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Disabilities

ADAAA at Five: Intent Largely Realized, But Interpretation Continuing to Evolve

Five years after Congress revised the nation's primary workplace disability discrimination law, the ADA Amendments Act has largely fulfilled its legislative purposes and policy goals, but some confusion and unsettled questions remain, federal officials and employee and management advocates agree.

The officials and advocates also told Bloomberg BNA that the amendments have had a significant impact, and they offered insights into where the evolution of the ADA may be headed as well as compliance tips for employers and other practical suggestions.

The ADAAA was signed into law in September 2008 (31 EDR 382, 10/1/08), and it took effect Jan. 1, 2009. Its goal was counteracting four U.S. Supreme Court decisions that many believed too narrowly interpreted the original Americans with Disabilities Act by adopting an overly restrictive reading of the term ''disability.''

The primary intent of the ADAAA was to ensure broad coverage by shifting the focus away from whether the plaintiff meets the statutory definition of ''disability,'' and onto whether the employer fulfilled its legal duties under the law.

Changes Targeted Narrow View of Disability. EEOC Commissioner Chai Feldblum told Bloomberg BNA May 8 ''the legislative amendments, and the final regulations that the EEOC published in 2011, have largely met their intended purpose.'' She said ''the trend is toward enhanced coverage'' under the ADA.

Management attorney Frank C. Morris with Epstein, Becker & Green in Washington agreed that the ADAAA successfully overruled Supreme Court and lower court decisions that strictly interpreted the original ADA ''to require a significant impact on major life activities in order to establish coverage under the ADA as one having a substantial limitation on a major life activity.''

As a result, the number of ADA lawsuits dismissed in the early stages based on the plaintiff's ''inability to meet the high threshold of a substantial impairment has been dramatically reduced,'' Morris said May 20.

The ADAAA's elimination of consideration of mitigating measures at the disability inquiry stage, he added, ''has also materially increased the number of ADA claims that qualify as substantial limitations on a major life activity.''

Cancer, HIV, Other Cases Discussed. EEOC Legal Counsel Peggy R. Mastroianni said that for the most part courts are applying the ADAAA to easily find that individuals with a wide range of conditions previously deemed unprotected meet the substantially limited standard.

''The turn-around in the case law is especially notable with respect to cancer, as well as HIV, multiple sclerosis, diabetes, and psychiatric conditions,'' Mastroianni told Bloomberg BNA May 21.

The intent of the ADA amendments, and the hope of the EEOC, she said, is that ''employers are expeditiously determining whether individuals have disabilities and then moving on to the heart of the matter: judging fitness based on individual abilities and qualifications, and providing accommodation where needed to do the job.'' Over time, that should result in a reduction in ADA litigation, she said.

In the view of Brian East of Disability Rights Texas in Austin, Texas, it's ''so far, so good'' under the ADAAA. A final assessment of the amendments' success may have to wait, but the changes to the ADA seem ''to have made pleading and proving disability a lot easier'' or have ''eliminated any dispute on that issue,'' he said May 22.

Jennifer Mathis, deputy legal director and director of programs with the Bazelon Center for Mental Health Law in Washington, a group that advocates for people with mental disabilities, echoed East's views. She told Bloomberg BNA May 30 that ''it is still early in the life of the ADAAA,'' but it has ''begun to have a very significant effect.''

She said the amendments have ''vastly improved the ADA's protections for people with disabilities,'' because courts generally ''are spending far less time parsing the details of plaintiffs' disabilities to determine whether they are sufficiently impaired to be deserving of legal protections.''

ADA Charges, Lawsuits on Rise. ''If EEOC charge and federal court litigation statistics are any measure, the ADAAA has been an unqualified success in encouraging those with impairments that may not have qualified for protection in the past to bring ADA discrimination claims,'' Rae Vann, general counsel for the employer group the Equal Employment Advisory Council in Washington, told Bloomberg BNA May 23.

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Vann cited the surge in disability discrimination charges filed with the EEOC since the ADAAA took effect in 2009 as well as a corresponding increase in ADA litigation in federal courts.

Although the overall number of civil cases filed in federal court in fiscal year 2012 declined, there was a 10 percent increase in lawsuits involving workplace ADA bias claims, which is ''another indication that Congress's goal of increasing the scope of the law's protection is being achieved,'' Vann said.

Citing a recent law review article, she said empirical studies also show that the amendments have had a positive impact on plaintiffs' efforts to avoid summary judgment at the district court level (Stephen F. Befort, An Empirical Examination of Case Outcomes Under the ADA Amendments Act, 70 Wash. & Lee L. Rev. 2027 (2013)).

Morris agreed that the liberalization of the disability determination has resulted in ''a rather dramatic increase in EEOC charges alleging disability discrimination.'' He noted that in FY 2013 there were almost 26,000 disability discrimination charges filed with the EEOC, which constituted almost 28 percent of all of the total charges received.

''That is a remarkable development,'' Morris said, ''given that the EEOC, of course, also receives other substantive discrimination charges alleging race, color, sex, national origin and religious discrimination.''

More Requests for Accommodations. Jeffrey D. Polsky, a management attorney with Fox Rothschild in San Francisco, told Bloomberg BNA May 20 that the ADAAA's expanded definition of disability ''has had a big impact'' from a workers' rights perspective.

''We used to be able to argue that the ADA didn't apply to impairments that were temporary or episodic. Not anymore,'' he said. As a result, ''a lot more employees can ask for accommodations or, if they don't get them, bring claims.''

From a business perspective, Polsky added, the expanded definition of disability has increased the types of accommodations employers must offer.

''It's always fun explaining to an employer that the statute requires them to provide accommodations even if they're costly or disruptive or inefficient (up to a point),'' he said.

Vann agreed that ''one of the most significant practical implications of the ADAAA for employers has been the need to consider and address many more requests for various types of workplace reasonable accommodations than in the past.''

And Morris attributed ''a heightened number of requests to telework or for flexible schedules'' to the ADAAA, as well as to rapid advances in technology.

''This issue already has seen considerable litigation and there is every reason to believe this will remain a highly contested issue,'' he said. Employers are concerned about telework requests and frequently seek management counsel's assistance in evaluating such requests, ''and defending why such requests are not a reasonable accommodation in various employment settings,'' Morris said.

More Employers Focusing on Compliance. Mathis said the greatest impact of the ADAAA is that, by and large, employers now understand that they need ''to take seriously their obligations under the ADA.'' She said ''many more employers seem to be making ADA compliance a routine part of their business, and focusing less energy on the details of employees' and applicants' disabilities.''

Previously, employees requesting accommodation often received lengthy questionnaires inquiring into the details of their disability and were forced to engage in protracted processes of providing medical and other personal information, ''only to be denied accommodations on the ground that they were not sufficiently impaired,'' Mathis said.

Pointing to the litigation impacts of the amended ADA, Mastroianni said employers now must ''justify many employment decisions that they used to be able to avoid by convincing courts that plaintiffs did not have covered disabilities.''

But ''employers should not be discomfited by this new landscape,'' Mastroianni added, saying they still aren't required to provide job accommodations that eliminate an essential job function, add significant operational difficulties or expenses, or lower production standards.

However, Vann said that as the number of individuals seeking work-related reasonable accommodations increases, the potential legal risk if those requests aren't handled properly also increases.

''In addition, employers are increasingly mindful of the heightened risk under the ADAAA of potential liability for 'regarded as' disability discrimination,'' Vann said. As a result, she said, employers have redoubled their efforts to train staff on ensuring that all decisions are made for legitimate business reasons unrelated to a perceived impairment.

Amendments Still Being Misapplied. When asked about areas in which the ADAAA might be viewed as having missed the mark, East said any problems aren't with the amended statute itself, but instead are because some courts and litigants don't seem to be aware of, or fail to clearly understand, the amendments.

''When it is properly presented, in most cases the courts are following it pretty closely,'' he said.

Mastroianni agreed, saying the most common mistake by both plaintiffs' and management attorneys seems to be a simple failure to argue the new standards, including those providing coverage for temporary impairments, major bodily functions such as immune and endocrine functions, and impairments that are ''episodic or in remission.''

''Absent proper argument of the new standards by counsel, some courts are mistakenly citing and applying pre-ADAAA case law,'' she said.

''There have also been an unsettling number of decisions misapplying the new 'regarded as' prong of the

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definition of disability,'' Mastroianni said. She cited cases mistakenly importing into the regarded-as analysis ''the now-defunct requirement that the employer perceived the impairment to be substantially limiting, instead of simply inquiring if an employment action was taken because of an actual or perceived impairment.''

Courts likewise have misinterpreted the new regarded-as standard as shutting out claims where an impairment lasted less than six months, Mastroianni said. ''This is a misreading of an exception to 'regarded as' coverage where an employer takes an action based on an impairment that *both* lasts fewer than six months *and* is minor.''

Mathis cited other ''emerging'' concerns as courts begin to focus less on how disabled a worker is and more on whether discrimination actually occurred. For example, she said, many disabled workers still find themselves unable to obtain relief because courts are finding they aren't able to perform the job in question.

''While it is entirely sensible that individuals must be able to perform the essential functions of their jobs, with or without reasonable accommodations, too often individuals who have been doing their jobs successfully for years are found unqualified—and thus unable to claim the ADA's protections—based on minor incidents or on assertions that particular duties are essential job functions even when individuals have rarely or never been called upon to do them,'' Mathis said.

Like Mastroianni, Mathis noted a too-frequent misreading of the ADA's amended regarded-as prong. ''[M]any courts continue to apply the old standards that Congress rejected—standards that made it extraordinarily difficult for plaintiffs using this prong to claim protection,'' she said.

Feldblum likewise sees emerging and developing issues under the amended law. She said an area she has recently focused on is employers' use of qualification standards, which the ADA prohibits to the extent they screen out or tend to screen out persons with disabilities on the basis of disability.

For instance, employers need to ensure that ''the lifting standards or attendance policies they've had in place for 30-40 years are justifiable,'' Feldblum said. ''Otherwise, those standards might end up being the subject of charges and investigations.''

'Amendments May Have Gone Too Far.' But in Morris's view, the ADAAA ''may well have gone too far in removing the requirement for an impairment to have a meaningful temporal component,'' except in the case of regarded-as disabled claims.

He said ''the removal of a reasonable durational requirement for an impairment to qualify as a disability has a tendency to trivialize bona fide disability claims while in many ways tending to make the ADA almost co-extensive with'' the Family and Medical Leave Act.

It is questionable, Morris said, ''whether the resources and time required for good faith conduct of the interactive process and accommodations is warranted where an asserted disability will not last for at least six months,'' which generally was recognized as the minimum duration needed for a disability under the pre-ADAAA case law.

There is ''still a tremendous amount of uncertainty about what's required if an employee attributes his or her bad behavior to a disability,'' Polsky said. Unless there is evidence of threats of or actual violence, ''the cases are all over the place as to whether employers can hold disabled employees to the same behavior standards as others,'' he said.

Significant Case Developments. Vann said there have been a number of cases deciding significant issues under the ADAAA, with the U.S. Court of Appeals for the Fifth Circuit's decision in *Neely v. PSEG Texas, LP*, 735 F.3d 242, 28 AD Cases 1325 (5th Cir. 2013) (41 EDR 706, 11/13/13), being perhaps the most noteworthy.

Neely makes clear that, although the amended ADA demands a less stringent standard than the pre-amendment act, it doesn't relieve plaintiffs of the burden of establishing an ADA-covered disability, Vann said. The decision ''confirms that even after the ADAAA, plaintiffs still are required to establish, as a threshold matter, that they have a covered disability, were qualified, and suffered an adverse employment action because of their disability.''

Morris pointed to the Seventh Circuit's decision in *Majors v. General Electric Co.*, 714 F.3d 527, 27 AD Cases 1313 (7th Cir. 2013) (40 EDR 621, 4/24/13)—involving an employee's request to have a co-worker lift heavy objects for her as a reasonable accommodation—and the Fifth's Circuit's ruling in *Owusu-Ansah v. Coca-Cola Co.*, 715 F.3d 1306, 27 AD Cases 1583 (11th Cir. 2013) (40 EDR 734, 5/15/13)—involving the job-relatedness and essential nature of the ability to handle the reasonable and necessary stresses of a job and to work well with others.

The importance of *Majors*, he said, ''is to reaffirm that despite the ADAAA, even a task that might be considered relatively menial in nature can still be an essential function and that a job need not be restructured to eliminate such a task.''

In *Owusu-Ansah*, the Fifth Circuit affirmed that a fitness-for-duty examination was job-related and consistent with business necessity for an employee who had banged his fists on a table and threatened his manager. Morris said a fitness-for-duty exam ''can be a necessary tool for employers to avoid negligent retention claims where an employee has engaged in behavior that a reasonable person would find has raised the possibility of the employee presenting a danger to customers, co-workers or the employee him or herself.''

For East, the most significant post-ADAAA case ''probably'' is the Fourth Circuit's decision in *Summers v. Altarum Institute, Corp.*, 740 F.3d 325, 29 AD Cases 1 (4th Cir. 2014) (42 EDR 137, 1/29/14), which considered whether serious, temporary conditions are covered.

''The trial court seemed to have a hard time believing that temporary conditions, even very serious ones, could be covered, and basically said that the appeals court was going to have to tell him so,'' East said. ''That's what the Fourth Circuit did, finding that Congress really meant what it said, following the EEOC's regulatory guidance, and reminding us that the pre-ADAAA case law on the definition of disability is now suspect, to say the least.''

Mathis also discussed *Summers*, saying that prior to the amendments, courts had routinely held that impairments that weren't permanent or that lasted for short periods weren't disabilities, regardless of whether they imposed extremely significant limitations on an individual's major life activities.

As *Summers* recognized, ''Congress clarified in the ADAAA that the duration of an impairment or its limi-

tations was simply a factor in the determination of whether the impairment was a disability—and not dispositive by itself,'' Mathis said.

Mastroianni cited *Norton v. Assisted Living Concepts, Inc.*, 786 F. Supp. 2d 1173, 24 AD Cases 1061 (E.D. Tex. 2011), a case involving a worker with kidney cancer, as the most significant ruling under the ADAAA. The court ruled that cancer at any stage substantially limits the major life activity of normal cell growth, even if episodic or in remission.

''As a result of changes made by the ADAAA,'' she said, ''those needing accommodation related to current or past cancer should easily be found to have a disability within the meaning of the first part of the ADA's definition based on the analysis in *Norton* and subsequent similar cases.''

Moreover, individuals now are covered under the ADA's regarded-as prong when an employer engages in a prohibited employment action based on the individual's cancer, ''or unjustifiably refuses to allow the employee to return to work during treatment,'' Mastroianni said.

Feldblum observed that every case under the amended law where a court has found coverage for a disability that previously wasn't covered is a significant ADAAA decision. She added that the EEOC ''has and will continue to look for opportunities to participate as amicus in cases where a court misinterprets or does not properly apply the law.''

She said the agency ''recently had a good result'' in *Mazzeo v. Color Resolutions Inc.*, 2014 BL 89774, 29 AD Cases 757 (11th Cir. Mar. 31, 2014), in which the Eleventh Circuit found that a lower court failed to recognize changes made by the ADAAA, including the lower standard for showing a substantial limitation on a major life activity (42 EDR 436, 4/9/14).

How Might the ADAAA Mature? Looking forward, Feldblum said she expects the ADAAA to continue to fulfill its purpose and that more and more workers will be covered under the law. As that happens, ''the number of cases that center on whether or not a person has a covered impairment will dwindle,'' she predicted.

''I also expect that people with impairments that meet the ADAAA standards but are not commonly considered disabilities, such as persons with pregnancy-related impairments, will become aware of their rights under the law and begin to seek accommodations from employers,'' Feldblum said.

Mastroianni noted that ''there are many unresolved or evolving legal issues'' under the ADAAA that still need to be addressed by the courts, including:

- What type and amount of evidence will be sufficient to establish disability?
- How do the new rules apply to areas such as pregnancy-related impairments?
- Does the regarded-as prong apply to claims where the employer had no knowledge of the impairment at issue?

''But the primary ways in which the ADAAA will mature is the enhanced understanding of its changes by employers, counsel, and courts,'' Mastroianni said. When the changes made ''are more fully understood and consistently applied, we expect to see long-overdue development in the case law on merits issues, such as the scope of reasonable accommodation and the analysis of qualification standards that screen out individuals with disabilities.''

These developments in the case law will benefit employers and employees alike, and provide practical guidance for future ADAAA compliance, she said.

Mathis said that as courts become more familiar with the new ADA framework, she believes ''the analysis of ADA claims will start to look more like the analysis of Title VII claims,'' with courts more focused on the merits of the plaintiff's claims.

East said he will be watching for evidence that employers have stopped trying to argue that serious conditions, including those listed in the EEOC's ADAAA regulations at 29 C.F.R. § 1630.2 (j)(3)(iii), aren't disabilities, ''or when courts make it clear to employers that such arguments are a waste of time and money.'' That will be ''one signpost that the law has fully matured,'' he said.

The EEOC's Subsection (j)(3)(iii) list includes conditions such as blindness, deafness, epilepsy, diabetes, cancer, HIV infection and bipolar disorder that the commission believes should easily be found to be substantially limiting and thus disabilities.

Intellectual Disability Developments Forecast. Morris said that, ''based on the questions we have been receiving from clients, one of the major areas of continuing development under the ADAAA will be with regard to intellectual disabilities.''

He said the amended law's ''expansion of major life activities to include thinking and concentration is highly significant because it is virtually impossible to identify a job where thinking and concentrating are not required to be able to successfully perform the essential functions of the position.''

Employers have considerable experience addressing and accommodating physical disabilities, but they haven't typically had much experience addressing and accommodating intellectual disabilities, Morris said.

''Just as a substantial body of law has developed on the physical disability side, I fully expect the ADAAA to spur development of a similar body of law addressing intellectual disabilities,'' Morris said. ''The process of seeking to accommodate intellectual disabilities may well be more challenging than for physical disabilities. It is also true that the issue of whether or not some individuals with intellectual disabilities will be able to perform the essential functions of a position in question may also be more challenging.''

He also foresees more issues with individuals seeking accommodation for post-traumatic stress disorder, stress and related conditions, and the potential convergence of issues under the ADA, the FMLA and workers' compensation laws. But he noted that, ''even under the ADAAA, the courts have affirmed that all jobs involve stress and that being called upon to meet the demands of the job, e.g., making a sales quota or processing a set number of claims, etc., is neither improper even if it is stressful nor generally a basis for an accommodation.''

For Vann, a key issue moving forward is how ''substantially limits'' is defined. She said the ADAAA and the EEOC's implementing regulations don't specifically define the term and instead set several broad rules of construction.

''The task of establishing a more precise, workable standard invariably will fall on the courts,'' Vann said. ''Courts will have to decide, for instance, the circum-

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stances under which a temporary condition like a broken leg restricts the performance of one or more major life activities to such a degree as to rise to the level of an actual disability.''

Similarly, she said, the statute and regulations likewise fail to define the term ''minor'' as it is used in the regarded-as disabled context. ''I expect that we soon will see more courts weigh in on that issue, as well.''

Polsky agreed that ''better guidance from the courts as to what some of these statutory provisions mean'' is needed as the law matures. ''The line between reasonable accommodation and undue hardship remains uncertain (largely because it depends in part on the size of the employer),'' Polsky said. ''And it remains difficult in many situations to determine what functions of a job are essential.''

ADA Compliance in 2014 and Beyond. Regarding future ADA compliance, East suggested that employers receiving accommodation requests ''begin by assuming that the condition is a covered disability, and move on to the interactive process of trying to identify a reasonable accommodation that will work for both parties.''

Vann agreed that, as a result of the ADAAA, ''employers should now be spending considerably less time (if any) on threshold coverage issues, and more time on determining—with the employee's input—whether and to what extent reasonable accommodations exist that would be effective in enabling the employee to perform the essential functions of the job in question.''

She said understanding how the amended law impacts the reasonable accommodations process ''may require ongoing staff training, as well as regular review of workplace reasonable accommodations policies and procedures.'' In addition, with the focus now on what actions the employer took in denying an accommodation request or in taking other adverse action, Vann said ''proper recordkeeping and documentation techniques will be critical.''

Polsky agreed that training employees on the requirements of the ADAAA ''is critical.'' Line managers need to be educated regarding the issues to look for and where to go for guidance, he said.

''Turning even severely disabled applicants away without going through the interactive process is itself a violation,'' Polsky warned. ''And those making decisions need to understand what's required in terms of exploring possible accommodations, documenting steps taken, and how to follow up.''

Morris Lays Out Five-Part Plan. Morris described his five-part plan for employers to ensure ADAAA compliance.

First, he said, when confronted with a disability issue, assume—except in extraordinary cases—that the worker will qualify as an individual with a disability under the ADAAA. The second step is to focus on the issue of whether the individual can perform the essential functions of the position with or without reasonable accommodation.

Employers next should engage in the interactive process in good faith, and try to determine if there is a reasonable accommodation, even if the accommodations proposed by the employee or job applicant would amount to an undue hardship for the employer, Morris said. ''It is important that employers contemporaneously document their efforts in the interactive process as such documentation will be invaluable in the event of a charge or claim.''

Morris said the fourth step is for employers to make sure that their written job descriptions ''accurately capture the essential functions of the job and the skills and abilities needed to perform those essential functions.'' If the employer believes attendance is essential, ''the job description should capture that fact and some elaboration of why that is true,'' he advised. Morris noted that ''disputes around attendance, punctuality and teleworking'' have become increasingly dominant in ADA cases and that by documenting time and attendance requirements in job descriptions, employers create evidence on the issue.

''Fifth, I also advise employers to look at how they screen applicants or candidates for promotion to assess whether the screening process could adversely affect individuals with disabilities,'' Morris said.

He added that employers should be prepared to consider accommodation requests by employees who have exhausted their FMLA leave. ''While hardships caused during the FMLA leave may be taken into consideration when assessing a post-FMLA accommodation request, the normal individualized specific analysis of whether the request is a reasonable accommodation or undue hardship is still required,'' he said.

Advice From EEOC. Mastroianni said employers ''now more than ever before'' should avoid making ''assumptions or generalizations based on diagnoses or past medical history about an individual's current ability to do the job,'' and instead base all employment-related decisions ''on objective, individualized information about the particular applicant or employee's actual medical restrictions, if any, and on current and past work performance, including history performing similar work for other employers.''

Now is ''a good time for employers to adopt or revise internal reasonable accommodation procedures to conform to the ADAAA's broad view of disability, and to make sure everyone within the organization knows about the changes and their significance,'' she said.

Employers should train ''managers and supervisors on their responsibilities with respect to any accommodation request they receive,'' Mastroianni said, and explain the steps for handling a request, including the interactive process and obtaining and sharing information.

''These steps might include referral of the request to the authorized decision maker, communicating with the employee to clarify the request, obtaining and exchanging information with the requester and/or his or her health care provider to the extent necessary regarding medical restrictions, needs, and alternatives to determine if accommodation can be provided, and consulting outside resources for ideas where needed,'' she said.

It isn't grounds to discontinue the interactive process simply because an individual requests a particular accommodation that isn't effective, would pose an undue hardship, or isn't otherwise legally required, Mastroianni said. Employers should make sure managers and supervisors understand that they need to determine if an alternative reasonable accommodation can be provided. She advised that employers make managers and supervisors aware of the range of possible types of accommodations, including:

- physical modifications to the workplace;

- new equipment or devices;
- modification of existing equipment or devices;
- policy modifications;
- job restructuring, job and shift swapping, and the elimination of marginal job functions; and
- leave, telework and reassignment to a vacant position.

In addition, Mastroianni said, ''consider requiring decision makers to consult with an appropriate manager before denying a proposed accommodation on the basis of cost or operational difficulty,'' that is, someone who can determine whether the proposed accommodation would pose a significant difficulty or expense for the employer.

For Feldblum, the key is for employers to begin ''thinking about how they can accommodate employees and whether the standards and systems they use are compliant with the law.''

''The pool of persons covered by the law has expanded dramatically. Focusing heavily on whether a person's impairment qualifies as a disability is a waste of resources at this point,'' she said.

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