



LABOR & EMPLOYMENT DEPARTMENT

# ALERT

## EMPLOYERS' LIABILITY EXPANDS UNDER THE ADA AMENDMENTS ACT

By Steven K. Ludwig & Erin Fitzgerald\*

The newly enacted ADA Amendments Act of 2008 becomes effective on January 1, 2009. Congress' express purpose is to expand the scope of protection provided by the Americans with Disabilities Act of 1990 (ADA) and to provide "clear, strong, consistent, enforceable standards addressing discrimination." The Act overturns several Supreme Court decisions favorable to employers and broadens the scope of protections available under the ADA.

The Act expands the scope of the ADA to provide coverage for disabled individuals not currently covered. Many more potential plaintiffs are empowered to file administrative complaints and lawsuits against employers, schools and places of public accommodation alleging discrimination on the basis of disability or a perceived disability.

The only good news for employers is the explicit clarification that reasonable accommodations are not required if an individual is merely "regarded as" having a disability.

### THE CURRENT LAW

Currently, the ADA 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. However, the ADA does not explicitly define the terms "impairment," "substantially limits," or "major life activity."

Several U.S. Supreme Court decisions interpreted the ADA as setting a high standard in order to qualify as a disabled individual. For example, in *Toyota Motor Mfg. of Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), the Supreme Court interpreted "substantially limits" to mean preventing or severely restricting an individual from doing activities that are of central importance to

most people's daily lives. In *Sutton v. United Air Lines Inc.*, 527 U.S. 471 (1999), the Supreme Court required that measures taken to mitigate physical and mental impairments must be considered when deciding whether an individual is substantially limited in a major life activity.

### THE NEW LAW

The new law rejects the Supreme Court's statutory interpretation as too restrictive and specifically overturns these and other decisions. The definition of disability is expanded to be read broadly and to cover more plaintiffs.

### SUBSTANTIALLY LIMITING IMPAIRMENT

The Act, though, still does not define the term "substantially limits." Instead, the issue is punted to the Equal Employment Opportunity Commission, the Attorney General and the Secretary of Transportation to draft regulations compliant with the purpose of the amendments.

The Act widens the definition of "impairment." An impairment need only limit one major life activity, and an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. This provision is intended to clarify that the ADA applies to individuals suffering from illnesses such as diabetes, cancer or epilepsy who, in some cases, were previously denied protection because their conditions could be treated with medication or were in remission.

### MAJOR LIFE ACTIVITIES

The new law now specifies certain activities that qualify under the Act as a "major life activity." These include but are not limited to:

- caring for oneself
- performing manual tasks
- seeing
- hearing
- eating
- sleeping
- walking
- standing
- lifting
- bending
- speaking
- breathing
- learning
- reading
- concentrating
- thinking
- communicating
- working

Also included are major bodily functions, such as:

- functions of the immune system
- normal cell growth
- digestive
- bowel
- bladder
- neurological
- brain
- respiratory
- circulatory
- endocrine
- reproductive

#### MITIGATING MEASURES

With the exception of “ordinary eyeglasses and contact lenses,” the amendments eliminate consideration of mitigating measures in determining whether a person is substantially limited in a major life activity. The proposed language explicitly forbids consideration of the following:

- medication
- medical supplies, equipment or appliances
- low vision devices
- prosthetics
- hearing aids and other implanted hearing devices
- mobility devices
- oxygen therapy equipment and supplies
- use of assistive technology
- reasonable accommodations or auxiliary aids or services

- learned behavioral or adaptive neurological modifications

An entity covered by the ADA also may not use qualification standards, employment tests or other selection criteria based upon an individual’s uncorrected vision unless the entity can show job-relatedness or business necessity.

#### REGARDED AS HAVING AN IMPAIRMENT

To prove that an individual is regarded as having an impairment, the amendments only require that an individual prove that he or she has been subjected to a prohibited action because of an actual or perceived physical or mental impairment. But if an individual has a transitory or minor impairment with an actual or expected duration of six months or less, he or she will not be regarded as having an impairment. The exclusion of transitory and minor impairments is designed to prevent individuals with the flu and other similar illnesses from coverage.

#### The Effect of the Act on Employers

Employers may see increased costs in providing accommodations because the number of workers entitled to accommodations is greater. Employers will be subjected to increased costs defending against a larger number of charges and lawsuits filed by employees. The Act makes it less likely that an employer will succeed on a summary judgment motion, which enables a case to be resolved before a trial by jury. An employer’s defenses to claims will be more limited.

To reduce liability exposure, employers should review internal procedures to ensure they comply with the protections provided by the ADA, as amended. An employer should focus less on determining who is disabled because the coverage is very broad. Instead, the employer should focus its efforts more on engaging in interactive discussion with employees to provide them with the necessary, reasonable accommodations to perform the essential functions of their jobs. As a result, employers are well advised to keep detailed records of these interactions and decisions made regarding the provision of accommodations.

For more information about this topic, contact Steven K. Ludwig at 215.299.2164 or [sludwig@foxrothschild.com](mailto:sludwig@foxrothschild.com), or any member of the Labor & Employment Department.

*\*Awaiting admission to the Bar*

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