

Employers Beware: Disability Law Amendments Effective in 2009

David N. Michael

Employment E-lert

Beginning on January 1, 2009, employers will face the reality that many more of their employees will be considered "disabled" under the Americans with Disabilities Act (the "ADA"). On that day, the recently enacted amendments to the ADA ("Amendments") become effective to expand the definition of "disability." As a result, more employees and applicants will be considered "disabled" and entitled to protection under the ADA's anti-discrimination and reasonable accommodation requirements. An increase in litigation under the ADA is, consequently, a certainty.

Although the new legislation is the result of a compromise reached by civil rights groups, the U.S. Chamber of Commerce, and the Society for Human Resources Management, the Amendments clearly favor employee rights. According to the bill's proponents, the Amendments restore original Congressional intent by providing wide protection against discrimination to anyone with a disability, perceived disability, or record of impairment. The Amendments were enacted, in large part, to overturn four decisions by the United States Supreme Court that had narrowed the definition of a disability under the ADA. As Congress stated in the Findings of the Amendments, those decisions have led lower courts to "incorrectly" find "that people with a range of substantially limiting impairments are not people with disabilities."

Since its inception in 1990, the ADA has prohibited discrimination against "disabled" employees (and applicants) and has imposed a reasonable accommodation requirement on employers. The ADA originally defined a disability as a physical or mental impairment that substantially limited a major life activity. The Amendments overrule the Supreme Court's 1999 decision in *Sutton v. United Airlines Inc.*, and two companion cases, in which the Court held that mitigating measures (such as eyeglasses) had to be considered in determining whether an individual was disabled. The Amendments prohibit the consideration of mitigating measures, such as medication, prosthetics, and assistive technology in determining whether an individual is disabled. As a small consolation to employers, the Amendments do allow an exception for individuals with visual impairments that can be corrected with eyeglasses or contact lenses.

The Amendments also overturn the 2002 decision in *Toyota Motor Mfg. Ky. Inc v. Williams*, where the Court adopted a "demanding standard for qualifying as disabled." In that case, the Court held that to be substantially limited in performing a major life activity 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." The Court also adopted the Equal Employment Opportunity

Commission's (EEOC) regulation which stated that the term "substantially limits" means "significantly restricted." The Amendments reject these holdings and instead state that "the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." Consequently, the Amendments will make it easier for individuals with impairments to show they are substantially limited by providing, for example, that an impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability. Additionally, the Amendments make allowances for an impairment that is episodic or in remission if it would substantially limit a major life activity when active. Now people with conditions such as cancer or epilepsy, who were not previously covered by the ADA because their disease was in remission (or controlled with medication), will find protection under the Amendments.

The Amendments, for the first time, provide a definition of the phrase "major life activities" by adding two lists of such activities. The initial list includes many activities that the EEOC had previously recognized in its regulations (including caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, seeing, hearing, speaking, breathing, learning, and working) as well as activities that EEOC has not previously recognized (such as standing, lifting, bending, breathing, learning, reading, concentrating, and communicating). The Amendments also provide that an individual is disabled if he or she is substantially limited in any "major bodily functions." This list of major bodily functions includes functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

More changes come for those who are not actually disabled, but who are "regarded as" disabled. Whereas under the ADA a person was "regarded as" having a disability if the employer perceived that person was impaired and substantially limited in a major life activity, the Amendments repudiate the requirement that the person be perceived as being substantially limited. Therefore, it is enough for an employer to perceive an impairment alone. The Amendments do, however, resolve an open issue in the Courts by making clear that reasonable accommodations need not be provided to a person who is "regarded as" having an impairment. The Amendments also make clear that "transitory and minor" impairments are excluded from those impairments that would qualify a person as being "regarded as" disabled.

So what do the Amendments mean for employers? Well, the mere fact that the motivation for the bill arose from outright disapproval of Supreme Court decisions that had narrowed the interpretation of the definition of a disability is proof alone that the passage of the Amendments will present an added challenge to employers trying to defend a claim that an employee is "disabled" under the ADA. While certain compromises were made that benefit employers, the major impact of the Amendments will be that many more employees and applicants are entitled to the ADA's protections. With this newly expanded coverage, policies and practices will have to be modified before employers find themselves entangled in an onslaught of

reasonable accommodation requests, discrimination charges, and/or lawsuits. For starters, employers should revise policies related to the ADA to the extent they are inconsistent with the Amendments. Because more employees will be considered disabled under the ADA, employers will face granting more accommodations to employees. Accordingly, they should establish or review their procedures for handling requests for reasonable accommodations including documentation of the interactive discussions used to determine whether and which reasonable accommodations are necessary. Employers should also consider offering comprehensive training sessions for supervisors and managers on the requirements of the ADA and how to respond to reasonable accommodation requests appropriately. Employers should also review their job descriptions to ensure they clearly define the essential job functions of each position – a key step in determining what accommodations are required.