



Sweeping Amendments to the ADA Become Effective January 1, 2009

President Bush recently signed a law, effective January 1, 2009, that significantly expands and amends the **Americans With Disabilities Act (ADA)**. The Amendments mandate one of the most sweeping changes to employment law in over a decade. It is critical that employers understand these changes and be prepared to offer accommodations to many more employees. The ADA applies to all employers who had 15 or more employees (including part-time and temporary) for any 20 weeks during the current or preceding calendar year. A summary of the important changes follows.

1. The Definition of Disability: The Less Things Change The Less They Stay The Same

- The statutory definition of “disability” remains the same: an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment.
- However, courts and employers must adopt a “broad standard” when determining whether an individual is disabled. Courts must provide coverage for plaintiff employees “to the maximum extent permitted”. This reverses the course of over a decade of conservative federal court opinions, which set a very high bar for determining who was disabled and thus entitled to protection under the ADA.
- The EEOC must revise its regulations. The EEOC has previously stated that a major life activity is “substantially limited” if the persons ability to perform that activity was “significantly restricted.” The ADA Amendments say this “created an inappropriately high level of limitation necessary to obtain coverage under the ADA”. In other words, something less than “significantly restricted” will qualify as substantially limited after January 1st.
- Under the current law, impairments that are “episodic or in remission” were not disabling. The Amendments make these episodic conditions disabling if, when they are active, they substantially limit a major life activity. For example, an employee with cancer that is in remission and asymptomatic is “disabled” – and entitled to ADA protection – even while he is in remission. This requires employers to determine whether episodic or intermittent impairments could rise to the level of a disability when active.

2. Major Life Activity: Everything but the Kitchen Sink

- The ADA has been silent on what constituted a “major life activity” – leaving the interpretation up to the EEOC and courts. The new ADA codifies two non-exhaustive lists:
 - a. Major Life Activities including: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
 - b. Major Bodily Functions including: functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.
- Combined with the mandate to construe the definition of disability “broadly”, these non-exhaustive lists ensure that **nearly any employee who wishes to file an ADA claim – or request accommodations from their employer – will be able to do so.**

3. Mitigating Measures: Don’t Go There!

- o Employers and courts must ignore any and all mitigating measures being used by the employee when determining whether the employee is disabled under the ADA. The sole exception is for “ordinary eyeglasses or contact lenses”.
- o For example, consider an employee who uses a hearing aid. Without the hearing aid, his hearing is significantly restricted; with the hearing aid, his hearing is average. Under current law, the employee would not be considered disabled because, with the hearing aid, his hearing was not restricted. However, beginning January 1st, this employee will be considered disabled and entitled to protection under the ADA because without his hearing aid – even if he wears the hearing aid all day every day at work – his hearing is substantially limited. This change in the law requires the employer to make speculative assumptions about “what may be” without mitigated measures, rather than “what is” with mitigating measures. This change also puts an affirmative obligation on the employer to accommodate the “disabilities” of a whole new group of employees.

4. Perception is Everything: the “Regarded As” Prong Expands

- o An employer cannot discriminate against an employee who is not in fact disabled but who the employer “regards as” disabled.
- o Under the current law, employees bringing a claim under the “regarded as disabled” prong needed to prove that their employer actually regarded them as

being substantially limited in a major life activity. Under the Amendments, the plaintiff will only need to produce evidence that the employer “perceived” them has “having an impairment”. This change, compared with the broader application of the ADA, ensures it will be fairly easy for the employee to bring a “regarded as” claim.

- The only good news for employers here is that the Amendments specifically exclude impairments that are “transitory” (meaning lasting six months or less) and “minor” from coverage under the “regarded as” prong. But don’t get too giddy – these transitory and minor impairments are only excluded from claims under the “regarded as” prong. Transitory and minor impairments could still be disabilities under the other parts of the ADA.
- The Amendment also clarifies that “regarded as” employees (i.e., those who do not in fact have disabilities) are not entitled to accommodations.

5. **Just When You Had it All Figured Out: New Regulations on the Horizon**

- The Amendments expressly mandate the EEOC to issue new regulations and interpretive guidance. (The EEOC enforces the ADA with respect to employment situations and publishes the regulations and guidance documents that interpret the ADA.)
- The regulations must be consistent with the broader scope intended by the Amendments. The regulations specifically must also provide a new regulatory definition for the term “substantially limits” that will lower the standard for finding an employee to be disabled, consistent with congressional intent.
- It could take a year or more for the EEOC to issue regulations and guidance documents interpreting the new ADA. In the meantime, employers must still comply with the letter & spirit of the Amendments.

Certainly some of these Amendments only excite the lawyers. Others, however, require significant changes to your policies and procedures. A few practical tips:

- **Recognize that more employees will be protected by the ADA beginning January 1, 2009.** Some of the “new” disabilities will be obvious, but many more will not. Keep this in mind when making employment decisions.
- Remember that the ADA is primarily an accommodation statute. It is one of only two civil rights laws that impose an affirmative obligation on the employer to accommodate (as opposed to anti-discrimination laws that simply prohibit the employer from discriminating). **Because the Amendments increase the scope of**

who is covered, employers must be ready, willing and able to offer accommodations to more workers.

- **Err on the side of caution when determining whether to engage in the interactive process.** The ADA requires employers to work with disabled employees who request an accommodation to identify what accommodations will be effective and reasonable.
- When considering a request for accommodations, **engage in the interactive process without regard to mitigating measures.**
- **Update your written accommodation policies, handbooks, and forms to be consistent with the Amendments.** Note that some healthcare providers may not know (or will forget) that examinations must be conducted without regard to mitigating measures. It's a good idea to amend your medical certification form to reflect that change.
- **Remember that most states have their own disability accommodation statute, with which employers also need to comply.** In many cases, the state law provides even greater protection to employees. Be sure you are in compliance not only with the new ADA, but also whatever state law applies to your workplace. If you need assistance, contact an employment attorney for help.



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