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## **New ADA Amendments Expand Definition of Disability**

Pursuant to recent legislation, it will soon be easier for individuals to qualify for protection under the Americans with Disabilities Act ("ADA"). On September 25, 2008, President George W. Bush signed into law the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA"), under which the definition of "disability" is to be broadly construed to cover individuals to the "maximum extent permitted" by the ADA. The new law (Public Law No. 110-325) becomes effective January 1, 2009.

### **Definition of "Disability"**

Under the ADA, "disability" is defined as: (i) a physical or mental impairment that substantially limits one or more of the major life activities; (ii) a record of such impairment; or (iii) being regarded as having such impairment. 42 U.S.C. 12102 (2). While the core definition of disability remains unchanged, its scope is broadened by the ADAAA through a number of significant changes to key terms, including:

### **"Substantially Limits"**

The ADAAA explicitly rejects the interpretation of the term "substantially limits" under Toyota Motor Mfg., Ky. v. Williams, 534 U.S. 184, 198 (2002) (U. S. Supreme Court held that in order to be "substantially limited" 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"). Instead, the ADAAA provides that the term "substantially limits" shall be interpreted consistent with the findings and purposes of the ADA Amendments Act of 2008, and instructs the U. S. Equal Employment Opportunity Commission to revise its current regulations to effectuate the ADAAA's broader view.

### **Mitigating Measures**

The new law also reverses the U. S. Supreme Court's decision in Sutton v. United Air Lines with respect to the use of mitigating measures. 527 U.S. 471 (1999) (held "disability" under the ADA determined using effects of corrective measures). Under the ADAAA, the determination of whether an individual has a qualified disability must be made on the basis of the impairment or condition alone, without considering whether mitigating measures, such as medication or assistive devices, lessen or alleviate the effects of the condition. However, the new law excludes eyeglasses and contact lenses, which may still be considered when determining whether an individual has a qualified disability.

### **"Major Life Activities"**

The new amendments add specific examples to the ADA's non-exhaustive list of major life activities, including: "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working." Major life activities now also include "the operation of major bodily functions," such as the "immune system, normal cell growth, digestive, bowel, bladder,

neurological, brain, respiratory, circulatory, endocrine and reproductive functions.” The ADAAA extends protection to individuals with episodic impairments or conditions in remission if they would substantially limit a major life activity when active. Thus, for example, individuals with conditions such as epilepsy, cancer, Multiple Sclerosis and diabetes may now be protected under the ADA even when the impairment is inactive. Further, the ADAAA clarifies that an impairment need only substantially limit *one* major life activity in order to be considered a disability.

### **“Regarded As”**

The ADA provides protection to individuals who are “regarded as” having an impairment. Under the ADAAA, an individual meets the requirement of “being regarded as having such an impairment” if the individual proves that he or she has been subjected to prohibited action under the ADA because of an actual or perceived mental or physical impairment, whether or not the impairment meets the definition of a “disability.” Impairments that are minor or transitory (expected to last six months or less), however, are not protected. Additionally, the new law clarifies that reasonable accommodations need not be provided to individuals who are solely “regarded as” having a disability.

### **No Reverse Discrimination**

While many employment law statutes provide a cause of action for reverse discrimination claims, the ADAAA clarifies that reverse discrimination claims are not allowed under the ADA (cannot sue on the basis of non-disability).

### **Implications for Employers**

The bottom line for employers is that more employees will fit within the expanded definition of disability under the ADA. As such, employers will likely see more “reasonable accommodation requests,” more discrimination charges and more lawsuits. The ADAAA provides that the analysis should focus less on whether an individual is disabled and more on whether the employer has complied with the law. Thus, employers are likely to experience higher accommodation costs, higher litigation costs and higher settlement costs – as more individuals will now be covered under the ADA, and it will be more difficult to get cases dismissed at the early stages of litigation through a motion to dismiss or summary judgment motion. The ADAAA grew out of a perception in Congress that the courts were dismissing too many ADA cases. Therefore, in order to avoid ADA claims, employers need to be prepared to engage in the interactive process with a greater number of employees prior to charges or lawsuits to determine what, if any, reasonable accommodation is necessary.

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November 1, 2008

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