

# Labor Law Bulletin

## CONGRESS EXPANDS ADA COVERAGE

Since the Americans with Disabilities Act (ADA) became law in 1990, the United States Supreme Court and many lower federal courts have interpreted the statute in a way that has narrowed the population of persons who are considered to be “disabled” and therefore protected under the law. This is about to change. On September 25, 2008, the President signed the “ADA Amendments Act,” which becomes effective January 1, 2009. These amendments are intended to legislatively overrule a series of Supreme Court decisions and make it easier for persons to qualify for protection under the ADA. They no doubt will accomplish that purpose.

If your company has 15 or more employees (including part-time and temporary employees), these changes will affect you beginning January 1, 2009.

### **Definition of Disability Is Broader**

Courts have taken a hard line over the years in determining what constitutes a “disability.” Not anymore. The new amendments expressly require courts to construe the term disability “in favor of broad coverage . . . to the maximum extent permitted” by the ADA. This circular language portends ongoing litigation over what the ADA permits.

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However construed, the amendments clearly are intended to expand ADA coverage to more people. Further, the definition of “disability” now includes any impairment that is episodic or in remission if it would

substantially limit a major life activity when active.

### **Super Sized Definition of Major Life Activities**

A disability is a physical or mental condition that substantially limits “one or more major life activities.” The ADA amendments contain a list of “major life activities” including: caring for oneself, performing manual tasks, seeing, hearing, breathing, learning, reading, concentrating, thinking, communicating and working. A major life activity also includes the “operation of a major bodily function,” such as “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions.” The intent is to ensure that a broad range of health conditions including high blood pressure, diabetes, epilepsy and asthma, may be considered conditions that affect major life activities.

### Cannot Consider Mitigating Measures

In a 1999 decision, the U.S. Supreme Court held that mitigating factors, such as prosthetics and medication that ameliorate the adverse effects of a health condition, must be taken into account when determining whether an individual is disabled. The amendments reject that ruling. The new law explicitly states that corrective measures should not be taken into account in determining whether a person's impairment substantially limits a major life activity. Thus the ameliorative effects of medication, mobility devices, hearing aids and prosthetics cannot be considered. The one exception is that "ordinary eyeglasses and contact lenses" can be considered when determining whether an individual has a disability.

### EEOC to Define "Substantially Limits"

The new amendments reject a 2002 U.S. Supreme Court interpretation that the phrase "substantially limits a major life activity" means an individual must have an impairment that prevents or severely restricts the individual from engaging in activities that are of central importance to most people's daily lives. However, the law does not provide a new definition. Rather, the EEOC

is required to define the phrase "substantially limits" in a manner "consistent with the purpose" of the amendments. Although regulations are still months away, employers can be certain that the EEOC will take an expansive approach.

### More Coverage for Persons "Regarded As" Disabled

The ADA has always protected workers who were "regarded as" disabled, even if they were not actually disabled. Before the amendments, claimants needed to show that the employer regarded them as being substantially limited in a major life activity. Now, a "regarded as" claimant need show only that the employer perceived the individual as impaired, whether or not the impairment limits or is perceived to limit a major life activity. In a minor concession, the ADA excludes "regarded as" claims for transitory (6 months or less) and minor impairments. A more significant clarification of the law is that an employer is not required to provide reasonable accommodation to individuals who are regarded as disabled but are not disabled in fact.

### Conclusion

There is no doubt that the amendments will result in more disability discrimination claims and more litigation to sort out the meaning of the

new statutory provisions. In the short term, here are some things employers may want to consider:

- Review your disability discrimination policies. They may require revision to comport with the new statutory definitions of "disability."
- Management and human resources professionals should continue to take disability issues seriously. Employers should train their management staff to be even more vigilant for disability and accommodation issues given that more employees will now be eligible for ADA protection.
- Employers can expect more accommodation requests. Since more employees are now covered under the law, managers and HR professionals must treat all such requests seriously, continue to develop resources and protocols to respond to such requests and consult with counsel before deciding that an employee is not entitled to an accommodation.

If you have any questions about the new ADA amendments, please contact **Bruce R. Alper** (312-609-7890), **Timothy J. Tommaso** (312-609-7688) or any other Vedder Price attorney with whom you have worked.

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