



Electronic Dispatch

# Labor and Employment Law Information Memo

September 2008

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## ADA AMENDED TO EXPAND COVERAGE

On September 25, 2008, President Bush signed new legislation amending the landmark Americans with Disabilities Act (“ADA”). This legislation passed with overwhelming bipartisan support in Congress, and will take effect on January 1, 2009.

The new law—known as the ADA Amendments Act of 2008 (“ADAAA”)—reverses several Supreme Court rulings which had narrowed the ADA’s scope of protection. Congress found that these rulings ran contrary to the original intent of the ADA’s drafters, which was to cover a substantially broader range of impairments than permitted under the Supreme Court’s narrow interpretation of the law.

### I. Redefining “Disability” Under the ADA

While the new legislation retains the basic definition of “disability” provided by the ADA, it supplements that definition with new language intended to broaden significantly the meaning of “disability” under federal law.

#### A. Clarifying Language Added to the First Prong of the ADA’s “Disability” Definition

“Disability” is defined under the ADA as: (1) a physical or mental impairment that substantially limits one or more major life activities; (2) a record of such an impairment; or (3) being regarded as having such an impairment. Central to the first prong of this definition is the requirement that the impairment *substantially limits* one or more *major life activities*.

##### (1) “Substantially Limits”

The Supreme Court has narrowly interpreted the meaning of “substantially limits” under the ADA’s first prong, ruling that the impairment must *prevent or severely restrict* the employee in the performance of a major life activity. Consequently, employees have been required to demonstrate a very high level of impairment in order to trigger the ADA’s protections. The ADAAA, however, relaxes this strict standard, requiring that “substantially limits” be more broadly interpreted consistent with the purposes of the new legislation. In amending the ADA, Congress expressly stated its intent to repudiate the narrow holdings of the Supreme Court and the lower federal courts on this issue, and empowered the U.S. Equal Employment Opportunity Commission (“EEOC”) to give meaning to the new, broader interpretation.

##### (2) “Major Life Activity”

The new legislation further supplements the ADA’s “disability” definition by clarifying what constitutes a “major life activity.” Again, the Supreme Court has interpreted this term narrowly, finding that it only covers activities “that are of central importance to most people’s daily lives.” Under this narrow interpretation, lower courts have found that activities such as running, jumping, and climbing stairs are not covered under the ADA.

The ADAAA broadens the definition of “major life activity,” and expressly provides the following examples: seeing, hearing, eating, sleeping, breathing, learning, reading, concentrating, thinking, communicating, working, caring for oneself, and performing manual tasks. Additionally, the new legislation states that a “major life activity” also encompasses “the operation of a major bodily function,” such as bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions, as well as normal cell growth and functions of the immune system. As Congress sought, these examples cover a broader range of activities than has been typically accepted by courts to date.

In addition, the ADAAA clarifies that an impairment need only limit one major life activity in order to be considered a disability under the ADA.

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### (3) *Mitigating Measures*

According to prior Supreme Court rulings, an employee is not disabled if his or her impairment has been corrected to the extent that it no longer substantially limits a major life activity. For example, a diabetic whose condition is stabilized through the use of mitigating measures, such as insulin or dieting, would not likely be considered an individual with a disability. By contrast, the ADAAA prohibits employers from considering the ameliorative effects of mitigating measures, except for ordinary eyeglasses and contact lenses. In other words, in assessing an employee's physical or mental impairment, an employer must determine whether the impairment would substantially limit a major life activity if corrective measures were not in fact being taken.

### (4) *Episodic Impairments or Impairments in Remission*

The ADAAA further broadens the definition of "disability," by specifying that an impairment that is episodic or in remission is a "disability" under the ADA, if it would substantially limit a major life activity when active.

#### B. "Regarded As" Disabled

Under the third prong of the statutory definition, "disability" is defined as being *regarded as* having a physical or mental impairment that substantially limits one or more major life activities. Currently, an employee may fall within this definition if his or her employer: (1) mistakenly believes that the employee has an impairment that substantially limits a major life activity; or (2) mistakenly believes that an actual nonlimiting impairment substantially limits a major life activity. The ADAAA, however, stipulates that employees do not have to prove that an impairment actually limits or is perceived to limit a major life activity. Instead, employees can satisfy the ADA's "regarded as" definition by merely establishing they were subjected to a prohibited action based on an actual or perceived impairment.

Note, however, that the ADAAA exempts "minor" and "transitory" impairments from coverage under the ADA's "regarded as" category. A "transitory" impairment is one lasting fewer than six months. Significantly, the new legislation stipulates that employers are not required to provide reasonable accommodations to employees who only meet the ADA's "regarded as" definition of "disability."

## II. **Impact on New York Employers**

In New York, where the State's Human Rights Law ("HRL") already affords employees a very broad scope of protection against disability discrimination, the new federal legislation will likely have the practical effect of bringing the ADA into line with these state law safeguards.

As drafted, it does not appear that the amended ADA will afford employees a significantly broader scope of protection than already provided to them under the HRL. Therefore, passage of the ADAAA will not likely require New York employers to assess potential disability issues differently than in the past. Of course, the extent to which these separate bodies of law truly square up with one another will ultimately depend on how courts interpret the new legislation.

Even if the ADAAA proves to be closely aligned with the scope of protection already afforded under the HRL, New York employers should be mindful of the differences in remedies under the New York and federal statutes. Until passage of the ADAAA, it has been much more common for a court to find that an employer's act violated the HRL than the narrower ADA. Thus, the financial exposure arising from a discriminatory act was often restricted to the more limited remedies available under the HRL, *i.e.*, injunctive relief such as re-instatement; back pay; and compensatory damages. In contrast, the remedies available under the ADA not only include compensatory damages, but also include attorneys' fees and punitive damages. Given the passage of the ADAAA, employees (and their attorneys) will have greater incentive to assert claims under both the HRL and the ADA.

To help avoid exposure, employers should review their reasonable accommodation policies and practices. Employers should also ensure their employee job descriptions and job qualifications are accurate, up-to-date, and include a reference to the essential functions for each position. Additionally, employers should take steps to make certain their supervisors and human resources staff are trained to both identify potential disability issues and to facilitate properly an interactive process with employees seeking accommodations.

Bond, Schoeneck and King, PLLC has staff attorneys and resources available to help make sure your company is prepared for the ADA. If you need any assistance in making these preparations or have any questions regarding this information memo, please contact:

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