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Of Counsel Carl S. Silverman

By E-Mail

To:
From: Bert Bisgyer
Date: November 20, 2008
Re: The ADA Amendments Act of 2008

The ADA Amendments Greatly Expand the Americans With Disabilities Act and Create Substantial New Obligations for Employers - - Effective January 1, 2009.

President Bush recently signed into law the ADA Amendments Act of 2008 ("ADAAA"), which significantly amends the Americans With Disabilities Act of 1990 (the "ADA") and is effective January 1, 2009.

Coverage of the ADA.

The ADA prohibits discrimination on the basis of physical or mental disability in employment and requires employers to make reasonable accommodations that are necessary to enable individuals with covered disabilities to perform the essential functions of a job unless such accommodation would create an "undue hardship" for the employer. Coverage under the ADA turns on the threshold question of whether an individual has a "disability," defined as a physical or mental impairment that "substantially limits one or more major life activities," a "record of such an impairment," or "being regarded as having such an impairment."

The Definition of Disability Has Been Substantially Broadened.

Under the original ADA, "disability" is defined as a physical or mental impairment that substantially limits one or more of the individual's major life activities. While the ADAAA does not change that definition, it directs the Equal Employment Opportunity Commission (EEOC) to interpret the "substantially limits" language far more liberally than in the past, and to broaden the law's coverage to include more conditions, including those conditions that have been excluded by court decisions over the years.

The Definition of “Major Life Activities” Has Been Substantially Expanded.

The ADA provided little statutory guidance as to what constituted a “major life activity” for purposes of determining whether a particular disability was covered. Many courts refused to adopt the EEOC’s interpretation of covered activities. The ADAAA contains a comprehensive, non-exhaustive, and much-expanded list of life activities including: sleeping, reading, thinking, eating, concentrating, communicating, working, performing manual tasks, caring for oneself, standing, lifting, bending, seeing, hearing, speaking, learning, walking, and breathing. Also included are major “bodily functions” such as bowel, bladder, neurological, respiratory, circulatory, endocrine, and reproductive functions, the immune system, and normal cell growth.

The expansion of the “major life activity” concept coupled with the expansive definition of “disability” will drastically increase the scope and coverage of the ADA. The addition of “thinking” and “concentrating” as major life activities will also raise a panoply of reasonable accommodation issues, because the successful performance of most jobs requires these activities. Note further that the inclusion of “bending” as a major life activity is expected to incorporate a wide variety of back problems as covered disabilities, requiring reasonable accommodation by employers.

Episodic or Dormant Impairments Are Covered Disabilities.

The ADAAA makes clear that an episodic impairment or one in remission remains a “disability” if it would substantially limit a major life activity when active. Thus, individuals with diseases that were once active but currently are in remission will now be considered disabled under the ADA. Consequently, the ADAAA would reject the legal rationale for my victory for Comcast Corporation in *Odyssey v. Comcast*, where I proved that plaintiff’s non-Hodgkin’s Lymphoma, then in remission, did not constitute a covered disability.

Mitigating Measures Will Not Be Considered.

The ADAAA overturned the Supreme Court’s decision in *Sutton v. United Airlines*. Consequently, the ameliorative effects of mitigating measures will no longer be considered in determining whether an impairment “substantially limits” a major life activity. This further expands the concept of what is a covered disability. Under the more restrictive interpretation of the ADA, if, through the assistance of medications or objects such as hearing aids or artificial limbs, an individual’s condition improved to the point that it no longer substantially limited a major life activity, that condition would not be considered a covered disability. In contrast, under the ADAAA, whether an individual is disabled will be determined by the condition without consideration of the use of mitigating measures (other than eyeglasses and contact lenses). Consequently, even where individuals suffer no limitation due to the use of mitigating measures, they will nevertheless be considered disabled if they had a covered disability without regard to the mitigating measure. This may be counterintuitive, but it is the new law.

The “Substantially Limits” Standard Will No Longer Be Strictly Construed.

The ADAAA also overturned the Supreme Court’s decision in *Toyota v. Williams*, which held that the term “substantially limits” should be strictly interpreted to create a demanding standard for qualifying disabilities (i.e. that the disability severely restricts major life activities.) The ADAAA rejects this standard, declares that the definition “shall be construed in favor of broad coverage of individuals under this Act,” and states that “it is the primary intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and that the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.”

The “Regarded As” Theory of Disability Has Been Expanded.

The ADAAA lowers the standard of proof required to establish that an employer discriminated against an individual whom it “regarded as” having a disability but who, in fact, did not have an active disability. In the past, an individual claiming to have been “regarded as” having a disability had to establish either that the employer mistakenly regarded the individual as having an impairment that substantially limited a major life activity or that the employer mistakenly believed that an actual impairment substantially limited the individual’s capabilities (when, in fact, that was not the case). The ADAAA rejects this approach. The employer will now be held liable under the “regarded as” theory if the plaintiff can establish discrimination because of an actual or perceived physical or mental impairment, regardless whether that impairment actually limits or is perceived to substantially limit a major life activity. This significantly reduces the proof necessary to establish a “regarded as” claim under the ADA, removing a key hurdle for plaintiffs asserting such claims.

Note: The ADAAA clarifies that “regarded as” claims cannot be based on “transitory and minor impairments” where the impairment is expected to last less than six months. The ADAAA further clarifies that employers are not required to provide reasonable accommodation to individuals who are regarded as disabled.

Readers and Interpreters.

The ADAAA expressly defines readers and interpreters as included in “Auxiliary Aids” and “Services.” This could be important, because the costs of readers and interpreters may be substantial, and the ADAAA’s reference to these services may indicate that they should be considered to be reasonable accommodations.

Impact of the ADAAA and Recommended Proactive Steps.

- **More Lawsuits:** The ADAAA dramatically expands the coverage of the ADA to many more individuals, including those whose impairments have little or no actual impact on their major life activities due to mitigating measures. The ADAAA also substantially eases the burden of proof for ADA plaintiffs suing employers. A substantial rise in the number of ADA lawsuits against employers should be anticipated in the pre-hire, employment, and termination contexts, and the defense of such lawsuits will likely be more problematic.
- **More Reasonable Accommodation:** While the ADAAA did not expressly modify the definitions of “reasonable accommodation,” “undue hardship,” and “direct threat,” courts may well interpret these concepts more liberally for plaintiffs, in accordance with the ADAAA’s philosophy. Since it will now be much easier for plaintiffs to establish that they have a covered disability, employers will be required to exercise their duty to engage in the “interactive process” far more frequently, and to assess whether various accommodations are “reasonable” (and not “undue hardships”). Novel questions also will be presented as to how to address impairments affecting mental processes including concentrating and thinking. Bottom line, reasonable accommodation will be required far more frequently in these and other areas under the ADAAA.
- **Policy Development and Training:** To ensure that requests for reasonable accommodation are properly addressed, employers must update their ADA policies and compliance activities to comply with the ADAAA. Supervisory training regarding the substantially expanded scope of the ADA is essential to assure that supervisors are able to recognize requests for accommodation and to take necessary actions. Appropriate procedures to implement the ADAAA should also be put in place. It is additionally recommended that current position descriptions be carefully reviewed to ensure that they accurately identify all essential job functions. Accurate, comprehensive position descriptions will be critical to the employer’s ability to defend its actions, and to address requests for accommodations from employees, including those who are limited in their abilities to communicate, think, remember, or concentrate.

Compliance and Penalties: The above synopsis represents a very brief overview of the ADAAA’s scope and anticipated impact on employers. The remedies available to plaintiffs who successfully prove a violation of the ADA include compensatory and punitive damages, as well as injunctive relief, back pay, reinstatement, promotion, and the like.

Feel free to call if we may be of assistance in your compliance efforts.