

MODERN MANAGEMENT

**THE AMERICANS WITH
DISABILITIES ACT**

and

**THE AMERICANS WITH DISABILITIES
ACT AMENDMENTS ACT**

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TABLE OF CONTENTS

	PAGE
INTRODUCTION.....	1
Summary of the ADAA	1
THE ORIGINAL ADA.....	2
Disability.....	4
Exclusions.....	5
The Employer’s Duty under the ADA	5
THE ADAA.....	6
Purpose of the ADAA	7
Definitions	7
CONCLUSION	9

INTRODUCTION

On September 25, 2008, President Bush signed the Americans with Disabilities Act Amendments Act (“ADAA”) into law. The legislation will take effect on January 1, 2009, and will significantly broaden the federal definition of the “disabilities” that require accommodation under the Americans with Disability Act (“ADA”).

The ADA defined “disability” as a substantial impairment that causes serious limitations. This definition prevented people with minor or transitory problems from filing frivolous lawsuits. Presumably, when the first President Bush signed the ADA he understood that Congress had struck a balance between protecting people with serious disabilities, and who suffered from real discrimination, and people with minor medical conditions who would use the ADA as a job protection law.

Eventually, the U.S. Supreme Court got the opportunity to discuss this balance. In *Sutton v. United Air Lines* (1999), the Court held that people who use medical devices, such as prescription eye glasses, or who take medication to mitigate the limitations of their disabilities are not ADA-disabled. To rule otherwise, the Court observed, would extend ADA protection to nearly every American with a medical condition, something that Congress clearly did not want to do.

In 2002, the court decided *Toyota Motor v. Williams*, which held that a medical condition had to pose severe and near permanent limitations to functioning to qualify as an ADA-disability. In that case, the Court questioned whether an employee with carpal tunnel syndrome had an ADA-disability.

Following these decisions, and others, the federal courts began dismissing ADA lawsuits filed by employees. By 2005, employers had won 97% of ADA cases.

Summary of the ADAA

The new legislation preserves the traditional verbal formula that a covered disability is one which “substantially limits one or more major life activities.” However, Congress has now expressly changed the meaning of these words to expand the number of employees who will be covered by the ADA. For example:

- The term “disability” shall henceforth be interpreted broadly in favor of finding coverage under the ADAA.
- A covered disability now includes any condition that “materially restricts” (rather than “substantially limits”) a major life activity. There is no telling what this new term is intended to mean except that it is intended to be broader than the prior definition.
- An employee is now covered under the ADA whether or not he or she has a covered disability, so long as the employer “perceives” that he or she has an “impairment” that has an expected duration of more than six months.

- The employee's condition shall now be judged in its *unmitigated* state—i.e., without regard to the effects of any corrective measures, such as medications that would control the symptoms.

This pamphlet summarizes the major provisions of the ADA and how the ADAA affects that which employers are required to do there under. Because of the breadth and scope of the ADAA, employers need to take conservative measures in dealing with disabled employees. As such, this pamphlet attempts to both educate and speculate how the ADAA will affect the relationship between employers and employees with disabilities.

THE ORIGINAL ADA

An employer shall not, because of a disability, discriminate with regard to any term or condition of employment against a qualified individual with a disability who can, with or without reasonable accommodation, perform the essential functions of the job, unless such accommodation would create an undue hardship on the employer.

Title I of the ADA covers private, state, and local government employers with 15 or more employees; Section 501 of the Rehabilitation Act of 1973 covers federal agencies. The statutes contain identical anti-discrimination provisions.

The ADA prohibits discrimination against applicants and employees who meet the statute's definition of a "qualified individual with a disability." The ADA defines a "disability" in three ways:

- A physical or mental impairment that substantially limits one or more of the major life activities of an individual;
- A record of such an impairment; or
- Being regarded as having such an impairment.

A "qualified" individual with a disability can (1) satisfy the requisite skill, experience, education and other job-related requirements and (2) perform the essential functions of a position with or without reasonable accommodation.

Job-related requirements, also known as "qualification standards," may include the following:

- Possessing specific training;
- Possessing specific licenses or certificates;
- Possessing certain physical or mental abilities (e.g., meeting vision, hearing, or lifting requirements; showing an ability to run or climb; exercising good judgment);
- Meeting health or safety requirements; or

- Demonstrating certain attributes such as the ability to work with other people or to work under pressure.

Most jobs require that employees perform both “essential functions” and “marginal functions.” The “essential functions” are the most important job duties, the critical elements that must be performed to achieve the objectives of the job. Removal of an essential function would fundamentally change a job. Marginal functions are those tasks or assignments that are tangential and not as important.

If an applicant or employee cannot meet a specific qualification standard because of a disability, the ADA requires that the employer demonstrate the importance of the standard by showing that it is “job-related and consistent with business necessity.” This requirement ensures that the qualification standard is a legitimate measure of an individual’s ability to perform an essential function of the specific position the individual holds or desires. If an employer cannot show that a particular standard is “job-related and consistent with business necessity,” the employer cannot use the standard to take an adverse action against an individual with a disability.

Employers may have to provide a “reasonable accommodation” to enable an individual with a disability to meet a qualification standard that is job-related and consistent with business necessity or to perform the essential functions of her position. A reasonable accommodation is any change in the work environment or in the way things are customarily done that enables an applicant or employee with a disability to enjoy equal employment opportunities. An employee generally has to request accommodation, but does not have to use the term “reasonable accommodation,” or even “accommodation,” to put the employer on notice. Rather, an employee only has to say that he or she requires the employer to provide him or her with an adjustment or change at work due to a medical condition. An employer never has to provide an accommodation that would cause undue hardship, meaning significant difficulty or expense, which includes removing an essential function of the job. Employers typically establish job-related requirements, the specific task or assignments that an employee must perform, and methods to evaluate performance. Evaluation criteria may take into account how well an employee is performing both essential and marginal functions and whether the employee is meeting basic job requirements. For example, working well with others or serving customers in a professional manner. Employers may also enforce conduct standards. For example, rules prohibiting destruction of company property or the use of company computers to access inappropriate materials, such as pornography. Certain performance and conduct standards will generally apply to all employees working for a company or other entity where others might only apply to certain offices or jobs within that entity.

Disability

Prior to the ADAA, the ADA was read broadly as prohibiting disability discrimination in all *terms, conditions* and *privileges of employment*. This included application procedures, hiring, termination, compensation, promotions, job assignments and benefits. The ADA defined a disability as a physical or mental impairment that substantially limits one or more major life activity. Physical impairments are physical disorders or anatomical losses, as well as cosmetic disfigurements that affect the respiratory, cardiovascular or other major body systems. Characteristics that are not the result of a physiological disorder such as height, weight or muscle tone that are within “normal” range are not “impairments.”

Impairments are determined without regard to medicines or prosthetic devices that may treat or compensate for the condition. Mental impairments include mental or psychological disorders such as mental retardation, organic brain syndrome, emotional or mental illness, and special learning disabilities.

Major life activities include performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. An individual is substantially limited in the major life activity of walking, for example, if a physical condition prevents him from walking more than very brief periods of time. Because they have little or no long-term impact, broken limbs, sprained joints and influenza are not likely to be impairments. An individual is substantially limited in the major life activity of working when an impairment precludes that person from performing a class of jobs or a broad range of jobs. However, an individual is not substantially limited in working if he is unable to perform a particular job for one employer, or a specialized job requiring extraordinary skill, talent, or prowess. For example, a professional baseball pitcher who develops a bad elbow and can no longer throw a baseball would not be considered substantially limited in the major life activity of working.

In addition to actual disabilities, the ADA also protects (1) individuals with “a record of ... impairment,” and (2) individuals who are “regarded as” being disabled. Thus, individuals who have recovered from past impairments, as well as those who have been misclassified as having an impairment, are protected. All of this is to protect those with or without impairments who face obstacles as the result of the perceptions of others. Thus, a person with controlled high blood pressure who is reassigned to less strenuous work solely because of the employer’s unsubstantiated fears that the employee will have a heart attack would be “regarded as” disabled. Other examples would be those with cosmetic disfigurements, former drug addicts, and people with a history of cancer or mental disabilities.

Exclusions

Homosexuality, bisexuality, transvestism, pedophilia, exhibitionism, voyeurism, gender identity disorders and other sexual behavior disorders are not protected disabilities under the ADA. Other conditions not protected by the ADA are compulsive gambling, kleptomania, pyromania, current use of illegal drugs, and psychoactive substance use disorders resulting from current use of illegal drugs.

The Employer's Duty under the ADA

The line between reasonable accommodation and undue hardship will vary with each situation, and courts continue to resolve the conceptual difficulties contained in both standards. Decisions indicate that plaintiffs have the burden of production regarding the possibility of reasonable accommodation. Some uncertainty exists as to the employer's burden once the plaintiff has produced evidence sufficient to make a facial showing that accommodation is possible. Generally speaking, the larger the employer, the greater the likelihood that a particular accommodation will be seen as reasonable. This is because the larger employers will be presumed to have the financial wherewithal and the operational flexibility to do more.

An employer must also bear in mind that its history of dealing with employees will be relevant when deciding the reasonableness of an accommodation. For example, an employee's request for a medical leave will need to be considered in light of leaves granted others for reasons such as pregnancy. However, if an employer is required to reassign a disabled employee to a lower paying job, it is permissible to lower the person's salary to match the job if the same is done when non-disabled employees are reassigned.

There are some areas where accommodation is not required. Those who associate or have a relationship with the disabled may not be disqualified because of the association, but there is no duty to accommodate them. While applicants are due accommodation, an employer is not required to move an applicant to a different job because he cannot perform (with accommodation or without) the essential duties of the job for which he applied. Federal courts have consistently held that an employer is not required to accommodate an employee's disability at the expense of infringing upon other employees' rights under the terms of a collective bargaining agreement. In general, employers are obliged to look for ways to alter the job and the environment to better fit the person rather than rejecting the person out of hand.

Employers are not obligated to accommodate disabilities that are unknown to them nor are they required (or permitted) to ask employees if they require an accommodation. The duty is to respond to requests. (If the need for an accommodation is obvious, however, an employer is well-advised to confront the situation and look for ways to help the employee rather than sit back and watch him or her fail.) Courts have ruled that it is

incumbent upon both the employee/applicant and the employer to engage in dialogue concerning possible accommodations. And, as the disabled individual knows best the extent of his disability, seeking input from that person is encouraged.

THE ADAA

The ADAA broadens the protections of the ADA in a number of ways:

- (1) The ADAA specifically requires courts to interpret the definition of disability broadly. Additionally, the Equal Employment Opportunity Commission (“EEOC”) is directed by Congress to redraft its regulations to incorporate this broad view as it defines the meaning of “substantially limits a major life activity.” Currently, the EEOC regulations define it as “significantly restricted.” This aspect of the ADAA overturns the U.S. Supreme Court decision in *Toyota Motor Mfg, Kentucky, Inc. v. Williams*. In *Williams*, the Court held the ADA should be interpreted strictly to create a demanding standard, and concluded that “substantially limits” means a limit “to a large degree;”
- (2) The ADAA clarifies that, in assessing whether someone is disabled, an employer can no longer consider the effect of mitigating measures (except that, notably, eyeglasses and contact lenses may still be considered). This aspect of the ADAA overturns the U.S. Supreme Court decision in *Sutton v. United Airlines, Inc.* In *Sutton*, the Court held the determination of whether an impairment is “substantially limiting” must account for the “corrective measures” a person takes to ameliorate his/her disability;
- (3) The ADAA specifies numerous “major life activities,” including operation of bodily functions (for example, the functions of the immune system, the circulatory system, and the digestive system), eating, thinking, concentrating, reading, learning, communicating, caring for oneself, and working. The Act is intended to re-establish coverage under the ADA for neurological difficulties such as dyslexia and other learning disabilities;
- (4) The ADAA clarifies that an “impairment that is episodic or in remission” may qualify as a disability, if the impairment substantially limits a major life activity when in its active state; and
- (5) The ADAA expands the definition of who may be “regarded as” disabled. Courts have interpreted this phrase to mean the employer must regard the individual as having a “disability” within the meaning of the ADA. Now, under the ADAA, a person may be regarded as disabled simply if he or she has or is perceived as having a physical or mental impairment regardless of whether it limits a major life activity or is perceived to limit a major life activity. Thus, the two prong test now becomes one prong.

Purpose of the ADAA

As codified in the ADAA, the purposes of this Act are:

- (1) To carry 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;
- (2) To reject the requirement enunciated by the U.S. Supreme Court in *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures;
- (3) To reject the U.S. Supreme Court's reasoning in *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability ("the regarded as" prong) and to reinstate the reasoning of the U.S. Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973;
- (4) To reject the standards enunciated by the U.S. Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), that the terms "substantially" and "major" in the definition of disability under the ADA "need to be interpreted strictly to create a demanding standard for qualifying as disabled," and 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"; and
- (5) To provide a new definition of "substantially limits" to indicate that Congress intends to depart from the strict and demanding standard applied by the U.S. Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* and by numerous lower courts.

Definitions

(1) Disability—The term "disability" means, with respect to an individual:

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

(2) Substantially Limits—The term “substantially limits” means materially restricts.

(3) Major Life Activities—

- (A) IN GENERAL- Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working.
- (B) MAJOR BODILY FUNCTIONS- A major life activity also 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.

(4) Regarded As Having Such An Impairment—

- (A) 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.
- (B) An individual is not regarded as having an impairment if such impairments are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

(5) Rules Of Construction Regarding The Definition Of Disability—

- (A) The definition of “disability” shall be construed broadly.
- (B) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.
- (C) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
- (D) (i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as—
 - (l) medication, medical supplies, equipment, or 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;

- (II) use of assistive technology;
 - (III) reasonable accommodations or auxiliary aids or services; or
 - (IV) learned behavioral or adaptive neurological modifications.
- (ii) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.
- (iii) (I) the term “ordinary eyeglasses or contact lenses” means lenses that are intended to fully correct visual acuity or eliminate refractive error; and
- (II) the term “low-vision devices” means devices that magnify, enhance, or otherwise augment a visual image.

As a result of all of the aforementioned factors, there will likely be an increase in the number of employees claiming disability status under the law. Consequently, employers may receive more frequent requests for accommodation from employees claiming disability status. In tandem with the additional number of accommodation requests, employers may also receive an increased number of disability-related discrimination claims. While ADA claims have often been regarded as more difficult to assert than other forms of discrimination, the expansive language of the ADAA will likely change that dynamic.

CONCLUSION

The new legislation takes effect January 1, 2009. At that time, a larger portion of the workforce will qualify as disabled, additional reasonable accommodations may be required, and employees will be more successful in the court system. As employers gear up for the effective date of the ADAA, they should reassess their reasonable accommodation procedures, and educate HR professionals and managers about what may qualify as a disability to ensure compliance with the new law. Employers should also watch carefully how the new “regarded as” definition is used by employees in the workplace and in the court system. Of all the ADAA provisions, the new definition of “regarded as” may prove to be the most difficult for employers.

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