

Americans with Disabilities Act to Be Substantially Expanded Effective January 1, 2009

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On September 15, 2008, President Bush signed into law the Americans with Disabilities Act Amendments Act of 2008 (ADAAA), which passed both houses of Congress with strong bipartisan support. The ADAAA sets out to broadly expand the meaning of "disability" and thereby to widen the coverage of the original Americans with Disabilities Act (ADA). These amendments, which go into effect January 1, 2009, legislatively overrule a series of decisions by the U.S. Supreme Court that had narrowly interpreted what constitutes a person with a disability entitled to protection under the ADA. As a result, there are a number of changes that will have an impact on employers across the country.

A Summary of Important Changes under the ADAAA

Congressional Intent to Expand Class of Individuals Covered by the ADA. Courts have taken a restrictive view over the years of what constitutes a disability under the ADA. The ADAAA makes it clear that this will no longer take place. In fact, the ADAAA expressly requires that courts construe disability "in favor of broad coverage . . . to the maximum extent permitted" by the ADA. The implied directive is that courts are to err in favor of coverage.

"Major Life Activities" Expanded. The ADA defines a disability as a physical or mental condition that substantially limits "one or more major life activities." The ADAAA calls for a broader interpretation of the term "major life activities" by adding specific examples and expanding the phrase to include "operation of a major bodily function." The new and non-exhaustive list of major life activities includes "caring for oneself, performing manual tasks, seeing, hearing, eating, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working." According to the ADAAA, major bodily functions now include "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions." The intent is to ensure that certain medical conditions—such as high blood pressure, diabetes, epilepsy and asthma—are considered conditions that affect major life activities.

"Substantially Limited" Standard to Be Softened. The U.S. Supreme Court interpreted the requirement that a disability be "substantially limited" to mean that a plaintiff had to show that his or her impairment prevented or severely restricted performance of activities of central importance to

daily life. The ADAAA states that the term "substantially limited" does not need to arise to this level of severity. The ADAAA does not, however, describe what the correct definition or test should be. Instead, it instructs the EEOC to modify its regulations to define the phrase in a manner "consistent with the purpose" of the ADAAA.

Mitigating Measures No Longer to Be Considered. In a 1999 decision, the U.S. Supreme Court held that mitigating factors, such as medications and prosthetics, could be considered in determining whether an individual is disabled under the ADA. Rejecting this standard, the ADAAA explicitly states that corrective measures should not be taken into account in determining whether a person's impairment substantially limits a major life activity, even if such measures allow the individual to successfully manage his or her impairment. Therefore, an employer will still need to accommodate an individual who is fully able to perform his or her job duties while taking medication or using prescribed medical devices. The only exception is that usage of "ordinary eyeglasses and contact lenses" can be considered in determining whether a person has a visual disability.

Expansion of Coverage for Persons "Regarded as" Disabled. The ADA protects employees from being discriminated against for being "regarded as" disabled. A U.S. Supreme Court decision held that for an employee to prove discrimination based on a *perceived* disability, he or she had to show that the impairment in question actually limited or was perceived to limit a major life activity. The ADAAA overturns that decision by requiring that the employee need only show that the employer perceived the employee as impaired, whether or not the impairment actually limits or is perceived to limit a major life activity. The ADAAA does exclude impairments properly characterized as "minor and transitory" from qualifying under "regarded as" claims, with "transitory" defined as six months or less. The ADAAA also makes clear that a claimant with no actual impairment has no cause of action under the ADA for a failure to accommodate.

Episodic Conditions Covered. The ADAAA also extends ADA protection to persons with episodic impairments or conditions that are in remission if the impairment substantially limits a major life activity in its active state.

Impact of the ADAAA on Employers

Until now, an employer faced with an ADA discrimination claim had an enhanced ability to get charges or lawsuits dismissed or summary judgment motions granted on the basis that the claimant could not prove that the claimed impairment rose to the level of a disability protected by the ADA. That will probably no longer be the case, as many conditions that previously did not meet the requirements for being "disabilities" will now be considered covered under the ADAAA. As a result, more cases will likely go to trial or settle for larger amounts.

It is also likely that the focus in contested claims or lawsuits will shift from the initial question of whether an individual has a covered disability to the issue of the individual's ability to perform the essential job functions with or without a disability.

Also troubling for employers is the new "regarded as" disabled language. Under the ADAAA, employees will no longer have to show that the employer regarded them as substantially limited in any major life activity, making it far easier for employees with impairments not rising to the level of disabilities to pursue claims on a "regarded as" disabled theory.

In light of these developments, management should take disability claims and requests for accommodations even more seriously. If you have questions about the ADA, the new amendments or

the ADAAA's impact on your obligations as an employer, please contact a member of the Much Shelist Labor & Employment practice group.

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