

## **President Bush Signs Legislation Expanding the Americans with Disabilities Act**

**September 26, 2008**

On September 25, President Bush signed into law the ADA Amendments Act of 2008 (ADAAA or the Act), which passed both the House and Senate with bipartisan and near-unanimous support. The legislation had the approval of both the disabled and business communities. More information on the new laws can be found at <http://thomas.loc.gov/cgi-bin/query/z?c110:S.3406>.

The new law, which becomes effective January 1, 2009, overturns several recent Supreme Court rulings that had limited the Americans with Disabilities Act (ADA), and as a result wipes out several employer defenses to ADA claims. Thus, the ADAAA is expected to alter in a major way how employers handle disability issues both in the workplace and in litigation.

### **Background**

A 2006 study found that plaintiffs had lost more than 97% of all ADA employment discrimination claims—the highest failure rate in the federal system, second only to prisoner cases. In most instances, employees' claims were rejected because, by the courts' interpretation, they did not meet the statute's strict definition of "disability." Concerned that the federal courts, including the U.S. Supreme Court, had unduly narrowed the group of people Congress had intended to protect when it enacted the ADA in 1990, Congress proclaimed its purpose in passing the ADAAA to "restore the intent and protections of the Americans with Disabilities Act of 1990."

When the ADAAA was first introduced in July 2007 as the Americans with Disabilities Act Restoration Act (ADARA), it immediately garnered extensive congressional support. However, during House and Senate hearings on the legislation in the fall of 2007, some members of Congress expressed concern that the amendments extended protections too far and would result in excessive litigation. Therefore, the disabled and business communities were encouraged to negotiate and offer a joint proposal that would preserve the stated intent of the legislation while simultaneously taking account of business concerns. After extensive negotiations, the ADAAA was approved by overwhelming voice votes in both the House and Senate.

### **The ADA Provides for "Broad Coverage"**

The most significant part of the ADAAA is its clear intent to "reinstated a broad scope of protection to be available under the ADA." Specifically, the ADAAA overturns several judicial interpretations of the scope of coverage under the ADA.

The first is the Supreme Court's 2003 decision in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002). Addressing the question of what employees must prove to establish that they are "substantially limited" in a "major life activity," the Supreme Court held that they must prove that they are "*prevented or severely restricted* in an activity that is of central importance in most people's daily lives." While not changing the statutory language, the ADAAA reinterprets the phrase "substantially limited" so that its interpretation is now consistent with the broad remedial purpose of the ADAAA. That is, the focus in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations. The question of whether an individual's impairment is a disability under the ADA may no longer "demand an extensive analysis."

The new Act includes a nonexhaustive list of major life activities and major bodily functions. This list includes caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. Included on the list of major bodily functions are normal cell growth and immune system, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrinal, and reproductive functions. These changes will no doubt greatly expand the number of individuals who are protected under the ADA.

### **Elimination of the Disability Mitigation Defense**

The ADAAA explicitly overturns a series of Supreme Court decisions (often called the *Sutton* trilogy, based on the lead case of *Sutton v. United Airlines*, 527 U.S. 471 (1999)) by permitting courts to evaluate an employee's disability without regard to "mitigating measures." In these 1999 Supreme Court decisions, the Court held that the ADA did not protect an employee who was able to manage the symptoms of his or her disability by using medication, prosthetics, or other means of diminishing his or her impairment—often referred to as "mitigating measures." These mitigating measures now *cannot* be analyzed in interpreting an employee's alleged disability, again effecting a significant expansion of the group of individuals protected by the ADA by including, for example, employees suffering from epilepsy, diabetes, depression, bipolar disorder, cancer, and many other conditions that can be managed through medication or other treatment.

### **ADA Now Covers Episodic Impairments and Those in Remission**

The ADAAA modifies the ADA to clarify that when evaluating a person who suffers from an episodic impairment or one that is in remission, employers and courts must determine whether the condition would substantially limit a major life activity *when the condition is active*. This amendment is intended to eliminate the circumstances in which courts had ruled that certain conditions like epilepsy or posttraumatic stress disorder were not protected under the ADA because the individual may not presently be suffering symptoms of the condition.

### **Expansion of the "Regarded As" Provision in the ADA**

Congress also provided for expansion of coverage under the ADA's "regarded as" prong. Under the wording of the ADA, employees may establish that they are covered by the act by proving that they are "regarded as" having an impairment by their employer. Under current court precedent, employees must show that their employer perceived them to be incapable of performing not just the job they had been denied, but also a range of jobs. The new amendments permit individuals to establish that they are "regarded as" disabled by proving that they were subjected to an adverse action prohibited by the ADA because of an actual or perceived impairment, whether or not the impairment limits or is perceived to



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