

## **Congress Passes Major Changes to the ADA**

Kai W. McGintee | September 24, 2008

Congress recently passed sweeping changes to the Americans with Disabilities Act, which will significantly impact the defense of disability discrimination claims on the Federal level.

The ADA Amendments Act of 2008 (“ADAAA”) was approved by an overwhelming majority in the House and the Senate and is expected to be signed into law by President George W. Bush within the next few weeks. Once signed by President Bush, the amendments will take effect on January 1, 2009.

The ADAAA broadens the scope of protection available under the ADA by expressly rejecting Supreme Court cases that have applied a strict standard when determining whether a plaintiff is disabled for the purposes of bringing a federal discrimination claim. Under the ADAAA, the definition of disability is to be “construed in favor of broad coverage of individuals . . . to the maximum extent permitted” by the statute. Although the ADAAA will almost certainly increase the number of individuals who are considered “disabled”, the changes may have limited impact in states, such as Maine, that have already passed legislation defining “disability” more broadly than its then existing federal counterpart.

The following lists the most significant changes that will impact employers when the ADAAA goes into effect on January 1, 2009:

### **Mitigating Measures Must Now Be Ignored:**

Under the ADAAA, an employee’s disability is determined without regard to any mitigating measures that the individual may use, such as medications, prosthetics, hearing aids, mobility devices, and oxygen therapy and equipment. The good news for employers is that “ordinary eyeglasses or contact lenses” are specifically excluded from the new mitigating measures determination. As a result, the ameliorative effect of eyeglasses and contact lenses may be taken into consideration in deciding whether a person is disabled under the ADA. In almost all other cases, however, an employer should disregard any mitigating measures when engaging in the interactive process with employees and their health care providers.

### **Almost Anything Is a Major Life Activity:**

Prior to the recent amendments, the ADA was silent on what constitutes a “major life activity” in determining whether an individual is substantially limited and can therefore claim a disability. The ADAAA, however, provides a comprehensive and

non-exhaustive list of activities, including caring for oneself, performing manual tasks, eating, sleeping, reading, concentration, thinking, communicating, and working. Moreover, the operation of any major bodily function will also now be deemed a major life activity.

**“Regarded As” Prong Re-Defined:**

In offering protection to those individuals wrongly “regarded” as disabled, the ADAAA removes the requirement that plaintiffs demonstrate that their employer regarded them as substantially limited in a major life activity. Now, plaintiffs will only have to show that the employer perceived them as having a mental or physical impairment, regardless of whether or not the impairment actually limits or is perceived to limit a major life activity.

The encouraging news for employers is that the “regarded as” prong will not be applicable when impairments are transitory (6 months or less) and “minor.” Furthermore, employers are not required to provide reasonable accommodations to employees who are “regarded as” disabled.

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