

Labor & Employment
Inner Workings



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ADAAA Update: How the New
Regulations Impact You & Your Business

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1990



- On signing the measure in 1990, President George H. W. Bush said:
 - “I know there may have been concerns that the ADA may be too vague or too costly, or may lead endlessly to litigation.”
 - “But I want to reassure you right now that my administration and the United States Congress have carefully crafted this Act. We've all been determined to ensure that it gives flexibility, particularly in terms of the timetable of implementation; and we've been committed to containing the costs that may be incurred.... Let the shameful wall of exclusion finally come tumbling down.”

1999

- *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999)
 - *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999)
 - *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999)
- Corrective and mitigating measures must be considered in defining “disability”

2002

- *Toyota Motor Mfg. Ky., Inc. v. Williams*, 534 U.S. 184 (2002)
- Tougher standard in determining whether employee is “substantially limited”

2007



- July 26, 2007
- ADA Restoration Act
- Substantial opposition
 - Due to attempt to remove requirement that a disability “substantially limit a major life activity”

2008

- ADA Amendments Act
- Comprehensive agreement among many groups, like
 - SHRM
 - American Diabetes Ass'n
 - National Ass'n of Manufacturers
 - American Ass'n of People with Disabilities

2008

- Sept. 11, 2008
 - Bill passes Senate by unanimous consent
- Sept. 17, 2008
 - Bill passes House by unanimous consent
- Sept. 25, 2008
 - ADA Amendments Act of 2008 signed into law

January 1, 2009

- Mitigating measures
- Expanded list of “major life activities”
- More generous standard for “regarded as” cases
- “The question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.”

ADA Amendments Act

A Side-by-Side Analysis

Scope of Definition of Disability

- ADA defined “disability” as (1) a physical or mental impairment that substantially limits a major life activity, (2) a record of such impairment, or (3) being regarded as having such impairment
- Supreme Court narrowly defines “disability”
- Lower courts followed suit
- ADAAA retains the same definition
- Purpose of ADAAA is to “reinstate the broad scope of protection” by expanding the definition of “disability”
- Nine “rules of construction” assist in determining scope of definition

So, a disability is:

1. A physical or mental impairment that substantially limits on or more major life activities;
2. A record of impairment that substantially limited a major life activity; *or*
3. When a covered entity takes an action prohibited by the ADA because of an actual or perceived impairment that is not both transitory and minor (“regarded as”)
[§ 1630.2(g)]

“Substantially Limits”

- Under ADA, impairment substantially limits if it “prevents or severely restricts the individual” from performing the activity.
- Strict interpretation to create demanding standard for qualifying as disabled—a win for employers
- New EEOC Regs: “An impairment need not prevent, or severely or significantly restrict,” a major life activity to be considered ‘substantially limiting.’
- Term is to be construed broadly in favor of expansive coverage
- No more “mini-trials” on disability assessment [§ 1630.2(j)(1)(i)-(ii)]

“Substantially Limits”

- The ADAAA requires that a determination of whether a person is substantially limited in a particular major life activity involves a comparison of the individual’s ability to the ability of “most people in the general population” not to the average person of similar age, education and experience as some courts held prior to the amendments

“Major Life Activity”

- ADA: MLA must be of “central importance to most people’s daily lives.”
- Impairment must be “permanent or long term.”
- Substantial limitation in MLA of “working,” must show inability to perform broad range or class of jobs, not just one particular job.
Sutton v. United Air Lines, 527 U.S. 471 (1999).
- ADAAA provides a new, non-exhaustive list of MLAs
- This list *includes* “the operation of major bodily functions” in the definition of an MLA
- “Major” is not to be interpreted narrowly or strictly to create a demanding standard for a finding of disability
- Even short-term conditions may be covered if sufficiently severe
- This applies to First and Second prongs of definition of disability
[§1630.2(i)(1)-(2)]

“Major Life Activity”

- Some of the major life activities expressly set forth in the ADAAA:
 - Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, working
 - Functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions
- Expanded definition encompasses many more conditions, including short-term and episodic conditions

Mitigating Measures

- Under the ADA, “mitigating measures” counted in determining whether a person was substantially limited in a major life activity
- Under ADAAA, positive effects of mitigating measures must be ignored on determining disability
- Negative effects of mitigating measures *may* be considered [§ 1630.2(j)(1)-(5)]

Mitigating Measures (Cont'd)

- Rules on mitigating measures does *not* apply to glasses or contact lenses
- Positive and Negative effects of mitigating measures considered when determining eligibility for accommodation
- Employers cannot require employee to use mitigating measure [§1630.2(j)(1)-(5)]

Episodic Conditions

- Prior narrow interpretation of ADA meant that certain impairments were not considered disabilities (e.g., epilepsy, HIV, PTSD, cancer, irritable bowel syndrome, obesity, etc.)
- Under ADAAA/New Regs, episodic impairments **or those in remission** are disabilities if they substantially limit a major life activity **when active**.
[§1630.2(j)(1)(vii)]

“Regarded As” Having a Disability

- Liability under ADA where employer regarded employee as disabled and that it substantially limited a major life activity
- Under ADAAA, employer regards employee as disabled anytime it takes a prohibited action because of an actual or perceived impairment.
[§1630.15(f)]

“Regarded As” Defenses

- Legality of Employer’s actions is a separate inquiry; finding of “disability” is not meant to be difficult
 - Individual must still be “qualified” for the job
 - Valid defense to “regarded as” claims is where impairment is “transitory and minor” (e.g., expected to last 6 months or less)
 - Objective determination
[§1630.2(l)(1)-(2); §1630.15(f)]
- If “Regarded As” disabled, not entitled to accommodation

What Do All These Changes Mean for Employers?

What Do All These Changes Mean for Employers?

- Because more conditions will meet the disability threshold, the focus for disability claims has shifted from whether a person has a disability to other considerations.

New Focuses

- Employee qualifications
- Interactive process
- Reasonableness of accommodations



Employee Qualifications

- Will be the new battle-ground for employers who litigate disability claims
- Employee has the burden to prove he or she is qualified BUT the employer has to articulate what functions are essential and what performance standards the employee is required to meet
- Measured at the time of the adverse action

Essential Job Function Analysis:

- What does the **job description** say
- Has the employer required all other employees to satisfy the same job-related requirements
- Amount of time spent performing the job function
- Consequences of eliminating or reassigning the job function
- Collective bargaining agreement provisions

Employer's Legitimate Performance Standards

- Are allowed to require employee to meet production and performance standards
- Attendance, productivity requirements, rules of conduct, safety standards, etc.
- Need to be applicable across the board
- Demonstrating business necessity will be important for employers

Interactive Process

- Going forward, the employer's process will be under the microscope
 - Obligation is triggered by either an employee request or by an employer's knowledge of the employee's disability and indications that employee may need an accommodation
 - Must engage quickly; unreasonable delay will be evidence of discrimination

Interactive Process

- Supervisors should be trained on what to do if they suspect an accommodation is needed (Contact HR!)
 - Remember, no magic words needed to trigger employer's obligation to engage in interactive process
 - Just need to say enough to put employer on notice that they need something because of some condition

Interactive Process

- Goal is to analyze the job functions at issue, identify the barriers to performing those functions, and identify possible accommodations that would eliminate those barriers
- Both the employer and employee are responsible for helping identify possible accommodations

Interactive Process

- Accommodation needs to be because of disability
- Employer is entitled to reasonable **documentation** about the individual's disability and job limitations
- An employee's failure to provide requested medical documentation or being otherwise responsible for a breakdown in the interactive process

Reasonable Accommodation

- ADA does require preferential treatment in this area
- Equal treatment is not enough when it comes to reasonable accommodation so be careful with “no exception” type policies
- BUT employer has the right to choose any accommodation that will eliminate the barrier to working

Reasonable Accommodation

- Examples of Accommodations Found To Be Reasonable:
 - Modified work schedule or location
 - Leave (so long as there is some indication that the employee will be able to return to work)
 - Reassignment to open position
 - Elimination of non-essential job functions
 - Acquiring or modifying equipment
 - Providing readers, interpreters or allowing job coaches

Reasonable Accommodation

- Examples of Accommodations Found to Be Unreasonable:
 - Indefinite leave
 - Open-ended schedules
 - Rescinding discipline
 - Reassignment if it requires promotion or bumping another employee
 - Lowering productivity standards
 - Assigning the employee to a new supervisor
 - Modification of seniority policies

Reasonable Accommodation

- Focus for employers should shift from the nature of the condition to what the employee needs (unless there is doubt the condition exists)
- If it's something that can be done without much cost or burden, just do it and document that the job accommodation was provided without an analysis of disability
- Focus on the condition only if accommodation is costly or creates an undue hardship (or doubt)

Reasonable Accommodation

- Undue Hardship Defense:
 - Historically, not much action in this area because it was harder for employees to establish a disability
 - Demonstrating undue hardship is now more important for employers who deny accommodations for employees who satisfy the lower disability threshold

Reasonable Accommodation

- Undue Hardship Considerations:
 - Nature and cost of the accommodation
 - Financial resources of facility, the number of employees at the facility, the effect on expenses and resources, or impact on the operation of the facility
 - Overall financial resources of the employer, the size of business, the number, type, and location of its facilities
 - Type of operations of the employer and the geographic separateness and administrative or fiscal relationship of the facility in question to the employer overall

Reasonable Accommodation

- Undue Hardship Defense (con't)
 - Be careful when concluding that a proposed accommodation is too costly
 - Also, effect on employee morale is typically not enough to establish undue burden
 - Better angle: Has an adverse effect on other employees or requires employer to ignore its own legitimate, performance standards
 - Must **DOCUMENT**

Questions?

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