Client Advisory

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President Bush Signs ADA Amendments Act, Greatly Expanding Number of Employees Protected Against Disability Discrimination

On September 25, 2008, President Bush signed into law the "ADA Amendment Act of 2008" ("ADAAA"), which amends and significantly expands the scope of the Americans with Disabilities Act. The ADAAA takes effect on January 1, 2009. The ADAAA did not change an employer's basic obligations under the ADA. It does, however, expand the definition of an ADA–protected "disability" and thus the universe of people potentially covered by the law. That expansion, coupled with the publicity surrounding the ADAAA's passage, will likely cause an uptick in disability bias claims. All employers need to be aware of the new definitions and train their managers and HR professionals to avoid becoming ensnared by the new statute.

WHAT HAS CHANGED?

- There is now a broader and more flexible definition of the term "disability."
- The list of "major life activities" has expanded.
- Courts can no longer consider whether "mitigating measures," such as medication or assistive technology, reduces the impact of an impairment on an individual.
- Diseases that are "episodic" or in remission may still be "disabilities."
- Anyone who claims he is "perceived" to be disabled can now make an ADA claim, even if the "perceived" disability *does not* impact a major life activity.

A NEW "FLEXIBLE" DEFINITION OF A DISABILITY

The ADA defines a disability as a physical or mental impairment which "substantially limits" a person's ability to engage in one or more of his or her "daily life activities." Once someone proves they have an ADA-covered "disability," the employer may not discriminate against this person and may be required to "accommodate" him or her in the workplace.

When it was passed in 1991, the ADA was predicted to have wide application to thousands of people. That is not how it turned out. In construing the ADA, the federal courts have interpreted the definition of a "disability" strictly, resulting in cases where people with cancer, for example, were found not to be entitled to the ADA's protections. That is all over, and now under the new ADAAA, thousands more people will be able to successfully claim they are "disabled."

The goal of the ADAAA was to nullify what Congress regarded as overly restrictive caselaw and it thus began with a specific direction to the courts: that the ADAAA should be interpreted to favor "broad coverage of individuals under the ADA." Congress further directed that the issue of whether an employee has a "disability" should no longer be subject to "extensive analysis." Instead, the courts must be "expansive" and "flexible" in interpreting the term, and to focus *not* on whether an employee is "disabled," but on whether the "employer is complying with its obligations under the law."

What does that mean?

Congress is giving the courts and the EEOC a mandate to apply the ADA more liberally and include more people in its protections. The courts will be obligated to follow those directions and more employees will now be deemed "disabled."

THERE ARE MORE "MAJOR LIFE ACTIVITIES"

The ADAAA also rejects the federal courts' restrictive interpretation of the term "major life activity," instructing that this term should also be interpreted using a "flexible" standard. The Act then goes on to provide a "non-exhaustive" list of "major life activities" and "major bodily functions." Among these new "major life activities" are reading, learning, working, "communicating," "concentrating," "thinking," "caring for oneself," walking, eating and sleeping. With the addition of "working" to this list, it is now clear that someone who is deemed disabled by an insurance carrier or physician because this person cannot do his or her job is now "disabled" under the ADA. Moreover, this arguably means that anyone who cannot perform one of these activities due to a physical or mental impairment is now "disabled" under the ADA.

The ADAAA also states that any impairment that interferes with any of the "major bodily systems or organs" (i.e., neurological, reproductive, digestive, respiratory, circulatory) are now covered by the ADA.

What does this mean?

People with a wider range of impairments will seek ADA protection. As drafted, even if a listed impairment is not at all related to work, the individual has a "disability" under the ADA. Employers are also likely to see more claims based on "invisible" illnesses, such as learning disabilities, psychological disorders and mental illnesses.

COURTS MAY NOT CONSIDER "MITIGATING MEASURES"

In what *was* a victory for employers, in *Sutton v. United Airlines*, 527 U.S. 184 (1999), the Supreme Court had held that in evaluating whether an employee had a disability, the courts should consider any "mitigating measures," such as medications, prosthetics, or hearing aids, which were available to that person, to ameliorate the effects of their condition. *Sutton* is no longer the law. The ADAAA overruled *Sutton* and provides that, in assessing whether a person has a "disability," courts now *cannot* consider any "mitigating measures" (except for eyeglasses and contact lenses).

What does that mean?

Anyone with a condition that is regulated by medication, or who is aided by a device like a hearing aide, a pacemaker, an implant or some other technology will now qualify as "disabled" under federal law, regardless of whether they exhibit symptoms which interfere with their ability to work. Essentially, you are "disabled" even if modern medicine allows you to function well, despite your condition.

THE ADAAA COVERS IMPAIRMENTS THAT ARE EPISODIC OR IN REMISSION

Under the "old" construction of the ADA, courts had found that employees who had a disease that was in remission were not protected by the ADA, since they were not currently "substantially limited" in a major life activity. This is also a thing of the past.

The ADAAA states that employees suffering from "episodic" impairments or impairments in remission are protected under the ADA, if the condition *would* substantially limit a major life activity *when active*.

What does that mean?

The employee whose heart disease or diabetes or high blood pressure is treated with medication and controlled, or who may not "show" any symptoms is now "disabled" under the ADA. Does this mean that the employee with cancer or heart disease that is treated and in remission is forever "disabled"? One would wonder how the EEOC will construe these new terms. But,

you could argue that no employee will ever be "cured" under the new ADAAA.

EXPANDED PROTECTION FOR EMPLOYEES WHO ARE "REGARDED AS" DISABLED

The ADA had always protected those who claimed they were "regarded" or "perceived" as disabled even if they were not presently suffering from any disability. However, these plaintiffs had to prove that the alleged disability would have been "substantially limiting," in order for them to be protected. This is also no more. The ADAAA provides that an employee may claim that they were "regarded as" disabled by their employer *even if the impairment would not substantially limit a major life activity*. In a small victory for employers, it states that a plaintiff who claims a "transitory" or "minor" impairment may not fit into this "regarded as" group, and employers are not required to provide reasonable accommodations to those employees who are covered only under the "regarded as" prong of the statute.

What does this mean?

An employee who "thinks" he or she is being treated differently because of some "perceived" disability (which may not exist) can make an ADA claim.

THE IMPACT OF ADAAA ON EMPLOYERS

The ADAAA greatly expands the number of employees who may have an ADA-covered "disability," and thus creates a broad new class of employees who are protected by the ADA. More daunting is the fact that many of the newly "disabled" may not presently be ill, or may have conditions which are "controlled" or asymptomatic. Hence, it will not always be easy to determine who falls into this category. As a result, it is likely that you will see more employees declaring themselves to be "disabled," and claiming discrimination for requesting work accommodations.

Not only are more employees covered by the ADA, the onus will now be on employers to make sure that they are in compliance with the law. In fact, Congress has told the courts and the EEOC that the presumption must weigh in favor of finding the employee to be "disabled," thus turning the focus from the plaintiff to whether the employer has "satisfied its obligations" under the law. As a result, employers will be under more scrutiny, and will be expected to defend employment decisions and establish that reasonable accommodations were offered and provided. This will make it more difficult for employers to defend against ADA claims. Employers would be well advised to err on the side of over-inclusion, presuming that an employee with an impairment or a history of impairment is protected by the law.

WHAT SHOULD YOU DO?

- Start with your job descriptions. Review them and make sure they are accurate, complete and that they define the "essential" and non-essential functions of every position. Remember, you do not have to accommodate an employee by removing an essential job function. This may become more important once the ADAAA goes into effect.
- Review your leave policies as well as policies for hiring, promotion, applications and transfers. Make sure you are tracking the ADAAA and its new definitions.
- Make sure that you comprehensively document the accommodation process with your employees. Document any job accommodations offered or provided to employees, as well as the process that was undertaken by the company to design those accommodations. If anything, employers will have to err on the side of "over-inclusion" and should take care to provide reasonable accommodations where required by the statute.

- If you need to discipline an employee with impairment or a history of an impairment, make sure to *document*, *document* and *document*. Employers must be sure that any adverse action taken against a "disabled" employee will be subject to extra scrutiny and be prepared to defend it.
- Training is essential. This new ADAAA opens up a brave new world and employers must train all supervisors, managers and human resources personnel to educate them as to the new standards. It is your managers who are often the first to hear requests for light duty, shift changes and other matters that can pertain to claims of disabilities. They need to understand how to respond and handle those issues, or they could create liabilities for the company.

For more information or advice on complying with the new legislation, or on any other labor and employment matter, please contact:

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