THE AMERICANS WITH DISABILITIES ACT AMENDMENTS ACT –
WHAT DOES IT DO?

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I. THE AMERICANS WITH DISABILITIES ACT – CURRENT LAW

A. Overview

Title I of the Americans with Disabilities Act (ADA) prohibits employers from discriminating against a “qualified individual with a disability” because of the individual’s disability with respect to the application process, hiring, advancement, discharge, compensation, training and other “terms, conditions, and privileges of employment.”

The ADA defines a qualified individual with a disability as someone who, “with or without reasonable accommodation, can perform the essential functions” of her job or the job she seeks. The Act defines a disability as: (1) “a physical or mental impairment that substantially limits one or more of the major life activities”; (2) “a record of such impairment”; or (3) “being regarded as having such an impairment.”

B. Impairments

While the ADA does not specifically define what is an “impairment,” the Equal Employment Opportunity Commission (“EEOC”) regulations provide a broad definition of...

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1 42 U.S.C. § 12112(a).
2 Id. § 12111(8).
3 Id. § 12102(2)(A)-(C).
physical and mental impairments. Physical impairments include “[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin, and endocrine.”5 A mental impairment is “[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness and specific learning disabilities.”6

The regulations and other EEOC guidance also clarify that personality traits, physical characteristics and socioeconomic conditions do not qualify as impairments under the ADA. For instance, chronic lateness and irritability are not impairments.7 Similarly, poverty and predisposition to disease also are not impairments under the ADA.8

C. When an Impairment “Substantially Limits”

Under current law, individuals must meet a high burden to show that they are substantially limited in a major life activity. According to the United States Supreme Court, “substantially limits” means “prevents or severely restricts” and should be “interpreted strictly to create a demanding standard for qualifying as disabled.”9

Importantly, the Supreme Court has held that an impairment must be considered in its mitigated state.10 For example, in Sutton v. United Air Lines, Inc., twin sisters with vision

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4 The EEOC offers guidance and regulations for the ADA, as well as for other anti-discrimination in employment statutes. While these regulations are not binding, courts often grant them a high level of deference.
5 29 C.F.R. § 1630.2(h)(1).
6 Id. § 1630.2(h)(2).
8 Appx. to 29 C.F.R. § 1630.2(h).
impairments applied for jobs as commercial airline pilots.\textsuperscript{11} The women had severe myopia –
20/200 vision or worse in each eye – and although the sisters wore glasses to correct their vision,
they argued that this condition constituted a disability.\textsuperscript{12} Considering the condition in its
mitigated state, the Court held that the sisters were not substantially impaired in the major life
activity of seeing because with corrective lenses their vision was not impaired.\textsuperscript{13}

\textbf{D. Major Life Activities}

The ADA itself does not define “major life activity,” but the regulations state that “caring
for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning,
and working” are major life activities.\textsuperscript{14} Case law has recognized other activities as major life
activities under the ADA, including bathing,\textsuperscript{15} dressing,\textsuperscript{16} sleeping,\textsuperscript{17} eating,\textsuperscript{18} and reproducing.\textsuperscript{19}

\textbf{E. Employer Obligations under the ADA}

The ADA prohibits employers with 15 or more employees from discriminating against an
employee or job applicant because of his disability.\textsuperscript{20} It also requires employers to make
reasonable accommodations for qualified individuals with disabilities, unless such
accommodations would impose “undue hardship” on the employer’s business.\textsuperscript{21} An undue
hardship is an action that is significantly difficult or expensive when considering the nature and
cost of the accommodation, the employer’s type of business, and the employer’s overall financial

\begin{footnotes}
\item[11] Id. at 475.
\item[12] Id. at 476.
\item[13] Id. at 488-89.
\item[14] 29 C.F.R. § 1630.1(i). This list is not exclusive.
\item[15] See Forest City Daly Hous., Inc. v. Town of N. Hempstead, 175 F.3d 144, 151 (2d Cir.
1999).
\item[16] Id.
\item[17] Head v. Glacier Nw., Inc., 413 F.3d 1053, 1060 (9th Cir. 2005).
\item[21] Id. § 12112(a)(5)(A).
\end{footnotes}
resources. Whether an employer must reasonably accommodate an individual who is merely “regarded as” disabled is the subject of much debate under the current ADA.

II. THE AMERICANS WITH DISABILITIES ACT AMENDMENTS ACT

A. Overview

The Americans with Disabilities Act Amendments Act (ADAAA) takes effect January 1, 2009. The ADAAA contains six major changes – most of which either respond to disfavored Supreme Court decisions or address current circuit court splits. Specifically, the ADAAA:

- mandates that “disability” be interpreted broadly, rejects the U.S. Supreme Court’s strict standard for finding a disability and requires the EEOC to modify regulations that define “substantially limits” to express a lower standard;
- states that mitigating measures, other than eyeglasses or contacts, will not be considered in determining whether an individual has a disability;
- specifies that an “impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active”; adds a non-exhaustive list of major life activities;
- clarifies that a person is “regarded as” having a disability if he or she was subject 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 limit a major life activity”;

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22 Id. § 12111(10)(A)-(B).
23 Compare Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1232-33 (9th Cir. 2003) (finding no duty to accommodate where employee was regarded as being disabled) with Williams v. Philadelphia Hous. Auth. Police Dept., 380 F.3d 751, 773 (3d Cir. 2004) (expressly rejecting Kaplan).
25 Id. § 4(a).
26 Id. § 2(b)(4).
27 Id. § 2(b)(6).
28 Id.
29 Id. § 4(a).
30 Id.
31 Id.
• provides that individuals who are merely “regarded as” having a disability are not entitled to reasonable accommodation.\footnote{Id. § 6(a).}

**B. New Interpretation of “Substantially Limits”**

The ADAAA specifically rejects the Supreme Court’s holding in *Toyota Motor Manufacturing, Kentucky, Inc., v. Williams* that courts should interpret “substantially limits” strictly, stating that this decision “has created an inappropriately high level of limitation necessary to obtain coverage under the ADA.”\footnote{Id. § 2(b)(4)-(5).} The current regulations define “substantially limits” to mean that the individual is “significantly restricted” in performing a major life activity.\footnote{29 C.F.R. § 1630.2(j)(1)(ii).} According to the ADAAA, this standard also is too burdensome and “inconsistent with congressional intent.”\footnote{S. 3406 § 2(a)(8).}

While it is unclear what Congress specifically intended “substantially limits” to mean, the legislative history of the ADAAA provides some insight. An earlier draft of the ADAAA included a provision that “[t]he term ‘substantially limits’ means materially restricts.”\footnote{H.R. Rep. 110-730, at 2 (2008).} Further, the comments in the accompanying House Report assert that “[m]aterially restricted’ is meant to be less than a severe or significant limitation and more than a moderate limitation, as opposed to a minor limitation.”\footnote{Id. at 10.} This definition was not included in the final ADAAA; however, as courts begin to interpret the ADAAA, they may consider the legislative history when ruling on these new provisions. Regardless, the ADAAA makes it clear that the current standard for “substantially limited” is too onerous, and it directs the EEOC to modify its regulations to reflect
a lower standard.\textsuperscript{38} As a result, many more individuals will be considered disabled and will qualify for protection under the ADA.

The ADAAA also specifies that an individual is disabled even if his impairment substantially limits only \textit{one} major life activity; the individual need not be substantially limited in performing other major life activities.\textsuperscript{39} This is a significant change because courts have been split as to whether the substantially limited major life activity must be related to the individual’s ability to work for the individual to be considered disabled under the ADA.\textsuperscript{40} Clearly, under the ADAAA, the impairment need not limit the major life activity of working.

\textbf{C. New Major Life Activities}

The ADAAA also provides a non-exhaustive list of major life activities, which includes “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”\textsuperscript{41} The new law therefore settles previous debate as to whether concentrating, thinking, and communicating are major life activities.\textsuperscript{42}

Moreover, although courts have generally held most bodily functions to be major life activities, the ADAAA codifies these holdings, stating that “a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune

\textsuperscript{38} S. 3406 § 2(b)(6).
\textsuperscript{39} Id. § 4(a).
\textsuperscript{40} Compare Chenowith v. Hillsborough County, 250 F.3d 1328, 1330 (11th Cir. 2001) (finding that plaintiff did not have an ADA claim because although she was substantially limited in major life activity of reproduction, the limitation had no relevance to her work) with Davidson v. Midelfort Clinic, Ltd., 133 F.3d 499, 508 (7th Cir. 1998) (stating that an individual claiming to have a disability need not show that his limitations are work-related).
\textsuperscript{41} S. 3406 § 4(a).
\textsuperscript{42} See Littleton v. Wal-Mart Stores, Inc., No. 05-12770, 2007 WL 1379986 at *3 (11th Cir. May 11, 2007) (expressing doubt as to whether thinking and communicating are major life activities); Doebele v. Sprint, 342 F.3d 1117, 1130 (10th Cir. 2003) (agreeing that concentrating is not a major life activity).
system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.\textsuperscript{43} The ADAAA reiterates that these lists are merely illustrative, not exhaustive,\textsuperscript{44} and leaves open the question whether other debatable activities, such as driving, using a computer, or engaging in sexual relations (aside from reproduction) are covered under the ADA. Notably, the House Report accompanying one version of the ADAAA states that the bill’s drafters also consider “interacting with others, writing, engaging in sexual activities, drinking, chewing, swallowing, reaching, and applying fine motor coordination” to be major life activities.\textsuperscript{45} Although these activities were not expressly included in the final version of the ADAAA, courts may look to legislative history for guidance in statutory interpretation and conclude that they are indeed major life activities.

\textbf{D. Broader Definition of “Impairment” to Include Episodic Conditions or Those in Remission}

The ADAAA further broadens the definition of “impairment” by providing that “[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”\textsuperscript{46} Thus, individuals who have certain conditions that affect them periodically, such as epilepsy, will be considered disabled under this new definition, even if the seizures are infrequent. Moreover, an individual with AIDS or cancer will now certainly be covered under the ADAAA, even while his symptoms are not acute or even if the cancer is in a state of remission.

It is still unclear under the ADAAA whether an impairment must be “permanent or long-term” to be a disability, as required by the Supreme Court in \textit{Toyota}.\textsuperscript{47} The Act does specify that

\begin{flushleft}
43 S. 3406 § 4(a).
44 \textit{Id.}
46 S. 3406 § 4(a).
47 \textit{Toyota}, 534 U.S. at 185.
\end{flushleft}
a person is not “regarded as” disabled if she has an impairment that is “transitory and minor,” with “transitory” defined as having “an actual or expected duration of six months or less.”\textsuperscript{48} However, the legislative history accompanying the ADAAA asserts that this rule does not apply to actual or “record of” disabilities.\textsuperscript{49} This ambiguity leaves open the possibility that courts may find even short-term disabilities to be protected under the new amendments.

\subsection*{E. Mitigating Measures not Considered}

The ADAAA imposes another important change in the law with regard to mitigating measures. In determining whether an individual is disabled, the individual should be evaluated in her unmitigated state.\textsuperscript{50} Thus, if an individual’s impairment is treated effectively with medication, medical equipment, prosthetics, low-vision devices, hearing devices, mobility devices, or oxygen supplies,\textsuperscript{51} such that she is no longer substantially limited in a major life activity, the law will no longer preclude her from coverage under the ADA. The exception to this rule, however, applies to individuals who wear “ordinary eyeglasses or contact lenses.”\textsuperscript{52} These mitigating devices remain a necessary consideration in assessing whether an individual is substantially limited in a major life activity.

On a related note, the ADAAA also creates a standard for whether it is appropriate for an employer to require employees or job applicants to submit to eye examinations.\textsuperscript{53} An employer may use “qualification standards, employment tests, or other selected criteria based on an individual’s uncorrected vision” only if the test is related to the individual’s position or sought

\textsuperscript{48} S. 3406 § 4(a).
\textsuperscript{50} S. 3406 §4(a). This directly overrules the Supreme Court’s holding on this issue.
\textsuperscript{51} Id.
\textsuperscript{52} Id. The ADAAA distinguishes between ordinary glasses and low-vision devices. The former are “lenses that are intended to fully correct visual acuity,” while the latter are “devices that magnify, enhance, or otherwise augment a visual image.” Id.
\textsuperscript{53} S. 3406 § 5(b).
position, and only if the test is “consistent with business necessity.” “Business necessity” is a term used in many areas of employment discrimination law. To be consistent with business necessity, an employment practice must be essential to the safe and efficient running of the business.54

F. Changes to the “Regarded as” Provision

Under the ADA, an individual is considered disabled if he is “regarded as” having an impairment that substantially limits a major life activity.55 Perhaps one of the more confusing areas of the ADA, this provision has sparked a great deal of litigation. The ADAAA revises the definition of “regarded as” to make it clear that an individual meets this requirement if she has suffered an adverse action prohibited by the ADA because of either an actual or perceived impairment.56 In addition, the ADAAA specifically provides that it is irrelevant whether the actual or perceived impairment limits or is perceived to limit a major life activity.57 For example, if an employer refuses to hire someone because she has cerebral palsy, that person is covered under the ADAAA even if she does not have cerebral palsy. Furthermore, if she is “regarded as” having cerebral palsy, she is protected under the ADAAA even if the perceived disability does not substantially limit a major life activity. As the House Report explains, “unfounded concerns, mistaken beliefs, fear, myths, or prejudice about disabilities are often just as disabling as actual impairments.”58

While most of the ADA amendments broaden the scope of coverage under the ADA, two new provisions clarifying the “regarded as” prong may limit coverage for individuals trying to meet that definition. First, the Act provides that an individual is not regarded as being disabled if

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56 S. 3406 § 4(a).
57 Id.
he has an impairment that is “transitory and minor.”\footnote{S. 3406 § 4(a).} A transitory impairment is one with an actual or expected duration of six months or less.\footnote{Id.} This clause reflects Congress’ concern that, given the broadening coverage for those “regarded as” disabled, absent the “transitory and minor” limitation, individuals who are regarded as having a cold or the flu would be covered under the third prong.\footnote{Id.} Despite this restriction, the House Report indicates that this exception to the broad rule should be construed narrowly, so as not to exclude more people than necessary from coverage.\footnote{Id.}

The second provision restricting the “regarded as” definition of the ADAAA clarifies that employers need not provide reasonable accommodation unless an individual is covered under the first or second prong of the disability definition.\footnote{S. 3406 § 6(a).} In other words, individuals who are “regarded as” disabled are not entitled to accommodation. This provision was included in the Act in response to court holdings that an individual who had an impairment but could not make the difficult showing of being substantially limited in a major life activity could nevertheless receive reasonable accommodations via the “regarded as” definition.\footnote{H.R. Rep. No. 110-730, at 18.} Theoretically, because the ADAAA rejects the strict interpretation of “substantially limited,” these individuals will now be able to show that they are actually disabled or have a “record of” a disability.\footnote{Id.}

III. HOW THE ADAAA WILL AFFECT EMPLOYERS

When the ADAAA goes into effect, many more individuals will be protected as “disabled” under the ADA. As a result of the broader coverage, employers are likely to see more

\footnotesize{59} S. 3406 § 4(a).
\footnotesize{60} Id.
\footnotesize{62} Id.
\footnotesize{63} S. 3406 § 6(a).
\footnotesize{64} H.R. Rep. No. 110-730, at 18.
\footnotesize{65} Id.
accommodation requests from employees and job applicants. Further, a greater number of accommodation requests will be legitimate requests that employers are obligated to fill.

Employers should be careful not to deny requests based on past policies. All new accommodation claims should be taken seriously and carefully reviewed to determine whether the employee is protected by the ADAAA. Employers are also advised to revisit prior denied accommodation requests; it is likely that many companies have current employees who were not protected by the current ADA, but now will be entitled to reasonable accommodation in the workplace. While recognizing that more individuals will be covered under the ADAAA, employers also should take care not to assume that a particular employee is disabled. Such an assumption could render an employer liable under the “regarded as” provision of the ADA.

The ADAAA also merits a wholesale review of employment practices and policies related to employees who may be disabled. Employers should review and, if necessary, update their training manuals, employee handbooks, and employment policies to reflect the amendments to the ADA. Companies should retrain managers and supervisors on how to respond to an accommodation request and how to appropriately discipline employees whose poor performance may be related to an impairment. Employees in supervisory positions should also be reminded of the company’s anti-discrimination and anti-retaliation policies.

IV. CONCLUSION

The purpose of the ADAAA is clear: to ensure that more individuals will qualify for protection under the ADA. Under the new provisions, individuals will have an easier time showing a substantial limitation on a major life activity – a disability. In addition, new impairments will be considered disabilities under the Act, such as dormant AIDS or cancer in remission. The ADAAA now will apply to individuals with substantial limitations in a greater range of life activities, such as thinking and concentrating. Finally, the ADAAA will protect
anyone who suffers an adverse action prohibited by the ADA because of either an actual or a perceived impairment. While two of the amendments appear to restrict coverage of the “regarded as” definition, we do not expect these restrictions to adversely affect the number of individuals protected by the Act, particularly given the new broader definition of “regarded as” disabled under the ADAAA. Consequently, the ADAAA will significantly expand the scope of coverage and protection provided under the Americans with Disabilities Act. As a result, employers should expect to see an increased number of employees requesting accommodations in the workplace, as well as accompanying concerns of disability-based discrimination and litigation.

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