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Congress Amends the Americans with Disabilities Act

By Barry H. Uhrman

On September 17, 2008, the U.S. Senate passed the ADA Amendments Act of 2008 ("the Act"), containing its proposed amendments to the Americans with Disabilities Act ("ADA"). The Senate returned the bill to the U.S. House of Representatives, which approved the Senate's version of the bill less than a week later. President George W. Bush has stated he will sign the bill into law, and the legislation is set to take effect on January 1, 2009.

The ADA prohibits covered employers from discriminating on the basis of disability and requires that they make reasonable accommodations for disabled employees. To be classified as "disabled" under the ADA, the employee must show that a disease or condition "substantially limits a major life activity."

The ADA has not been significantly legislatively modified since it was originally signed into law in 1990. The Act, however, makes several important changes to the ADA. Under the Supreme Court's decision in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), courts were required to consider the impact of mitigating measures like medication, hearing aids, and assistive devices, when determining whether an individual was disabled under the ADA and had an impairment that affected a major life activity. The Act overturns the Sutton decision, provides that the definition of "disability" is to be construed in favor of "broad coverage of individuals" to the maximum extent permitted by the terms of the ADA, and prohibits considering mitigating measures when determining whether a condition substantially limits an individual's major life activities. The Act, however, specifically excludes eyeglasses and contact lenses from the list of mitigating measures that should not be considered.

The Act also addresses the U.S. Supreme Court's interpretation of the ADA's "substantially limits" standard in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002). The Supreme Court held that the term "substantially limits" required that a disease or condition prevent or severely restrict a major life activity before an employee could be deemed disabled. The Act provides that defining the term "substantially limits" as "significantly restricted" is inconsistent with Congressional intent and expresses too high a standard. The Act states that the determination of whether an individual's impairment is a disability under the ADA "should not demand extensive analysis." An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability. The Act also directs the Equal Employment Opportunity Commission to draft new regulations requiring a less demanding standard for an individual to establish a substantially limiting physical or mental impairment.

Finally, the Act lowers the standard for individuals claiming they are "regarded as" disabled. Under the Act, employers may be liable for disability discrimination 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. This significantly eases the burden of proof to establish a "regarded as" claim under the ADA.

In a mild victory for employers, however, the Act clarifies that "regarded as" claims cannot be based on transitory and minor impairments where the impairment is expected to last less than six months. The Act also provides that employers are only required to provide reasonable accommodations for individuals who can demonstrate they have an impairment that substantially limits a major life activity, or a record of such impairment. Employers do not need to provide reasonable accommodations to individuals who are regarded as disabled, which is consistent with existing Ninth Circuit case law.

The Act will undoubtedly expand the number of individuals who are considered disabled and likely will make defending ADA claims more difficult for employers. Employers must understand their legal obligations and requirements with respect to disabled employees. Jones, Skelton and Hochuli's Employment Law Practice Group will continue to keep you apprised of all future developments concerning the Americans with Disabilities Act. ◆

About The Author

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Mr. Uhrman joined the firm in 2007 and concentrates his practice on employment law, complex litigation and governmental liability. He has successfully defended Title VII, ADA, ADEA and FMLA cases for Fortune 500 clients and public and private sector employers. Mr. Uhrman has extensive experience revising sexual harassment and other employment policies for employee handbooks. In addition, he has authored articles and seminar materials regarding leaves of absence under the ADA and FMLA.

Mr. Uhrman has also represented clients in other areas of employment law, with an emphasis on intellectual property and trade secrets. He has successfully defended multi-million dollar copyright infringement, defamation and trade secrets cases. Mr. Uhrman has also represented private sector employers in cases involving employment law torts, including interference with business advantage, violation of the right of publicity, and tortious interference with contractual relationships.

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