



ADA Amendments Act of 2008

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On September 25, 2008, the President signed the Americans with Disabilities Act (ADA) Amendments Act of 2008 (ADA-AA) into law. P.L. 110-325. The ADA-AA represents a compromise effort between the disability rights community, businesses and Congress to implement the first significant revision of the ADA since its original passage in 1990.

The ADA-AA serves two main purposes: 1) to repudiate existing Supreme Court precedent which had placed a high burden of proof on complainants attempting to prove that they suffer from a disability covered under the ADA; and 2) to expand the definition of disability under the ADA to significantly broaden its coverage. Congress passed the ADA-AA with the purpose of shifting the debate in ADA cases from “Is the complainant disabled under the ADA?” to “Did discrimination occur because of complainant’s disability?”

The ADA-AA goes into effect on January 1, 2009 and the EEOC will publish new enforcement guidance to aid employees and agencies in dealing with claims of disability discrimination under the ADA-AA shortly thereafter. Both employees and managers alike should pursue training on the provisions of the ADA-AA to understand the broadened definition of disability as well as how the new law might affect issues such as reasonable accommodation requests and qualification standards.

Below is a summary of the major changes enacted by the ADA-AA.

What does “disability” mean?

The current version of the ADA defines disability as “a physical or mental impairment that substantially limits a major life activity; a record of such an impairment; or being regarded as having such an impairment.” 42 U.S.C. 12102. While the definition of a disability has not been changed by the ADA-AA, the interpretation of the definition, particularly the phrase “substantially limits” has changed.

The ADA-AA rejects prior Supreme Court guidance that the ADA requires a “demanding standard” for establishing coverage and that “substantially limits” should be read to

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mean that an impairment must “severely restrict” a major life activity. P.L. 110-325, §2(b). The ADA-AA also expresses Congress’s expectation that the EEOC will revise its regulation defining “substantially limits” as “significantly restricted.” *Id.* In the absence of these exacting standards, the bar for establishing coverage under the ADA has been greatly reduced, allowing for a wider pool of potential complainants. Until the EEOC publishes new regulations, it remains unclear what the new definition of “substantially limits” will be under the ADA-AA, but it is apparent from the language of the statute that Congress’s intent was to establish a definition of disability that did not serve as an insurmountable obstacle to coverage. Further, Congress expressly states that “the question of whether an individual’s impairment qualifies as a disability should not demand extensive analysis.” *Id.*

Also of note, the ADA-AA provides that an impairment can be a disability even if it is episodic or in remission. This provision would cover conditions such as epilepsy or cancer, but each case would be evaluated individually to determine if it met the “substantially limits” standard when the impairment was active. P.L. 110-325, §4.

“Mitigating measures” no longer considered

Under the ADA-AA, mitigating measures (i.e. measures that help correct or ameliorate an individual’s physical or mental condition) are no longer to be considered when determining if the individual suffers from a disability covered under the ADA. *Id.* Some examples of mitigating measures are: medication, medical supplies and equipment, low vision and hearing devices, prosthetics; use of assistive technology and reasonable accommodation. *Id.* The only exception to this new rule is ordinary corrective lenses that “fully correct visual acuity or eliminate refractive error.” *Id.* These are distinguished from low vision devices that “magnify, enhance, or otherwise augment a visual image.” *Id.*

New Major Life Activities Recognized

In broadening the ADA’s definition of disability, the ADA-AA has included new “major life activities” that if “substantially limited” by an individual’s condition will form the basis of coverage under the ADA. *Id.* The new activities added are bending, reading and communicating. *Id.* The ADA-AA also provides a revised list of major bodily functions that are also considered “major life activities.” *Id.* The lists provided in the ADA-AA are not all encompassing. Activities such as reaching, sitting, and interacting with others have been recognized by EEOC; despite not being explicitly listed in the statute, they could still be covered and form the basis of establishing disability.

“Regarded as” disabled

Under the original ADA, in order to establish a claim that an employee is “regarded as” disabled, an employee must show that he or she is regarded as having a condition that substantially limits a major life activity. Further, under the original ADA, an employee must also show that he or she is regarded as being unable to perform a class of jobs, not

just the particular job they hold at the time of the alleged discrimination. The ADA-AA removes both of these burdens on employees seeking coverage under the “regarded as” provision of the ADA. Instead of needing to prove that an employer regards employee’s condition as substantially limits a major life activity, the ADA-AA requires that an employee must be subject to discriminatory act under ADA based on a disability that is not transitory (lasting 6 months or less) and minor. Further, under the ADA-AA, rejecting prior Supreme Court precedent, an employee is no longer required to show that the employer regarded the employee as substantially limited in the major activity of working, namely that the employee is unable to perform a class of jobs. Despite this broadened definition of being “regarded as” disabled, defenses are still available to employers, namely that the employee is in fact unable to perform the job in question; or someone else is better qualified. Clearing up an issue previously raised by complainants of disability discrimination based on the employer regarding him or her as disabled, under the ADA-AA, such complainants are not entitled to reasonable accommodation.

Looking forward

Though the ADA is silent on issues such as reasonable accommodation and “direct threat,” the expanded definition of disability created by the ADA-AA will no doubt impact how employers, including federal agencies, treat these issues. With the sweeping revisions of the ADA-AA, it is certainly likely that an increase in litigation under the ADA will occur. Given direct instruction from Congress to ensure the broadest coverage possible, courts will now attempt to redefine the boundaries of disability discrimination.