

## President Signs ADA Amendments Act of 2008

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On September 25, 2008, President Bush signed the ADA Amendments Act of 2008 (ADAAA). The legislation was overwhelmingly approved by the House of Representatives and Senate. As anticipated, the amendments strengthen and expand the protections of the American with Disability Act of 1990 (ADA), which has been viewed as diminished through judicial review and interpretation.

The legislative intent of the ADAAA was to address the legal case law that has incorrectly developed a narrowing of the scope of the ADA, and "as a result...courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities."<sup>1</sup> Congress further noted that "the current Equal Employment Opportunity Commission (EEOC) ADA regulations defining the term 'substantially limits' as 'significantly restricted' are inconsistent with congressional intent, by expressing too high a standard."<sup>2</sup>

Congress further noted that the purpose of the amendments include,

carry[ing] out the ADA's objectives of providing "a clear and comprehensive national mandate for the elimination of discrimination" and "clear, strong, consistent, enforceable standards addressing discrimination" by reinstating a broad scope of protection to be available under the ADA;

to reject the requirement...that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures;

to reinstate a broad view of the definition of handicap under the Rehabilitation Act of 1973;

to reject the strict standard of interpretation of the terms "substantially" and "major" in the definition of disability and the impact upon performing a major life activity;

to convey that the primary object is whether entities covered under the ADA have complied with their obligations and the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis; and

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<sup>1</sup> ADA Amendments Act of 2008, Section 2.

<sup>2</sup> Id.

the EEOC will revise its regulations that defines the term “substantially limits” as “significantly restricted” in compliance with the amendments.<sup>3</sup>

As currently drafted, the ADA prohibits discrimination against people with disabilities in employment, transportation, public accommodation, communications, and governmental activities and applies to employers with 15 or more employees. The ADA ensures equal opportunity in selecting, testing, and hiring qualified applicants with disabilities; job accommodation for applicants and workers with disabilities when such accommodations would not impose undue hardship; and equal opportunity in promotion and benefits. Additionally, the ADA currently defines disability is defined as: (1) a person who has a physical or mental impairment that substantially limits one or more major life activities, (2) a person with a record of a physical or mental impairment that substantially limits one or more major life activities, and (3) a person who is regarded as having a physical or mental impairment that substantially limits one or more major life activities.

A major life activity under the ADAAA includes the operation of a major bodily function, including functions of the immune system, normal cell growth, digestive, bowels, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions.<sup>4</sup>

The ADAAA retain the requirement that a disability must substantially limit one or more 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.<sup>5</sup>

Further, current ADA legislation permits a determination of whether an impairment substantially limits a major life activity to be made with regard to the ameliorative effects of mitigating measures such as medication, medical supplies, equipment, appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies; use of assistive technology; reasonable accommodations or auxiliary aids or services; or learned behavioral or adaptive neurological modifications.

However, the ADAAA will eliminate such mitigating measures as part of the impairment analysis. Further, pursuant to the ADAAA, the substantial limitation analysis will include impairment of one major life activity, but need not limit other activities to be considered a disability. Additionally, an impairment that is episodic or in remission, will now be considered a disability if it would substantially limit a major life activity when active.<sup>6</sup> As with the current ADA analysis, the amendments will continue the consideration of mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether impairment substantially limits a major life activity.

The amendments expand the definition of a person who is regarded as having a physical or mental impairment that substantially limits one or more major life activities. The ADAAA details 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 the 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.<sup>7</sup> However, the “regard as” analysis does not apply to impairments that are transitory and minor, which is impairment with an actual or expected duration of 6 months or less.<sup>8</sup>

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<sup>3</sup> Id.

<sup>4</sup> Id. at Section 3(2).

<sup>5</sup> Id.

<sup>6</sup> Id. at Section 3(3).

<sup>7</sup> Id.

<sup>8</sup> Id.

The ADAAA is effective January 1, 2009. It is anticipated that the ambiguity of the language and definitions will certainly create interpretation and administration turmoil for human resources professionals and potentially open the floodgates of additional litigation. Litigation will likely ensue as a result of the amendments to the Act, but also through the revisions to the regulations that will be promulgated by the EEOC in the future. Further, it is anticipated the amendments will significantly broaden ADA protection to include individuals that are not currently protected.

In preparation for the enactment of the amendments, human resources professionals should begin the process of reviewing policies and procedures to ensure compliance in 2009. Further, training should be provided to staff responsible for the administration of these policies within the organization to ensure proper application of the ADAA. It is also recommended that revisions to policies and procedures are reviewed with legal counsel prior to implementation to ensure the revisions comply with the amendments to the Act. Mr. Baker may be contacted with questions or concerns regarding compliance with this issue. He is also available to assist in the revision/drafting of policies.