

**Date:** January 7, 2009

**Re:** The Amended Americans With Disabilities Act

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The Americans with Disabilities Act Amendments Act of 2008 became effective on January 1, 2009. The basic intent of the Act is to reject the holdings contained in several Supreme Court decisions and portions of the EEOC's ADA regulations in order to provide greater protections to the disabled. The principal set of changes surround the interpretation of disability.

### **Definition of Disability**

The most significant change to the ADA is the new definition of "disability". While the basic definition provided under the original ADA is retained, the gloss added by the amendments will broaden the interpretation and application of that definition.

Under the Act, a person is considered to have a disability if he/she meets one of the following criteria: (1) he/she has a physical or mental impairment that substantially limits one or more major life activities of such individual; (2) has a record of such impairment or (3) is regarded as having such impairment.

Thus, a person claiming ADA protection under criteria (1) or (2) listed above must have a physical or mental impairment that substantially affects a major life activity. Although the prior version of the ADA did not define "major life activity," the Act now fills that gap with a list of major life activities and bodily functions which – if materially affected by an impairment – create a presumption that the person has a disability protected by the ADA.

The lists of Major Life Activities added by the amendments to the ADA are as follows, but importantly are not exhaustive:

**Major Life Activities:** caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working.

**Major Bodily Functions:** functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

One consequence of the ADA's non-exhaustive list of major activities/functions is that an impairment affecting activities other than the life activities and bodily functions listed in the amended ADA may still be determined to be a disability by the courts.

Importantly, the Act also specifically clarifies that an impairment only need to substantially affect one major life activity to qualify as a disability.

The Act also overrules existing case law so that the determination as to whether a disability exists is made without reference to corrective or mitigating measures, such as treatment, medicine, therapy, etc. As a result, individuals who would not qualify as disabled in the past because their condition was capable of correction by medicine or otherwise, will now meet the requirements to establish disability.

Finally, the Act expressly states that a condition that is episodic or in remission is considered a disability if it would substantially limit or alter a major life activity when active. Thus, any employee with a major illness, such as cancer, currently in remission is now unquestionably considered as having a disability.

#### How It Affects Your Business:

These amendments will have two major effects:

- (1) expand the number of persons/employees deemed disabled under the Act;
- (2) make it virtually impossible for employers to defeat lawsuits at an early stage by arguing that the employee is not disabled for purposes of the ADA.

#### **“Regarded As” Disabled**

Before Congress amended the ADA, an individual seeking a remedy because he or she was “regarded as” having a disability had to prove that the employer believed that the employee was substantially limited in a major life activity. The law now provides that an individual may be unlawfully regarded as having a disability “whether or not the impairment limits or is perceived to limit a major life activity.”

Importantly, transitory and minor impairments that have an actual or expected duration of less than six months are not considered disabilities under the “regarded as” analysis. Also significant, the ADA Amendments have clarified a conflict in prior case law to provide that an employer is not required to provide a reasonable accommodation or make reasonable modifications to policies, practices, or procedures for an individual who meets the “regarded as” definition provided by the ADA.



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How it affects your business:

Before the amendments, employees suing under the ADA typically alleged that they were discriminated against due to an actual disability and, in the alternative, to assert that their employer *regarded* them as disabled. As the coverage for employees “regarded as” disabled has been expanded, a larger number of lawsuits will rely on the “regarded as” theory, and it will be more difficult to defend against these claims. Thus, it is imperative to train employees and decision-makers to heighten their sensitivity to – and avoid – those situations that can now provide employees with evidence to support an ADA “regarded as” claim.

**The information contained in this Bulletin is not, nor is it intended to be, legal advice. You should consult an attorney for individual advice regarding your own situation.**