

## PREPARE FOR SIGNIFICANT CHANGES TO ADA

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Congress recently passed, and President Bush recently signed, the ADA Amendments Act of 2008 ("ADAAA"). Effective January 1, 2009, the Americans with Disabilities Act ("ADA") will undergo significant change.

There is a good chance that we will experience an increase in the number of ADA cases filed as well as an increase in the number of ADA cases actually going to trial. Congress sent a clear message to courts that they should focus less on whether a plaintiff is disabled and more on whether the employer complied with its ADA obligations. The ADAAA overturns several U.S. Supreme Court and related lower court decisions that Congress concluded denied the protections of the ADA to persons the law was intended to cover.

Set forth below is a summary of significant changes that take effect January 1, 2009:

1. **Broad Interpretation of "Disability"**. The ADAAA will change the conservative approach that many courts have taken to these cases by confirming that the ADA's definition of disability must be construed in favor of broad coverage to the maximum extent permitted by law.
2. **Ignore Mitigating Measures and Remission**. Overturning U.S. Supreme Court precedent, the ADAAA states that, with the exception of "ordinary eyeglasses or contact lenses", employers may not consider the impact of mitigating measures when determining whether an employee has a disability protected by the ADA. This means that a person who experiences no functional impairment when on medication now may be covered. The ADAAA also provides: "An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." These changes likely will result in millions more people being covered by the ADA and certainly will change the content of employers' communications with employees' health care providers.
3. **Broad Interpretation of "Major Life Activity"**. For purposes of the ADA, major life activities are now defined to include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. A major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. These definitions likely will result in more impairments being considered covered disabilities.
4. **Expansion of "Regarded As" Claims**. The ADA has always protected individuals whose employers incorrectly regarded them as being disabled. Courts historically have required plaintiffs with "regarded as" claims to prove their employer regarded them as being substantially limited in a major life activity. This proved to be a difficult standard for many plaintiffs to meet. Once the ADAAA takes effect, a plaintiff claiming his employer "regarded him" as disabled must prove only that his employer

perceived him as having a mental or physical impairment (not that the impairment limits a major life activity). This is a much lower burden that will make “regarded as” cases more difficult to defend. The news on “regarded as” claims is not all bad for employers, however. According to the ADAAA, the “regarded as” part of the definition of disability will not apply to impairments that last six months or less, and employees who are merely regarded as disabled are not entitled to reasonable accommodation.

### **What Should You Do?**

- As soon as possible, review and, if necessary, modify your handbook and other personnel policies to maintain compliance with the “new” ADA. Pay particular attention to policies that define “disability” and/or relate to your efforts to provide reasonable accommodations.
- Review how you are handling pending situations involving employees with impairments to confirm that your plan of action complies with the ADAAA.
- Be prepared for an increase in requests for reasonable accommodation. Train your managers on how to respond to such requests.
- Review and, if necessary, modify any form letters that you use to communicate with health care providers when necessary to confirm whether a particular individual currently is able to safely perform the essential functions of his or her job, with or without reasonable accommodation.

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