

Get Ready for Significant ADA Changes

Congress has passed the *The ADA Amendments Act of 2008*. The Act, which received final Congressional approval on September 17, will significantly expand coverage of the Americans with Disabilities Act. President Bush has indicated that he will sign the bill which is effective on January 1, 2009. The legislation was in response to criticism of court decisions that excluded many individuals who it was thought should be covered under the ADA.

The new law will undoubtedly increase the number of individuals protected under the ADA and likely spur more litigation. It also will require changes by employers to ensure compliance and avoid time consuming and costly employee complaints and lawsuits. The ADA applies to organizations with 15 or more employees, including part time and temporary workers.

You'll remember that under the ADA an individual may be considered to have a "disability" if she,

1. Has a physical or mental impairment that substantially limits one or more major life activities;
2. Has a record of such impairment; or
3. Is regarded as having such an impairment.

Among other things, the new law will change how these disability definitions will be interpreted and applied.

What's Been Changed?

1. **The definition of "disability" must be broadly interpreted in the future.** The Amendments strongly state that "the Act shall be construed in favor of broad coverage of individuals...to the maximum extent permitted...."
2. **The definition of "major life activity" is expanded.** Before the Amendments the ADA did not specify examples of major life activities. The Amendments define major life activities to include, but not limited to: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. Additionally, the Amendments add new major life activities that involve "major bodily functions." Those functions include such things as "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. Major life activities just got a whole lot more inclusive.
3. **Mitigating measures won't be considered any longer.** The Amendments provide that disability status is to be determined without considering mitigating measures (e.g., medication, prosthetics, hearing aids, assistive technology) that might improve or correct an individual's condition. One small exception is made for ordinary glasses or contact lenses.
4. **The definition of "regarded as" is broadened.** In the past, an individual would have to show that an employer regarded him as substantially limited in a major life activity. The Amendments loosen that standard, permitting an individual to meet the "regarded as" standard whether or not an impairment limits a major life activity.

Note that the Amendments make clear that the "regarded as" test doesn't apply to impairments that are minor or lasting 6 months or less.

5. **“Substantially limits” will be given a broader definition consistent with the Amendments.** The new law rejects the strict definition used by many courts in considering whether a disability “substantially limits” a major life activity. No new definition was included in the law. We’ll have to wait to see how the EEOC and courts will handle this mandate and loosen the definition.
6. **Episodes or impairments in remission may be protected.** Under the new law, an impairment that is episodic or in remission is a disability if it would substantially limit a major activity when active.
7. **No reverse “lack of disability” discrimination.** Under the new Amendments an individual can’t sue because he believes he was discriminated against because he didn’t have a disability.

What should you do now?

Most organizations will need to make changes in their policies and procedures to ensure compliance with the new law. Therefore it’s important to become familiar with the Amendments, watch for new EEOC regulations, and check your state law to see if it imposes even greater requirements. It’s also a good time to plan an ADA training update for managers.

Additionally, managers should prepare to take a more liberal view of who may be covered under the ADA and what additional accommodations may be necessary. A cautious approach that errors on the side of the employee may be wise until the effect of the changes becomes clearer. That of course requires more regulations and more court cases. Stay tuned.

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