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ADA Amendments Will Expand Employee Protections

Law360, New York (September 09, 2008) -- With strong bipartisan support, the United States Congress appears ready to enact new legislation this month amending the Americans with Disabilities Act ("ADA").

It is intended that the amendments will "restore protection for the broad range of individuals with disabilities as originally envisioned by Congress".

Notably, these amendments to the ADA expressly reject certain Supreme Court rulings that narrowed the definition of disability, eliminating protection for many individuals "in ways not expected or intended by Congress."

Known as the "ADA Amendments Act of 2008" ("ADAAA"), the new law clarifies some key terminology used in the definition of "disability," sets forth standards to consider in determining if one is an individual with a "disability," redefines and broadens the scope of "major life activities," and provides new rules of construction.

On June 25, 2008, the House of Representatives approved legislation, H.R. 3195 amending the ADA. Since that time, the Senate has made further refinements to that Bill, and, in its view, eliminated certain potential ambiguities in what is now known as S. 3406.

The new Bill, which claims more than sixty-five (65) sponsors, including Senators Hatch, McCain, Harkin, Obama and Kennedy, will be presented to the Senate in September and it is anticipated will win quick Senate approval.

Thereafter, the Senate's Bill is expected to move quickly through the House so that it can be voted upon before the election recess.

The White House has signaled that President George W. Bush will sign the new law amending the landmark ADA legislation. If enacted, the amendments to the ADA will become effective in January 2009. This article describes the changes that Congress

has incorporated in the ADAAA and discusses the potential impact of the new law on the workplace.

Overview, Findings And Purposes Of The ADAAA

While variations exist between the House and Senate Bills, there is universal agreement in Congress that a series of United States Supreme Court decisions, including Sutton v. United Air Lines Inc. and Toyota Motor Manufacturing, Kentucky Inc. v. Williams, effectively narrowed the definition of "disability" under the ADA, were wrongly decided, set a restrictive standard for qualifying as disabled within the meaning of the ADA, ignored Congressional intent as expressed in the 1989-1990 House and Senate Committee Reports, and prevented individuals that Congress unquestionably intended to cover from ever getting a chance to prove their case.

As expressed in both the House and Senate Bills, the ADAAA is intended to redress the broad array of federal court cases that have "created an inappropriately high level of limitation necessary to obtain coverage under the ADA," resulting in dozens of decisions holding that "people with a range of substantially limiting impairments are not people with disabilities."

Throughout the Congressional deliberations, there was broad agreement that the federal disability law return to the broad coverage standard that Congress envisioned when it passed the ADA in 1990, and both Bills incorporate this intent in their "Findings" and "Purposes" sections which will, in turn, be incorporated directly in the ADA itself.

Defining Disability

The ADA defines "disability" 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. While the amendments fundamentally maintain the ADA's "disability" definition, the ADAAA clarifies the meaning intended for each prong of the definition, and overturns the restrictive definitions of "disability" found in the Supreme Court's Sutton and Williams holdings, as well as their companion cases and progeny.

At the same time, the ADAAA broadens the definition of "major life activities" but fails to define "substantially limits," referring that task to the EEOC which is directed to amend its Regulations reflecting the "Findings" and "Purposes" of the ADAAA.

Substantially Limits And Mitigating Measures

In Williams, the Supreme Court concluded that to be substantially limited in a major life activity, an "individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."

The ADAAA rejects Williams' demanding "substantially limited" standard.

While the Senate's Bill fails to define the term "substantially limits," the Senate forthrightly states in its Bill that the current EEOC Regulations that define the term "substantially limits" as "significantly restricted" are "inconsistent with congressional intent, by expressing too high a standard."

Thus, the EEOC is directed to revise its regulations to define "substantially limits" consistent with the findings and purposes of the ADAAA.

Notably, the House Bill endeavored to define "substantially limits" as "materially restricts." As envisioned under the House Bill, "materially restricts" was meant to be "less than 'severely restricts' and less than 'significantly restricts' but more serious than a moderate impairment which would be in the middle of the spectrum."

In choosing not to adopt the House Bill's definition of "substantially limits," and instead directing the EEOC to issue Regulations defining the term consistent with the ADAAA's congressional intent and the standard used by the courts under the Rehabilitation Act, it is likely that EEOC's forthcoming Regulations will incorporate the House Committees' considered views on this issue.

With respect to mitigating measures, the ADAAA rejects the Supreme Court's decision in Sutton that a determination of disability requires consideration of the measures taken to correct for or mitigate a physical and mental impairment, and whether the individual, in light of those ameliorative measures, remains substantially limited in a major life activity.

Now, the ADAAA clearly states that a determination of whether an individual is substantially limited in a major life activity should be made without regard to mitigating measures (e.g., medication, medical supplies, equipment, and other auxiliary aids or services). The only exceptions noted that may be considered are common eyeglasses or contact lenses.

The ADAAA also provides that if an employer uses qualification standards or other selection criteria that are based on uncorrected vision standards, the employer had better be prepared to demonstrate that such requirements are job-related and consistent with business necessity.

Significantly, the ADAAA provides that the first prong of the "disability" definition is to be construed broadly, that the determination as to whether an impairment is a disability "shall be made without regard to the ameliorative effects of mitigating measures," that an impairment that limits but one major life activity is sufficient to trigger ADA's protections, and that an impairment that is episodic or in remission is still a disability if, when active, it would substantially limit a major life activity.

Major Life Activities

With respect to "major life activities," the ADAAA identifies an illustrative list of activities of central importance to most peoples lives including, but 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.

The ADAAA also clarifies that "major life activities" includes "the operation of major bodily functions," such as normal cell growth, endocrine functions, neurological functions, digestive functions, respiratory functions and reproductive functions.

Additionally, while courts interpreting the ADA have required that individuals show that an impairment substantially limits more than one life activity, the ADAAA expressly provides that an impairment need only substantially limit one major life activity to be considered a disability.

Regarded As Having An Impairment

Turning to the third prong of the "disability" definition, Section 4 of the ADAAA clarifies the meaning of "regarding as having such an impairment."

Under the amended law, an individual satisfies the disability definition if s/he establishes that s/he has been subjected to prohibited action based on an actual or perceived physical or mental impairment.

Such an individual (who is "regarded as" having an impairment) need not establish a substantial limitation to a major life activity. Thus, Congress rejected that part of the Supreme Court's decision in Sutton which held that a covered entity, to be liable under this prong, "must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting."

Further, under the ADAAA, the "regarded as" prong does not apply to impairments that are transitory (i.e., an actual or expected duration of six months or less) and minor. Congress included this provision to make clear that the ADA's protections do not extend to common ailments such as the flu or a cold.

Accordingly, so long as an individual's impairment is not transitory and minor, such individual seeking protection under the "regarded as" prong need only show that the covered entity thought he or she had an impairment (whether perceived or actual) and that they were subjected to a prohibited act under the ADA on the basis of that impairment.

Finally, and importantly, the Amendments make clear that employers do not have to make reasonable accommodations in cases falling under the “regarded as” prong of “disability.”

Rules Of Construction

The ADAAA sets forth various rules of construction that will be of interest.

First, that the standards for determining eligibility for benefits under state workers’ compensation laws and/or disability benefits programs are not affected by the ADA.

Second, the Amendments prohibit reverse discrimination claims by explaining that claims based on a lack of disability are not actionable.

Third, the ADAAA makes clear that despite the broader class of individuals covered under the “regarded as” prong, employers need not provide a reasonable accommodation to those “regarded as” disabled.

Therefore, accommodations need only be made to an individual who establishes coverage under the first or second prongs of the definition of “disability.”

Regulatory Authority

Finally, the ADAAA clothes the EEOC, Attorney General and Secretary of Transportation with authority to issue Regulations implementing the definitions in Sections 3 and 4 of the Amendments consistent with the broad purposes expressed by Congress.

The Amendments clarify that these designated agencies have the authority to issue Regulations implementing the definition of “disability” and that courts should give such Regulations and Guidance their proper deference.

What Impact Will The ADAAA Have On The Workplace?

The expanded definition of “disability” under the ADAAA will increase the number of individuals in the workplace who are protected by the federal law.

While the new law should not require companies to revise their ADA employment policies and practices already in place, employers must understand that the range of coverage and protections afforded under the amended ADA will expand significantly, while defenses and employer modes of attacking disability claims are narrowed.

In our view, this expansion in the federal disability law, will have little impact for employers in a number of states, such as California, New Jersey, and New York, where state and/or local laws are even more expansive in their coverage and protections.

Under the amended federal law, for employees or applicants claiming a disability, assuming the employer requests substantiation, some documentary evidence from a health care practitioner supportive of the disability claim and reflecting the limitation(s) resulting from the impairment will still be needed under the ADAAA.

However, under the ADAAA, its broad coverage and protections remove the focus from a "disability" inquiry, and place it squarely on the interactive process, such that employers must be prepared to engage applicants/employees in a reasonable accommodations conversation and, as appropriate, provide qualified applicants or employees with accommodations to perform their essential job duties.

With a January 2009 effective date looming, employers should review their policies and practices governing the ADA's interactive process, and focus on their reasonable accommodations procedures.

As we view the landscape, challenges under the amended ADA are likely to arise with respect to reasonable accommodations issues. In addition, we would not be surprised to see an uptick in litigation involving the employer's "undue hardship" defense and individuals claiming to be "regarded as" disabled.

Initially, we may also see an increase in litigation arising under the first two prongs of the "disability" definition, in the event employers resist the broad coverage envisioned by Congress as incorporated in the ADAAA.

Consequently, in the brave new world of ADAAA, keeping records or "logs" of requests made, and accommodations denied and/or provided, along with some evidentiary back-up for the decisions made, warrants every employer's attention.

Finally, refresher training of human resources professionals and line management as to ADA's requirements concerning the interactive process and reasonable accommodations obligations should also be considered.

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