

Federal Disability Discrimination Law Dramatically Expanded

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On September 25, 2008, President Bush signed into law the American with Disabilities Act Amendments Act of 2008 ("ADAAA"). The legislation overturns a number of U.S. Supreme Court cases that have narrowly interpreted the American with Disabilities Act ("ADA") and sends a message to the courts and the federal agencies charged with enforcing the ADA that the 1990 disability discrimination statute should be interpreted broadly. The ADAAA will be effective January 1, 2009. In anticipation of the new law, employers need to review their ADA compliance practices to meet the new law's more exacting requirements of who is entitled to protection and reasonable accommodation on account of disability.

The Basics

The ADA prevents employers from discriminating against individuals who are actually disabled, perceived as disabled, or who have a record of a disability. The ADA defines a disability as a physical or mental impairment that substantially limits one or more of the major life activities of an individual. In determining whether an impairment is substantially limiting, courts consider the nature and severity of the impairment, its duration or expected duration, as well as the permanent or long term impact of the impairment.

What's New

The new law provides broader coverage by:

- Overturning Supreme Court decisions in *Sutton v. United Air Lines*, 527 U.S. 184 (1999), *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999), and *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999), which held that "mitigating measures" should be considered in determining whether an individual is disabled under the ADA. Under the new law, employers may not consider whether "mitigating measures"—like medications, wheelchairs, prosthetics or other assistive technologies—render the impaired person able to function normally and engage in a full range of activities of daily living so as to fall outside the protections of the ADA. The only exception is persons who are visually impaired. Employers may still consider the effect of ordinary eyeglasses and contact lenses in determining whether an employee who is visually impaired is protected by the ADA.
- Overturning the Supreme Court decision in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002),

which held that to be protected under the ADA, the individual's impairment must "substantially limit" a "major life activity" which is of central importance to most people's daily lives. The new law directs the Equal Employment Opportunity Commission to draft regulations, which currently state "substantially limits" means "significantly limit, a major life activity," to adopt a less demanding definition of disability to qualify for protection under the ADA.

- Protecting individuals with episodic impairments, or impairments that are in remission, so long as their condition would substantially limit a major life activity when active. For example, individuals with impairments such as diabetes or cancer can be covered under the ADA even if they are not currently experiencing any effects of their impairment.

Adding to the list of "major life activities" the new law includes the following: "caring for oneself, performing manual tasks, seeing, hearing, eating, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." Major bodily functions like reproductive functions, brain, bowel, circulatory and bladder functions are also considered to be major life activities.

The new legislation also expands the "regarded as" aspect of disability discrimination. Previously, an employer would run afoul of the ADA only if it perceived, albeit incorrectly, that an individual's impairment substantially limited a major life activity. Under the new law, an individual is regarded as disabled if the individual establishes that he has been subjected to an adverse action because of an actual or perceived physical or mental impairment, whether or not the impairment limits or is perceived to limit a major life activity. This means, in most instances, that employees with medical impairments will be able to overcome the initial hurdle of a disability discrimination case and establish that they are disabled. The only good news is that employers have no duty to accommodate an individual perceived to be regarded as disabled under the ADA. This ends a circuit court split whether an employer has a duty to reasonably accommodate an individual "regarded as" disabled under the ADA.

What Does it Mean

These changes are likely to increase the number of ADA lawsuits and decrease the number of those suits that are dismissed at an early stage. Thus, companies' accommodation policies for disabled employees will become even more important and the focus of many ADA cases.

Employers should review and revise their ADA policies to ensure that accommodation request procedures are consistent with the broader definition of disability provided for by the ADAAA. Employers should pay particularly close attention to any policies that relied on the Supreme Court cases stating that mitigating measures should be considered when determining whether an employee had an ADA covered disability. Those cases are no longer good law. Employers should also update their discrimination and harassment training materials to reflect the ADAAA changes and educate managers and others responsible for ADA compliance. Only time will tell exactly how the new law will impact

employers, but given the broader protections available to employees under the ADA, employers should anticipate more disability-related issues as the new law gains more attention by employees and employee advocates.

For more information on this legislation, please contact Vivian Barrios at (303) 473-2714 or vmbarrios@hollandhart.com.

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