



Legal ALERT!

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The Americans With Disabilities Act Amendments Act of 2008

Effective January 1, 2009, the Americans with Disabilities Act Amendments Act of 2008 (the "Act"), which was signed by President Bush in September 2008, became effective. The Act is a reaction to several years of Supreme Court decisions which narrowly construed the term "disability" so as to exclude individuals with impairments such as diabetes, epilepsy, cancer, artificial limbs, and muscular dystrophy, as well as those individuals with impairments which do not significantly affect their daily lives because of mitigating measures such as prescription medicine.

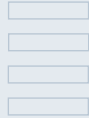
The Act retains the definition of the term "disability" as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. However, the Act explicitly rejects the Supreme Court's interpretation of "substantially limits" as meaning "significantly restricted" and directs the Equal Employment Opportunity Commission to revise its regulations in favor of broad coverage of individuals to the maximum extent possible. In doing so, the Act clarifies that an impairment that is episodic or in remission should be considered a "disability" if it would substantially limit a major life activity when active.

The Act also broadens the definition of "major life activities" by including two non-exhaustive lists. The first list includes many activities that have long been recognized under the Americans with Disabilities Act ("ADA"), including walking, sleeping and hearing, as well as many activities that were not previously recognized, such as reading, bending, concentrating, and communicating. The second list introduces a new category of major bodily functions, including not only neurological, digestive, respiratory, and reproductive functions, but also normal cell growth and endocrine functions, which is clearly intended to cover previously excluded impairments such as cancer.

Significantly, as noted above, the Act provides that mitigating measures other than "ordinary eyeglasses or contact lenses" shall not be considered in assessing whether an individual has a disability. Such language counteracts the landmark holding in *Sutton v. United Airlines*, in which the Supreme Court narrowed the group of people covered under the ADA by ruling that mitigating measures were to be considered in determining whether a person was substantially limited in a major life activity. By way of an example, under *Sutton*, individuals diagnosed with mental impairments such as depression, bipolar disorder or schizophrenia who are able to control the effects of their impairment with the use of medication were not considered "disabled."

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Effective January 1, 2009, those individuals may be considered “disabled” and therefore entitled to the protection of the ADA, despite the fact that, because of the medication, they generally are not substantially limited in a major life activity. Under the Act, the pertinent question is not how the individual acts while on medication, but rather, how the individual would act if not on the medication.

With respect to the “regarded as” prong of the definition of “disability,” the Act sets forth a new standard intended to clarify the relevant considerations. In that regard, the Act simply provides that an individual subjected to an action prohibited by the ADA (e.g., termination, failure to hire, failure to promote) because of an actual or perceived impairment will meet the “regarded as” definition of disability. However, the Act also clarifies that transitory (meaning less than six months) or “minor” impairments cannot be used to establish a “regarded as” disability. And, employers have no duty to provide reasonable accommodations to individuals who are solely “regarded as” having a disability.

These amendments will likely result in a substantial increase in the number of disability discrimination claims being filed and in the number of claims surviving motions for summary judgment. In fact, Congress explained in the “purpose” section of the Act that the examination of whether an individual has a covered “disability” has become too strict and that the primary object of courts’ attention in disability discrimination cases should not be whether an individual is “disabled,” but rather, whether covered entities (i.e., employers) have complied with their obligations under the ADA.

However, how cases will be actually be handled will depend in large part upon the EEOC’s revised regulations. The EEOC recently met to discuss a proposed notice of rule, but did not approve the notice, which means that to date, the regulations have not been published.

In the meantime, employers should note that any disability discrimination cases currently pending before a federal court will (or should) be governed by the standards that were in place prior to January 1, 2009. Any cases filed after January 1, 2009 will be decided under the amendments. ■

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