



Significant Amendments to the Americans with Disabilities Act

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On September 25, 2008, President Bush signed the ADA Amendments Act of 2008 ("ADAAA") into law. The ADAAA becomes effective January 1, 2009 and was adopted to restore the intent and protections of the Americans with Disabilities Act of 1990. Washington employers will now see federal disability discrimination claims raised in addition to claims raised under [RCW 49.60.180](#).

Compared to the current federal law, the ADAAA:

- Expressly overturns several Supreme Court decisions that narrowed the definition of "disability"
- Rejects a strict interpretation of disability by making it clear that the ADA is intended to provide broad coverage to protect anyone who faces discrimination on the basis of disability
- Prohibits consideration of mitigating measures (except for ordinary eyeglasses or contact lenses) such as medication, prosthetics and assistive technology in determining whether an individual has a disability
- Covers persons who experience discrimination based on a *perception* of impairment regardless of whether the individual is disabled
- Provides that reasonable accommodations are only required for individuals who can demonstrate they have an impairment that substantially limits a major life activity or bodily function, or who have records of such impairment

Background – A Return to the ADA's Original Purpose

In 1990, President George H.W. Bush, signed the ADA into law. Similar to other civil rights laws that prohibited discrimination based on race or sex, the ADA was intended to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." However, over time, U.S. Supreme Court decisions significantly narrowed the definition of disability. As a result, many fewer individuals with serious health conditions were found to be protected by the ADA than originally anticipated. In response to the erosion of the ADA's protections and with the help of disability advocates and business organizations, Congress eventually arrived at the ADAAA, which passed this year with bipartisan support.

Supreme Court Decisions Expressly Rejected by the ADAAA

The ADAAA expressly rejects the U.S. Supreme Court's decision in *Sutton v. United Airlines* (holding that mitigating measures must be considered in determining whether an individual is disabled), and *Toyota v. Williams*, (taking a restrictive view of what constitutes a substantial limitation in the major life activity of working). These decisions made it more difficult for ADA plaintiffs to prove they were "substantially limited" in a "major life activity." Instead, the ADAAA instructs courts that the ADA's definition of disability "shall be construed in favor of broad coverage under the Act, to the maximum extent permitted by the Act." The ADAAA declares that current Equal Employment Opportunity Commission ("EEOC") regulations that state the statutory term "substantially limits" means "significantly restricted" are "inconsistent with congressional intent, by expressing too high a standard."

Mitigation Not Considered

The ADAAA, in expressly rejecting *Sutton*, states that "the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures." Thus, the ADAAA, in determining whether a person is disabled, prohibits employers from considering mitigating measures such as medication, medical supplies, equipment, or appliances, low-vision devices (not including ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies; use of assistive technology; reasonable accommodations or auxiliary aids or services; or learned behavioral or adaptive neurological modifications.

What Constitutes "Major Life Activities"

The ADAAA explains and broadens the definition of a "major life activity" that may be substantially limited by disability. The amendments specify that "major life activities" include, but are not limited to, "caring for oneself, performing manual tasks, seeing, hearing, eating, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." Major life activities also include the "operation of a major bodily function," such as "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."

Regarded as Disabled Defined

Additionally, under the ADAA, a person can prove he or she is "regarded as" disabled by establishing that he or she has been discriminated against "because of an *actual or perceived* physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." This is in contrast to previous court rulings that required a plaintiff to prove the employer or other defendant incorrectly perceived them as "substantially limited" in a major life activity. Fortunately for employers, the definition of "regarded as having such impairment" does not apply to "impairments that are transitory and minor," with a "transitory" impairment defined as those with an "actual or expected duration of 6 months or less."

Employer Guidance and Best Practices

Until passage of the ADAAA, Washington employers have been more likely to face disability discrimination claims under RCW 49.60.180, which is more broadly construed than current federal law. Now, however, plaintiffs bringing disability discrimination claims will be able to assert claims under federal law as well. As a result, more disability claims are expected to be litigated in federal court. Employers will not know the full scope of their obligations under the ADAAA until the EEOC issues new regulations. In the mean time, employers should assume that the same range of disabling conditions will be covered under the ADAAA as are covered by RCW 49.60.180 and continue to implement non-discriminatory policies that ensure reasonable accommodation of all physical or mental impairments.

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