

## Americans With Disabilities Act Amendments Act of 2008

On September 25, 2008, President Bush signed into law the Americans With Disabilities Act Amendments Act ("ADAAA"), which will be effective January 1, 2009. By expressly rejecting a series of Supreme Court opinions that it deemed too restrictive of disabled employees' rights, the ADAAA strengthens protections for employees covered by the Act.

On its face, the basic definition of disability under the Americans With Disabilities Act ("ADA") remains unchanged. Disability is still defined 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. In 2002, the Supreme Court ruled that this definition must be strictly construed "to create a demanding standard for qualifying as disabled." The ADAAA explicitly rejects this interpretation and provides that "[t]he definition of disability shall be construed in favor of broad coverage of individuals under this Act."

Indeed, the ADAAA ensures broader coverage of employees by revising several important concepts, including the following:

**Most mitigating measures are no longer considered.** The ADAAA provides that the determination of whether an impairment substantially limits a major life activity must be made "without regard to the ameliorative effects of mitigating measures." Put another way, courts may no longer consider the effects of medication, "assistive technology," or employers' accommodations on the impairment in question. Ordinary eyeglasses or contact lenses, however, still will be considered in the impairment analysis.

**Expanding the concept of "substantially limits."** Previously, only those impairments that "prevent[ed] or severely restrict[ed] . . . [the performance of] major life activities" were covered by the ADA. The new law directs the Equal Employment Opportunity Commission ("EEOC") to craft a less restrictive standard for measuring the extent to which an individual is substantially limited in a major life activity.

**Impairments that are episodic in nature or in remission are now covered.** The Supreme Court previously instructed courts to focus on an individual in his or her present state when determining the presence of a disability. Rejecting this approach, the ADAAA provides that "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity *when active*" (emphasis added).

**Revising the definition of "major life activities."** Prior to the amendments, the task of defining major life activities was left to the EEOC. The new law incorporates a non-exhaustive list of examples into the statute and adds new activities such as eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating.

**Expanding coverage for employees "regarded as" disabled.** Previously, an employee had to prove that because of a disability, an employer regarded the employee as being substantially limited in a major life activity. Under the ADAAA, an employee is protected from discrimination on the basis of an actual or *perceived* impairment, regardless of whether the impairment actually limits a major life

activity. While the ADA formerly focused on the severity of a plaintiff's impairment, the new law frames the inquiry on the employer's motivations in making an adverse employment action.

The ADAAA contains several key restrictive changes. For example, prior to the amendments, courts were divided on the issue of whether an employer had to accommodate employees merely "regarded as" disabled. The ADAAA settles this issue, providing that employers "need not provide reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the "regarded as" definition. Moreover, the ADAAA provides that an employee "regarded as" having an impairment that is merely minor and transitory is not afforded any protection. Finally, the amendments expressly foreclose the possibility of reverse discrimination actions made on the basis of an individual's "lack of disability."

Several major components of the ADA remain unchanged by the amendments. The ADAAA does not address what constitutes "reasonable" for purposes of reasonable accommodation. The interactive process (the dialogue between employer and employee with the objective of finding an accommodation) remains the same, as does the analysis of what constitutes an undue hardship for an employer.

For many employers, state and local laws already impose standards stricter than, or equivalent to, the ADAAA. The expansion of coverage under the new law should have less of an effect on these workplaces. Nevertheless, the ADAAA brings important changes to federal disability law. With a January 1, 2009 effective date looming there are several things employers can do now to prepare for these changes, such as:

**Reviewing disability policies.** Employers should review their disability-related policies to ensure ADAAA compliance.

**Training supervisors and Human Resources staff.** Employers should train managers, supervisors, and Human Resources staff regarding company disability practices, how to handle accommodation requests, and the new contours of disability law.

**Preparing for more accommodation requests.** An employee seeking reasonable accommodation is still required to provide supporting documents from a health-care professional describing the impairment and the particular accompanying limitations. Employers should review practices and administrative capacity to ensure that each accommodation request can be promptly and properly addressed and documented.

**Be on the lookout for the EEOC regulations.** Many provisions of the ADAAA will be detailed and enforced by the EEOC in regulations to be promulgated in 2009.

Hughes Hubbard's Labor and Employment department has extensive experience counseling employers with disability issues and would look forward to working with you to ensure compliance with the ADAAA.

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