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eAlert

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ADA NOTEBOOK

ADA AMENDMENTS ACT WILL REDEFINE DISABILITY

On September 25, 2008 President Bush signed the Americans with Disabilities Act Amendment Act ("ADAAA" or "ADA Amendments Act"), which is the first major overhaul to the Americans with Disabilities Act ("ADA"), 42 USC §12101 *et seq.*, since its passage in 1990. The ADAAA, which expands the definition of "disability" and legislatively overturns two United States Supreme Court decisions that had become flashpoints for controversy, takes effect on January 1, 2009.

Existing Definition of Disability

The existing definition of disability has been at the heart of litigation for 16 years.

> "(2) Disability. - The term 'disability' means, with respect to an individual
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
> (B) a record of such an impairment; or
> (C) being regarded as having such an impairment." 42 USC §12102(2).

In other words, an individual may be disabled if s/he has an actual/current disability, has a record of having been disabled, or is perceived/regarded as disabled.

Modifications to the Definition of "Actual" Disability

A. Substantially Limits

This term is not defined in the ADA. However, EEOC has "defined" it in its regulations. See 29 CFR §1630.2(j). The definition is not a model of clarity (e.g., "substantially limits" is defined in part as "significantly restricted"). The ADAAA directs the EEOC to revise the existing regulatory definition of substantially limits by proposing a more lenient standard that does not require extensive analysis.[1]

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[1] In directing EEOC to revise its regulatory definition, the ADAAA expressly overturns the decision of the United States Supreme Court in *Toyota Motor Manufacturing Inc. v. Williams*, 534 US 184 (2002). The ADAAA provides: "The purposes of this Act are … (4) to reject the standards enunciated by the Supreme Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), that the terms 'substantially' and 'major' in

B. Major Life Activities

This term is another term that is not defined in the ADA. Further, EEOC offers only a short regulatory definition.[2] The best explanation is that the drafters of the ADA (and the EEOC regulations) could not imagine the multitude of activities that might be considered major.

Over the years, litigants have proven to be far more creative than Congress or the EEOC. Litigants have described as major all varieties of activities, from the common (e.g., thinking and eating) to the unusual (e.g., air travel and eating chocolate cake). Consequently, the courts, with little statutory or regulatory guidance, have been forced to give shape to this concept.

The ADAAA steps into this void. Revised 42 USC §12102(2) attempts to better define major life activities. First, it identifies a non-exhaustive laundry list of major life activities; the list includes each of the nine activities identified in EEOC's regulation and adds nine others that have been the subject of litigation over the years.

> "(A) IN GENERAL- For purposes of paragraph (1), major life activities include, but are 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." 42 USC §12102(2)(A) (emphasis added).

Second, the ADAAA expands "major life activities" to include "major bodily functions."

> "(B) MAJOR BODILY FUNCTIONS- For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." 42 USC §12102(2)(B).

This is not an entirely new category of activity. There has been litigation related to a number of these bodily functions.[3] However, this modification, in combination with the as yet to be developed revised definition of substantial limitation, is likely to spur additional litigation. For example, most would agree that an individual who has no unassisted respiratory function is disabled; however, as the sliding scale moves towards full respiratory function people may disagree over the point at which a conclusion of disability is no longer warranted.

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the definition of disability under the ADA 'need to be interpreted strictly to create a demanding standard for qualifying as disabled,' and 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'" and "(5) to convey congressional intent that the standard created by the Supreme Court in [that case] for 'substantially limits', and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it 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".

[2] See 29 CFR §1630.2(i), which describes "major life activities" to include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."

[3] In fact, in its first decision addressing the ADA, the United States Supreme Court concluded that the bodily function of reproduction is a major life activity. *See Bragdon v. Abbott*, 524 US 624 (1998).

C. Mitigating Measures

From the initial passage of the ADA, one of the more contentious issues was whether or not "mitigating measures" should be considered when evaluating disability status. For example, when determining whether a person with diabetes is or is not disabled, should there be any consideration of medication prescribed for that condition?

In 1999 the Unites States Supreme Court held that mitigating measures should be considered. Specifically, in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), the Court considered the disability discrimination claims of Karen Sutton and Kimberly Hinton, identical twins who suffered from acute visual myopia. Their uncorrected vision was less than 20/100, but with corrective lenses they were able to see well enough to function normally in their daily lives. After both applied, unsuccessfully, for commercial pilot positions with United Airlines, they sued alleging that United had discriminated against them based on disability. The Court observed that a determination of disability under the ADA should be made in reference to an individual's ability to mitigate his/her impairment through corrective measures. Because Sutton and Hinton were able to correct their vision with glasses, the Court found that they were not disabled.

The *Sutton* decision proved to be very controversial and is expressly overturned in the ADAAA. The ADAAA provides: "The purposes of this Act are … (2) to reject the requirement enunciated by the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures". Further, it states that disability determinations are to be made without consideration of medications, assistive technology, auxiliary aids, or adaptive behavior. See 42 USC §12102(4)(E)(i).

> "(E)(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as--
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> (I) medication, medical supplies, equipment, or appliances, low-vision devices[4] (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;
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> (II) use of assistive technology;
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> (III) reasonable accommodations or auxiliary aids or services; or
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> (IV) learned behavioral or adaptive neurological modifications."

Exception: There is one exception to the rule against consideration of mitigating measures. Specifically, the ADAAA provides that "[t]he ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses[5] shall be considered in determining whether an impairment substantially limits a major life activity" (42 USC §12102(4)(E)(ii)).

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[4] The term "low-vision devices" means "devices that magnify, enhance, or otherwise augment a visual image" (42 USC §12102(4)(E)(iii)(II)).

[5] The term ""ordinary eyeglasses or contact lenses" means "lenses that are intended to fully correct visual acuity or eliminate refractive error" (42 USC §12102(4)(E)(iii)(I)).

D. Conditions That Are Episodic or In Remission

The ADAAA provides that an "impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." See 42 USC §12102(4)(D). This provision will require a degree of speculation. In certain situations, there will be historical evidence to support a conclusion that a condition would be substantially limiting if active (e.g., lung cancer in remission after aggressive treatment). In other situations, historical evidence is inconclusive (e.g., shingles in remission after a first mild attack has the potential to be far more debilitating). Undoubtedly, there will be litigants who push this envelope.

Modifications to the Definition of "Regarded" as Disabled

The Good News: The ADAAA helpfully codifies what should always have been obvious: an employer is not required to provide reasonable accommodation to an individual who is regarded as disabled.[6] Surprisingly, this has been a troubling concept for the courts.[7]

The Bad News: The ADAAA modifies the standard for a "regarded as disabled" claim by providing, illogically, that an individual meets the definition of regarded as disabled if s/he is able to show that an adverse action was taken against him/her because she was regarded as having an impairment, whether or not that impairment is limiting. Here is the provision.

> "(A) An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this 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." 42 USC §12102(3)(A).

The language is vague. Both parties in litigation will have difficulty dealing with it. As a result, it is certain to lead to an increase in the number of "regarded as" claims litigated.[8]

Bullard Smith will continue to follow developments related to the ADAAA. Please also feel free to contact us with any questions regarding the ADA, ADAAA, disability discrimination and/or reasonable accommodation, as well as regarding any other labor, employment and benefits issues.

~MICHAEL G. MCCLORY

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6 42 USC §12201(h) provides: "A covered entity under Title I … need not provide a reasonable accommodation … to an individual who meets the [regarded as] definition of disability in section 3(1) solely under subparagraph (C) of such section."

7 Congress buried this bit of wisdom in the "miscellaneous provisions" in Title V (42 USC §12201).

8 Fortunately, the ADAAA does provide that transitory conditions may not form the basis for a regarded as claim. "Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less." 42 USC §12102(3).