

Broadened ADA Could Mean More Litigation

By Karen S. Aframe

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In September, President Bush signed into law amendments to the Americans with Disabilities Act of 1990 that greatly expand the ADA's coverage by broadening the definition of disability.

The changes, which take effect in January, will ultimately require employers to extend reasonable accommodations to more employees and are likely to increase ADA litigation. The ADA has two primary components: It prohibits employers from discriminating against disabled employees and it mandates that employers provide disabled employees with reasonable accommodations to perform the essential functions of their positions.

The ADA's requirements apply only to disabled employees. Under the ADA, an employee is disabled if she has a physical or mental impairment that substantially limits one or more of the major life activities, has a record of such impairment or is regarded as having such an impairment.

Through two decades of litigation, the Supreme Court has limited the ADA's reach by narrowly interpreting the term "disability," and thus limiting the numbers of persons protected by the ADA. In particular, the court has concluded that the effect of an impairment on a major life activity must be judged with the employee using mitigating measures (for example, hearing aids or hypertension medication). The court also has said that, to be disabled, an employee must show that an impairment "prevents or severely restricts" the performance of a major life activity.

The court based these rulings on language in the original ADA indicating that only 10 percent or less of Americans are disabled, and Congress' determination that the disabled are "a discreet and insular minority." The court reasoned that if the disability definition was interpreted broadly, more than 43 million Americans would be disabled - not a discreet and insular minority. These decisions have had a major impact. According to one study, employers have prevailed in over 90 percent of ADA cases.

By amending the ADA, Congress intended to overturn the Supreme Court's narrow interpretation of disability and made five significant changes to broaden its reach:

- The amendments delete the language from the original ADA that the Supreme Court relied on to narrowly construe the definition of disability. According to congressional sponsors, this "removes the barriers to construing and applying the definition of disability more generously."
- The amendments state that the definition of disability "shall be construed in favor of broad coverage of individuals under [the] Act, to the maximum extent permitted by the terms of the Act." This change overrules the tough standard imposed on employees to show that their impairment "prevents or severely restricts" a major life activity.
- The amendments prevent consideration of mitigating measures in determining whether an individual is disabled. In addition, impairments that are episodic or in remission (such as

migraines) are to be assessed as if they were in an active state.

- The amendments provide a broader definition of major life activity. As amended, such activity includes 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 definition of major life activity now includes the operation of a major bodily function, such as the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions.
- The amendments clarify the definition of being regarded as disabled. Under current law, an employee is only regarded as disabled if the employer believed that the employee had an impairment that substantially limited a major life activity. As of January, so long as the employer believed that the employee suffered an impairment, the employee is covered by the ADA. In some minor good news for employers, the amendments also clarify that an employer is not required to provide a reasonable accommodation to an employee it regards as disabled (but who in fact is not disabled).

Preparing for change

The ADA amendments will undoubtedly deprive employers of one of their most effective grounds for defending ADA claims – arguing that the employee is not disabled. As a result, ADA litigation will likely shift away from threshold disability questions to more fact-intensive questions, such as the meanings of reasonable accommodation, essential functions of the job and undue hardship.

What should employers do to prepare for this significant change in the ADA? Employers must review (or develop) their policies for handling requests for accommodation. The law requires a collaborative employer/employee dialogue to determine what accommodations would be feasible.

Employers should train managers to work with employees to identify and implement reasonable accommodations. Employers also should make sure that job descriptions define essential functions of the job because these are often critical to identifying reasonable accommodations.

In sum, policies and systems must be implemented that show a serious commitment to accommodating their disabled workers.

Karen S. Aframe, a member of Bernstein Shur's Labor and Employment Practice Group in Manchester, can be reached at 603-623-8700 or kaframe@bernsteinshur.com.