

WHAT EVERY EMPLOYER SHOULD KNOW ABOUT THE NEW AMERICANS WITH DISABILITIES ACT:

THE ADA AMENDMENTS ACT OF 2008 (ADAAA) AND THE PROPOSED CHANGES TO THE REGULATIONS

Presented By:

David E. Constine, III
Tevis Marshall
Troutman Sanders LLP
1001 Haxall Point
Richmond, VA 23218
804-697-1200

David.Constine@TroutmanSanders.com
Tevis.Marshall@TroutmanSanders.com

THE ADA AMENDMENTS ACT OF 2008

Effective January 1, 2009

On September 25, 2008, President Bush signed the Americans with Disabilities Act Amendments Act of 2008. The ADA Amendments Act of 2008 (“ADAAA”) took effect on January 1, 2009. The ADAAA was Congress’s attempt to respond to several Supreme Court decisions that have limited the ability of disabled persons to recover in discrimination lawsuits under the ADA. Although the ADAAA’s ultimate impact will not be known until lawsuits are brought and decided by the courts, the following changes are certain.

SUMMARY OF CHANGES

The ADAAA retains much of the basic framework of the ADA; however, it expands the definition of several key terms and overturns some U.S. Supreme Court decisions that narrowed the scope of ADA protections. For example, the Act:

- Directs the EEOC to amend its regulations to redefine the term “substantially limits”
- Expands the statutory definition of “major life activities”
- Limits the use application of “mitigating measures” in disability determinations
- Clarifies “episodic” impairments
- Clarifies the “regarded as” prong of the disability definition
- Emphasizes that “disability” should be interpreted broadly

DEFINITION OF DISABILITY IS BROADENED

Under the original ADA, “disability” is defined as a physical or mental impairment that substantially limits one or more of the major life activities of the individual, a record of such impairment, or being regarded as having such an impairment. The ADAAA does not change that definition, but it directs the EEOC to interpret the “substantially limits” language more liberally than it has in the past. “Substantially limits” will be broadened to cover more conditions, including many that have been excluded by court decisions over the past decade.

The effects of mitigating measures will no longer be considered in determining whether an impairment substantially limits a major life activity. Under the former interpretation of the ADA, if, through the assistance of medications or objects such as hearing aids or artificial limbs, an individual’s condition improved to the point of no longer substantially limiting a major life activity, that individual would no longer be considered disabled. Under the ADAAA, whether an individual is disabled will be determined by their condition *without regard* to the use of these mitigating measures (other than eyeglasses and contact lenses). So, even where the individual suffers from no limitations due to the use of a mitigating measure, he or she will still be considered disabled if they could be impaired without the mitigating measure. The ADAAA also covers conditions that are in remission but that *would* substantially limit a major life activity if they were active, such as multiple sclerosis and cancer.

The ADAAA makes clear that an episodic impairment, or one in remission, is still a disability if it would substantially limit a major life activity when active. One example is an individual with cancer that was once active but is now in remission—the individual will now be considered disabled.

LIST OF MAJOR LIFE ACTIVITIES IS EXPANDED

The original ADA included little statutory guidance as to what constituted a major life activity for purposes of determining whether an individual was disabled. The EEOC issued a list of major life activities, but many courts refused to adopt the list or narrowed the activities included. The ADAAA contains an expansive list of life activities, including: sleeping, reading, thinking, eating, concentrating, communicating, working, performing manual tasks, caring for oneself, standing, lifting, bending, seeing, hearing, speaking, learning, walking, and breathing. Also included are major bodily functions such as digestive, bowel, bladder, neurological, respiratory, circulatory, endocrine, and reproductive functions.

“REGARDED AS” DEFINITION IS CHANGED

The ADAAA also lowers the standard to prove that an employer discriminated against an individual whom it “regarded as” having a disability. Traditionally, an individual claiming he or she was “regarded as” having a disability had to establish either that the employer mistakenly regarded the individual as having an impairment that substantially limited a major life activity or that the employer mistakenly believed that an actual impairment substantially limited the individual (when in fact it did not). The ADAAA now makes an employer liable under a “regarded as” theory if the individual can show 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. This significantly eases the evidentiary proof needed to establish a “regarded as” claim under the ADA.

There is a bit of good news for employers, however, when dealing with those claiming they are regarded as disabled. The ADAAA clarifies that “regarded as” claims cannot be based on transitory and minor impairments where the impairment is expected to last less than six months. It also clarifies that employers are not required to provide a reasonable accommodation to individuals who are regarded as disabled, an issue over which the federal courts of appeals were previously split.

FIVE GENERAL RULES OF CONSTRUCTION ANNOUNCED BY EEOC

As to the application of the lower standard for determining whether an impairment limits a major life activity, the EEOC has commented that the proposed regulations contain five general rules of construction. The first rule would provide that “[t]he focus in ADA cases should be on whether discrimination occurred, not on whether someone meets the definition of ‘disability’; the definition of ‘substantially limited’ should be construed broadly to the maximum extent allowable under the ADA; and the determination of whether someone has a disability should generally not demand extensive analysis.”

The second proposed rule of construction provides that “an individual whose impairment substantially limits a major life activity need not also demonstrate a limitation in the ability to perform ‘activities of central importance to daily life.’”

The third rule provides that “an impairment that substantially limits one major life activity need not limit other major life activities to be considered substantially limiting.”

Citing to ADAAA regulations, the fourth proposed rule of construction provides that “comparison of an individual’s limitation to that of most people in the general population often may be made using a common-sense analysis without resorting to scientific or medical evidence.”

Finally, in response to anticipated confusion over the application of the transitory and minor exception to the “regarded as” definition of disability, the fifth proposed rule provides that “impairments that last for fewer than six months may still be substantially limiting.”

IMPAIRMENTS THAT WILL CONSISTENTLY MEET THE DEFINITION OF “DISABILITY”

The proposed changes to the regulations specifically list several impairments that will consistently meet the definition of the term “disability,” including the following:

- Blindness
- Deafness
- Intellectual Disabilities
- Missing limbs
- Mobility impairments requiring the use of a wheelchair
- Autism
- Cancer
- Cerebral Palsy
- Diabetes
- Epilepsy
- HIV/AIDS
- Multiple Sclerosis and Muscular Dystrophy
- Major Depression
- Bipolar Disorder
- PTSD
- Schizophrenia

IMPAIRMENTS THAT *MAY* MEET THE DEFINITION OF “DISABILITY”

The proposed changes to the regulations list several impairments that *may* meet the definition of the term “disability,” including the following:

- Asthma
- High Blood Pressure

- Coronary Artery Disease
- Learning Disabilities
- A Back or Leg Impairment
- Carpal Tunnel Syndrome
- Psychiatric Disabilities (panic or anxiety disorder and forms of depression other than major depression)
- Hyperthyroidism

IMPAIRMENTS THAT DO *NOT* MEET THE DEFINITION OF “DISABILITY”

Temporary, non-chronic impairments of short duration with little or no residual side effects usually will not meet the definition of disability. Such conditions include:

- Common Cold
- Seasonal or common influenza
- Sprained joints
- Minor and non-chronic gastrointestinal disorders
- Broken bones which are expected to heal completely

Remaining conditions will likely be determined on a case-by-case basis, as was the practice under the original ADA.