



Labor & Employment Client Alert
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**NEW LAW DRAMATICALLY EXPANDS SCOPE OF
THE AMERICANS WITH DISABILITIES ACT**

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On September 17, 2008, the House approved the ADA Amendments Act, which had previously been passed by the Senate on September 11, 2008. It is fully expected that the President will sign the bill into law.

The ADA Amendments Act (“ADAAA”) expands the scope of ADA protections in five (5) major respects. In doing so, the ADAAA overturns four (4) U.S. Supreme Court decisions and orders the EEOC to rewrite current ADA regulations to lessen the legal burden faced by an individual trying to show that his/her condition is a disability protected by the ADA.

1. **ADA protection is expanded to include individuals who take measures to correct for a physical or mental impairment.** The ADAAA, with certain very limited exceptions, requires individuals to be evaluated in their hypothetical “uncorrected state” in determining whether the individual is disabled under the ADA. This expansive provision overturns three (3) 1999 Supreme Court decisions: *Sutton v. United Air Lines, Inc.* (severely myopic twin sisters not disabled under the ADA because their condition was correctable with appropriate lenses); *Murphy v. United Parcel Service, Inc.* (mechanic with high blood pressure not disabled under the ADA because his condition was correctable with medication); and *Albertson’s Inc. v. Kirkingburg* (truck driver with no vision in his left eye not disabled under the ADA because he could compensate for his condition).
2. **ADA protection is expanded to cover individuals who are “regarded as” having an impairment even if the impairment does not limit or is not perceived to limit a major life activity.** This expansive provision overrules that portion of *Sutton* which narrowed coverage under the third prong of the definition of disability by holding that the employer did not regard job applicants as having a substantially limiting impairment because they were



only disqualified from a single job – global airline pilot – and there were other positions within the airline that plaintiffs could have held.

3. **The EEOC is directed to revise its overly restrictive definition of when an impairment “substantially limits” a major life activity.** The ADAAA does not define “substantially limits”, but directs the EEOC to revise its current definition which defines “substantially limits” as “significantly restricted”. In Congress’ view, this expresses too high a standard.
4. **ADA protection is expanded to include individuals who are substantially limited in one major life activity even if the impairment does not limit other major life activities. In addition, in an entirely new section, the ADAAA specifically broadens “Major Life Activities” to include, among other things, working and “Major Bodily Functions”.** These expansive provisions overturn the 2002 Supreme Court decision in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* (employee with carpal tunnel not substantially limited in major life activity of performing manual tasks because, while she could not perform a class of manual tasks associated with working on an assembly line, she was not prevented or restricted from performing tasks that are of central importance to most people’s daily lives.). In the *Toyota* case, the Supreme Court justified its decision by explaining that “the manual tasks unique to any particular job are not necessarily important parts of most people’s lives”.
5. **The ADAAA expressly states as its primary objective the goal to expand coverage to individuals who previously have been excluded. The ADAAA seemingly takes any analysis of whether an impairment is in fact a disability out of the equation when it states: “[t]he primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.”**

Clearly, Congress accomplished its goal of broadening protections for individuals with disabilities with passage of the ADAAA. The mandate expressed that whether an individual’s impairment constitutes a disability “should not demand extensive analysis” succinctly crystallizes Congress’ view that protection should be expanded to more individuals and that employers need to focus not on whether an impairment constitutes a disability, but on how an individual with an impairment can be accommodated. This is a sea change in disability law protection, and requires every



employer to rethink how they address individuals with disabilities and requests for accommodation.

ADAAA Overhauls ADA Definitions

In overturning Supreme Court decisions and adding provisions that expand the definition of disability, the ADAAA overhauls definitions which prescribe when a disability is deemed to substantially limit a major life activity, thereby broadening when disabled individuals are entitled to the protections of the Act.

Prior to the amendments, disability was defined as: (1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment.

Mitigating Measures

In the *Sutton* case, the Supreme Court, in considering the definition of disability under the first prong, concluded that a person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently “substantially limits” a major life activity. The Court explained:

Looking at the [ADA] as a whole, it is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures - - both positive and negative - - must be taken into account when judging whether that person is “substantially limited” in a major life activity and thus “disabled” under the Act.

In the ADAAA, Congress resoundingly rejects this view. A new statutory provision is added which expressly provides that corrective measures will **not** be taken into account when determining whether an individual has a disability. Specifically, the law provides:

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 - -

- (I) 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:

- (II) use of assistive technology;
- (III) reasonable accommodations or auxiliary aids or services; or
- (IV) learned behavioral or adaptive neurological modifications.

Based on this amendment, whether a person has a disability under the ADA, with limited exceptions, is based on an evaluation of the person's uncorrected state.

Regarded as Having an Impairment

The *Sutton* decision also considered the third prong of the definition of disability, which is triggered when an employer regards an individual as having an impairment. In *Sutton*, the Court concluded that the employer had not regarded job applicants as having an impairment because the applicants did not demonstrate that they were substantially limited in a major life activity. Rather, they were only able to show that there was one job, *i.e.*, global airline pilot, that they could not perform because of their poor vision. The Court reasoned that because the global airline pilot job was a single job, the allegation did not support the claim that the employer regarded the applicants as having a *substantially limiting* impairment. Again, in the ADAAA, Congress resoundingly rejects this view adding a new statutory provision that provides:

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 Act 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.**

Based on this amendment, Congress wiped out the requirement that the perceived disability substantially limit one or more major life activities. Instead, under the so-called "regarded as" prong, an individual need only show that he or she was subjected to an adverse action because of a perceived physical or mental impairment. The analysis ends there, and there is no consideration whether the perceived disability substantially limits a major life activity.



Substantially Limits Major Life Activities

In the 2002 *Toyota* case, the Supreme Court formulated a standard for determining when an individual is substantially limited in performing manual tasks. The Court concluded that, while the employee was limited in the performance of a class of manual activities affecting her ability to perform assembly line tasks at work, she did not show that she had an impairment under the ADA. This is because in order to establish a substantial limitation on the ability to perform manual tasks, an individual must show that he or she is prevented or severely restricted from doing activities that are of central importance to most people's daily lives. In this case, the Court concluded that the manual tasks unique to an assembly line job were not necessarily important parts of most people's daily lives.

Again, in the ADAAA, Congress resoundingly rejects this narrow view of what substantially limits major life activities. In response, the ADAAA contains several new provisions. First, "Major Life Activities" are expressly defined in the legislation 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". Second, in a separate provision, Congress further expands the definition of "Major Life Activities" to include "Major Bodily Functions" including "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions". Clearly, these definitions go well beyond the *Toyota* standard of "central importance to most people's daily lives".

In tandem with expanding the definition of "Major Life Activity", Congress also directs the EEOC to redefine the term "substantially limits", so that it is less restrictive than the current EEOC definition which requires a showing that the individual is "significantly restricted" in a major life activity. When all of these provisions are considered together, it is clear that under the ADAAA, there is a much lower threshold for making the determination of whether an individual is substantially limited in a major life activity.

Sweeping Mandate

The thrust of the ADAAA is clear when the specific provisions regarding mitigating measures, "regarded as" disabled, "substantially limits" and "major life activities" are considered. Indeed, Congress' intent to vastly expand the scope of the ADA is clear in the preamble provision to the Act which specifically directs courts to redirect their focus when reviewing claims under the ADA. According to Congress, the focus should not be directed towards determining whether an individual with an



impairment has a disability. Rather, the focus needs to be directed towards examining whether employers have complied with their ADA obligations. This, more than any of the specific provisions, loudly and clearly announces Congressional intent. Accordingly, employers need to be prepared to incorporate these expanded provisions of the ADA into the manner in which they address issues involving individuals with disabilities.

As a first step, employers need to be mindful that while a physical or mental condition may not appear to be substantially limiting, either because the employee is using a corrective measure or because his or her work is not being impacted, the employee may still be entitled to the protection of the ADA. Such protection may warrant a reasonable accommodation or at least initiation of the interactive process to consider reasonable accommodation.

As a second step, employers need to be mindful of how their actions can be construed by employees either because employers mistakenly believe that employees have an impairment when they do not or that a nonlimiting impairment substantially limits a major life activity when it does not. In either case, employees may be able to establish a “regarded as disabled” claim because of the employer’s perceptions. As the ADAAA provides, the employee need only show that the employer regarded him or her as impaired, and not that the impairment substantially limits a major life activity.

Finally, employers should not make quick decisions regarding whether an employee suffers from an impairment, whether an employee is substantially limited in a major life activity, and/or whether an employee can perform the essential functions of the job with or without reasonable accommodation. The answers to all of these questions are impacted by the new ADAAA and likely warrant consultation with legal counsel.

If you have any questions about this guidance, the ADA, or any other employment law topics, please contact Kathryn Murphy, Thomas Colomb or the Labor & Employment attorney assigned to your account at Murphy, Hesse, Toomey & Lehane, LLP at 617-479-5000.

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