

October 2008 Labor and Employment Update

On September 25, 2008, President Bush signed into law the Americans with Disabilities Act Amendments Act of 2008 (ADAAA). The ADAAA overturns several recent United States Supreme Court decisions and, in doing so, expands the scope of the Americans with Disabilities Act (ADA). The ADAAA will take effect on January 1, 2009, and will be the first landmark change to the ADA since its passage in 1990.

The following is a brief summary of the most significant changes to the ADA that will result from the passage of the ADAAA.

A Broader Definition of "Disability" and a Prohibition Against Further Consideration of Virtually All Mitigating Measures

The ADAAA marks Congress' attempt to return the primary focus in ADA cases to whether employers have complied with their obligations under the law. According to Congress, the question of whether an individual's impairment is a disability under the ADA is one that should not demand extensive analysis. One of the major ways in which the ADAAA fulfills this Congressional intent is by broadening the definition of who can qualify as "disabled" for purposes of the ADA.

The ADAAA provides that the definition of "disability" under the ADA should be "construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act." As an example of just how broadly coverage under the ADA is to extend, the ADAAA provides that "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." Moreover, the ADAAA legislates away the court-mandated emphasis on the effects of mitigating measures when determining whether an individual is "disabled" for purposes of the ADA.

More specifically, the ADAAA overturns *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases which held that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures (e.g., medication, prosthetic devices, hearing aids, mobility devices, etc.). Under those cases, a person whose physical or mental impairment is corrected by medication or other measures would not be

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deemed to have an impairment that substantially limits a major life activity for purposes of the ADA.

Beginning on January 1, 2009, the effects of most mitigating measures will no longer be a permissible consideration when determining whether an individual is "disabled" under the ADA. Indeed, for purposes of the ADA, the only mitigating measures that an employer will still be able to consider will be the use of ordinary eyeglasses and contact lenses.

The imminent prohibition against consideration of most mitigating measures for ADA purposes is a significant change. That change will require a corresponding change in the policies/practices of many employers who presently do consider such measures.

"Regarded As" Having a Disability

The ADAAA significantly expands the ADA by prohibiting adverse employment actions based on the perception that an individual suffers from a physical or mental impairment, *whether or not the impairment actually limits or is perceived to limit a major life activity*. Therefore, plaintiffs will no longer have to establish that they are regarded as being substantially limited in a major life activity in order to be regarded as "disabled." Rather, they will simply need to demonstrate that they are regarded as suffering from a non-minor impairment that is more than transitory (i.e., they will have to demonstrate that they suffer from a non-minor impairment with an actual or expected duration of longer than six months).

Impact of the Act

The ADAAA will have the effect of increasing the number of employees covered under the ADA. Plaintiffs, seeking to enforce their greater legal rights, will likely test the limits of the amended ADA in court. Employers should prepare for this eventuality now by scrutinizing their existing policies and procedures to ensure that they are appropriate under the revised ADA.

If you would like further guidance or have any questions on the implications of the ADAAA, please contact an attorney in Reinhart's Labor and Employment Department.

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