



HOW WILL THE NEW ADA AMENDMENTS AFFECT YOU?

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President Bush signed the ADA Amendments Act into law on Thursday, Sept. 25. The law represents the first material modification of the Americans with Disabilities Act since its original passage in 1990, and will significantly alter the current legal analysis of which employees qualify as “disabled” under the ADA. Human Resource professionals will need to become familiar with the new definition of “disability” and ensure that workplace policies and practices conform to the new Amendments. The law will be effective as of Jan. 1, 2009.

To understand the impact of the new Amendments it is helpful to briefly review some historical background which gave rise to the Amendments and to review the key provisions of the new law.

History of the Legislation: When it was enacted in 1990, the ADA was hailed as landmark legislation, on par with the Civil Rights Act of 1964, facilitating a greater enjoyment of life and careers to millions of Americans who suffer from serious medical impairments. Because of its extensive rules and regulations, (often vague and conflicting), the ADA soon became the source of a multitude of lawsuits against employers, public institutions, building owners and others. ADA claims were filed by individual employees, guests at public accommodations, disability advocacy groups and eventually by representatives of class action lawsuits. The explosion of ADA claims led to hundreds of court decisions attempting to define what Congress intended when it passed the Act. Many of those decisions were in conflict with each other, leaving employers without any clear guidance on how to comply with the law. Eventually the United States Supreme Court entered the fray, and issued several decisions seeking to provide guidance to courts, employers, employees and others.

Conservative justices constituted the majority of the Supreme Court during this period of time and their ADA decisions took a very narrow approach to the law. Part of their motivation may have been aimed at reducing the number of legal challenges, another goal may have been to reduce the burden on employers, who are required to provide “reasonable accommodations” to workers who qualify as “disabled”, even if the disability was fully mitigated by medication or other measures, and even if the accommodation was extremely costly or led to business inefficiencies.

Among the most significant of these Supreme Court cases was Sutton v. United Air Lines, decided in 1999 along with two accompanying decisions, which held that if a medical

condition was effectively mitigated through medications or other measures, such condition did not qualify as a “disability”. In 2002, the Court continued its conservative approach in Toyota Manufacturing v. Williams, which held that the definition of disability was to be “interpreted strictly to create a demanding standard” and that 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 lives.

Disability advocates were outraged by the decisions and by subsequent court cases, some of which found conditions such as epilepsy, diabetes, and even cancer not to qualify as a “disability” under the U.S. Supreme Court definitions.

Soon, legislation was introduced in Congress to reverse the Supreme Court rulings. In 2007, one of these bills was entitled the “ADA Restoration Act”. The legislation was reintroduced in 2008, and after passing the House, was sent to the Senate, where it was re-titled the “ADA Amendments Act of 2008” and a few of the more drastic provisions were modified as part of a compromise between employer and employee groups and between both parties of Congress. However, the preamble of the Amendments still refers to “reinstating” the “broad protection” which was to have “been available under the ADA” and specifically indicates that the intent is to overrule the U.S. Supreme Court cases which had taken a narrow view of the definition of disability.

Why did conservative legislators and President Bush’s administration agree to the legislation? One answer might be their fear that a new congress and possibly a new chief executive might pass an even more expansive Amendment and therefore a limited compromise would be a more preferable option. Another likely factor is their fear that opposition to the measure may have resulted in a political backlash in the upcoming November elections, many of which, including the presidential election, are too close to call.

Key Provisions of the Amendments and their Impact: The ADA Amendments Act of 2008 is not a lengthy piece of legislation, but its impact will have far-reaching results. Among the key features are the following:

- The Amendments overrule the U.S. Supreme Court Sutton trilogy, and direct that mitigating measures, with the exception of normal eyeglasses and contact lenses, are not to be considered when determining whether an individual has a disability. For HR professionals, this will mean that a worker who has no impairments or noticeable medical symptoms and who is able to perform all aspects of their job without trouble can still be protected as “disabled” if the impairments have been eliminated because of a mitigating measure. A worker must be evaluated as though he or she were not being assisted by any mitigating measures to determine whether they would be “substantially limited” in one or more major life activities”. This may be an extremely difficult analysis, not only for HR professionals, but for physicians or other experts who may be called on for opinions, since some the analysis could be theoretical.
- The amendments partially overrule the 2002 Toyota decision (and almost all decisions

since 2002) by providing that the ADA shall, in the future, be construed “in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of the Act”. This will now create a period of legal uncertainty while new cases are decided under the new language (and no one wants to be one of the first litigants to defend a case under the new Amendments). Uncertainty will create difficulty in making decisions – is this person legally “disabled” or not? Some employees may try to take unfair advantage of the new expansion, creating additional issues for employers and for those employees who are truly “disabled”.

- The Act expands the list of “major life activities” to be considered in determining “disability” status. That list now includes, but is not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working”. It also includes “major bodily functions” including, but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions.” This expansive list will lead to new dilemmas for employers. For example, are overweight employees now “disabled” if they can establish some “digestive” impairment? Must employees with “reproductive” difficulties be given time off to attend fertility treatments? Are all psychological conditions now “disabilities” if they interfere with “concentration”? Are the prior cases still valid which hold that a limitation on “working” means working in a “wide range of jobs” not just the employee’s specific job?
- The Amendments confirm that a person may have a disability even if there are only episodic symptoms and the “disability” is to be analyzed during the time when the episodic symptoms occur.
- The Amendments clarify that individuals who are “regarded as” having a disability are legally protected, but are not legally required to be accommodated. In addition, medical conditions under the “regarded as” cannot be “transitory and minor” and must have an “actual or expected duration of at least six months”. This last clause has already been misquoted in the media and is certain to result in continued confusion. The limitation on “transitory and minor” conditions and conditions lasting under 6 months is not part of the definition of “disability”. It is only part of the definition of “regarded as” disabled. “Disabilities” under the ADA might last less than 6 months. For example, the EEOC Compliance Manual, “Section 902 Definition of Disability” currently states that if a condition lasts “at least several months” it can qualify as a “disability”. (Copies of the Manual can be accessed at www.eeoc.gov)

Recommended Action: What should HR practitioners do as a result of the amendment? To begin with, recognize that the ADA definition of “disability” has now fundamentally changed. You will not be able to rely on a court taking a narrow interpretation of the definition. You are now likely to have many more employees in your existing and future work force that qualify as “disabled”. Your ability to deny an accommodation on the basis that the employee is not “disabled” will be much more difficult. Reviewing whether to grant an accommodation because it presents an “undue hardship” will be a more frequent analysis. However, the

definition of “undue hardship” has always been interpreted narrowly and has been one of the most difficult positions to defend in court. Therefore, be sure that you obtain qualified advice before making a final decision based on an “undue hardship” defense.

Second, make sure that your staff, the owners, upper management and front line supervisors understand the new changes and how they will impact your workplace. The failure to educate and train your staffs could result in internal conflict (i.e. “Why is HR suddenly granting all these new accommodations?") and greater legal exposures (i.e. supervisors informing a worker that they “are not disabled”).

Third, take more proactive to avoid “regarded as” claims. This can be one of the most confusing provisions of the ADA and “regarded as” lawsuits are one of the fastest growing types of ADA litigation. These provisions can create dilemmas for employers who, for example, wish to accommodate an employee for a medical condition which is not a “disability” or who must terminate or deny employment to a worker who has a non-“disability” medical condition. For this reason, great care must be taken in the wording of all documentation relating to any employee with any medical condition.

Because of the new definitions and because of the extensive remedies available under the ADA, the ADA Amendments Act of 2008 presents a “clear and present” impact to our Wisconsin workplaces. HR professionals are advised to fully understand the new Amendments, immediately update training to supervisors and managers, audit existing practices, procedures and forms to ensure that proper accommodation procedures are in place and that proper definition of “disability” is used in evaluating workers with medical conditions, and take extreme care in handing any decisions involving workers with medical conditions of any type.