

ADA AMENDMENTS ACT OF 2008: THE IMPACT FOR EMPLOYERS

By Alex Walker

What is the ADA?

The ADA (the American's with Disabilities Act of 1990) prohibits discrimination based on an individual's disability in employment, in public accommodations, and other related areas. In the employment context, the ADA provides that "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual."

What are the ADA Amendments?

Both the Senate and the House of Representatives have passed the ADA Amendments Act of 2008 ("ADAAA"). The Senate approved the bill (S. 3406) on September 11th, and the House subsequently approved the Senate's version. President Bush is expected to sign the ADAAA into law in the next few weeks.

When do the Amendments go into effect?

January 1, 2009.

Who will be affected?

Entities that are already covered by the ADA. Generally speaking, that includes employers with 15 or more employees.

What changes under the Amendments?

In deciding if someone's impairment constitutes a covered disability under the ADA, Congress has "clarified" the term "substantially limits" to mean "materially restricts." This appears to be a lower threshold for employees seeking to establish coverage under the ADA.

Previously, the text of the ADA was silent on what constituted a major life activity. The Amendments will mean that the statute will now include a list of sample major life activities: reading, learning, concentrating, thinking, communicating, working, and major bodily functions (immune system, bladder, reproductive system, etc.). This change signifies that an ADA qualifying "disability" will be considered more broadly.

Is disability still defined by considering mitigating measures?

Until now, an employee's disability determination took into consideration any mitigating measures available to the employee (*i.e.*, medications, hearing aids, etc.). Now, employers – and courts – must ignore those measures and the determination of whether an individual has a

disability is to be made without taking any mitigation measures the employee uses to decrease the severity of the impairment into account. The only exception is the use of prescription eye glasses and/or contacts.

What's changed regarding the "regarded as" provision of the ADA?

The Amendments clarify that "regarded as" claims cannot be based on transitory and minor impairments where the impairment is expected to last less than six months. The Amendments also clarify that employers are not required to provide a reasonable accommodation to individuals who are regarded as disabled, an issue over which the courts were previously split. However, the changes also mean that an individual asserting a "regarded as" claim need show only that the employer perceived the individual as having a mental or physical impairment. Gone is any requirement that the perceived impairment substantially limit a major life activity.

What's the bottom line?

Congress clearly wanted to shift attention away what they perceived as an improper focus by the judiciary on the question of whether an individual's impairment qualifies as a disability under the ADA, noting: "[I]t is the intent of Congress 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." The Amendments also direct the EEOC to draft new regulations requiring a lower standard for establishing a substantially limiting physical or mental impairment.

We expect that these Amendments will increase the number of individuals who are considered "disabled" under the ADA, and will likely make defending disability claims more difficult for employers. Defending ADA claims will become more like defending other employment law claims, as the focus shifts from the issue of whether the individual is "disabled" to whether the employer can justify its decisions.

If you have a question about the ADA or the ADA Amendments Act, or any other employment matter, please contact Alex Walker at (505) 848-1861 or awalker@modrall.com.