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Labor and Employment Update: President Signs ADA Act Into Law

By Ronald J. Stolkin

On September 18, 2008, we advised you that the Senate passed the ADA Amendments Act of 2008 ("ADAAA") on September 11th by unanimous consent. The House of Representatives approved the Senate's version of the bill less than a week later, on September 17, 2008. President George W. Bush signed the ADAAA into law on September 25, 2008. The legislation will take effect on January 1, 2009.

A "disability" under the ADA is still defined as: (1) a physical or mental impairment that substantially limits one or more major life activities of an individual; (2) a record of such impairment; or (3) being regarded as having such an impairment. But employees who will be covered under the ADA has been expanded dramatically by the new Act:

- The ADAAA overrules two Supreme Court cases that had restricted the definition of what constitutes a disability: *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) (holding that physical and mental impairments are not "disabilities" under the ADA if they are controlled by corrective and mitigating measures – such as medications and assistive devices); and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) (holding that an impairment is not a "disability" unless it prevents or significantly restricts an individual from performing a major life activity, such as walking, sleeping and working).
- Now, consideration of mitigating measures such as medication, prosthetics, and assistive technology in determining whether an individual is disabled is strictly prohibited. Instead, the ADAAA requires that the "definition of disability . . . shall be construed in favor of broad coverage of individuals . . . to the maximum extent permitted by the terms of [the ADA.]" The EEOC is charged with drafting new regulations with this broader approach.
- The ADAAA also lowers the standard required to prove that an impairment "substantially limits one or more . . . major life activities." No longer will employees also be required to prove that the life activity was of "central" or primary importance. Moreover, the ADAAA has expanded the definition of what constitutes a "major life activity" with the inclusion of a much broader list of major life activities.
- The ADAAA expands coverage for those individuals claiming that they are "regarded as" having a disability. Under the new law, such individuals need only show that an employer's alleged discrimination was based on an actual or perceived physical or mental impairment;

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the individual need not also show that the employer believed the impairment actually limits or is perceived to limit a major life activity. “Regarded as” claims, however, cannot be based on impairments that are minor or transitory, i.e., those that last or are expected to last six months or less, and reasonable accommodation protection does not apply to persons covered by the ADA solely under the “regarded as” prong of the law.

Other changes include:

- Individuals whose disability is in remission or is episodic are still considered disabled if the condition would qualify as a disability when active.
- A non-disabled person cannot maintain a claim for reverse disability discrimination. Although the ADAAA broadens the scope of who may be disabled, it does not change many of the ADA’s requirements, such as: to be covered under the ADA, an individual must be a “qualified individual with a disability” (i.e., a person who meets legitimate skill, experience, education, or other requirements of a job, and who can perform the “essential functions” of the position with or without reasonable accommodation) and an employer’s obligations to explore and provide “reasonable accommodation.”

The ADAAA’s changes also apply to the Rehabilitation Act – a law prohibiting disability discrimination by federal agencies and by employers who are federal contractors.

The ADAAA will make it harder for employers to argue that an individual is not “disabled” within the meaning of the Act. This means that more reasonable accommodation requests and decisions, as well as more discrimination charges and lawsuits, can be expected. In anticipation of these new challenges, we advise you to:

- Review your policies and procedures with respect to persons with disabilities.
- Provide training for supervisors and human resources about the ADAAA and its effects.

If you need further information about the ADAAA or other assistance, please contact any of our experienced labor and employment attorneys.

Ronald J. Stolkin is co-chair of the firm’s labor and employment law practice. Mr. Stolkin counsels management on personnel practices, employee discipline and labor relations. He defends employers in litigation alleging employment discrimination, breach of contract, wrongful discharge and other employment related torts. He has counseled clients on a wide range of employment issues including employment handbooks and personnel policies, employment-at-will issues, wage/hour issues, drug and alcohol policies, sexual issues, employee disability issues, and leave of absence issues. He earned his B.A. (1967) and J.D. (1978) from The University of Arizona.



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