CLIENT ALERT

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The "New" Americans with Disabilities Act:

What the Employee-Friendly Revisions to the ADA Mean for Employers

On September 25, 2008, President Bush signed the ADA Amendments Act of 2008 ("ADAAA") into law. The ADAAA is not effective until January 1, 2009, but employers need to immediately prepare to comply with this new law.

A Broader Class of Physical and Mental Impairments will be Considered "Disabilities" under the ADA

Lowering the Bar for ADA Protection ~ The Americans with Disabilities Act ("ADA") states that only 43 million individuals in the United States have disabilities and that such individuals are a "discrete and insular minority." The Supreme Court has used this language to support its position that the definition of disability needs to be "interpreted strictly to create a demanding standard." The ADAAA not only deletes the aforementioned language in the ADA, but also overturns the Supreme Court's corresponding standards of strict construction of the term "disability" and directly states that one of the purposes of the ADAAA is to reinstate the ADA's "broad scope of protection." As a result, an ADA claim will no longer involve an extensive analysis of whether an individual's impairment is a disability; rather, courts will focus on whether the employer complied with its ADA obligations. Thus it will be easier for a person to qualify as being "disabled."

Expanding the Definition of Major Life Activity ~ The definition of "disability" under the ADAAA is similar to the original definition, encompassing a physical or mental impairment that substantially limits one or more major life activities. However, the ADAAA includes the "operation of major bodily functions" as major life activities, whereas the original ADA regulations listed disorders of various major bodily functions as only impairments. For example, an individual who has a disorder of his or her respiratory system would automatically be protected under the ADAAA. Under the ADA, this individual would not be protected, unless the condition had some effect on the ADA categories of major life activities – i.e., concentrating, walking, care for oneself, etc.

Diminishing the "Substantial Limitation" Standard ~ Under prior case law, "substantially limits" meant to prevent or severely restrict the activity in question for a period of time. If the limitation did not reach the requisite severity, the employee had no protection.

Under the ADAAA, "substantially limits" encompasses limitations of a significantly lesser degree, although it is still unclear just how limiting an impairment will have to be in order to be protected. For example, the major life activity of walking would be substantially limiting if an individual can only walk for short periods of time under both the original ADA and the new ADAAA. Likewise, the individual who can walk ten miles, but on the eleventh mile walks slowly and with difficulty, is not protected under either the ADA or the ADAAA. The gray area is the individual who must walk slowly and has trouble walking up stairs. Under the original ADA, courts often found this degree of impairment was not protected. Under the new ADAAA, this type of limitation may very well be protected.

Further, under prior federal case law, the severity of the limitation was considered with regard to the ameliorative effects of mitigating measures, such as artificial aids, assistive technology, and learned behavioral or adaptive neurological modifications. The ADAAA takes the opposite position; the positive effects of mitigating measures cannot be considered, except for eyeglasses and contact lenses. For example, an individual who has a prosthetic leg will automatically have a disability under the ADAAA, as clearly the individual, if unassisted, is substantially limited in the major life

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If you have questions about this Client Alert or other Employment and Labor law issues, please feel free to contact Mr. Gamboli or Ms. Byrd.

activity of walking. Under the original ADA, whether the individual was protected would depend on how well and often the person could walk with crutches, a prosthetic limb or with other mitigating measures.

Finally, the ADAAA specifically provides that the term "disability" includes "[a]n impairment that is episodic or in remission ... if it would substantially limit a major life activity when active." This new standard calls for the hypothetical inquiry into what the disability would or could be like in the future. Under the ADAAA, because speculation as to future events is not only allowed but required, the importance of diagnosis and the employee's past experiences will increase for employees with episodic disabilities or those with disabilities in remission.

A New Class of Employees are Protected under the ADAAA

The most astonishing change is found in the so-called "regarded as" prong of the ADAAA. Employees "regarded as" having a disability are protected under the ADA. However, this requires a difficult showing by the employee that the employer subjectively thought the employee had a physical or mental impairment that substantially limited a major life activity.

No longer is the "regarded as" prong simply about the employer's subjective beliefs. Now the "regarded as" prong creates the following two new classes of protected employees, neither of whom have disabilities or are thought to have disabilities: (1) employees with physical or mental impairments regardless of whether the impairments affect a major life activity; and (2) those who are thought to have such a physical or mental impairment.

This is significant because the term "impairment" has historically been defined by the Equal Employment Opportunity Commission in an extremely broad fashion, including any physiological disorder, condition, cosmetic disfigurement or anatomical loss affecting one or more body systems, or any mental or psychological disorder. "Impairment" differs from "disability" because it may not substantially limit or even have any effect on a major life activity.

For example, consider the waitress who has a facial scar. The scar would be a cosmetic disfigurement of the skin and thus an "impairment" under the ADAAA, but would likely not be a disability under the ADA as it does not limit a major life activity. Under the ADA, the employer who wants to fire the waitress or transfer her to a backroom job to maintain a certain image at the restaurant would be free to do so. Under the ADAAA, the employer cannot fire or take other adverse action against the waitress because of the scar.

Employers should be glad to know that the ADAAA limits the protection of employees who are impaired or regarded as impaired to only guarding against discrimination – such as not hiring, firing, or promoting an individual because of a non-disabling impairment – but does not require employers to provide accommodations to these non-disabled employees. Using the waitress example, the employer also does not have to allow the waitress time off to get cosmetic treatments for the scar as a reasonable accommodation because the waitress does not have a disability.

Finally, the ADAAA does attempt to rein in the extension of "regarded as" cases by excluding individuals with minor or transitory impairments, defined by the ADAAA as an impairment with an "actual or expected duration of six months or less," from protection.

Conclusion

The ADAAA expands the rights of employees with physical or mental impairments. The result will be an increase in the number of disability claims filed against employers. Further, these claims will be harder for employers to defeat because it will be harder for employers to challenge the employee's assertion that he or she has a disability. Employers need to begin educating their managers on the ADAAA, so that on January 1, 2009, they are prepared to properly address potential claims and avoid costly lawsuits.

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