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The Americans with Disabilities Amendments Act of 2008

The Americans with Disabilities Act Amendments Act of 2008 (ADAAA), most recently passed into law, effectively amends the Americans with Disabilities Act of 1990 (ADA), which prohibits discrimination in the workplace against individuals with disabilities.¹ Specifically, the ADAAA reverses several U.S. Supreme Court rulings handed down in the last 10 years regarding what constitutes a “disability,” and how the term “substantially limits” should be interpreted.²

The purpose of the ADAAA is “to restore the intent and protections of the Americans with Disabilities Act of 1990.”³ Sen. Steny Hoyer (D-Md.), the majority leader in the Senate, asserted that “[o]ur intent was to be inclusive; civil rights bills are meant to be interpreted broadly.”⁴ Just as other civil rights laws prohibit employers from making employment decisions based on protected characteristics such as race, Congress intended to prevent employers from basing employment decisions on a disability.⁵ In 2004, plaintiffs lost 97 percent of ADA-based employment discrimination claims—often because of the strict interpretation of the definition of “disability.”⁶ The ADAAA seeks to broaden the scope of the ADA.⁷

The U.S. House of Representatives passed its version of the bill (H.R. 3195) in June 2008 by a 402-17 vote, with 15 members not voting.⁸ After the Senate made modifications to the legislation, the Senate approved the ADAAA (S. 3406) by unanimous consent on Sept. 11, 2008.⁹ The House then approved the modified amendment by voice vote on Sept. 17, 2008.¹⁰ Then on Sept. 25, 2008, President George W. Bush signed the bill into law, which will go into effect in January 2009.¹¹

In its findings, the ADAAA states that “the holdings of the Supreme Court in *Sutton v. United Airlines Inc.* and its companion cases, and in *Toyota Manufacturing, Kentucky Inc. v. Williams* have nar-

rowed the broad scope of protection intended to be afforded by the ADA, thus eliminating the protection for many individuals whom Congress intended to protect; and ... as a result of these Supreme Court cases, lower courts have incorrectly found in individual cas-

es that people with a range of substantially limiting impairment are not people with disabilities.”¹² In addition, the ADAAA states that the Equal Employment Opportunity Commission’s (EEOC) current ADA regulations defining the term “substantially limits” as “significantly restricted” are inconsistent with the ADA’s intent because of the high standard.¹³

The ADAAA specifically rejects the requirement enunciated by the Supreme Court in *Sutton* and its companion cases that the question of whether or not an impairment substantially limits a major life activity is to be determined by referencing mitigating measures.¹⁴ In the *Sutton* case, twin sisters applied to be commercial airline pilots, but they were not offered the positions because their uncorrected vision did not meet the airline’s minimum vision requirement.¹⁵ The sisters filed suit under the ADA and maintained that whether an impairment is substantially limiting should be determined without regard to corrective measures, such as their eyeglasses.¹⁶ The Court disagreed and held that “the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual’s impairment, including, in this instance, eyeglasses and contact lenses.”¹⁷

The ADAAA overrules this holding in *Sutton* and states the following:

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: medication, medical supplies, equipment, or appliances, low-vision devices (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; the use of assistive technology, reasonable accommodations or auxiliary aids or services; or learned behavioral or adaptive neurological modifications.¹⁸

Similar to the particular plaintiffs in the *Sutton* case, the ADAAA maintains that the ameliorative effects of ordinary eyeglasses or contact lenses should be considered in determining whether an impairment is substantially limiting.¹⁹ The ADAAA further finds that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.²⁰ Hoyer maintained that the result of



the *Sutton* decision was to exclude the ADA for many people, such as those who have insulin-controlled diabetes, and Congress never expected that the ADA would not cover people who work to mitigate their disability.²¹

The ADAAA also rejects the Supreme Court's reasoning in *Sutton* relating to the "regarded as" prong of a disability, and the act reinstates the reasoning the Supreme Court used in *School Board of Nassau County v. Arline*, which sets forth a broad view of the "regarded as" prong for the definition of "handicap" under the Rehabilitation Act of 1973.²² An individual is disabled under the "regarded as" prong if the individual is regarded as having a physical or mental impairment that substantially limits one or more major life activities of such an individual.²³ The ADAAA defines the "regarded as" prong in the following way:

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 [a]ct 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.²⁴

Under the ADAAA, the "regarded as" prong does not apply to impairments that are transitory or minor, which are defined as impairments with an actual or expected duration of six months or less.²⁵

Along with *Sutton*, the ADAAA rejects the Supreme Court's standard—articulated in *Toyota Motor Manufacturing, Kentucky Inc. v. Williams*—for the terms "substantially" and "major" in order to "convey the congressional intent that the standard ... has created an inappropriately high level of limitation necessary to obtain coverage under the ADA."²⁶ The ADAAA specifically rejects *Toyota Motor's* findings that "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 that the terms "substantially" and "major" "need to be interpreted strictly to create a demanding standard for qualifying as disabled."²⁷ The ADAAA further forces the EEOC to revise the regulations that define the term "substantially limits" as "significantly restricted" and to rewrite the definition in a less stringent way.²⁸ The ADAAA attempts to shift the focus away from the threshold determination of coverage and to focus primarily on the question of whether or not discrimination based on disability actually occurred.²⁹

The ADAAA also provides a list of per se "major life activities" to include "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."³⁰ In addition, the ADAAA provides that a major life activity includes the opera-

tion of a major bodily function, such as "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."³¹ Furthermore, the ADAAA maintains that an impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.³²

Although the ADAAA implements considerable changes in the definition of a covered disability, the law should not have a significant impact on the day-to-day operation of employers who engage in the interactive process and provide reasonable accommodations. As Jay Timmons, executive vice president of the National Association of Manufacturers, remarked, "This bill represents a truly remarkable collaboration of disability, civil rights and employer groups that generated strong bicameral and bipartisan support in Congress."³³ It is essential for employment counsel to be aware of this new legislation and its effect on both employees and employers. **TFL**

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