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## Labor and Employment Legal Update **ADA Amendments Act of 2008**

### **ADA Amendments Act Now Effective**

The Americans with Disabilities Amendments Act of 2008 (Act), which was signed by President Bush in September, became effective January 1, 2009. Since its passage in 1991, court decisions interpreting the Americans with Disabilities Act (ADA), as well as portions of the regulations of the Equal Employment Opportunity Commission (EEOC), have limited its protections in various respects. The ADA Amendments Act is intended to undo some of those limitations and "to restore the intent and protections of the ADA."

By significantly broadening the definition of a disability, the Act increases the circumstances under which employers are required to provide reasonable accommodations. In conjunction with the revised definition of when an employee is "regarded as" impaired, the Act's substantial changes to the ADA are likely to lead to more litigation and potentially a greater likelihood that an ADA claim will survive to trial.

### **Act Redefines "Disabled"**

Under the ADA, a disability is defined as a "physical or mental impairment that substantially limits one or more...major life activities." Court decisions and EEOC regulations defined these statutory terms over time. While the ADA Amendments Act of 2008 leaves the original definition intact, it introduces additional statutory definitions and interpretations that represent a fundamental broadening in the coverage of the ADA. To that end, the Act clarifies that no longer should the definition of disabled be considered a "demanding standard" to meet; instead, the definition of disabled should be construed "in favor of broad coverage."

### **Act Rejects Consideration of Mitigating Measures**

In 2002, the U.S. Supreme Court determined that the effects of any mitigating measures, such as prosthetics, medications, hearing aids, and learned behaviors, must be considered when determining whether an individual is disabled. Under the former regulations, if an individual was no longer "substantially limited in performing a major life activity" with the use of such mitigating measures, the individual was not considered "disabled" under the ADA.

The Act reverses this rule, prohibiting both courts and employers from taking into account any mitigating measure that assists individuals when determining whether they are disabled under the statute. The Act does, however, carve out eyeglasses and contact lenses as exceptions to the mitigating measure rule, stating that "ordinary eyeglasses or contact lenses must be considered in determining whether an impairment substantially limits a major life activity."

### **Act Expands Coverage of Impairments That Are Episodic or In Remission**

Prior to the ADA Amendments Act, it was often difficult to establish that an episodic impairment, or one in remission, had substantially limited an individual in a major life activity because the standard focused on the overall effects of an impairment, not just impairments at their most severe. In a significant change, the Act provides that an impairment "that is episodic or in remission is a disability if it would substantially limit a major life activity when active." The new standard appears to allow hypothetical inquiries as to the severity of an individual's impairment. As a result, many more impairments that are episodic or in remission will qualify as disabilities.

## **Act Redefines "Substantially Limits" Language, but Provides Little Guidance**

The Supreme Court has interpreted the term "substantially limits" to mean an impairment that "prevents or severely restricts" an individual from performing major life activities. The Act rejects this standard, again indicating an intention to provide broader coverage than the Supreme Court's interpretation; however, the Act does not provide a new standard, leaving the EEOC to define "a standard that will be consistent with this Act."

## **Act Expands "Major Life Activities"**

To be considered a disability, an impairment must substantially limit one or more "major life activities." Although "major life activity" previously has not been defined in the ADA, the EEOC has provided a short list of examples, which has led to uncertainty about activities that do not appear on the list. For example, certain nonvolitional bodily activities, such as normal bodily functions, were not on the EEOC's list and had become the source of debate among courts.

The Act broadens the list of major life activities and provides clarification that an impairment that substantially limits one "major life activity" need not limit the other major life activities to be considered a disability. Under the Act, the list of major life activities includes caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. In addition, the law clarifies that the operation of any major bodily function is considered a major life activity, including, but not limited to immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

## **Significant Changes to "Regarded As" Prong**

Under the previous law, an individual with no impairment at all could be protected from being "regarded as" disabled if the individual was regarded or treated as having a substantially limiting impairment. Thus, an individual was covered only if the employer treats the person as if he or she has an impairment that substantially limits a major life activity. Many claims failed under this standard because it is difficult to demonstrate that an employer's misperception of the individual's condition is so severe as to amount to a belief that the condition substantially limits a major life activity.

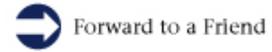
In contrast, under the ADA Amendments Act of 2008, to state a claim that an individual is "regarded as" being disabled, it is no longer necessary to demonstrate that the individual is regarded as having an impairment that substantially limits a major life activity. The Act focuses on the employer's motivation, regardless of the severity of the perceived impairment. Thus, an individual meets the statutory requirement by establishing that he or she suffered an adverse action (e.g., denial of promotion, termination) because of an actual or perceived impairment, regardless of "whether or not the impairment limits or is perceived to limit a major life activity."

The Act, however, limits the newly expanded "regarded as" claim of discrimination in two ways. First, the Act clarifies that when an impairment lasts for only six months or less and is "minor," the impairment will not qualify as a disability under the "regarded as" prong. Second, the Act clarifies that an employer need not provide reasonable accommodations or reasonable modifications to policies, practices, or procedures to an individual who only meets the "regarded as" definition of disability. To be entitled to a reasonable accommodation, an individual must actually be substantially limited in a major life activity.

## **Impact of ADA Amendments Act of 2008 for Employers**

With the new year upon us, employers are readying themselves to maneuver the new ADA landscape. Under the new Act, more individuals will qualify as disabled, and employers will be required to provide accommodations to a greater percentage of their workforce. The Act's strong statements favoring coverage, such as "...whether an individual's impairment is a disability under the ADA should not demand extensive analysis," forecast a shift in litigation focus away from the definition of disability. The more expansive definition of a disability may also impose a greater obligation on employers to engage in the "interactive process" to determine whether a reasonable accommodation would allow individuals to perform the essential functions of their position. In addition, the Act's revised definition of when an employee is "regarded as" having a protected impairment is likely to increase litigation of these types of claims. Although additional guidance may be anticipated from the EEOC and court decisions interpreting the Act, now is the time for employers to review their policies and practices and to educate human resources, executives, and supervisors in response to the new amendments to the ADA.

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