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# **The ADA Amendments Act: Is your Company Ready?**

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## The ADA AAA – HOW WE GOT HERE

- The ADA was enacted on July 26, 1990
- “The Emancipation Proclamation of the Disabled”
- 43 Million Americans estimated to be covered
- No one expected it would be difficult to prove individuals were protected by the law
- They were wrong.
- The Supreme Court narrowly construed the ADA’s disability definition.

## **The ADAAMA – HOW WE GOT HERE**

- ADA cases were usually limited to whether the plaintiff was “disabled”
- Disability community demanded that steps be taken to “restore” the ADA’s original intent and shift focus to question of whether individuals were subjected to “discrimination”
- Ultimately, the ADA Amendments Act is passed in September 2008
- President Bush signed S.3406, not H.R. 3195
- Becomes effective January 1, 2009

# THE ADA AMENDMENTS ACT

## What it changes ...

# ADAAA – EFFECTIVE JAN. 1, 2009

## Congressional Findings and Purpose :

“The question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.”

“The definition of disability shall be construed in favor of broad coverage of individuals, to the maximum extent permitted by the terms of the ADA”

# The ADA's Disability Definition

- a physical or mental impairment that substantially limits one or more major life activities of such individual;
- a record of such an impairment; or
- being regarded as having such an impairment **(as defined in paragraph (3)).**

## Changes to “Disability” Definition

- Substantially limits
  - No longer can consider impact of mitigating measures
- Major life activities
- Regarded as prong of disability definition

# Substantially Limits

- The term “substantially limits” shall be redefined through new EEOC regulations
- An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active
- An impairment that substantially limits one major life activity need not limit other major life activities to be considered a disability

## No Mitigating Measures

- Except for ordinary eyeglasses and contact lenses, the ADAA prevents courts and employers from considering mitigating measures an individual may be using when determining whether the individual is disabled
- Therefore, it is quite likely literally tens of millions of individuals with conditions such as diabetes, high blood pressure, carpal tunnel syndrome, and cancer will have a “disability” under the ADA, even if the conditions are well controlled.

# No Mitigating Measures

- **Mitigating measures include:**
  - 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;
  - use of assistive technology;
  - reasonable accommodations or auxiliary aids or services; or
  - learned behavioral or adaptive neurological modifications.



# Major Life Activities

- **“(A) IN GENERAL-** For purposes of paragraph (1) [definition of disability], major life activities 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.”
- **“(B) MAJOR BODILY FUNCTIONS-** For purposes of paragraph (1), 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.”

# THE ADA's IMPACT

● Examples of illnesses likely to be ADA disabilities:

- Diabetes
- Hypertension
- Heart disease
- Cancer
- Depression
- Pregnancy complications

● Examples of injuries likely to be ADA disabilities:

- Broken bones that do not heal properly
- Back impairments
- Carpal tunnel or other cumulative trauma disorders
- Depression

## **“REGARDED AS” CLAIMS WILL INCREASE AND BE MORE DIFFICULT TO DEFEND**

- The ADAAA would hold an employer liable under a “regarded as” theory if the individual can show discrimination because of an actual or perceived physical or mental impairment, whether or not the impairment actually limits or is perceived to limit a major life activity.
  - When relying on “regarded as” claim, impairments cannot be “transitory” and “minor.”
  - Transitory is defined as having an actual or expected duration of less than six months.
  - Minor is not defined.
  - Plaintiff’s now only need to prove an adverse action was taken as a result of mistaken belief about an impairment or about the individual’s ability to perform his or her job

## MORE ON “REGARDED AS” CLAIMS

- The ADAAA clarifies that employers are not required to provide reasonable accommodations for individuals who are only “regarded as” being disabled
- Changes to “regarded as” claims may impact protection for many work-related injuries (e.g., carpal tunnel)
  - EEOC v. Rockwell International



# The EEOC's Notice on the ADAAA

[http://www.eeoc.gov/ada/amendments\\_notice.html](http://www.eeoc.gov/ada/amendments_notice.html)

## According to the EEOC ...

- “On September 25, 2008, the President signed the Americans with Disabilities Act Amendments Act of 2008 (“ADA Amendments Act” or “Act”). The Act makes important changes to the definition of the term “disability” by rejecting the holdings in several Supreme Court decisions and portions of EEOC’s ADA regulations. The Act retains the ADA’s basic definition of “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, it changes the way that these statutory terms should be interpreted in several ways.”

## According to the EEOC ...

- “Most significantly, the Act:
  - directs EEOC to revise that portion of its regulations defining the term "substantially limits";
  - expands the definition of "major life activities" by including two non-exhaustive lists:
    - the first list includes many activities that the EEOC has recognized (e.g., walking) as well as activities that EEOC has not specifically recognized (e.g., reading, bending, and communicating);
    - the second list includes major bodily functions (e.g., "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions");”

## According to the EEOC ...

- “states that mitigating measures other than "ordinary eyeglasses or contact lenses" shall not be considered in assessing whether an individual has a disability;
- clarifies that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active;
- provides that an individual subjected to an action prohibited by the ADA (e.g., failure to hire) because of an actual or perceived impairment will meet the "regarded as" definition of disability, unless the impairment is transitory and minor;
- provides that individuals covered only under the "regarded as" prong are not entitled to reasonable accommodation; and
- emphasizes that the definition of "disability" should be interpreted broadly.”

# Practical Strategies on Preparing for the “new” ADA

## INCREASE “INDIVIDUALIZED ASSESSMENT”

- Since more individuals will be considered to have a “disability,” the affirmative obligation to provide reasonable accommodations will increase.
- If an employer does not provide such accommodation, it may result in an independent ADA violation.
- Employers should train or retrain managers to refresh them on the requirement of interacting with employees; developing clear individualized assessment procedures for injured and ill employees are essential.



# Preparing for the “new” ADA

- Focus less on whether someone meets the ADA definition of “disability”
  - It’s a litigation issue at best, and, in most cases, a losing one.
- Prepare or update “functional” job descriptions (consider essential function analysis)
- Consider implementing a formalized process for addressing reasonable accommodation requests
- Review reasonable accommodation procedures
  - Review or develop forms, guidelines, or template letters to help facilitate communication with individuals with disabilities and their healthcare providers.

# Additional Points to Consider

- **Be mindful of potential ADA obligations and risks where they may not be obvious. For example:**
  - Prepare to explore reasonable accommodations when you know, or have reason to know, that performance or conduct problems are, or appear to be, caused by medical conditions
  - Prepare to explore reasonable accommodations with individuals on short term disability or workers' compensation programs to enhance return to work efforts.
  - Remain mindful that settling workers' comp claims may not resolve potential ADA claims absent specific language in your release.

# Recurring Operational Scenarios

**Legal Considerations and  
Best practices**

# Do you have to accommodate?

Jeremy, a job applicant, discloses that he has ADD and says he will need an accommodation in the hiring process to fill out the application in a quiet room.

- Do you have to accommodate this request?

You hire Jeremy and then you find out that he has been coming to work with alcohol on his breath. You immediately schedule a meeting with Jeremy and his supervisor Karen, but just before the meeting, Jeremy cancels, saying that he needs leave to attend inpatient treatment for alcohol addiction.

- Do you have to grant the leave? He hasn't been employed long enough to have any leave protection under state or federal leave laws.

# Do you have to accommodate?

**Jeremy returns to work but his performance is terrible. You ask if he needs anything to be successful but he denies the need for accommodation.**

- Can you performance manage him?
- What are your risks of a retaliation claim?
- What might you do to reduce the risk of a claim?

## Confronting Workplace Safety Risks

Andrew's supervisor calls to tell you that Andrew recently seems to be "stressed out." He is scaring his co-workers who are coming to the supervisor. When asked, Andrew told his supervisor that he has been diagnosed with Acute Stress Disorder and borderline Major Depressive Disorder. He also told the supervisor that the machine he operates has been talking to him and telling him to do "bad things." He explains he is not taking his prescribed medication because it makes him sleepy and he is concerned about his ability to operate equipment if he takes it.

- Should the manager have asked?
- How should you respond?

## Raising Performance Issues After Leave

Jane is a data entry specialist who is having productivity problems. At the time of the initial performance warning, she tells you that she went to the doctor and has work-related carpal tunnel syndrome that is slowing her down. She needs to go out on leave.

- Can you deliver the warning?
- Do you have to allow leave as a reasonable accommodation?
- What should you offer to Jane when she returns to work?

# Litigation Implications

## IMPLICATIONS FOR ADA LITIGATION

- More than 90% of ADA lawsuits have been won by employers, usually based on whether an employee had a “disability” under the ADA. Employers will now start litigating tougher ADA issues:
  - *What is the scope and meaning of reasonable accommodation, undue hardship, or essential job functions?*
  - *What workplace standards are "job-related and consistent with business necessity"?*
  - *What workplace risks rise to the level of "direct threats"?*

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