

The ADA Amendments Act

How the Disability Landscape Will Change

By Daniel Klein, Esq.



In the 20 years since it was first enacted, the Americans with Disabilities Act (ADA) has significantly changed the workplace for disabled individuals and their employers. Effective Jan. 1, 2009, the ADA Amendments Act of 2008 (ADAAA) expanded the definition of “disability” under the ADA, bringing the ADA’s protections to a broader range of individuals.

President Bush signed the ADAAA into law on Sept. 25. The bill moved through Congress swiftly with strong bipartisan support and the backing of a broad coalition of civil rights groups, disability advocates and employer organizations. Disability advocates and other civil rights groups sought to reverse U.S. Supreme Court decisions that had defined

covered disabilities more narrowly than many of the ADA’s original Congressional proponents had intended. Recognizing that amendments were inevitable, business groups supported compromise bills in the House and Senate and worked to craft the best deal possible for employers. While the amendments will significantly broaden the class of individuals protected as disabled, Congress did not expand the definition of “disability” as severely as originally proposed. The ADAAA,

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however, will change how courts and, in turn, employers evaluate whether an individual is disabled for ADA purposes in several significant ways.

How does the new law impact employers? Under the ADAAA, many employees who were not considered disabled under the ADA may now be considered disabled and, thus, eligible for an accommodation and protected from discrimination.

DEFINITION OF DISABILITY – WHAT HAS CHANGED?

Under the ADA, a physical or mental impairment has to substantially limit a major life activity to be considered a protected disability. Over the years since enactment of the ADA, many federal courts have dismissed ADA lawsuits, finding the employee not to be “disabled” because the employee’s impairment did not substantially limit the employee in a major life activity, as those terms had been defined by the courts. In a number of significant decisions for employers,

the Supreme Court narrowly defined these terms, establishing a strict standard for individuals to be considered disabled under the ADA.

Believing these decisions had eroded Congress’ original purpose in enacting the ADA, in the ADAAA, Congress specifically rejects several Supreme Court decisions that narrowly construed “disability” and ADA protections generally. Beginning in January 2009, for purposes of the

ADA, “disability” is to be construed broadly and coverage will apply to the “maximum extent” permitted by the ADA and the ADAAA.

SUBSTANTIALLY LIMITS

The House version of the ADAAA (H.R. 3195) would have further broadened the term “substantially limits” to cover any impairment that “materially restricts” a major life activity. However, the Senate version of the ADAAA (S.3406) — the version later approved by Congress and signed by the president — eliminated this change. Nonetheless, the new law squarely condemns previous, narrow judicial interpretations of “substantially limits.” Under the new law, courts are to focus on whether entities “have complied with their obligations” under the ADA. Thus, according to Congress, whether an individual has a disability should not “demand extensive analysis.” The ADAAA also instructs the Equal Employment Opportunity Commission (EEOC) to issue new

regulations defining “substantially limits,” so that the current definition (“significantly restricts”) is changed to something yet to be determined that comports with the ADAAA’s broader view. While we do not yet know how the EEOC will define “substantiality limits,” Congress has given the EEOC a clear mandate to define it broadly, and it is clear the new definition will result in a much broader range of individuals being protected as disabled individuals.

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MITIGATING MEASURES

In a complete reversal of Supreme Court precedent, the ADAAA rejects decisions holding that “mitigating measures” (e.g., medications, prosthetics, corrective surgery, hearing aids and mobility devices) are to be considered in assessing whether an individual is covered under the ADA. Going forward,

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impairments are to be evaluated in their unmitigated state when determining whether the individual is substantially limited in a major life activity, except that ordinary eyeglasses and contact lenses may be considered. That is, the analysis of whether an impairment substantially limits a major life activity will be made without regard to such mitigating measures. Thus, under the ADAAA, although an impairment still must substantially limit a major life activity, an individual may now be disabled even if the substantially limiting effects of the impairment are corrected by “mitigating measures,” such as a prosthetic device.

This change brings the ADA more in line with Massachusetts law, under which mitigating measures are not considered in assessing whether an individual is disabled under the commonwealth’s anti-discrimination law.

EXPANSION OF MAJOR LIFE ACTIVITIES

The amendments also expand the definition of “major life activities,” which the Supreme Court had defined as those activities of central importance to daily life. The ADAAA expands the list of major life activities previously recognized by the EEOC and now formally defines major life activities to specifically include such activities as standing, lifting, bending, reading, concentrating, sleeping, thinking, working, caring for oneself, seeing, hearing, eating, walking, speaking, breathing, learning and communicating. Also included as major life activities are “the operation of major bodily functions” such as the “immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions.”

“REGARDED AS” ANALYSIS

Under the ADA, an individual was protected from discrimination if the individual was “regarded as” disabled by the employer even if the person was

not actually disabled. The ADAAA significantly expands the number of individuals who can claim they are regarded as disabled. Under the amendments, an individual may be regarded as disabled if the individual is discriminated against because of an actual or perceived mental or physical impairment regardless of whether the impairment limits or is perceived to limit a major life activity. This means, for example, that a 10-pound lifting restriction that might not rise to the level of an actual disability (under the major life activity of working or otherwise) can nonetheless be the basis of a “regarded as” claim. Excluded from the “regarded as” prong of the definition of “disability,” however, are “minor and transitory impairments.” The ADAAA defines transitory impairments as those with an actual or expected duration of less than six months. It remains to be

seen, however, whether an arguably major impairment with an expected or actual duration of less than six months or, conversely, a minor impairment lasting more than six months will suffice to protect individuals under the “regarded as” analysis.

The new definition provides an expanded opportunity for employees who have impairments that do not amount to disabilities to claim discrimination. On the other hand, the ADAAA has clarified that an employer is not required to provide reasonable accommodation for an individual who is only “regarded as” disabled.

ADDITIONAL EFFECTS

The ADAAA also:

- Extends ADA protections to individuals with episodic impairments or conditions in remission if the impairment would substantially limit a major life activity in its active state (e.g. cancer, even in a state of remission, is now a disability);
- Clarifies that there is no duty to provide reasonable accommodations to individuals who are ADA-protected under only the “record of” prong of the definition of disability;
- Clarifies that impairments need only limit one major life activity in order to constitute a disability; and
- Clarifies that an individual without a disability cannot pursue a claim for reverse discrimination (on the basis of not having a disability).

IMPACT OF THE ADAAA ON EMPLOYERS

The ADA’s expanded scope will likely result in millions of individuals not previously covered under federal law now having protection as individuals with disabilities. Moving forward, case law and other guidelines that interpreted the definition of disability under the prior law will be of little value in determining who is covered under the new law. As a result, employers will be hard-pressed to get cases dismissed on the ground that an individual is not disabled. Thus, many employers will need to change their approach to medical conditions in the workplace, recognizing that common illnesses and impairments not

previously considered to be disabling will now be ADA-covered disabilities.

This vastly broader universe of covered individuals will, in turn, shift much of the focus to reasonable accommodation; more precisely, whether an individual with a physical or mental condition is otherwise qualified to per-

impairment. For example, suppose an employee has a 30-pound lifting restriction that precludes her from a narrow range of manufacturing jobs. Under the old ADA, absent evidence of a broader stereotypical conclusion by the employer, that employee was not ADA-protected — she was not regarded as substantially

real situations raised by employees, employers will need to take particular care when faced with workers who request accommodation for their disabilities. Due to the shift in focus to reasonable accommodation and whether individuals are otherwise qualified to perform the essential functions of the job (with or without reasonable accommodation), employers should review their job descriptions and other documents showing the essential job functions, as well as documents showing the qualification standards, such as job postings, requisitions and advertisements. Employers may also want to implement a formal accommodation policy and process, if not already in place. Finally, employers should train their supervisors and managers to recognize accommodation requests and to handle them properly by referring them to human resources or other appropriate personnel. ■

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form essential job functions, with or without reasonable accommodation. That means employers must re-evaluate their job descriptions, job qualification standards and reasonable accommodation procedures to ensure that they are current and defensible.

Perhaps the most troubling aspect of the ADAAA for employers is the new “regarded as” disabled language. Previously, the “regarded as” prong protected those perceived to have a substantially limiting

limited as to working or any other major life activity. Under the new ADA, if the employer takes action because of that restriction (for example, by assigning the employee to a lower-paying office job), the individual is ADA-covered, even though the employer formed no opinion regarding her ability to work generally.

CONCLUSION

Until courts begin interpreting the changes to the ADA and considering

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