

## **THE ADA AMENDMENTS ACT OF 2008: CHANGES TO THE AMERICANS WITH DISABILITIES ACT AND THEIR IMPACT ON EMPLOYERS**

The Americans with Disabilities Act of 1990 (ADA) is a civil rights law that prohibits, under certain circumstances, discrimination based on disability. It was signed into law on July 26, 1990, by President George H. W. Bush. On September 25, 2008, President George W. Bush signed into law The ADA Amendments Act of 2008 (“ADAAA”). It is intended to give broader protections for disabled employees by expanding the definition of disability and undoing several court rulings that restricted the application of the ADA. The ADAAA will take effect January 1, 2009.

The ADA states that a *covered entity* shall not discriminate against a *qualified individual with a disability*. The prohibition against discrimination applies to all terms, conditions, and privileges of employment including, without limitation, job application procedures, hiring, advancement and discharge. Just like other civil rights laws that prohibit decisions based on protected characteristics like race or sex, Congress wanted the ADA to stop employers from making adverse decisions based on disability. Unfortunately, after the passage of the ADA, several court decisions narrowed the definition of disability so much that people with serious conditions were unable to meet the statutory definition to invoke the protections of the statute.

In a series of rulings after the ADA took effect, courts placed a narrow construction on who is protected under the ADA. In one decision, the U.S. Supreme Court held that mitigating measures, such as wearing a hearing aid or taking medication, should be taken into consideration when determining if a person has a qualifying disability. In such a case, a worker that suffered from a disabling condition could not invoke the protection of the ADA when the worker was discriminated against because of a disability. In other words, an employer could fire or refuse to hire a fully qualified worker simply on the basis of a physical or mental impairment on the ground that the worker is not “disabled enough” to qualify for protection under the law.

The ADAAA will reverse these court decisions and the limiting trend that evolved with the following changes:

- **Broad Interpretation**

In order to undo the narrowing trend that developed in the case law and place greater focus on an employer’s actions, the ADAAA affirms Congress’ intent that the definition of disability be construed in favor of broad coverage. In addition, the ADAAA states that “proof of disability should not longer require extensive evidence.” Rather, the primary focus “should be whether entities covered under the ADA have complied with their obligations.”

- **Major life activities**

Currently, under the ADA, “disability” is defined as a physical or mental impairment that substantially limits one or more major life activities; A record of such an impairment; or, Being regarded as having such an impairment. While the ADAAA maintains the definition of a disability as one involving a physical or mental impairment that substantially limits one or more major life activities, it expands the definition of the term *major life activities*. Thus, under the ADAAA, *major life activities* is broadly defined and includes such things as “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working”.

In addition, the legislation states that a major life activity includes the operation of a major bodily function including “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.” The ADAAA notes that the list of examples is non-exhaustive.

- **Substantially Limits**

Following the passage of the ADA, the Equal Employment Opportunity Commission (EEOC) issued a regulation that narrowly defined the phrase *substantially limits* to mean “significantly restricted.” In addition, in *Toyota Motor Manufacturing Kentucky, Inc. v. Williams* 534 U.S. 184 (2002), the U.S. Supreme Court took a limiting view of the ADA and held that an impairment must “prevent or severely restrict” an individual in tasks that are of “central importance to most people's daily lives, rather than simply restricting the individual's ability to perform tasks in a particular job. The Court further held that the term *substantially* needed to be interpreted strictly to create a demanding standard for qualifying as a disability.

The ADAAA rejects these interpretations calling them “an inappropriately high level of limitation” and mandates an interpretation of the term *substantially limits* in a manner consistent with the findings and purposes of the ADAAA (i.e., to reinstate a broad scope of protection under the ADA). The ADAAA also rejects the EEOC’s definition of *substantially limits* and expresses the expectation that the EEOC will revise that portion of the regulations.

The legislation also clarifies other aspects of the ADA. For example, the ADAAA states:

- Only one major life activity needs to be limited. An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.
- An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

- **Mitigating Measures**

As noted above, following the passage of the ADA, several court rulings held that corrective and mitigating measures must be considered in determining whether an impairment substantially limits a major life activity. For example, in *Sutton v. United Airlines* 527 U.S. 471 (1999), the U.S. Supreme Court stated when corrective measures are used to mitigate an impairment, the effects of those measures must be taken into account when determining whether a person is disabled. In *Murphy v. United Parcel Service, Inc.* 527 U.S. 516 (1999), the Court applied the same analysis to medication used to treat hypertension, and concluded that a terminated employee was not protected under the ADA, because medication alleviated some of his symptoms. Lastly, in *Albertson's Inc. v. Kirkingburg* 527 U.S. 555 (1999), the Supreme Court declared that mitigating measures included not only artificial aids such as devices and medications, but also subconscious measures a person may use to compensate for an impairment. In the case, the employee was blind in one eye, and the employee's brain subconsciously learned to compensate for the monocular vision. That compensation was found to be a mitigating measure, and using the *Sutton* analysis, the Court found that the employee did not have a disability under the ADA.

The ADAAA reverses this line of cases and provides that the determination of whether an impairment *substantially limits* a major life activity must be made without considering the ameliorative effects of mitigating measures.

- **Being Regarded As Having An Impairment**

Under the ADA, a person can claim to be “disabled” if the employer *regarded* the person as having an impairment. To establish a claim, a person would have to show that his/her employer *regarded* him/her as having an impairment that substantially limited a major life activity. Under the ADAAA, a person can meet the requirement of being *regarded as* disabled if he/she can prove discrimination because of an actual or perceived physical or mental impairment, regardless of whether the impairment actually limits or is perceived to limit a major life activity.

The ADAAA further clarifies that employees *regarded as* being disabled (but not actually disabled) need to be accommodated.

- **What You Can Do To Prepare For The Changes**

1. Review policies related to the ADA, discrimination, and accommodation procedures to make sure that they are consistent with the new changes.
2. Make sure job descriptions are up to date and accurately identify essential job functions.
3. The ADA requires that employers engage in an interactive process to determine whether there is a reasonable accommodation that will allow a disabled individual to

perform a job. With a broader interpretation of “disability”, employers should make sure that procedures are in place for responding to requests for reasonable accommodations and documenting the interactive process.

4. Train supervisors and managers about the changes and how to handle claims of discrimination and requests for accommodation.

5. If an employee was previously denied a reasonable accommodation request because it was determined that he/she did not satisfy the “disability” requirement of the ADA, reevaluate whether the ADAAA changes the analysis.