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EMPLOYMENT LAW ALERT

Fall 2008 Issue

What Was Old is New Again: Congress Enacts the ADA Amendments Act of 2008

The ADA Amendments Act of 2008 (ADAAA) was recently signed into law and will go into effect January 1, 2009. It significantly expands the reach of the original Americans with Disabilities Act (ADA) to include more individuals with less severe impairments. Although the ADAAA retains the ADA's definition of disability, it expands the terms used in that definition to broaden coverage under the Act. Among the changes in ADAAA:

Major life activities: While the ADA was silent with regard to what constitutes a "major life activity," the ADAAA gives explicit, yet unlimited, examples of what represents a major life activity, such as:

- Caring for oneself
- Hearing
- Walking
- Speaking
- Reading
- Communicating
- Performing manual tasks
- Eating
- Standing
- Breathing
- Concentrating
- Working
- Seeing
- Sleeping
- Lifting/bending
- Learning
- Thinking

This change may significantly broaden the class of persons who may qualify as impaired under the statute.

Major bodily functions: The ADAAA also adds *major bodily functions* as a new "major life activity." Major bodily functions include, without limitation:

- Functions of the immune system
- Digestive, bladder and bowel functions
- Respiratory and circulatory functions
- Reproductive functions
- Cell growth
- Neurological and brain functions
- Endocrine functions

New standard—"substantially limits": One primary objective of the Amendments was to modify previous court rulings which required that an impairment "prevent" or "severely restrict" activities that are of "central importance to most people's daily lives" in order for such impairment to qualify as a disability. The ADAAA now only requires that an impairment "substantially limit" a *single* major life activity, regardless whether that activity is of "central importance" to an employee's daily life. In this regard:

- The EEOC is to issue interpretative guidance that lowers the standard of "substantially limits" to a level consistent with Congress' intent. Current EEOC guidance defines the term to mean "significantly restricted;" and,
- Impairments that are episodic or in remission qualify as covered disabilities if they substantially limit a major life activity while active.

"Regarded as" claims: Although "regarded as" claims were allowed under the original version of the ADA, the ADA did not define what it meant to be "*regarded as having such an impairment.*" Under court rulings, however, employees had to prove that the employer regarded them as being disabled simply because they were viewed as being substantially limited in a major life activity. Under the new provisions of the ADAAA, an employee must show only that they were subjected to prohibited action 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.* Thus, the employee must only prove that he or she was viewed as being impaired, regardless whether the impairment was, in fact, a protected disability. Nevertheless, there are 2 stipulations which serve to limit "regarded as" claims:

- Impairments that are "transitory and minor" (i.e., with an actual or expected duration of 6 months or less) cannot form the basis of a "regarded as" claim; and

(continued)



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- Employers do not have to provide reasonable accommodations to employees who are “regarded as” disabled, unless those persons satisfy another part of the disability definition (i.e., have a physical or mental impairment that substantially limits one or more major life activities or a record of such impairment).

Mitigating measures: Under the ADAAA, determination of whether an impairment substantially limits a major life activity shall be made *without* regard to the benefits of mitigating measures such as:

- Medication, medical supplies, equipment or appliances (e.g., low-vision devices, prosthetics, hearing aids and implantable hearing devices, mobility devices, or oxygen therapy equipment);
- Use of assistive technology;
- Reasonable accommodations or auxiliary aids or services; or
- Learned behavior or adaptive neurological modifications.

As a result, if an employee’s condition would qualify as a disability without such aids, the employee is considered to have a protected disability. This change squarely negates a Supreme Court ruling on this issue.

- One exception: *ordinary eyeglasses or contact lenses*. The ameliorative effects of the mitigating measures of ordinary corrective lenses shall be considered in determining whether an impairment substantially limits a major life activity.

Vision tests: Under the corrective lenses exception, employers cannot use qualification standards, employment tests and other selection criteria based on a person’s *uncorrected vision*, unless the standard, test or criteria, as used by the employer is:

- (1) *job-related for the particular employment position* and
- (2) *consistent with business necessity*.

Reverse discrimination: The ADAAA expressly states that a reverse discrimination claim is *not actionable under the ADA*.

Focus-shifting recommendations: As stated in the ADAAA, Congress intended that the primary objective in ADA cases to be whether employers have complied with their obligations.

Whether a person’s impairment constitutes a “disability” should not demand an extensive analysis. This suggests that an employer must shift most of its focus from the initial determination of whether an employee has a protected disability to whether the employer has adequately engaged in the interactive and accommodation processes.

In light of the new provisions of the ADAAA, employers should:

- Update policies and procedures to include ADAAA changes;
- Examine ADA documentation to include ADAAA changes;
 - Example: Documentation asking a medical practitioner to assess an employee’s ability to perform essential job functions should note that mitigating measures are not to be considered.
- Review job descriptions to ensure that the essential functions listed are job-related and consistent with business necessity;
- Educate management personnel about ADAAA changes;
- Advise managers and supervisors to consult with HR whenever an employee requests an accommodation, rather than immediately refusing the request or retaliating against the employee for making the request; and
- Reconsider past accommodation requests from current employees who were denied accommodation under the pre-ADAAA definition of “disability.”

Through enactment of the ADAAA, Congress has clearly expressed its intent to broaden the coverage provided under the ADA. As a result, employers should review their policies and procedures in light of the new statute to ensure that following old procedures does not result in new liabilities.

Rainey Kizer Announces New Office Location in Memphis, Tennessee

The Memphis office has relocated to the Morgan Keegan Tower, 50 N. Front Street, Suite 610, Memphis, TN 38103.

All of the firm’s phone and fax numbers will remain the same.

For Rainey Kizer, the new office means improved client service, new amenities for employees, and room for growth.

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