

Client Alert

A report
for clients
and friends
of the Firm

September 2008

Congress Amends the Americans with Disabilities Act; President Bush Expected to Sign New Law

On September 17, 2008, the U.S. House of Representatives approved the Senate's version (S. 3406) of the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA") sending the legislation to the White House for enactment. It is widely anticipated that President Bush will sign the legislation, clearing the way for the amendments to take effect on January 1, 2009. Previously, on September 11, 2008, the Senate approved the ADAAA by unanimous consent. Earlier, on June 25, 2008, the House of Representatives approved a similar, but slightly different, Bill (H.R. 3195) by an overwhelming vote of 402-17.

The new law effectively rejects a host of U.S. Supreme Court rulings, and their progeny in the lower courts, that narrowed the definition of "disability" contained in the Americans with Disabilities Act ("ADA"). The ADAAA will "carry out the ADA's objectives of providing 'a clear and comprehensive national mandate for the elimination of discrimination'" "on the basis of disability" and "by reinstating a broad scope of protection to be available under the ADA." As approved, "it is the intent of Congress" that the primary object of attention in disability cases be focused on whether covered entities have complied with their obligations to reasonably accommodate disabled applicants/employees.

In this Client Alert, Proskauer's ADAAA Task Force highlights the significant changes being made to the federal disabilities law.

I. ADAAA At A Glance

The ADAAA:

- Amends the definition of "disability" by providing clarification to its terminology;
- Rejects several Supreme Court rulings that narrowed the definition of "disability";
- Lowers the bar an employee must clear to show that his/her impairment is "substantially limiting";
- Prohibits consideration of mitigating measures when determining whether an impairment constitutes a disability;
- Provides that impairments that are episodic or in remission must be assessed in their active state;
- Describes a non-exhaustive list of "major life activities" and expands the meaning of this phraseology by identifying "major bodily functions" that are incorporated therein;
- Clarifies that an individual comes within the law's "regarded as" protective umbrella by showing that s/he has been discriminated against because of an actual or perceived physical or mental impairment, whether or not the impairment limits a major life activity;
- Provides that employers are not required to provide a reasonable accommodation to individuals who are "regarded as" disabled;
- Reiterates that impairments that are minor and transitory are NOT protected disabilities under federal law (Beware of your state/local law!);

- Directs the EEOC and other federal regulatory authorities to issue Regulations implementing the definition of “disability” consistent with sections 3 and 4 of the ADAAA. This change will have repercussions, as well, for Title III compliance;
- Re-emphasizes that an employee continues to bear the burden of proving that s/he is a *qualified* individual with a disability;
- Clarifies that a person *without* a disability *cannot* bring an action for reverse discrimination (on the basis of not having a disability); and
- Leaves untouched several important provisions of the ADA, including those addressing reasonable accommodations, the interactive process, individualized assessments and undue hardship.

Be sure to look for Proskauer’s invitation to its ADAAA Breakfast Seminar, scheduled for October 16, 2008.

II. CHANGES UNDER THE ADAAA

A. Definition of “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 takes several steps to achieve a broader, more generous interpretation and application of these terms.

I. “Substantially Limits” Standard

Turning to the first prong of the “disability” definition, although the legislation does not define the term “substantially limits,” its unique drafting lowers the bar an employee must clear to establish protection under the ADA by requiring that the courts and agencies look to the language in the “Findings and Purposes” section when interpreting the ADA. To determine whether an individual’s impairment meets the definition of “disability,” the legislation directs that:

The term “substantially limits” shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.

In turn, the legislation’s “Findings and Purposes” explicitly rejects the strict standard created by the Supreme Court in *Toyota v. Williams*, 534 U.S. 184 (2002) (“*Williams*”), and provides that the term “substantially limits” should be viewed

broadly. 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.” According to both the House Committee Reports, and the Senate’s Statement of the Managers Report, the Supreme Court’s holding in *Williams* set an inappropriately high threshold for employees to establish rights and be afforded protection under the ADA by effectively defining “substantially limits” to mean “prevents or severely restricts.” The Senate’s Statement of Managers Report makes clear that the test is not to be a demanding standard but rather one that ensures “appropriately broad coverage under this Act.” Thus, the 2008 amendments delete two findings in the ADA which led the Supreme Court to narrow the definition of “disability.” The findings, now eliminated, are the references that some 43 million Americans suffered from some disabling condition and that individuals with disabilities are a discrete and insular minority. The ADAAA also specifically provides in its Rules of Construction Regarding the Definition of Disability (“Disability Rules of Construction”) that “[t]he definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.”

Significantly, as well, the Disability Rules of Construction make clear that an impairment that is episodic or in remission must be considered a disability so long as that impairment – in its active state – would be substantially limiting. Finally, the ADAAA also directs the Equal Employment Opportunity Commission (“EEOC”) to revise its regulations to define “substantially limits” consistent with these “Findings and Purposes” and categorically rejects the EEOC’s existing regulation defining “substantially limits” as “significantly restricted” as “inconsistent with congressional intent by expressing too high a standard.” The Attorney General (Title III) and Secretary of Transportation (Title II) are also directed to re-issue regulations compliant with ADAAA’s “disability” definition.

2. Major Life Activities

The ADAAA now provides a nonexclusive list of major life activities, including “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working.” “Major life activities” now also include the “operation of major bodily functions,” such as functions of the “immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions.”

The legislation makes it easier for people with disabilities to be covered under the ADAAA because it effectively expands the definition of disability to include many more major life activities, as well as creating a new subcategory of major bodily functions. Additionally, the ADAAA's Disability Rules of Construction expressly provide that an impairment need only substantially limit *one* major life activity to be considered a disability. In so stating, the ADAAA rejects that part of the Supreme Court's holding in *Sutton v. United Airlines*, 527 U.S. 471 (1999) ("*Sutton*") to the effect that an individual must be unable to work in a broad class of jobs in order to be considered substantially limited.

3. Mitigating Measures

The ADAAA clarifies that the determination of whether an individual has a disability is to be made without taking into account the ameliorative effects of any mitigating measures (e.g., medication, medical supplies, equipment, or appliances) on an individual's impairment. Prescription eyeglasses and contact lenses are excluded, and may be considered when assessing whether an individual is "substantially limited" in a major life activity. Thus, 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 mandates that a determination of whether an individual is substantially limited in a major life activity is to be made *without regard* to mitigating measures.

4. "Physical Impairment" or "Mental Impairment"

The ADAAA does not provide a definition for the terms "physical impairment" or "mental impairment." According to the Senate's Statement of Managers Report, it is expected that the current regulatory definition of these terms, as promulgated by agencies such as the EEOC, the Department of Justice ("DOJ") and the Department of Education Office of Civil Rights ("DOE OCR") will not change.

B. "Regarded As" Having an Impairment

The ADA protects individuals who are "regarded as" having an impairment. The new law clarifies that an individual is protected under the "regarded as" prong so long as s/he establishes that s/he has been subjected to prohibited action based on an actual or perceived physical or mental impairment. Notably, as amended, an individual need not establish s/he is substantially limited in a major life activity to be protected under the "regarded as" prong of "disability." This section of the legislation expressly rejects the Supreme Court's decision in *Sutton*, which held that an employer "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" to be liable under the "regarded as" prong of the ADA.

Notwithstanding the above, the amendments make clear that individuals who are "regarded as" having impairments that are minor and transitory (*i.e.*, an actual or expected duration of six months or less) are not protected under the ADAAA. Importantly, as well, although a broader class of individuals may be covered under the "regarded as" prong, the ADAAA makes clear that employers need *not* provide a reasonable accommodation to those "regarded as" having an impairment.

C. Discrimination on the Basis of Disability

The ADAAA amends Section 102 of the ADA to mirror the structure of nondiscrimination protection in Title VII of the Civil Rights Act of 1964, as amended, changing the language of Section 102(a) from prohibiting discrimination against a qualified individual "with a disability because of the disability of such individual" to prohibiting discrimination against a qualified individual "on the basis of disability." As explained by the Senate's Statement of the Managers Report, in restructuring the ADA's language to mirror Title VII's protective standard, the ADAAA ensures that "the emphasis in questions of disability discrimination is properly on the critical inquiry of whether a qualified person has been discriminated against on the basis of disability, and not unduly focused on the preliminary question of whether a particular person is a 'person with a disability.'" Nevertheless, at all times, pursuant to the *Burdine* burden of proof formulation, it is the employee's burden to establish he or she is a *qualified* individual with a physical or mental impairment who can perform the essential functions of the job.

III. IMPLICATIONS FOR EMPLOYERS

The ADAAA will undoubtedly increase the number of disabled individuals in the workplace, and employers will now need to consider individuals with conditions controlled by medication or other mitigating measures as coming within the protective ADA umbrella. While the new law should not require companies to revise their disability employment policies and practices already in place, coverage and protections afforded under the amended ADA will expand significantly.

What will this mean for employers? In our view, this expansion in the federal disability law should 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, employees or applicants claiming a disability still must be "qualified," and

they will have to come forward with some documentary evidence from a health care practitioner supportive of the disability claim and reflecting the limitation(s) resulting from the impairment. As the ADAAA places the emphasis of inquiry squarely on the interactive process, 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 disability policies, practices, and complaint procedures. Refresher training on the ADA's interactive process and reasonable accommodations obligations are steps we recommend reviewing with Human Resources professionals and line management. As we view the landscape, challenges under the amended ADA are likely to arise with respect to reasonable accommodations issues and individuals claiming to be "regarded as" disabled. Initially, too, we may see a surge in litigation arising under the first prong 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 the ADAAA, we recommend keeping records or "logs" of disability claims, accommodations requests, accommodations provided and/or denied, along with some rationale for the decisions made.

If you have any questions regarding ADAAA compliance or training, please contact any of the attorneys listed herein who are members of Proskauer's ADAAA task force.

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