

## New Law Expands the Americans with Disabilities Act

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**R**egardless of the outcome of the November elections, change is coming for employers. On September 26, 2008, President Bush signed the Americans with Disabilities Amendments Act (the "Act") which modifies the Americans with Disabilities Act ("ADA"). The Act is intended to reverse the Supreme Court's decision in *Sutton v. United Air Lines Inc.*, 527 U.S. 471 (1999)<sup>1</sup> and *Toyota Motor Mfg. Ky. Inc. v. Williams*, 534 U.S. 184 (2002)<sup>2</sup> which appropriately limited the scope of the ADA. The Act contains two major changes: first, it broadens the definition of "disability" and second, it defines and expands the class of employees "regarded as" disabled under the ADA. Going forward, these legislative revisions and expansions of coverage will have a significant impact on how employers deal with ADA issues in the workplace.

The first major function of the Act, broadening the definition of "disability," is accomplished in two ways. First, it eliminates from consideration "mitigating measures and conditions in remission" when courts and employers are making a determination of whether or not an employee qualifies as "disabled" under the ADA. Second, it codifies what constitutes "major life activities" and makes it easier for an employee to show that one or more of these codified "major life activities" is "substantially limited" by his or her condition.

Previously, employers as well as courts were allowed to consider "mitigating measures" such as hearing aids, insulin used to control diabetes, and mobility devices in determining which employees were covered under the ADA. Further, they were able to consider whether or not the condition was in remission when making their determination of the disability of an employee. The Act makes it clear that neither of these practices is permitted for determination of disabilities. The Act specifically states that a condition that is in remission is a disability if it "would substantially limit a major life activity when active." Similarly the Act states that only ordinary eye glasses or contact lenses may be taken into consideration as "mitigating measures."

<sup>1</sup> This held that the courts must consider "mitigating measures" used to overcome or manage impairments, such as insulin to control diabetes, in deciding whether the employee is "disabled" for ADA purposes.

<sup>2</sup> This holding restricted the ease with which a plaintiff could prove that they were "substantially limited" in a "major life activity" for ADA purposes.

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The Act further expands the definition of “disabled” by making it easier for employees to show that they are “substantially limited” in one or more “major life activities.” This section of the Act eliminates the current Equal Employment Opportunity Commission (“EEOC”) regulations that define the statutory term “substantially limits” as meaning “significantly restricts.” The Act declares that this construction of the ADA language creates too high a standard and thus does not comply with congressional intent. The Act puts into law an exhaustive list of what are considered “major life activities” and instructs the EEOC to adopt less restrictive regulations for showing that one or more of these “major life activities” are “substantially limited” by the employee’s condition.

The second major function of the Act is to expand the class of employees “regarded as” disabled. Under this prong of the ADA the courts have required an employee claiming that they were “regarded as” having a disability to prove that their employer mistakenly regarded them as having disabilities that “substantially limited” one or more “major life activities” in order to qualify for protection under the ADA. The Act makes it clear that the “regarded as” definition of “disability” applies if the employee can prove discrimination by the employer because of an actual or perceived disability, whether or not the condition actually limits or is perceived to limit a “major life activity.” This section of the Act, along with the portion dealing with the expansion of the definition of “disability,” will have a significant impact on the construction and implementation of ADA protections by both employers and the courts.

**LESSON:** The Act represents a significant expansion of potential liability for employers under the ADA and will undoubtedly be the source of additional uncertainty and litigation. In the near future the EEOC will likely issue new regulations intended to further Congress’ stated intention of ensuring that the definition of “disability” is “construed in favor of broad coverage” under the ADA. Until these new EEOC regulations are issued, employers should become familiar with the new Act and human resources personnel, supervisors and managers should be trained on how these amendments expand their responsibilities under the ADA.

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