

President Bush Signs the ADA Amendments Act, Dramatically Expanding the Americans with Disabilities Act

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On September 25, 2008, President Bush signed into law the ADA Amendments Act of 2008 (ADAAA) (P.L. 110-325), which significantly amends the Americans with Disabilities Act of 1990 (the "ADA"). The ADAAA is effective January 1, 2009.

Title I of the ADA prohibits discrimination on the basis of physical or mental disability in employment and requires employers to make reasonable accommodations that are necessary to permit persons with disabilities to perform the essential functions of a job unless an accommodation would pose an undue hardship. Coverage under the ADA turns on the threshold question of whether an individual has a "disability." The ADA defines the term "disability" as a physical or mental impairment that "substantially limits one or more major life activities," a "record of such an impairment," or "being regarded as having such an impairment." The ADAAA overturns the Supreme Court's decisions in *Sutton v. United Airlines, Inc.*, 521 U.S. 471 (1999) and *Toyota Motor Manufacturing v. Williams*, 534 U.S. 184 (2002), which adopted a narrow interpretation of the term "disability." This narrow interpretation had the effect of excluding many individuals from the ADA's coverage.

The Supreme Court in *Sutton* had held that in determining whether an impairment substantially limits a major life activity, the ameliorative effects of mitigating measures must be considered. The ADAAA rejects this interpretation, stating that the analysis must be conducted without regard to mitigating measures except in the case of ordinary eyeglasses or contact lenses that are intended to *fully* correct a person's vision. The Supreme Court in *Toyota Motor Manufacturing* had held that the term "substantially limits" should be interpreted strictly, to create a demanding standard for qualifying as disabled. The ADAAA rejects this standard and states that the definition "shall be construed in favor of broad coverage of individuals under this Act." The ADAAA further states that "it is the primary intent of Congress that the 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." (Emphasis added.)

The ADAAA also contains a new statutory definition of "major life activity" which not only includes the activities presently listed in the Equal Employment Opportunity Commission's regulations but also includes eating, sleeping, standing, lifting, bending, reading, thinking, concentrating, communicating, and the operation of "major bodily functions" (e.g., the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions). The addition of thinking and concentrating as major life activities may raise a host of reasonable accommodation issues as successful performance of most jobs presumably requires these activities.

With regard to discrimination against persons who are "regarded as" disabled but who do not actually have a disability, the ADAAA expands the coverage here as well. The ADAAA provides that individuals bringing "regarded as" claims need only show that they were subjected to an action prohibited by the ADA because of an actual or perceived impairment, *regardless of whether the impairment was perceived to "substantially limit" them in a major life activity.* Because courts have previously held that to prevail under the "regarded as" prong of the ADA, a plaintiff must show that the employer regarded the individual as having an impairment that substantially limits a major life activity, this new provision will remove a key hurdle for plaintiffs asserting "regarded as" claims. One helpful point for employers is that the ADAAA makes clear that individuals with "transitory and minor" impairments are not covered under the "regarded as" prong of the ADA, and employers are not required to provide reasonable accommodations for persons who are only "regarded as" having, but do not actually have, a disability. The ADAAA defines transitory as lasting less than six months.

The ADAAA also expressly defines readers and interpreters as included in "Auxiliary Aids" and "Services." This is important, because the cost of readers and interpreters can be quite significant and it will be argued that the ADAAA's references to these services indicates they should be considered reasonable accommodations.

The ADAAA's expansion of the definition of a disability will also impact the obligations of public accommodations that are covered under Title III of the ADA. For example, Title III of the ADA requires public accommodations such as private academic institutions to make reasonable modifications in their policies, practices and procedures to accommodate individuals with disabilities unless such modifications would fundamentally alter the nature of the goods, services, facilities, or privileges or accommodations involved. Because mental impairments that substantially limit thinking, concentration, memory, and other brain functions are now disabilities that must be accommodated, private academic institutions must reassess whether and under what circumstances their academic requirements must be modified to comply with the ADA.

The obvious impact of the ADAAA will be to expand the coverage of the ADA to many more individuals, even those whose impairments have little or no actual impact on their major life activities due to mitigating measures. It will also substantially ease the burden for ADA plaintiffs. A rise in the number of ADA lawsuits against employers is likely and defending such lawsuits will be more challenging. Employers will necessarily face the duty to engage in the interactive process far more frequently and be forced to assess whether various accommodations are reasonable or if they are undue hardships. This will be particularly true for impairments affecting mental processes including concentrating and thinking. To ensure that such requests are properly handled and to minimize litigation exposure, employers should carefully review their ADA policies and how they handle ADA issues. Supervisory training on the dramatically expanded scope of the ADA will also pay dividends in preventing ADA claims. Reviewing job descriptions to ensure that they accurately identify all essential job functions will be critical, particularly in dealing with requests for accommodations from employees who are limited in their ability to communicate, think, remember, or concentrate.

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Mr. Morris and Ms. Vu are Co-Directors of the Firm's Disability Practice Group and are available to assist with any disability related matters whether employment, housing, state or local government or public accommodation.

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