ADA Amendments Act of 2008 Will Expand Employee Protections

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The ADA Amendments Act ("ADAAA") is the result of long negotiations between members of Congress to "restore the intent and protections of the Americans with Disabilities Act." On September 17, 2008, the House of Representatives approved the Senate's version of the ADAAA (S. 3406), which was unanimously approved by the Senate on September 11, 2008. In a statement issued after the House vote, the White House indicated that President Bush will sign the bill, clearing the way for the amendments to take effect on January 1, 2009.

As expressed in the bill, the ADAAA is intended to redress an array of federal court decisions that have limited the number of individuals eligible for protection under the statute. The legislation would overturn several Supreme Court decisions, which the proponents of the bill believe too narrowly construed the Americans with Disabilities Act ("ADA"). Among the decisions the bill would overturn are *Sutton v. United Air Lines, Inc.,* 527 U.S. 471 (1999) and *Toyota Motor Mfg. v. Williams*, 534 U.S. 184 (2002). According to Senator Tom Harkin, one of the sponsors of the bill, as a result of these Supreme Court decisions "people with conditions that common sense tell us are disabilities are being told by the courts that they are not in fact disabled, and are not eligible for the protections of the law."

This article describes the changes that Congress has proposed to the ADA and discusses the likely impact that the amendments will have on employers.

Defining Disability

The Americans with Disabilities Act defines "disability" as: (1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment. *See* 42 U.S.C. § 12102(2). Although the ADAAA fundamentally maintains the definition of disability in the ADA, the amendments clarify the meaning intended for several prongs of the definition and overturns what Congress believes are unduly restrictive interpretations of disability found in several Supreme Court holdings

"Substantially Limits" Standard

Notably, the ADAAA does not define the term "substantially limits," rejecting an earlier version of the bill passed by the House in June 2008 which defined the term to mean "materially restricts." Instead, the new legislation directs that the term "substantially limits" shall be "interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008." *See* ADAAA § 4.

In turn, the Findings and Purposes section of the legislation specifically rejects the strict standard provided by the Supreme Court in *Toyota Motor Mfg. v. Williams*, 534 U.S. 184 (2002). In *Williams*, the Court held that to be substantially limited in a major life activity, an "individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." *Williams*, 534 U.S. at 185. According to Congress, the *Williams* decision created "an inappropriately high level of limitation necessary to obtain coverage under the ADA" and conflicted with Congressional intent to afford broad coverage to individuals with disabilities. *See* ADAAA § 2(b)(5). Accordingly, in its rules of construction, the ADAAA expressly provides that the "definition of disability in this Act should be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act." *See* ADAAA § 4. Significantly, the ADAAA also clarifies that

an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. *See* ADAAA § 4.

The ADAAA also takes issue with a current EEOC regulation that defines the term "substantially limits" as "significantly restricted." *See* 29 C.F.R. § 1630.2(j). Concluding that this is too high a standard, the ADAAA directs the EEOC to abandon the regulation and to promulgate a new rule that allows broader coverage under the ADA. *See* ADAAA § 2(a)(8).

Major Life Activities

The ADAAA provides a non-exhaustive list of "major life activities," which expands upon and broadens the list contained in the EEOC's current regulations. *See* 29 C.F.R. § 1630.2(i). Specifically, the ADAAA states that "[m]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, easting, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. *See* ADAAA § 4. The ADAAA further clarifies that "major life activities" include "the operation of a major bodily function, including, but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions." Id. In adding these provisions, Congress effectively expanded the definition of disability under the ADA by expressly including many more major life activities and creating "the operation of major bodily functions" as a new subcategory of major life activities.

In addition, the ADAAA's rules of construction make clear that an impairment need only substantially limit one major life activity to be considered a disability. *See* ADAAA § 4.

Mitigating Measures

The ADAAA expressly renounced the Supreme Court's holding in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) that the determination of disability requires the consideration of measures taken to correct for or mitigate a physical or mental impairment. Instead, the amendments make clear that the determination of whether an individual is substantially limited in a major life activity should be made without regard to mitigating measures. Specifically, the ADAAA provide as follows

> The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as (I) medication, medical supplies, equipment or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies; (II) use of assistive technology; (III) reasonable accommodations or auxiliary aids or services; (IV) learned behavior or adaptive neurological modifications.

See ADAAA § 4. The only exception noted are common eyeglasses or contact lenses, the ameliorative effects of which shall be considered as directed by Congress.

The legislation further provides that employers may not "use qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless the standard, test or other selection criteria is shown to be job related and consistent with business necessity." *See* ADAAA § 5.

Regarded as Disabled

The ADAAA continues to protect individuals who are "regarded as" having an impairment, but clarifies the standard to be applied in determining whether an employee is so regarded. According to the new legislation, an individual is protected under the "regarded as" prong of the definition if s/he demonstrates that s/he has been subjected to a prohibited action on account of an actual or perceived physical or mental impairment "whether or not the impairment limits or is perceived to limit a major life activity." *See* ADAAA § 4. Accordingly, an employee need only show that an employer thought the employee had an impairment and s/he was subject to a prohibited act under the ADA because of such impairment. This section of the new legislation rejects the Supreme Court's conclusion in *Sutton* that to be liable under the "regarded as" prong, an employer must "believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment, when, in fact, the impairment is not so limiting." *See Sutton*, 527 U.S. at 489.

While certainly making it easier for employees to demonstrate that they were "regarded as" disabled, the new legislation does provide some limitation. The amendments make clear that the "regarded as" prong does not apply to "impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less." *See* ADAAA § 4.

Discrimination on the Basis of Disability

The ADAAA amends section 102(a) of the ADA to change the language prohibiting discrimination against a qualified individual "with a disability because of the disability of such individual" to prohibiting discrimination against a qualified individual "on the basis of disability." *See* ADAAA § 5. While it seems like a minor modification, Congress restructured the ADA's language to ensure that the courts' focus in disability cases is on whether a qualified person has been discriminated against on the basis of disability instead of the threshold issue of coverage.

Miscellaneous Rules of Construction

In addition to those noted above, the ADAAA provides various rules of construction to aid those endeavoring to interpret and apply the Act. *See* ADAAA § 6. Several of these rules are identified below:

- The standards for determining an individual's eligibility for workers' compensation and other disability benefit programs are not affected by the ADA.
- Reverse discrimination claims (i.e., claims by individuals without disabilities that they have been subject to discrimination on account of their lack of disability) are not actionable under the ADA.
- Employers are not required to provide accommodations to those who are solely "regarded as" disabled.

Likely Impact on Employers

The practical impact of the ADAAA is compelling. The ADAAA's expanded definition of disability will undoubtedly increase the number of employees who are protected by the federal law. Accordingly, employers will likely face instances in which they need to provide accommodations to employees who might not have been considered disabled in the past, but who are considered disabled under the new law. Until more interpretive guidance is available from the EEOC and the courts, employers may also encounter difficulty in making determinations concerning their employees' status as protected individuals. While the amendments do not necessarily require employers to modify their existing employment policies addressing disabled employees or reasonable accommodation in general, employers should review their policies to ensure they are compliant and do not contain provisions or definitions that will run afoul of the new law.

Employers should also strongly consider providing refresher training to human resources and management personnel as to the ADA's requirements concerning the interactive process and reasonable accommodation obligations.

At the outset, employers should expect an increase in disability discrimination litigation as the margins of the law are tested. Furthermore, the new legislation will likely impact ADA litigation by sending more cases to trial. Due to the expanded definition of disability coupled with Congress' expectation that courts will shift the focus of their inquiry to the question of whether an otherwise qualified disabled person has experienced discrimination rather than the threshold issue of coverage, it will be more difficult for employers to obtain summary judgment in ADA lawsuits.

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