

## In This Issue:

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Congress has amended the ADA with the ADA Amendments Act of 2008 to legislatively reverse four key Supreme Court decisions and substantially expand the number of persons covered by the law.

## Congress Tells the Courts How to Interpret the ADA

By Margaret Hart Edwards and Patrick F. Martin

On September 25, 2008, President Bush signed into law the ADA Amendments Act of 2008 (ADAAA), which will amend the Americans with Disabilities Act of 1990 (ADA) and directly overturn several decisions of the U.S. Supreme Court interpreting that landmark law. The ADAAA sends an unmistakable message to the courts that the concept of disability is to be more broadly, rather than narrowly, construed. The primary consequences of these amendments to employers is that far more people will fall within the definition of disability under the ADA. Specifically, the measures will increase coverage and strengthen employee protections under the ADA by:

- rejecting the strict interpretation of the ADA that defines disability to be an impairment that prevents or severely restricts an individual from doing activities that are of central importance to one's daily life;
- prohibiting the consideration of almost all measures that reduce or mitigate the impact of an impairment in the determination of whether an individual is disabled; and
- allowing persons who are discriminated against on the basis of a perceived disability to pursue a claim under the ADA regardless of whether the perceived impairment limits or is perceived to limit a major life activity.

### The ADAAA Rejects the Supreme Court's Strict Interpretation of the ADA As Setting a High Standard to Qualify as Disabled

The major goal of the ADAAA is to undo current case law that, for the most part, creates a restrictive interpretation of the statute's definition of disability. The amendments specifically direct courts to instead construe the law in favor of "broad coverage of individuals under the ADA." The ADAAA overturns the Supreme Court decisions in *Sutton v. United Air Lines*, 527 U.S. 184 (1999), *Murphy v. United Parcel Service Inc.*, 527 U.S. 516, and *Albertson's Inc. v. Kirkingburg*, 527 U.S. 555 (1999), in which the Court held that consideration must be given to mitigating measures that help individuals control impairments when determining whether persons are disabled under the ADA. This means that people who have successfully managed disabilities will still be covered by the ADA.

For example, in the *Murphy* case, Murphy had severe high blood pressure, but with medication, could function normally and engage in a full range of activities. Before the ADAAA, the law did not consider him to be disabled under the ADA because the use of medication controlled the effects of his high blood pressure. Murphy was prevented from pursuing an ADA claim after UPS found him unfit for his driver position because of his high blood pressure. The ADAAA now mandates that in determining whether an individual is disabled under the ADA, the person must be evaluated as if untreated, without considering the ameliorative effects of high blood pressure medication.

As a result of this change, the ADA will protect people whose cancer is in remission, whose diabetes is controlled by medication, whose seizures are prevented by medication, and who can function at a high level with learning disabilities. Employers will need to concentrate less on the threshold issue of disability, and focus more on their duty to provide reasonable accommodations. The ADAAA makes an exception for those who wear ordinary eyeglasses or contact lenses to correct vision to full acuity. These devices are not to be ignored in considering whether a person is disabled. Rather, they are to be taken into account, in all but rare cases. The purpose is to exclude from the definition of disability persons who simply need ordinary glasses to read, drive, etc.

## The Scope of “Regarded as” Claims Has Been Both Clarified and Broadened

The ADAAA further expands the ADA's definition of disability, specifically the “regarded as” prong of that definition, by now including persons that have been discriminated against because of an actual impairment or a perceived impairment “whether or not the impairment limits or is perceived to limit a major life activity.” This is in stark contrast to the previous requirement expressed in the U.S. Supreme Court's opinion in *Sutton* that the perceived impairment must, like any actual impairment, substantially limit a major life activity. If a person is treated adversely (in regard to job application procedures, hiring, advancement, discharge, compensation, job training, and other terms, conditions, and privileges of employment) because of an actual perceived impairment, that is a violation of the law, irrespective of whether the impairment actually limits or is perceived to limit a major life activity. However, the ADAAA excludes from the “regarded as” definition of disability those impairments that are transitory and minor. *Transitory* is defined as “an impairment with an actual or expected duration of 6 months or less.”

The ADAAA, however, limits the application of the ADA by clarifying that an employer's duty to accommodate does not extend to those individuals who make discrimination claims under the “regarded as” prong of the definition of disability. Before the ADAAA, there was a split among the federal courts as to whether the ADA's reasonable accommodation requirement applied to the “regarded as” category of disabled individuals. The ADAAA makes clear that employers have no duty to accommodate these individuals.

In short, the ADAAA clearly prohibits adverse employment actions based on myths, fears and stereotypes when the person being discriminated against may not actually have an impairment, but is simply perceived to have one. As it is logically inconsistent to require reasonable accommodation of a misperceived impairment, the ADAAA clarifies that employers need not engage in the reasonable accommodation process with persons regarded as impaired, who are not actually impaired.

## The ADAAA Clarifies Other Aspects of the Definition of Disability

To further the goal of broadening the definition of disability, the ADAAA adopts several other provisions to guide the interpretation of the term disability. These include:

- The ADAAA specifically adds a nonexclusive list of examples of major life activities to the language of the statute, and, in addition to the activities recognized in the regulations promulgated by the Equal Employment Opportunity Commission (EEOC), it adds the following: eating, sleeping, bending, reading, concentrating, thinking, and communicating. The ADA is also amended to now include a listing of examples of major bodily functions, which are considered major life activities. The ADAAA specifically rejects the restrictive interpretation of major life activity used by the U.S. Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).
- The ADAAA specifically includes as disabled those persons who have an impairment that is episodic or in remission, if the impairment would substantially limit a major life activity when active.

- The ADAAA rejects the definition of “substantially limits” in the *Toyota* case, and in EEOC regulations that define “substantially limits” as “significantly restricted,” and directs the agency to revise its regulations to be consistent with the amendment’s goal of broadening the class of persons covered by the ADA. However, unlike some initial proposals regarding the amendments and at least two current state laws, the ADA does not apply to persons who are simply “limited” due to a major life activity.

\* The ADAAA clarifies that an impairment that substantially limits one major life activity is enough. It need not limit more than one.

## There Is No Reverse Discrimination Under the ADA

The ADAAA states that there can be no claim of “reverse discrimination” under the ADA. Specifically, the ADAAA states that the ADA does not provide for a claim that an “individual was subject to discrimination because of the individual’s lack of disability.” “Reverse discrimination” claims have arisen in the context of an employer providing reasonable accommodation. This means that nondisabled persons cannot claim discrimination because they were treated less favorably or were not given the same accommodations.

## Practical Steps for Employers

The ADAAA will be effective January 1, 2009. Overall, this law will not require major changes by most employers, but some practical steps for employers to take are listed below. Employers should:

1. Review their policies to make sure any definitions they use track the new law. Any handbook changes made should be communicated clearly to all employees. Most of the changes made in the amendments are legal clarifications of points that had been sources of controversy among lawyers, so it is unlikely that employers will need any major rewrite of policies.
2. Make sure that those in the organization who make decisions about accommodations, and human resources executives in particular, receive training to educate them about the changes in the ADA. These individuals need to understand the implications of the change in the definition of disability, and they should be highly aware of the “regarded as disabled” source of liability, so they avoid behaviors that might fall into this category.
3. Train persons in the company or organization who will be involved in the interactive discussions with employees potentially covered by the ADA. Those persons need to understand the comparative ease under which many additional people may now be covered by the law. They also need to know more about reasonable accommodations as many additional employees and applicants will have to be accommodated due to the amendments.
4. Expect more lawsuits to be filed. The ADAAA makes it easier for applicants and employees to make claims of disability discrimination. The defense of these suits will be more difficult, as the more expansive construction of the meaning of disabled will limit some frequently used defenses available to employers.
5. Discuss the effects of these legal changes with legal departments and/or outside counsel. Through early discussion, inadvertent problems can be avoided. Time is of the essence as these amendments become effective January 1, 2009. Stated simply, planning avoids lawsuits.

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