

Broadened Employer Obligations Under The ADA

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Americans With Disabilities Act Amendments Act of 2008: Broadened Employer Obligations

Brief History of the Americans With Disabilities Act (“ADA”)

- The ADA grew out of the civil rights movement of the 1960’s.
- Section 504 of the Rehabilitation Act of 1973 prohibited discrimination on the basis of a disability towards otherwise qualified people with disabilities.
- However, Section 504 did not protect people with disabilities from discrimination by employers, by public accommodations in the private sector, by publicly funded programs and by those providing federal financial assistance.
- It took the ADA to address these areas not covered by Section 504.

Brief History of the ADA contd.

- Passed by Congress in 1990
- The ADA was the nation's first comprehensive civil rights law addressing the needs of people with disabilities, prohibiting discrimination in employment, public services, public accommodations, and telecommunications.
- The EEOC was given enforcement authority over the employment discrimination provisions.

ADA Basics

The ADA prohibits employers from discriminating against qualified individuals with disabilities in the following areas:

- Job application procedures
- Hiring
- Firing
- Advancement
- Compensation
- Job training and
- Other terms, conditions, and privileges of employment

ADA Statistics

- In 2008, EEOC received 19,453 charges of disability discrimination.
- In 2008, EEOC resolved 15,708 disability discrimination charges and recovered \$57.2 million in monetary benefits for charging parties and other aggrieved individuals (not including monetary benefits obtained through litigation).
- Between 1992 and 2008, the EEOC resolved 50,000 discrimination charges and recovered \$700 million in monetary benefits for charging parties.

ADA Amendments Act of 2008

Purpose of the Amendments Act

- On January 1, 2009, the Americans with Disabilities Act Amendments Act of 2008 (“Amended Act”) went into effect.
- “An act to restore the intent and protections of the Americans with Disabilities Act of 1990”
- Purpose: to reinstate “a broad scope of protection” under the ADA

ADA Amendments of 2008: Retroactivity

- The Amended Act does not just affect “new” disability cases.
- Individuals not qualified with a disability before January 1, 2009, may qualify for an accommodation now.

Important Definitions & Considerations Going Forward

- Definition of “Disability”
- Definition of “Substantially Limits”
- Affect of “Mitigating Measures”
- Definition of “Major Life Activities”
- Inclusion of “Episodic” or “in Remission”
- Definition of “Regarded As” (Perceived Disability)

What the Amended Act Has Not Changed: Basic Definition of Disability

Basic Three-Part Definition Will Stay the Same:

- Disability – the term disability means, with respect to an individual
 - (a) a physical or mental impairment that substantially limits one or more major life activities of such individual;
 - (b) a record of such an impairment; or
 - (c) being regarded as having such an impairment

What did the ADAAA Change?

- The Amendments Act did not change the actual definition of disability – the definition is exactly the same as it was.
- What did change is the meaning of some of the words used in the definition and the way those words are to be applied to individuals.
- The Amendments Act changes how courts must interpret whether an individual qualifies as disabled & requires the EEOC to issue new guidance.

General Purpose of Changes: Overruling “Demanding Standards”

- Pre Amendment Standard: disability needed to “be interpreted strictly to create a demanding standard for qualifying as disabled”
- The ADAAA: “the definition of disability shall be construed in favor of broad coverage of individuals under the Act, to the maximum extent permitted by the terms of this Act”

New Meaning of “Substantially Limits”

The definition of “substantially limits”
will not be as high a standard

Expanding “Substantially Limits”

- Pre Amendment: A substantial limitation “prevents or severely restricts an individual from performing major life activities” (See *Toyota Motor Mfg., Kentucky v. Williams*)
- The Amended Act states that the definition of disability shall be “construed in favor of broad coverage”

Expanding “Substantially Limits”

- The Amendments Act does not provide a definition of “substantially limits,” but it does require the EEOC to adopt a new definition of the term that is “consistent with the Act”
- The EEOC will most likely reject the Supreme Court’s “prevents or severely restricts” standard and adopt a more lenient one

Affect of “Mitigating Measures”

Mitigating Measures will no longer
be considered

Mitigating Measures

- Pre Amendment: “mitigating measures” were considered when determining if an individual is substantially limited in a major life activity
- Amended Act: “mitigating measures” are not to be considered, except ordinary eyeglasses / contacts
- Rejects the holding of the U.S. Supreme Court in *Sutton v. United Air Lines, Inc.*, in which the Court held that the effects of mitigating measures, such as medication, should be considered when determining whether an impairment substantially limits a major life activity

Mitigating Measures

Amended Act prohibits the consideration of measures such as:

- Medication
- Medical supplies
- Equipment
- Prosthetic devices
- Hearing aides
- Mobility devices

New Meaning of “Major Life Activities”

The definition of “major life activities”
will be expanded to include
bodily functions

“Major Life Activities” Amended Act Overview

- Broader standard
- Expanded List of Major Life Activities
- Inclusion of Bodily Functions

Expanding “Major Life Activities”

- Neither the original ADA nor the regulations issued by the EEOC actually defined the term “major life activities”
- The EEOC came up with a short, illustrative list of qualifying activities that left a number of questions unresolved

Expanding “Major Life Activities”

- The Amended Act explicitly rejects that the term “major life activities” must be narrowly interpreted.
- The Amended Act rejects that only activities of “central importance to most people’s daily lives” are “major life activities.”
- Rejecting the holding in *Toyota Motor Mfg., Kentucky Inc. v. Williams*

Expanding “Major Life Activities”

The new ADAAA list of “major life activities” includes the following:

- Caring for oneself
- Seeing
- Eating
- Walking
- Lifting
- Speaking
- Learning
- Concentrating
- Communicating
- Performing manual tasks
- Hearing
- Sleeping
- Standing
- Bending
- Breathing
- Reading
- Thinking
- Working

Expanding “Major Life Activities”

Major Bodily Functions Included

- The ADA specifies that “major bodily functions” are a type of “major life activity”
- Includes
 - normal cell growth
 - the functions of the immune, digestive, respiratory, circulatory, or other bodily systems
 - reproductive functions

New Inclusion of “Episodic” or “in Remission” conditions

Limitations on major life activities will
be considered as if active

Episodic Conditions & in Remission

- Pre Amendment: Some courts have held that such conditions do not qualify because the individual is not usually limited in his or her activities.
- Amended Act: Recognizes “episodic” conditions as potentially “substantially limiting”

Episodic & Remission Condition Examples:

- PTSD
- Epilepsy
- Diabetes
- Cancer (even if in remission)
- Other mental illness

Episodic Condition Statistics

A Closer Look

In 2008, EEOC resolved 15,708 disability discrimination charges and recovered \$57.2 million in monetary benefits for charging parties.

- Diabetes cases in 2008
 - 132 of the charges
 - \$2 million dollars
- An estimated 23.6 million in USA have diabetes
 - 8 percent of the population
 - 13.5 percent increase from 2005-2007

New Meaning to Have a Perceived Disability

The interpretation of “regarded as” will be very broad, with no substantially limits requirement

Changes to “Regarded As”

- The Supreme Court narrowed the “regarded as” prong by holding that the terms “substantially limits” and “major life activities” must be strictly interpreted
- The Court also applied its strict definitions to claims under “regarded as”

Changes to Perceived Disability

- The Amended Act explicitly rejects the Supreme Court's approach.
- Under the new standard, to be covered, an individual only has to establish that an employer discriminated against him because of a medical condition.
- It does not matter whether the employee actually has a medical condition or the employer just thought he did.
- The employee does not have to meet the substantially limited in a major life activity standard.

Changes to Perceived Disability

The focus will likely shift to determining:

- Does the employee have a mental or physical impairment?
- Was the employee perceived by the employer as having an impairment?
- Did the employer take adverse action against the employee?
- Was that adverse action based in whole or in part on the employee's real or perceived impairment?

Exception to Perceived Disability

- Exception for transitory and minor impairments
- The Amended Act defines a “transitory and minor” impairment as one “with an actual or expected duration of six months or less”
- “Transitory and minor” impairments (e.g. the flu) does not qualify under the regarded as prong

Now We Know:

1. The substantially limits standard is not as high a standard as it was.
2. When considering whether a person is substantially limited, we ignore the beneficial effects of any mitigating measures.
3. When considering whether a person is substantially limited in a major life activity, we consider bodily functions as well as other major life activities.
4. When considering whether a person whose condition is episodic or in remission is substantially limited in a major life activity, we consider the person's limitations as they are when the condition is in an active state.
5. Regarded as is very broad and does not require individuals to meet the substantially limited standard

What About Reasonable Accommodations?

- Amended Act did not change the definition of a reasonable accommodation
- However, does clarify that only individuals who meet the first (actual disability) and second (record of disability) are entitled to accommodations

Reasonable Accommodation is Flexible

Keep in mind flexibility built into the reasonable accommodation obligation under the ADA:

- Employers can choose among effective accommodation options and do not always to provide the requested accommodation.
- Employers do not have to provide accommodations that pose an undue hardship.
- Employers do not have to provide as reasonable accommodations personal use items needed to accomplish daily activities both on and off the job.
- Employers do not have to make an accommodation for an individual who is not otherwise qualified.
- Employers do not have to remove essential functions, create new jobs, or lower production standards as an accommodation.

What Does it Mean?

What to Do?

- Review and modify existing disability policies
- Train managers – create an HR checklist to follow
- Create accurate job descriptions
- Conduct early assessment of injuries / illnesses
- Audit existing employee roster for “Retroactivity Issue”
- Document actions and decisions

CONCLUSION

Thank you!

Questions?

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