



The New and EXPANDED Americans with Disabilities Act

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Introduction

January 1, 2009 marks both the start of a new year and the effective date regarding substantial amendments to the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101 *et seq.* On September 25, 2008, President George W. Bush signed into law S. 3406, the ADA Amendments Act of 2008 or “ADAAA.” The original ADA was signed into law by President George H.W. Bush on July 26, 1990. The ADAAA will protect a much broader percentage of the workforce and may well fundamentally alter employee relations with regard to persons with disabilities.

Legislative proponents believe that the ADAAA reflects what the original ADA was intended to affect, while others argue that the amendments have reached far beyond the original intent of the Act. Either way, the ADAAA contains significant changes in not only the definition “disability,” but also the definition “major life activity,” as well as how persons “regarded as” disabled will be treated in the workplace.

The ADAAA responds to the increasingly narrow interpretation given the terms “disability,” “major life activity” and other terms of art by federal courts since the ADA’s passage. Legislative proponents note that, in 2004, plaintiffs lost 97 percent of the ADA employment discrimination claims that actually made it to trial, often due to the interpretation of the definition of the term “disability.” In the findings published with the ADAAA, the drafters stated, “While Congress expected that the definition of disability under the ADA would be interpreted consistently with how the courts applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled.”¹

The original ADA applies to employers with 15 or more employees and aids in protecting an individual with a *disability* that *substantially limits a major life activity* who can perform the *essential functions* of his or her job with or without *reasonable accommodation(s)* that do not constitute an *undue hardship*. In determining the meaning of the many

highlighted terms contained in the statement above, practitioners have long had to rely on the accompanying Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630 and the Appendix to Section 1630—“Interpretive Guidance on Title I of the Americans With Disabilities Act” drafted by the Equal Employment Opportunity Commission (“EEOC”). However, despite the regulations and the EEOC’s Interpretive Guidance, this long statement of the ADA has many caveats developed by the courts over the last 18 years.

Specifically, Congress was most displeased with the whittled down definition of disability by the Supreme Court in a number of employment cases including *Sutton v. United Air Lines Inc.*, 527 U.S. 471 (1999) and *Toyota Motor Manufacturing, Kentucky Inc. v. Williams* 534 U.S. 184 (2002) and specifically referred to these cases in the findings to the ADAAA. In *Sutton*, the Supreme Court ruled that employers were allowed to consider mitigating measures such as medicines and other devices in determining whether an individual was substantially limited in a major life activity. In *Toyota Manufacturing*, the Supreme Court ruled that an individual must show that his/her impairments prevent or severely restrict an ability to perform activities of central importance to most people’s daily lives. For example, after these rulings, persons with diabetes, some back injuries, multiple sclerosis and other debilitating conditions were not considered “disabled” under the terms of the original ADA.

In a response to these judicial rulings, Congress, in stating the purposes of the ADAAA, avowed:

(2) to reject the requirement enunciated by the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures; (3) to reject the Supreme Court’s reasoning in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), with regard to the coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) which set forth the broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973; ADA Amendments Act of 2008, Purposes (b)(2-3).

The New Meaning of Disability—Without Mitigating Circumstances

While the ADAAA does not change the actual language of Section 12102(2), which defines the term “Disability” (except for an addendum to the “Regarded As” definition, which refers to an additional paragraph 3), additional language *added* to the Definition Section in the “Rules of Construction Regarding the Definition of Disability” expands the definition quite broadly.

The term “disability” is defined in the ADAAA as follows:

(2) Disability

The term “disability” means, with respect to an individual—

- (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment (as described in paragraph (3)).


* * * *

(4) Rules of Construction Regarding the Definition of Disability

* * * *

- (E)(i) The determination of whether an impairment substantially limits a major life activity shall be made *without regard to the ameliorative effects of mitigating measures* such as—

- (I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs or devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;
- (II) use of assistive technology;



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- (III) reasonable accommodations or auxiliary aids or services; or
- (IV) learned behavioral or adaptive neurological modifications.
- (ii) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.
- (iii) As used in this subparagraph—
 - (I) the term ‘ordinary eyeglasses or contact lenses’ means lenses that are intended to fully correct visual acuity or eliminate refractive error; and
 - (II) the term ‘low-vision devices’ means devices that magnify, enhance or otherwise augment a visual image.”

(emphasis added).

So, what does this new section regarding the definition of disability mean in practice? If an issue of possible discrimination arises whether it be with regard to, *inter alia*, hiring, pay, promotion, termination, or terms and conditions of employment, the employee’s disabling condition will now be considered *without regard* to mitigating measures. While the EEOC has been charged with issuing new Interpretative Guidelines to accompany the ADAAA, the number of persons with a covered disability should greatly increase in light of the new definition.

The following represent examples of different employees who may now be considered disabled under the ADAAA because the employer may not take into account the mitigating measure of:

- ⌘ the medication of a legal assistant whom the employer knows has bipolar disorder;
- ⌘ the weekly treatments of a waiter with HIV;
- ⌘ the insulin used by an salesperson who is diabetic;
- ⌘ the walking cane a plumber utilizes to walk;

- ⌘ the low-vision device relied upon by the elementary school teacher with glasses;
- ⌘ the prosthetic leg used by the foreman;
- ⌘ the hearing aid or cochlear implant used by the customer service representative;
- ⌘ the wheelchair used by a human resource manager; or
- ⌘ the oxygen therapy required by the librarian.

Additionally, a typist with ADHD who has been accommodated by being allowed to work in an office by himself may be considered disabled even taking into account this reasonable accommodation and a grocery bagger who does not use any sort of hearing aid but has learned to read lips may also be considered disabled despite a learned behavioral modification. In fact, *the only mitigating measure* that appears relevant when determining whether an employee is disabled is whether he or she wears glasses or contact lenses that “are intended to fully correct visual acuity or eliminate refractive error.” ADA Amendments Act, Section 12012(4)(iii)(I).

In sum, the aides, adaptive measures, medications and behavioral adaptations utilized by persons with otherwise substantially limiting conditions cannot be taken into account to exclude them from the definition of “disabled.” For practitioners, this will mean that more employees may qualify as disabled, an issue that in the past prevented many employees from overcoming an employer’s motion for summary judgment.

The ADAA Includes More Major Life Activities

The ADAAA has also redefined the term “major life activities.” The original ADA did not define the term “major life activities,” but such activities could be found in the EEOC’s Interpretive Guidelines to the Act. The ADAAA now lists both major life activities *and* major bodily functions:

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(2) Major Life Activities

- (A) In General—For purposes of paragraph (1), 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.
- (B) Major Bodily Functions—For purposes of paragraph (1), a major life activity *also includes* the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

ADA Amendments Act of 2008, Section 12102(2) (emphasis added). There is little doubt that the EEOC guidelines that are expected to accompany the enactment of the ADAAA will further clarify many of the terms as listed under “major bodily functions.”

In application, however, individuals who have HIV or AIDS which involve a compromised immune system or persons with sickle cell anemia could be considered persons with substantially limiting conditions. Additionally, Crohn’s disease, most cancers, including skin cancer, as well as pulmonary diseases, asthma, and sterility issues could be considered disabling under the bodily functions section of “major life activities.” To reiterate, medicine or other medical aides or assistive technology cannot be taken into account in determining whether these illnesses are disabling under the ADAAA.

“Substantially Limited” Has Been Substantially Broadened

The new ADAAA also broadens the term “substantially limited.” In Section 10102 (4) “Rules of Construction Regarding the Definition of Disability,” Congress set out the following parameters regarding construing the terms disability and substantially limited:


- (A) The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.
- (B) The term “substantially limits” shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.
- (C) An impairment that substantially limits one major life activity *need not limit other major life activities* in order to be construed as a disability.
- (D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity *when active...* (emphasis added)

These additional rules of construction are a strong reiteration by Congress that the term “disability” is not to be viewed narrowly or its definition diminished, and the term “substantially limited” will be broadened consistent with the “findings and purposes” clause of the ADAAA. Specifically, as stated in (C) above, a medical condition need only substantially limit *one* major life activity in order to be considered a disability. Therefore, if a bank teller has liver cancer and is undergoing chemotherapy, thus compromising her immune system but can otherwise car[e] for herself, perform manual tasks, see, hear, eat, sleep, walk, stand, lift, bend, speak, breathe, learn, read, concentrate, think, communicate, and work, she may be still be considered “disabled” under the ADAAA.

Similarly, conditions which are episodic or in remission may be considered a disability when those conditions are active. For example, a person with epilepsy who has seizures, at most every six months, could be considered disabled with the condition is active.

Changes to “Regarded as Disabled”

The ADA Amendments Act also clarifies the traditional “third prong” of the original ADA’s definition of disability—where an



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individual is “regarded as” disabled by an employer. The original ADA prohibits discrimination in employment with regard to whether an individual is: (a) disabled, (b) has a record of disability or (c) is regarded as disabled.

The ADAAA now states, “[a]n individual meets the requirement of ‘being regarded as having such an impairment’ if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.” This does not apply to impairments that are transitory and minor. The ADAAA defines a “transitory impairment” as “an impairment with an actual or expected duration of six months or less.” The ADAAA also provides that reasonable accommodations are only required for individuals who can demonstrate they have an impairment that substantially limits a major life activity, or a record of such impairment. Accommodations need not be provided to an individual who is only “regarded as” having an impairment.

What Does the Future Hold?

The primary intent of the ADAAA broadens coverage for those employees who may qualify as “disabled” in today’s workplace. It is very safe to assume that the EEOC will soon follow with expanded regulations for these broader protected categories.

We anticipate that there will be a greater emphasis placed on the “reasonable accommodation” requirements, as well as the

“interactive process” that accompanies such accommodation efforts. Employers must also carefully evaluate the essential functions of each job in the workplace in light of the expanded definitions provided in the ADAAA.

Without a doubt, the Amendments to the Americans with Disabilities Act will be the subject of litigation for years to come. ▲▼▲

Endnote

1. ADA Amendments Act of 2008, Findings (3)



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