

Employment Edge 87th Edition - What Employers Need to Know to Comply with the New ADA Amendments

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On September 25, 2008, President Bush signed into law the ADA Amendments Act of 2008 (ADAAA). The law, which amends the Americans with Disabilities Act of 1990 (ADA), clarifies the ADA's definition of disability and overturns certain Supreme Court decisions and EEOC regulations that narrowly interpret the ADA. More employees are likely to qualify for reasonable accommodations and protection from discrimination under the new law, but the law also provides employers with some much needed clarity about which employees are entitled to the ADA's protection. Although some commentators have suggested that the ADAAA will not be good for businesses, the law was supported by a broad coalition that included many employer trade associations, such as the U.S. Chamber of Commerce.

The ADAAA goes into effect on January 1, 2009. Employers will want to make sure that they are familiar with the ADAAA's legal changes, and amend any applicable employment policies appropriately before that date. This Employment Edge is intended to summarize the most significant changes to the law and to provide tips to help employers ensure compliance with the new law.

Changes to the Law

The most significant change made by the ADAAA is its clarification of the definition of the term "disability." The ADA defines the term "disability" as:

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

42 U.S.C. § 12102. The ADAAA does not alter this basic definition of disability, but provides a great deal more information about what this definition means. The ADAAA provides several examples of "major life activities" including: "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 states that the term "major life activities" 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." The ADAAA makes clear that episodic impairments or medical conditions that are in remission are disabilities if they would substantially limit a major life activity when active.

These changes indicate that conditions such as cancer, diabetes, serious heart conditions, and epilepsy, which some courts had found do not always constitute disabilities under the ADA, are likely to consistently be considered disabilities under the new law.

Another change the ADAAA makes is to reverse the Supreme Court's holding in *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999), which required courts to consider the ameliorative effects of mitigating measures in determining whether an individual is disabled. Under the ADAAA, most mitigating measures are not to be considered when determining whether an impairment substantially limits a major life activity. Therefore, employers should not consider measures such as medication, hearing aids, prosthetics, or other medical equipment or supplies in determining whether an employee meets the definition of disabled. The ADAAA makes an exception for ordinary eyeglasses and contact lenses, however, and states that they may be considered in determining whether an individual has an impairment that substantially limits a major life activity.

The ADAAA also weighs in on what it means for an impairment to "substantially limit" a major life activity. Although the ADAAA does not define the term "substantially limits" it expressly reverses the Supreme Court's decision in *Toyota Motor Mfg, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), which held that to be substantially limited in performing a major life activity under the ADA, "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." The ADAAA states that this is "too high a standard" and states that instead, "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." The ADAAA provides little clarity as to what this means, but this language indicates that conditions such as carpal tunnel, severe back pain, obsessive-compulsive disorder, learning disabilities, and depression, which have not always qualified as disabilities under the ADA, are more likely to be treated as disabilities by courts under the new law.

It is clear that these changes will benefit employees by making it more likely that they will qualify for reasonable accommodations and the ADA's protections. These changes will also benefit employers, however, by making it easier for employers, and their legal counsel, to determine which employees with impairments are entitled to protection from discrimination and reasonable accommodations under the ADA. The ADAAA states that the intent of these changes is that employers stop engaging in "extensive analysis" to determine what constitutes a disability under the law, and focus instead on complying with their obligation not to discriminate and to provide reasonable accommodations to individuals who are otherwise qualified to

do a job.

The ADAAA also provides more detail on what it means to be "regarded as" a person with a disability, and reverses the strict interpretation courts had applied to this term. The ADAAA states that:

An 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.

The ADAAA goes on to note that the "regarded as" definition does not apply to impairments that are transitory and minor.

This definition of "regarded as disabled" leaves many unanswered questions and potentially opens the door to many more disability claims against employers. For example, is an employee who is overweight or unusually short or tall regarded as having a disability under this definition? Is an employee who has had medical problems in the past (that did not constitute a disability) or who reads more slowly than other employees regarded as having a disability under this definition? The answers are not evident from the text of the law and it is possible that just about any kind of non-temporary impairment could give rise to a "regarded as disabled" claim. Therefore, employers will want to be particularly cautious about potential "regarded as disabled" claims over the next few years as we wait for the courts to provide more clarity on what this means. Luckily for employers, the ADAAA does clarify that employers do not need to provide reasonable accommodations to individuals who are regarded as disabled but are not actually disabled.

Tips for Complying with the ADAAA

Although the ADAAA makes some fairly significant changes to the law, employers that already have good employee-disability practices in place will not have to make many changes to their practices or procedures. The following tips should help employers to comply with the new law:

- Employers should review their employment policies on disabilities and reasonable accommodations. Most employers have very brief policies that will not need to be changed in light of the new law, but employers that have lengthy, detailed policies that include definitions of what constitutes a disability should consult with legal counsel about whether any changes are necessary.
- Employers that have denied reasonable accommodation requests to current employees because the employer determined that the employee did not satisfy the ADA's definition of the term "disability" should consider whether the new law changes their analysis.
- Human resources professionals and managers who deal with accommodation requests should be made familiar with the changes in the law. The takeaway lesson should be that many more individuals now qualify for protection from discrimination and for reasonable accommodations under the law, so when an

employee makes them aware of a serious physical or mental impairment, the best rule of thumb will be to assume that the condition is a disability and to focus on the employer's reasonable accommodation and non-discrimination obligations. If there are doubts about whether an impairment constitutes a disability under the law, it is advisable to consult with legal counsel.

- Because more employees are now likely to qualify for the ADA's protections, employers are likely to receive more reasonable accommodation requests from employees. Employers should ensure that their managers and human resources professionals have the training they need to appropriately respond to such reasonable accommodation requests. (The ADAAA has not made any changes to the ADA's reasonable accommodation obligations). Keep in mind that it is often helpful to consult with legal counsel when an employer is presented with a particularly challenging or questionable request.
- Managers should also be trained on changes to the ADA's definition of a person who is "regarded as" disabled, which now may make it possible for just about anyone with a non-temporary impairment to bring a discrimination claim under the law. As a result, denigrating comments about employees' physical appearance and physical and mental abilities are now more likely to give rise to liability. For example, denigrating comments about an employee's weight, height, stutter, limp, impaired reading ability, or intelligence are now more likely to give rise to a hostile work environment claim under the ADA. Policies and practices that promote a respectful workplace environment will help employers reduce the risks of such claims.
- In addition, human resources professionals and managers need to be aware of legal risks that now accompany the discipline or termination of a non-disabled employee who has an impairment and who might be regarded as having a disability under the law. More than ever, it is important for employers to dot their "i"s and cross their "t"s to ensure that they have appropriate documentation and support for their termination and disciplinary actions.

Although the ADAAA has changed the ADA and the way courts will interpret the law, good common-sense practices such as promoting a respectful work environment and being open-minded and thoughtful when employees request reasonable accommodations will continue to help employers comply with the law and avoid liability.

If you have any questions about the ADA, the ADAAA, or responding to an employee's reasonable accommodation request, please contact Carl Crosby Lehmann or another member of Gray Plant Mooty's Employment and Labor Law practice group.

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