

Amendments Strengthen Protections for Those With Disabilities

The Americans with Disabilities Amendments Act of 2008 (“ADAAA” or the “Amendments”) became effective on January 1, 2009 and represents sweeping changes to the protections afforded under the Americans with Disabilities Act (“ADA”).

The ADAAA was passed largely in response to several Supreme Court decisions of the past decade which narrowed the scope of protection offered by the ADA, especially with respect to those individuals covered by the ADA. In the Amendments, Congress explicitly rejects several of these holdings as well as the reasoning and interpretations in cases such as *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, and *Sutton v. United Air Lines, Inc.*, where the Court applied a strict interpretation standard to the ADA.

In response to these Supreme Court decisions, the ADAAA mandated a rule of construction that “the definition of disability shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.”

The ADAAA maintains the three-prong definition that was established by the ADA. As such, under the Amendments:

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...

Although the basic definition remains the same, the ADAAA significantly changes the scope of coverage of individuals who are considered to have a disability. Most of these changes broaden the coverage of the ADA, especially with regards to judicial interpretation of the ADA.

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Rejection of the “Mitigating Measures” Approach Adopted by the Supreme Court

In a series of Supreme Court decisions in the late 1990s, beginning with *Sutton*, the Court held that the question of whether an individual has a disability must be determined with reference to any mitigating or corrective measures with which the individual is able to offset the effects of a physical or mental impairment. In *Sutton*, the Court held that the plaintiff’s use of eyeglasses should be considered in judging whether plaintiff “was ‘substantially limited’ in a major life activity and thus ‘disabled’ under the ADA.” The Supreme Court and the lower courts have applied the *Sutton* holding to other mitigating measures, both artificial as well as measures undertaken within the human body’s own systems.

The ADAAA replaces the mitigating measures rule adopted by the Supreme Court with a standard requiring that the “substantially limited” determination be made without regard to the ameliorative effects of mitigating measures. The ADAAA defines mitigating measures as including both artificial measures such as medicine, medical supplies, and prosthetics, as well as learned behavioral or adaptive neurological modifications.

One major exception to this new approach involves eyeglasses and contact lenses. The ADAAA states that the effects of ordinary eyeglasses and contact lenses shall be considered in determining whether an individual has an impairment that substantially limits a major life activity.

Episodic Impairments

A second major change made by the ADAAA is that individuals who have impairments which are episodic in nature or which are in remission are now covered. Previously, the Supreme Court had repeatedly held that courts should not hypothesize about the potential severity of impairments or how impaired the individual is when the impairment is at its worst.

In rejecting these prior holdings, the ADAAA states that “an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.” By extending the coverage of the ADA to employees whose impairments are episodic or are in remission, Congress has broadened the definition of disability under the ADA.

Major Life Activities

Both the ADA and the Amendments state that an individual is considered to have a disability in situations where a “physical or mental impairment ... substantially limits one or more **major life activities** of such individual.” (emphasis added). The previous version of the ADA did not define what constituted “major life activities,” and the task fell to agencies such as the EEOC to define the term. Instead of defining the term, the EEOC created a non-exhaustive illustrative list of major life activities. Additionally, the Supreme Court narrowed the definition of “major life activities” by holding that these are “activities that are of central importance to most people’s daily lives.”

The ADAAA rejects this Supreme Court holding. Instead of providing a definition of the term, however, the ADAAA provides a non-exhaustive list of major activities. This list takes a broad view and includes certain activities not included in the EEOC list, such as “concentrating,” “communicating,” and “reading.” Moreover, the Amendments make clear that the term “major life activities” also includes the operation of major bodily functions, and provides a separate list of examples of these covered functions.

Persons “Regarded as” Having a Disability

The ADAAA makes major changes to the circumstances under which an individual is considered to have a disability under the “regarded as” prong. Again, these changes have the potential to expand the scope of coverage of individuals considered to have a disability. Under the ADAAA, an individual is regarded as having an impairment if the individual establishes they have been subjected to an action prohibited under the ADAAA “because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.” Prior to the Amendments, the “regarded as” standard was linked to an impairment that substantially limited a major life activity.

The Amendments focus on an employer’s motivation for an action, regardless of the severity of the individual’s impairment. As an example, if an employee has an impairment and can show that the impairment motivated the employer’s adverse action, the employee is covered under the “regarded as” prong, regardless of how limiting the impairment actually is. Similarly, if an employee can show that the employer perceived the employee as having an impairment, regardless of whether this perception was correct, and that this perception motivated the adverse action, the employee can claim coverage under

the “regarded as” prong, irrespective of how limiting the employer perceives the impairment to be.

The ADAAA resolves a circuit split over the question of whether an employer must provide reasonable accommodations to individuals whom they merely regard as having a disability. The ADAAA takes the side of employers, providing that employers need not provide reasonable accommodations or a reasonable modifications to policies, practices, or procedures to any such individuals.

What’s Next?

One issue that is sure to be litigated concerning the ADAAA is whether the provisions are retroactive. Typically statutes are not retroactive unless retroactivity is required by the precise language of the statute or by necessary implication. There is no such language in the ADAAA. The ADAAA does state that when originally enacted in 1990, Congress intended to provide broad coverage that courts have erroneously interpreted as more narrow, and therefore an argument might be presented that the ADAAA is meant to restore this original intent. A similar debate arose with respect to the Civil Rights Act of 1991, but ultimately, the Supreme Court rejected arguments that the 1991 Act was retroactive.

Finally, though the ADAAA has been in effect since the beginning of this year, the EEOC has yet to start the rulemaking process with respect to the Amendments. On December 11, 2008, the EEOC declined to issue a set of proposed rules drafted by the EEOC’s legal counsel. Although the ADAAA does not set a deadline for the EEOC regulations to be released, these should be released this year.