

Alert

On September 25, 2008, President Bush signed into law the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA"). Under the new law, which will become effective on January 1, 2009, many more medical conditions will qualify as either an actual disability or a perceived ("regarded as") disability for purposes of the Americans with Disabilities Act. As discussed below, the practical effect of the amendments will vary from state-to-state, depending on the degree of protection a state's law already provides to applicants and employees with disabilities.

Expansion of Definition of Actual Disability

The ADAAA does not change the ADA's three prong definition of disability.¹ It does, however, make clear that the interpretations of that term by both the United States Supreme Court and the Equal Employment Opportunity Commission are stricter than Congress believes they should be and that the former interpretations thus should be superseded.

Among other things, the new act takes issue with the holding of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), that an impairment "substantially limits" a major life activity only if an individual is "prevented or severely restricted in an activity that is of central importance to most people's daily lives" and essentially tells the EEOC (which had defined "substantially limited" in its regulations to mean "significantly restricted") to go back to the drawing board and devise a more liberal definition. By stating in the amendments that the primary object of attention in ADA cases should be on whether employers covered have complied with their obligations and that whether an individual's impairment is a disability under the ADA "should not demand extensive analysis," Congress appears to be suggesting that the revised definition should not be a complicated one. We must await the EEOC's new regulations to learn the agency's new definition.

The amendments also overrule the holding of *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), that mitigating measures an individual uses to counteract the effects of an impairment (for example, medication) must be taken into account in determining whether an impairment "substantially limits" a major life activity. Under the ADAAA, the only mitigating measures that may be taken into account in assessing whether an individual has a disability are ordinary eyeglasses and contact lenses.

The amendments further provide that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity.

Definition of Major Life Activity

Prior to the ADAAA, it was up to courts to determine whether activities qualified as "major life activities," using the regulations promulgated by the EEOC as guidance. The ADAAA removes much of the courts' and the EEOC's discretion by specifically designating the following activities as examples of major life activities: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, blinking, communicating and working.

The new statute also designates the operation of "a major bodily function" as *per se* a major life activity and provides as examples: functions of the immune system, normal cell growth, and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions.

Expansion of Definition of "Regarded As" Disability

Under the third prong of the definition of disability, individuals are protected from discrimination based on "being regarded as having such an impairment." Since the only thing in the definition that the word "such" can be read to refer to is "a physical or mental impairment that substantially limits one or more ... major life activities of such individual" (see n.1), courts have generally construed this provision as protecting only individuals whose employers perceive them to have an impairment that is an *actual* ADA disability, i.e., one that substantially limits an employee in the performance of one or more major life activities. The new amendment provides that a person will be "regarded as" disabled if the person establishes that he was subjected to discrimination because of an actual or perceived physical or mental impairment – regardless of whether the perceived or actual impairment actually limits or is perceived by the employer to limit a major life activity. The only qualification on this broadened definition of "regarded as" disability is that impairments that are both "transitory [meaning an actual or expected duration of six months or less] and minor" will not qualify for "regarded as" protection. The amendments do make clear that employers need not provide reasonable accommodation to individuals who do not actually have a disability but are "regarded as" having one.

Other Provisions

The ADAAA bars the use of qualification standards, employment tests, and other selection criteria based on an individual's uncorrected vision unless the standard, test or other selection criteria is shown to be job-related for the position in question and consistent with business necessity.

The new statute also makes clear that there is no claim for reverse discrimination under the ADA, i.e., an individual who does not have an ADA disability cannot state a claim based on preferential treatment afforded an individual who does have an ADA disability.

Impact of the ADAAA

In states that do not have their own statutory protection for individuals with a disability or that have statutes that define "disability" analogously to the original ADA, the impact of the ADAAA should be very significant: Many more individuals will be entitled to reasonable accommodations and protection from adverse employment action based on disability. Some states, however, including New York, New Jersey and Connecticut, have already defined "disability" broadly for purposes of their anti-discrimination statutes. For example, courts have interpreted the statutory definitions of disability under all three of these states' anti-discrimination statutes as not requiring that an impairment "substantially limit" a major life activity. Whether the ADAAA will cause courts to further liberalize the interpretation of "disability" under these states' laws remains to be seen.

Endnotes

¹ Under the ADA, disability is defined to mean (1) a physical or mental impairment that substantially limits one or more of the major life activities of such individuals; (2) "a record of such an impairment;" or (3) "being regarded as having such an impairment."

If you have any questions about the new amendments, please contact Ellen Martin at 212.336.2860 (emmartin@pbwt.com) or Lisa Cleary at 212.336.2159 (lecleary@pbwt.com).

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