

The New ADA Amendments: Increasing the Burden on Employers

Recently enacted legislation will expand ADA coverage to more persons with disabilities, thus likely necessitating more reasonable accommodation

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The Americans With Disabilities Act (ADA), enacted in 1990, prohibits discrimination based on disability. It was intended to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” Now more than ever, it is essential that employers have a clear definition of what it means to be “disabled” so that they may meet their obligations under the law.

On Sept. 25, 2008, President Bush signed into law S.3406, the ADA Amendments Act of 2008 (the Amendments). The Amendments make some significant changes to the ADA – changes that are certain to affect employers and their obligations to employees (see box). The Amendments (Pub. L. 110-325) go into effect on Jan. 1, 2009.

Summary of ADA Amendments

The Amendments will affect how “mitigating measures” such as eyeglasses may factor into a determination of whether someone has a disability, whether episodic conditions qualify as disabilities, and when does an impairment “substantially limit” an individual enough to make him or her disabled under the ADA.

But first, it’s important to review the definition of “disability” under the ADA as the backdrop for subsequent U.S. Supreme Court interpretations and the Amendments’ efforts to undo them.

Disability Under the ADA

In the employment context, the ADA specifically prohibits a covered employer (defined as a company that employs *15 or more* employees working every working day for a 20-week period during this calendar year or the last calendar year) from discriminating against a qualified individual with a “disability.” Broadly speaking, actions that violate the ADA include:

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- discriminating against individuals with disabilities in job application procedures, hiring, firing, training, advancement or compensation, or regarding any other terms, conditions or privileges of employment;
- refusing to make reasonable accommodation to the known physical or mental limitations a disability causes;
- discriminating against an individual because that person has a relationship or association with a disabled individual;
- harassing someone because of either a disability or his or her association with a disabled person;
- retaliating against a disabled employee because he or she has informed the employer of a disability and/or requested an accommodation; or
- limiting, segregating or classifying a job applicant or employee in a way that adversely affects the opportunities or status of an applicant or employee because of his or her disability.

It can be a daunting task for an employer to determine whether the ADA covers an employee because that individual is “disabled.” Under current law, a disability is defined as “a physical or mental impairment that substantially limits one or more major life activities.” Whether an individual is disabled determines whether an employer:

- 1) must investigate, engage in the interactive process and implement reasonable accommodations to assist the employee; and
- 2) is subject to liability under the ADA for failing to do so.

The Supreme Court Cases

The Amendments are a product of the legislature’s dissatisfaction with two U.S. Supreme Court decisions. They include the following finding:

The holdings of the Supreme Court in *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999) and its companion cases, and in *Toyota Motor Manufacturing, Kentucky, Inc., v. Williams*, 534 U.S. 471 (2002) have narrowed the broad scope of protection intended under the ADA, thus eliminating protection for many individuals for whom Congress intended to protect[.]

Supporters of the Amendments say that the Supreme Court’s decisions had narrowed the definition of “disability” to the point that people with serious impairments such as epilepsy, cancer, diabetes and cerebral palsy have failed to meet the ADA’s definition of disability.

The Current ADA Definition of ‘Disability’

Under the ADA, an individual must have a physical or mental impairment that substantially limits one or more major life activities in order to “qualify” as disabled. In *Sutton v. United Airlines*, United Airlines had a rule requiring global pilots to have an uncorrected vision of at least 20/40. Karen Sutton was a pilot for United regional airlines. She suffered from severe myopia; however, her vision was fully corrected with eyeglasses. Nevertheless, because she did not meet United’s minimum vision requirement for global pilots, she was denied employment as a global pilot. Sutton sued United for discrimination under the ADA.

The Supreme Court held that when determining whether an individual has a disability under the ADA, a court must consider the effects of any “mitigating” measures that reduce the disability’s effect, such as taking medicine or wearing eyeglasses. The Court reasoned that since Sutton’s glasses fully mitigated her impairment, Sutton was not “disabled” for ADA purposes, and could not use the ADA’s protection.

Significantly, and what seems lost on the drafters of the Amendments, is what the Supreme Court *did not* hold in *Sutton* (see box).

Misunderstandings About *Sutton*

The Court did not hold that a person is not disabled merely because he or she received effective treatment for an impairment. Instead, the Court held that evidence of the treatment’s effects must be considered along with the effects of the impairment. This means only that the ameliorating effects of the individual’s treatment should be considered along with the treatment’s adverse effects.

The Court also did not hold that treatment, even treatment that effectively ameliorates the effect of the disability, will mean a person is no longer “disabled.” The Court held only that a person who does not have a presently existing disability is not within the subsection (A) of the definition in 42 U.S.C. §12102(2)(A). The Court expressly stated that a person without a presently existing disability may still be considered disabled due to a history of a disability under subsection (B) of the definition in 42 U.S.C. §12102(2)(B) (defining “disability to include a person having a record of a mental or physical impairment that substantially limits one or more of the major life activities) or because he or she is regarded as having a disability under subsection (C) of the definition in 42 U.S.C. §12102(2)(C) (defining “disability to include individuals who are “regarded as” having a mental or physical impairment that substantially limits one or more of the major life activities).

The rulings in *Sutton* in large part were a byproduct of how it came before the Court. The plaintiffs had not alleged that they had a history or record of disability, so the Court neither did, nor could have, considered this possibility for coverage under the ADA.

In *Toyota v. Williams*, Williams suffered from carpal tunnel syndrome. She sued her employer, an auto manufacturer, under the ADA for discrimination based on disability. The employer defended in part on the ground that she was not disabled under the ADA. Williams claimed she was disabled because she had a physical impairment that substantially limited her ability to perform manual tasks in the workplace. However, she was able to accomplish a broad range of manual tasks outside the workplace, such as brushing her teeth, sweeping and gardening.

The Supreme Court agreed to hear the case and held that the lower court, which found in Williams’ favor, did not apply the proper standard in determining whether Williams was disabled for ADA purposes. The Court stated that when determining whether an individual is disabled under the ADA, it must analyze the manual tasks of the specific job and also determine whether the individual’s impairments prevent or restrict her from performing tasks that are of a “central importance to most people’s daily lives.” The Court further explained that an individual is substantially limited in a major life activity even if the impact of his or her condition on a single activity is not severe, as long as his or her ability to collectively perform a variety of activities is severely limited.

Individualized Assessment Needed

The Court also held that when determining whether an individual has a disability, courts must do an individualized assessment to determine if there is a substantial limitation, especially for those impairments (like carpal tunnel syndrome) in which the symptoms

greatly vary from person to person. Accordingly, the case was returned to the lower court to re-examine whether Williams had an ADA disability under the correct legal framework.

The History of the Amendments

The Amendments were a compromise reached between business groups, disability advocates and other worker advocacy groups. A history of the Amendments, from House to Senate to President Bush, is discussed below.

The House Amendments (H.R. 3195)

Currently under the ADA, a disability is defined as “a physical or mental impairment that substantially limits one or more major life activities.” H.R. 3195 maintained this definition but then went on to define “substantially limits” as “materially restricts.” Consequently, any impairment that “materially restricts” a person from performing a major life activity (that is, eating, sleeping, walking, thinking) would have been a disability under the law.

This definition would have been problematic for employers as the phrase “materially restricts” was neither defined in the bill nor in the ADA. Because this would have been a new phrase, courts have not decided its meaning. And the legislative history of the phrase was vague and stated only that “materially restricts” is “intended to be a less stringent standard to meet” that what the Supreme Court required in *Williams*.

H.R. 3195 also clearly departed from the Supreme Court’s ruling in *Williams* insofar as the bill specifically stated that, “An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.” In other words, impairment of a single major life activity, such as sleeping, would render an individual disabled, even if he or she can still accomplish a broad range of other major life activities like walking, talking, thinking, lifting and eating.

The bill also broadened the scope of who is “disabled.” It stated that an “impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.” The question of whether and how an employer can accommodate a currently dormant condition remained unanswered.

H.R. 3195 also directly prohibited courts from considering whether a person uses mitigating measures (medication, prosthesis or a hearing aid) in determining whether he or she is disabled. This admonition would have directly overruled the Supreme Court’s decision in *Sutton* holding that “mitigating measures” should be taken into account when determining if a plaintiff is disabled under the ADA. However, the bill would have allowed courts to consider the ameliorative effects of “ordinary eyeglasses or contact lenses” intended to fully correct visual acuity or eliminate refractive error.

Finally, H.R. 3195 defined that an individual would be “regarded as disabled” if the individual “establishes that he or she has been subjected to an action prohibited under the Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.” A person would not have been “regarded as disabled” for impairments that are transitory and minor in nature (that is, impairments that last, or are expected to last, six months or less).

The Senate's Version of the Amendments (S. 3406) That Have Been Signed Into Law

Like H.R. 3195, S. 3406 set forth significant changes to the ADA. The stated purpose of S. 3406, similar to that of H.R. 3195, is to reject the standards enunciated in *Sutton* and *Williams* and to:

Carry out the ADA's objectives of providing "a clear and comprehensive national mandate for the elimination of discrimination" and "clear, strong, consistent, enforceable standards addressing discrimination" by reinstating a broad scope of protection to be available under the ADA.

S. 3406 avoided at least one of the pitfalls in H.R. 3195 by not including its "materially restricts" language. This omission is significant. It means that S. 3406 will allow developed case law to retain some relevance in deciding future ADA cases. Employers will not be faced with drawn-out legal battles fought to create clarity for an uncertain term.

S. 3406 also corrects some of the cavalier wording found in H.R. 3195. For instance, H.R. 3195 commanded that the definition of disability "shall be construed broadly" to achieve the ADA's purposes. Legal experts have noted that this language was unusual (and problematic) because it would encourage courts to read beyond the actual words of the legislation in interpreting the statute. This may lead to varying analysis of the ADA and uneven results in court.

While "broad construction" provisions are common in civil rights legislation, generally they provide direction to some specific end, such as including a particular item within a standard or keeping in mind a particular factor. H.R. 3195, however, contained no such direction, further undermining legal certainty and consistency of results. S. 3406 corrects this problem. It clarifies that the ADA should be constructed "in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act." While this provision has little meaning in practice (courts should, of course, construe a statute as its terms require), it is a far better result than statutory confusion H.R. 3195 would have created.

S. 3406 contained the same clauses as H.R. 3195 dealing with:

- 1) a single impaired major life activity being enough to qualify an individual as disabled;
- 2) episodic conditions as disabilities;
- 3) the prohibition of considering mitigating measures (except for ordinary eyeglasses and contact lenses) when determining if an individual is disabled; and
- 4) the "regarded as" language.

S. 3406 passed the Senate, was then returned to the House – where it did not change – and then was signed into law.

What Won't Change

One of the ADA's most significant aspects that will not be changed by the Amendments is the requirement that individuals with disabilities demonstrate that they are otherwise qualified for a job. An employee is qualified if he or she can perform the essential functions of the job, with or without a reasonable accommodation. A job function is essential

if it is highly *specialized*, there are a *limited number* of employees to perform that function or the function is one of the *purposes* of the job position. Consequently, employers can continue to require that all employees be able to perform the essential functions of their jobs.

Where Do Employers Go From Here?

From a practical standpoint, it is likely that the changes to the ADA will increase the total number of people who are legally disabled under the law. This will likely require employers to accommodate a larger number of employees. Significantly, the new law may be interpreted to require employers to engage in the interactive process with and offer reasonable accommodations to employees who can fully perform their job duties, as long as they are taking medication or using prescribed medical devices.

There may be a corresponding increase in lawsuits from employees who are (or claim to be) disabled against employers that allegedly did not properly accommodate them. The Amendments also are likely to make it more difficult for employers to get cases dismissed on summary judgment, which, in turn, may lead to higher settlement costs to employers.

For a checklist of steps employers should take now that the ADA amendments have been enacted, see the box.

Preparing for the ADA Amendments

- Review current policies and procedures to ensure compliance with the changes the Amendments made. This may mean drafting new policies for your work force.
- Review company job descriptions for accuracy. Although a job description is not the ultimate arbiter of what are an employee's "essential functions," it is a first step. Job descriptions should accurately reflect an employee's duties and the real abilities required to meet those duties. Physical demands and attendance standards should always be included.
- When a reasonable accommodation is requested, engage in an interactive process with employees or applicants regardless of whether medication, aids or other mitigating measures may be available to them.
- If an employee or applicant demonstrates a physical or mental impairment that would limit his or her ability to request an accommodation, initiate an informal interactive process to accommodate the employee.
- Remember that the interactive process is ongoing. Do not assume because an employee is in remission or seems to be doing fine that you can stop engaging them.
- If you find yourself in a questionable situation concerning whether an individual is disabled, whether and what accommodation should be provided or any employment action for an employee with an impairment, consult a employment lawyer or other legal expert before taking any action.

For More Information

This article is one of 25 chapters on the most recent HR developments published in *Human Resources 2009: Answers to Your 25 Top Questions, Winter Edition*.

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