prevents" or "severely restricts" a major life activity. The ADAAA requires this term to be defined more inclusively and in light of the purposes of the ADA and the ADAAA. For example, under the new law an impairment need only substantially limit *one* major life activity; it need not limit a "central" or primary activity. Further, the impairment may substantially limit a major life activity even if it is episodic or in

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remission, which previously was not the case. This change will make it easier for an individual to demonstrate that her impairment rises to the level of a "disability." The ADAAA also directs the EEOC to revise its regulatory definition of "substantially limits," finding its definition of the term ("significantly restricted") to be inconsistent with congressional intent.

- It overturns US Supreme Court precedent that required corrective or mitigating measures and devices to be considered in assessing whether an individual is "disabled." Under the ADAAA, the determination of whether an individual has a disability must be made *without* reference to such measures and devices. (Interestingly, eye glasses and contact lenses can still be considered.) This change will expand the scope of individuals with covered disabilities. For example, in the past, an individual who effectively treated her impairment with medication would not have been considered disabled under the ADA; however, now that individual could be considered disabled under the ADAAA.

One other significant point is that the ADAAA lowers the standard to prove an employer discriminated against an individual whom it "regarded as" having a disability. Under the ADA, an individual claiming she was "regarded as" having a disability had to prove either the employer mistakenly regarded the individual as having an impairment that *substantially limited* a major life activity or the employer mistakenly believed that an actual impairment *substantially limited* a major life activity. With the ADAAA, an employer will be liable under a "regarded as" theory if the individual can show discrimination because of an actual or perceived impairment, *whether or not the impairment actually limits or is perceived to limit a major life activity*. This significantly eases the evidentiary proof to establish a "regarded as" claim under the ADA. On the other hand, the ADAAA clarifies that "regarded as" claims *cannot* be based on transitory and minor impairments where the impairment is expected to last less than six months. Also, the ADAAA specifically states that employers are not required to provide reasonable accommodations to those who are "regarded as" disabled, clarifying recent case law on this issue.

At a minimum, all employers with 15 or more employees should take the following steps in preparation for the ADAAA taking effect January 1:

- Provide ADAAA training to supervisors and managers;
- Review existing ADA-related policies and procedures to ensure they comply with the ADAAA; and,
- Review each job description to ensure it accurately describes the essential functions of the position. (What, you don't have job descriptions for each position?! Better put that on the list, as well.)

Even with the amendments, the ADA still prohibits medical inquiries and examinations, except in limited circumstances such as when an employee requests a reasonable accommodation and his/her disability is not obvious. Employers must protect the confidentiality of medical information by keeping it in secure files separate from the general personnel files. Employers still are required to provide only *reasonable* accommodations to individuals who, with or without

accommodations, are *qualified* to perform the essential functions of their positions. And the ADAAA does not change the fact that employers do not have to provide accommodations that will result in an undue hardship.

Employers should expect an increase in the number of employees requesting accommodation under the ADA as a result the ADAAA. These requests must be carefully analyzed in accordance with ADAAA.

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