



Expansion of the ADA

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The new Americans with Disabilities Act Amendments Act ("ADAAA") mandates a broad reading of the ADA that will expand protection to many employees with physical and mental impairments not previously protected. Because of the amendments, employers will focus less on the issue of whether an employee has a protected disability, and more on whether and how the protected employee can be reasonably accommodated.

The ADA provides protections for qualified disabled employees. A person is "disabled" if he/she has:

1. a physical or mental impairment that substantially limits one or more major life activities;
2. a record of such impairment; or
3. is regarded as having such an impairment.

Congress has legislatively rejected years of U.S. Supreme Court decisions that resulted in narrow construction of the term "disability," strict construction of the phrase "substantially limits," a limiting definition of "major life activities," removal from consideration of impairments whose effects are mitigated by medication and devices, and limitation on who is "regarded as disabled." The ADAAA mandates a broad reading of the Act that will now protect a multitude of individuals with impairments not previously protected.

The term "disability" must now be construed in favor of broad coverage.

1. **Original ADA:** The definition of "disability" was narrowly construed. Those individuals with protected disabilities were "a discrete and insular minority."
2. **Amendments effective January 1, 2009:** Congress has stricken the former ADA language providing that the population of individuals with protected disabilities is a "discrete and insular minority." The ADAAA states that the intent of Congress is that attention be paid to "whether entities have complied with their obligations," without "extensive analysis" of whether the individual's impairment constitutes a "disability." The definition of "disability" must now be interpreted in favor of "broad coverage . . . to the maximum extent permitted" by the statute.
3. **Impact on Employers:** The primary analysis will shift from whether an employee has a disability that requires accommodation engaging in an interactive process with the employee to determine what accommodations are reasonable.

The definition of “substantially limits” has broadened.

1. Original ADA: The United States Supreme Court held that the definition must “be interpreted strictly to create a demanding standard for qualifying as disabled.” In order to be substantially limiting, the impairment must “prevent or severely restrict the individual from doing activities that are of central importance to most people’s lives.”
2. Amendments effective January 1, 2009: The ADAAA rejects the Supreme Court’s holdings. Now “substantially limits” must be construed broadly. And an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
3. Impact on Employers: The duty to reasonably accommodate will arise more easily and even if the impairment does not currently limit activities but is episodic or in remission.

The definition of “major life activities” has expanded.

1. Original ADA: The statute did not define “major life activities,” but the United States Supreme Court held that major life activities” refer only to activities of central importance of daily life.”
2. Amendments effective January 1, 2009: The definition of “major life activities” has been expanded by including two non-exhaustive lists:
 - a. The first list includes many activities previously recognized, such as walking, but also now includes activities not previously recognized in this Circuit, such as reading, bending and communicating. They include, non-exhaustively, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working.
 - b. The second list includes major bodily functions, such as functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions.
3. Impact on Employers: This change is likely to have significant impact in a wide variety of circumstances, including back injuries.

Most mitigating measures are now immaterial.

1. Supreme Court decisions construing original ADA: Mitigating measures must be considered in determining whether an individual has an impairment that substantially limits a major life activity.
2. ADAAA: Now, mitigating measures (other than ordinary eyeglasses or contact lenses) must not be considered in assessing whether an individual has a disability. The effects of mitigating measures such as medication, medical supplies, equipment or appliances, low vision devices, prosthetics, hearing aids, mobility devices or oxygen therapy equipment, will not be considered. Use of assistive technology, reasonable accommodations or

auxiliary aids or services, and learned behavioral or adaptive neurological modifications will not be considered.

3. Impact on Employers: Impairments, both physical and mental, that are medically controlled are still covered.

“Regarded as” disabled has expanded.

1. Original ADA: In order to show discrimination on the basis that the employer regarded the individual as having a disability, it was necessary to prove, in part, that the individual has, or is perceived to have, a physical or mental impairment that substantially limits a major life activity.
2. ADAAA: The standard for being “regarded as disabled” will now be met if the individual has an actual or perceived impairment, regardless of whether it is perceived to substantially limit any major life activity, unless the perceived impairment is transitory (i.e., duration less than six months) or minor. Employers are not required to provide reasonable accommodations to those who are covered by the ADA solely by being “regarded as” disabled.
3. Impact on Employers: Simply regarding an employee as having an impairment, regardless of whether the employer regards the employee as having one that substantially limits major life activities, brings the employee within the protection of the Act.

What to do.

Every employer that is subject to the provisions of the ADA (every employer with 15 or more employees and state and local government of any size) should:

1. Provide training on the requirements of the ADA, as amended;
2. Audit its EEO, disability, accommodation, and related policies to ensure compliance with the amendments;
3. Coordinate its ADA process with its workers’ compensation process, as more workers’ compensation injuries will be covered; and
4. Audit its job descriptions to ensure that they are up-to-date and accurate, clearly setting out the employer’s expectations.

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