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President Bush Signs ADA Amendments Act of 2008 Broadening Coverage of Americans With Disabilities Act

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In an extraordinary act of bi-partisan activism by Congress, President Bush, and business groups, tens of millions of additional Americans have become "disabled" within the meaning of the Americans with Disabilities Act. The new legislation, called the ADA Amendments Act of 2008 ("**ADAAA**"), radically expands the ADA, overturns a series of Supreme Court decisions, and imposes on employers significant new obligations.

Although the ADAAA originated with Democrats in Congress and disability rights organizations, it passed with support from the U.S. Chamber of Commerce and near-unanimous support from Congressional Republicans, a remarkable demonstration of unanimity for a piece of legislation that will profoundly increase employer responsibilities and make it far more difficult for businesses to defend themselves in the tide of litigation that is certain to follow. Employers should expect more "reasonable accommodation" requests, more discrimination charges, and more lawsuits. Human resources professionals and line management, who came with time to understand the scope of employer obligations under the ADA as it previously existed, will have to learn the revised parameters of the statute and implement new procedures to ensure compliance. The Act takes effect on January 1, 2009.

A. Key Provisions of the ADAAA

The ADAAA fundamentally re-makes aspects of disability discrimination law. First, the new statute adds millions of Americans to those considered disabled. It accomplishes this in four ways:

- ADAAA Broadens the Definition of "Disability": The ADAAA provides that the term "disability" "shall be construed broadly" and specifically extends its meaning to encompass impairments that are "episodic or in remission," including those that are temporary. This rule of construction will cause trouble for employers in many cases in which the coverage issues are presented.

- ADAAA Expands the Definition of "Major Life Activity": The term "major life activity" is expanded to include a non-exclusive list of activities including "performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating

and working." The definition 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."

- Employers and Courts May No Longer Consider Mitigating Measures in Determining Whether an Individual is Disabled: Reversing the Supreme Court's decision in *Sutton v. United Air Lines, Inc., 527 U.S. 471* (1999), the ADAAA provides that the "substantial limitation" inquiry must be conducted without reference to medications, assistive devices, or other mitigating measures. Thus, an individual who, with medication, exhibits no limitations whatever in any major life function can nonetheless "disabled" within the meaning of the ADA. In support of the change, one proponent stated: "Lower courts have employed that holding to deny protection to people with muscular dystrophy, diabetes, epilepsy, and many other conditions that would have seemed clearly to fall within the heartland of the statute's coverage." The legislation's only exception is ordinary eyeglasses and contact lenses.

- ADAAA Expands the Definition of "Regarded As" Disabled: The legislation provides that an individual is "regarded as" having a disability if the employee establishes that he or she has been discriminated against because of an actual or perceived physical or mental impairment. The "regarded as" category does not apply to transitory and minor impairments where the impairment is expected to last less than six months. In a favorable development for employers, the legislation confirms that employers are not required to provide a reasonable accommodation to individuals who are regarded as disabled, something that was arguably already true under the pre-amendment ADA.

Perhaps more troubling for employers, the ADAAA provides the EEOC with new rulemaking authority that had been denied in the original ADA. This will permit the EEOC to expand ADA coverage and employer liability in currently unanticipated ways. At minimum, the EEOC will amend guidance regarding the prior ADA provision that defined "substantial limitation" of major life activity in a manner inconsistent with the ADAAAA. The ADAAA also strikes two legislative findings of the original ADA on which the Supreme Court has relied to determine whether Congress intended to include certain impairments within the Act's coverage. One finding declared the number of disabled Americans — and thus, presumably, the number intended to be covered by the Act — to be 43 million and growing at the time of its enactment; under the re-worked ADA, that number will be vastly higher. The second provision, echoing other civil rights laws, declared individuals with disabilities to be "a discrete and insular minority" subject to discrimination, implying that those not historically subject to such discrimination are not "disabled."

The purpose of these changes, according to the language's drafters, is to invalidate the Supreme Court's decisions in *Sutton, Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, and related cases that limited the coverage of the ADA's protections. In *Williams*, the Court held that "substantially limits" means "prevents or severely restricts," requiring that, to qualify as disabled, "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." The Court also held that, under this formulation, the impairment's impact must "be permanent or long term." The ADAAA explicitly overrules these precedents.

B. Consequences of the Legislation for Employers

- Higher Accommodation Costs - The ADAAA will force employers to incur greater accommodation costs as a great many more workers have become entitled to accommodations.

- Increased Litigation and Settlement Costs – In light of the expanded coverage, most employees will be able to identify an impairment and will therefore be able to claim that any adverse employment action was the product of discrimination. Even when an employment decision had nothing to do with the claimed impairment, the employer's ability to defend against such claims will be materially compromised, which will make litigation more likely, more expensive, and the outcome less certain.

C. Steps Employers Should Take Now

- Train human resources and medical personnel regarding the amendments and, in particular, the altered analysis when employees utilize mitigating measures such as medications and assistive devices to help them cope with physical or mental impairments.

- Review and revise employee handbooks and supervisor manuals to ensure that statements regarding disability and accommodation are consistent with the ADAAA.

- Document all steps taken during the interactive process and all accommodations offered, whether or not they are accepted by employees.

- Remain alert to new guidance and regulations that may be promulgated by the EEOC in response to the ADAAA amendments.

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