

SUMMARY OF MAJOR CHANGES CREATED BY ADA AMENDMENTS ACT OF 2008

On September 25, 2008, President George W. Bush signed into law the ADA Amendments Act of 2008. The ADAAA makes several important changes to the original ADA that will have a significant impact on legal claims asserted on behalf of persons with disabilities. A summary of those changes is set forth below.

DRN has posted this summary on the publications page of its web site, which can be found at www.drnpa.org. Check the DRN web site in the coming weeks for additional information about the ADAAA as well as updated versions of DRN publications.

1. New Findings & Purposes

- The ADAAA contains a series of findings, including the following:
 - » the Supreme Court's holdings in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), and *Toyota Motor Mfg. v. Williams*, 534 U.S. 184 (2002), narrowed the scope of protection to be afforded by the ADA *in contravention of Congress's intent*; and
 - » the Equal Employment Opportunities Commission's current definition of the term "substantially limits" to mean "significantly restricted" *also is inconsistent with congressional intent*.
- The ADAAA identifies a number of purposes for the legislation, including the following:
 - » to reject the rulings in *Sutton* that (a) required courts to consider the ameliorative effects of mitigating measures in assessing whether a person has a disability, and (b) adopted a narrow definition of "regarded as" disability;

- » to reject the standards adopted in *Toyota Motor Mfg.* “that the terms ‘substantially’ and ‘major’ in the definition of disability under the ADA ‘need to be interpreted strictly to create a demanding standard for qualifying as disabled,’ and that to be substantially limited in performing a major life activity under the ADA ‘an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives’”;
- » to instruct lower courts that the question of whether an individual’s impairment constitutes a disability under the ADA “should not demand extensive analysis”; and
- » to instruct the EEOC to revise its regulations that currently define the term “substantially limits” to mean “significantly restricted.”

2. Amending the ADA’s Findings

- The ADAAA eliminates the ADA’s finding that “43,000,000 Americans have one or more physical disabilities, and this number is increasing as the population as a whole is growing older,” and substitutes the following finding: “physical or mental disabilities in no way diminish a person’s right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination.”

3. Amendments to the Definition of Disability

- The ADAAA retains the three-pronged definition of disability created by the ADA, *i.e.*, that a disability means: (1) a physical or mental impairment that substantially limits one or more major life activities; (2) a record of having such an impairment; or (3) being regarded as having such an impairment. Additional definitions in the ADAAA, however, further flesh out these issues.

- » The ADA did not define “major life activities.” The ADAAA defines that term “to include, but not be 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.”
 - » The ADAAA further provides that “major bodily functions,” including “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions” are “major life activities.” This will effectively overrule the narrow application of this term in many cases, particularly those involving people with orthopedic impairments that limit functions like lifting and bending. Interestingly, though, the listing omits the ability to interact with others, which some courts have considered a major life activity and one that is often used to establish the disability of individuals with mental illness.
- The ADAAA clarifies the definition of when a person is “regarded as” having a disability with two changes:
 - » First, the ADAAA provides that an individual will be “regarded as” having a disability if he “has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not that impairment limits or is perceived to limit a major life activity.” This provision clarifies that a person need not show that a perceived disability actually substantially limits a major life activity or even is perceived to substantially limit a major life activity, which the ADA as previously written seemed to require. However, the definition is confusing. It seems that it is sufficient for a “regarded as” claimant to simply show that he has an actual or perceived impairment -- regardless of either the actual or perceived impact of the impairment. On the other hand, since the definition links the definition of “regarded as” to discriminatory action, a person would have to show that the actual or perceived impairment led the employer to discriminate against him.

- » Second, the ADAAA provides that “impairments that are transitory,” (i.e., “with an actual or expected duration of 6 months or less,”) “and minor” are not sufficient to establish that a person is “regarded as” having a disability.
- The ADAAA includes rules of construction regarding the definition of disability, instructing courts that the definition “shall be construed in favor of broad coverage.” In addition, the rules of construction provide as follows:
 - » An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. This should bring people with diabetes, epilepsy, and cancer within the scope of the Act.
 - » A determination as to whether an impairment substantially limits a major life activity should be made without regard to the ameliorative effects of mitigating measures, including: medication; medical supplies or equipment; prosthetics; hearing aids; cochlear implants; assistive technology; reasonable accommodations or auxiliary aids or services; and learned behavioral or adaptive neurological modifications. However, “ordinary eyeglasses or contact lenses” which are intended to fully correct visual acuity or eliminate refractive error shall be considered in determining whether an impairment substantially limits a major life activity. This rule of construction overrules the analysis in *Sutton*.

4. Qualification Standards and Tests Relating to Uncorrected Vision

- The ADAAA amends the prohibited forms of “discrimination” to include a provision that bars covered entities from using “qualification standards, employment tests, or other selection criteria based on an individual’s uncorrected vision unless the standard, test, or other selection criteria ... is shown to be job-related for the position in question and consistent with business necessity.” Thus, it appears that individuals with correctable vision who are subject to unnecessary vision standards would be able to

secure relief under the ADAAA as persons who are “regarded as” having a disability. This would likely overrule the holding in *Sutton*.

5. Worker’s Compensation/Disability Benefits

- The ADAAA amends Title V of the ADA (relating to rules of construction that apply to the entire Act) to make clear that the ADA does not “alter[] the standards for determining eligibility for benefits under State worker’s compensation laws or under State and Federal disability benefit programs.”

6. Reasonable Modifications

- The ADAAA amends Title V of the ADA to make clear that individuals who claim protection solely under the “regarded as” prong of disability are not entitled to receive reasonable accommodations or modifications under Titles I, II, or III of the ADA.
- The ADAAA also amends Title V of the ADA to make clear that under Title III a covered entity must make reasonable modifications in policies, practices, or procedures “including academic requirements in postsecondary education” unless it can demonstrate that doing so would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations offered. The thrust of this seems to be to make clear that postsecondary education academic requirements are both subject to the reasonable modification mandate of Title III and must be considered in determining whether changes to those requirements would result in a fundamental alteration.

7. Claim of No Disability

- The ADAAA amends Title V of the ADA to make plain that the ADA does not protect individuals who claim that they were subject to discrimination due to “lack of disability,” *i.e.*, reverse discrimination.

8. EEOC Authority

- The ADAAA authorizes the EEOC to make regulations to implement the revised definitions of disability.

9. Effective Date

- The effective date of the ADAAA is January 1, 2009.