

Congress Amends Americans with Disabilities Act

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Effective Jan. 1, 2009, new requirements under the ADA Amendments Act of 2008 (the “2008 Amendment”) will make it easier for employees to bring ADA discrimination claims against their employers.

Since becoming law in 1990, the Americans with Disabilities Act has prohibited employers from discriminating against individuals based on their disabilities, and it has required employers to provide reasonable accommodations to otherwise qualified individuals, permitting them to perform the essential functions of their position.

Cases brought under the ADA have been reviewed by the U.S. Supreme Court on numerous occasions and the results have been generally pro-employer. However, the “2008 Amendment” will reverse the effects of a few of those decisions.

The 2008 Amendment specifies among its purposes rejecting the Supreme Court’s rulings in *Sutton v. United Air Lines, Inc.* and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* and to convey Congress’ expectation that the Equal Employment Opportunity Commission will revise its regulations to be consistent with the terms of the 2008 Amendment. The 2008 Amendment defines disability with greater specificity than the ADA to prevent courts from narrowing the definition in the future, and it will make it easier for employees to prevail on ADA claims.

To be protected under the ADA, an individual must have an impairment that “substantially” interferes with a “major life activity.” The 2008 Amendment defines major life activities by providing examples (i.e., walking, hearing, sleeping, standing, learning, thinking, working, etc.) and by identifying major bodily functions such as normal cell growth, digestive, bowel, bladder, brain, endocrine, reproductive functions, etc.

The ADA also prohibits discrimination based on a disability where the individual has a record of an impairment or is being regarded as having an impairment. The 2008 Amendment defines “regarded as having an impairment” to include situations where the employer perceives the individual as having an impairment regardless of whether the employer perceives that impairment as limiting a major life activity. An exception applies where the perceived impairment is minor and transitory (i.e., six months or

less).

The 2008 Amendment also states that the standard created by the Supreme Court in *Toyota* for demonstrating that an impairment “substantially limits” a major life activity is inappropriately high and that it shifts too much of the focus from determining whether an employer has complied with its obligations under the ADA to whether the individual has a disability. Addressing this point, the 2008 Amendment provides that “[t]he definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.” It further requires courts to interpret the term “substantially limits” consistent with the purposes of the ADA and to include an impairment that affects only *one* major life activity and to include “[a]n impairment that is episodic or in remission” if, when active, the impairment would substantially limit a major life activity. This is a significant change from how courts previously interpreted the ADA.

Finally, the *Sutton* court held that whether one has a disability should be determined in light of mitigating measures such as eyeglasses or medications. Therefore, an individual who suffered from seizures without medication was not considered “disabled” (and had no protection) under the ADA if medication would prevent seizures. The 2008 Amendment requires disability to be determined “without regard to the ameliorative effects of mitigating measures” such as medication, hearing aids, prosthetics, oxygen therapy, etc.

An exception remains, however, for the ameliorative effects of the mitigating measures of eyeglasses. Thus, employers and courts may still consider an individual’s ability to see as corrected by eyeglasses in determining whether an individual has a disability and protection under the ADA. However, the 2008 Amendment specifically prohibits employers from using selection criteria based on an individual’s uncorrected vision unless the employer can show it is “job related for the position in question and consistent with business necessity.”

The 2008 Amendment takes effect on Jan. 1, 2009. Employers need to understand their obligations under it and, more than ever, consult with an experienced employment attorney when ADA issues arise in the workplace.