

AN EXPANDED ADA WILL RING IN THE NEW YEAR

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On January 1, 2009, the most significant disability rights legislation to emerge from Congress since 1990 will take effect. The ADA Amendment Act of 2008 (ADA Amendments) dramatically expands the Americans with Disabilities Act (ADA) by broadening the class of individuals considered to have a “disability.” The ADA Amendments make five important changes to the ADA.

1. The ADA presently provides that a “disability” is a physical or mental impairment that “substantially limits” a major life activity. The Supreme Court had interpreted this phrase to require that a major life activity be “severely restricted,” and the Equal Employment Opportunity Commission (EEOC) similarly interpreted this phrase to require that a major life activity be “significantly restricted.” The ADA Amendments expressly reject both of these standards as too restrictive, and instead direct that the term “substantially limits” be interpreted consistent with the congressional “findings and purposes” of the ADA Amendments. While these findings and purposes evince a clear congressional desire for broader protection, they fail to articulate the new standard. For example, one of the enumerated purposes states that the primary focus in ADA cases should now be whether covered entities have complied with their obligations, and that the question of whether an individual has a “disability” should not demand extensive analysis. By tying the definition of “disability” to such vague generalities, Congress has all but ensured that the meaning of “substantially limits” will be one of the first issues litigated under the new law.

2. The phrase “major life activities” has been expressly defined to include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. The ADA Amendments also provide that the operation of major bodily functions, such as functions of the immune system, normal cell growth, and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions, constitutes a major life activity. In addition, the ADA Amendments clarify that only one major life activity need be substantially limited to constitute a “disability.”

3. An impairment that is episodic in nature or in remission must be evaluated as if it were active when determining whether it constitutes a protected “disability.” For example, cancer, epilepsy, diabetes, cerebral palsy, and muscular dystrophy are

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impairments that will now be examined as if they were active when determining whether an employee has a “disability.”

4. The ameliorative effects of mitigating measures (e.g., medication, hearing aids, interpreters, prosthetic limbs/devices) on an individual’s impairment are no longer considered when determining whether that individual has a “disability.” The sole exception to this is where the mitigating measures consist solely of “ordinary eyeglasses or contact lenses.”

5. An individual can now be “regarded as” having a disability regardless of whether the impairment substantially limits, or is perceived to substantially limit, a major life activity. The ADA Amendments, however, make clear that employers have no duty to accommodate an employee who is “regarded as” disabled.

The Bottom Line for Employers:

The ADA will now protect many more employees with physical and mental impairments. Thus, the focus will now be whether the employer has engaged in discrimination and/or offered a reasonable accommodation. As a result, all employment actions taken with respect to employees with impairments should be carefully evaluated by human resource professionals and legal counsel, if necessary, to assure compliance with the ADA.