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An Analysis of the Recent Amendments and Guidance for Employers

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Under the Americans with Disabilities Act Amendments Act of 2008 (ADAAA), nearly everyone with any form of mental or physical disability is considered disabled. The focus now is on whether the employee can perform the essential functions of the job with or without a reasonable accommodation. The authors of this article advise employers to take strategic steps now to ensure compliance and minimize liability under the ADAAA.

On September 25, 2008, President George W. Bush signed into law the Americans with Disabilities Act Amendments of 2008 (the ADAAA). The ADAAA amended the Americans with Disabilities Act of 1990 (ADA) and became effective on January 1, 2009. Generally stated, the ADA prohibits discrimination or retaliation against a person with a disability by an employer. The ADAAA changed the landscape for employers by significantly broadening the statutory definition of "disability." Under the ADAAA, nearly everyone with any form of mental or physical impairment is considered disabled. The new, changing landscape poses obvious challenges for employers.[1] But these challenges are not insurmountable. Employers can minimize their exposure by implementing policy changes to ensure compliance with the latest developments under the ADA. These same policy changes might also make for a more efficient organization.

THE FUNDAMENTALS OF AN ADA CLAIM

The ADA provides that a covered employer may not discriminate or retaliate against a qualified individual on the basis of a disability. A covered employer includes both private and government employers that employ 15 or more employees for each working day in each of

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20 or more calendar weeks in the current or preceding calendar year.[2] A qualified individual includes any person with the skill, experience, or education to perform the essential functions of his or her job, with or without a reasonable accommodation from his or her employer.[3] An accommodation is a modification to the work environment that would allow an employee or prospective employee to perform a particular job. An individual is considered to have a disability for purposes of the ADA under three scenarios:

1. Where the individual in fact has a physical or mental impairment that meets certain conditions;

2. Where an individual has a "record of" having such an impairment; or

3. Where an employee is treated as or "regarded as" having an impairment whether or not the employee has an impairment.[4]

REVISITING THE PAST TO BETTER UNDERSTAND THE PRESENT

To understand the significance of the ADAAA on employers, it is important to understand the ADA as it existed prior to amendments. The original purpose of the ADA, enacted in 1990, was to protect the then-estimated 43 million Americans with some form of physical or mental disability.[5] In the decades following enactment, however, the United States Supreme Court narrowed the reach of the ADA through its interpretation of the meaning of disability. Some scholars suggest that Supreme Court cases narrowed the ADA to protect only about 13.5 million Americans.[6] In response, Congress passed the ADAAA to overturn a number of these cases, most notably *Sutton v. United Air Lines, Inc.*, and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams.*

Sutton v. United Air Lines

In *Sutton v. United Air Lines*,[7] near-sighted twin sisters with 20/20 corrected vision sued United Airlines because the company refused to hire them as commercial airline pilots. The company refused to hire the twins because they could not satisfy the company's uncorrected vision requirements. The United States Supreme Court affirmed dismissal of the disability discrimination claims because, considering the mitigative effect of eyeglasses, the twins were not disabled. Following this decision, lower courts from around the country extended this analysis and considered all kinds of mitigative measures in concluding that individuals were not disabled. This case gave employers attractive "coverage" arguments, meaning whether the individual was disabled and thus covered by the ADA.

Toyota Motor Manufacturing, Kentucky, Inc. v. Williams

In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,[8] the plaintiff suffered from carpal tunnel syndrome and was unable to perform certain tasks related to her job on the line of a Toyota plant. She requested an accommodation that would have altered her job duties to exclude the tasks that she was not able to perform. Toyota refused and she brought a lawsuit under the ADA. The United States Supreme Court concluded that she was not disabled because her impairment did not prevent or severely restrict an activity "of central importance to daily life." This gave employers other attractive "coverage" arguments.

The Old Battleground of the ADA Focused on "Disability"

In the 20 years since Congress passed the ADA, and thanks to the United States Supreme Court's treatment of the Act in *Sutton* and *Toyota*, one attractive argument for employers is that an individual did not have a "disability." Using that litigation strategy, employers often could prevail at summary judgment. For example, if mitigative measures corrected the impairment, the employee was not considered to be disabled under the ADA. Similarly, if the employee's impairment did not substantially limit a major life activity, the employee was not considered to be disabled under the ADA. And if the employer who regarded an employee as disabled did not consider the disability to be substantially limiting, the employee was not considered disabled under the ADA. Employers would often win summary judgment under any of these scenarios.

Mitigative Measures

Under the pre-amendment ADA as interpreted by *Sutton*, courts could properly consider mitigative measures when determining whether an impairment was a disability. For example, if an employee took medication, wore a prosthetic, or attended therapy, the employer could use these facts to argue that the employee was not disabled. Through the ADAAA, Congress changed the landscape and effectively told employers to view their employees as though they do not take medication, wear the prosthetic, or attend therapy when analyzing whether employees are disabled under the ADA.[9] One exception deals with eyeglasses and contact lenses. The ADAAA allows courts to consider the mitigative effect of eyeglasses or contact lenses in determining whether an employee is disabled.[10] Ironically, given this exception, the *Sutton* case that started the mitigative measure analysis would be decided the same way because United Airlines could still properly consider the mitigative impact of the plaintiffs' corrective lenses when determining whether they were entitled to accommodation under the ADA.

Substantially Limits

To be considered disabled under the ADA, a plaintiff must establish that he or she suffers from a physical or mental disability that substantially limits a major life activity. "Substantially limits" means that a person is "[u]nable to perform a major life activity that a person in the general population can perform" or is "significantly restricted" as to the manner or duration which a person can perform that activity compared with the rest of the population.[11] Because the pre-amendment ADA was "interpreted strictly to create a demanding standard for qualifying as a disabled,"[12] employers could successfully argue that although an employee's impairment somewhat limited the employee's activity, it did not "substantially limit" the activity, and therefore, the employee was not disabled. But under the ADAAA, Congress shifted the battlefield in favor of broad coverage. It directed that the question of whether an impairment "substantially limits" an activity should not demand extensive analysis.[13] Effectively, Congress wrote the "substantially limits" analysis out of the ADA when it passed the ADAAA. The US Equal Opportunity Commission (EEOC) is actively prosecuting cases under this expanded definition. Recently, the EEOC filed three new cases against employers who were alleged to have discriminated against qualified individuals with diabetes, cancer, and severe arthritis.[14] These cases are reflective of what is to come as the EEOC and the plaintiff's employment bar continues to prosecute claims under the expanded statutory definition of disability.

Major Life Activity

Under the pre-amendment ADA, the United States Supreme Court interpreted the term "major life activity" as an activity that is of "central importance to most people's daily lives."[15] Courts around the country often interpreted this to mean that a plaintiff must be substantially limited in an activity deemed by the courts to be "significant."[16] Activities that "lack central importance to daily lives" did not qualify.[17]And "working" was considered as a major life activity only if an impairment limited an employee in a broad range of jobs.[18] Employers could therefore successfully argue that although an employee was substantially limited in an activity, that activity was not a "major life activity." But under the ADAAA, Congress provided two non-exclusive lists of major life activities.[19] These lists are nearly all-inclusive. For example, Congress included working, thinking, concentrating, and communicating among the list of 18 "major life activities." Congress also stated that major life activities include operations of a major bodily function, and then listed every major system of the body. Thus, under the ADAAA, there is little room left for an employer to argue that an activity is not a "major life activity."

"Regarded As"

As identified above, one of the ways for an employee to establish a disability for purposes of the ADA is to prove that the employer treated that person as though that person were disabled, or regarded that person as being disabled. Under the pre-amendment ADA, an employee making a "regarded as" claim also had to prove that the employer perceived the disability to be substantially limiting of a major life activity.[20] But under the ADAAA, Congress made clear that an employee must prove only that the employer treated him or her as though he or she had a physical or mental impairment notwithstanding whether the employer perceived the limitation to be substantially limiting of a major life activity.[21] This amendment further narrowed opportunities for employers to prevail at summary judgment.

The Amendments Have Already Significantly Increased Claims Against Employers

The ADAAA resulted in lower thresholds for bringing a claim and surviving summary judgment. The increase in charges of discrimination and litigation under the ADA since the effective date of the ADAAA has been dramatic.[22] In 2009, the EEOC received 93,277 charges of discrimination. Of that number, 21,451 were based on disability discrimination. In 2010, the EEOC estimates that it will receive 5,561 additional disability discrimination charges (a 26 percent increase from 2009). And in 2011, as awareness of the ADAAA grows, the EEOC estimates that it will receive an additional 9,020 disability discrimination charges, which is a 42 percent increase from 2009. With the increase in charges comes a correlative increase in litigation. For this reason, employers must assess what preventive measures and defenses remain to limit their liability under the ADA.

THE NEW BATTLEGROUND OF THE ADA FOCUSES ON "QUALIFIED INDIVIDUAL"

While Congress drastically expanded the scope of those who are considered to be disabled, it did not modify the way courts consider whether an employee is a "qualified individual." As a result, the new battleground centers around where an employee is a qualified individual. A "qualified individual" is an individual who: (1) with or without reasonable accommodation (2) can perform the essential functions of the position he or she holds or desires, and (3) has the requisite skill, experience, education, and other job-related requirements of the position.[23] It is essential for employers to be conversant with these terms and the related concepts to navigate effectively their obligations under the ADA.

Familiarity with Key Concepts Facilitates Compliance Under the ADA

Reasonable accommodations include modifications to the application process or the work environment that allow a qualified employee or applicant to perform the essential job functions or enjoy "equal benefits and privilege of employment as are enjoyed by its other similarly situated employees without disabilities."[24] An accommodation is not reasonable if it poses an undue hardship on the employer. Undue hardship refers to whether the covered employer would incur "significant difficulty or expense" in implementing the requested accommodation.[25]

The employer must only provide reasonable accommodations for the "essential job functions." Essential job functions are the "fundamental" duties of a given position.[26] Essential job functions are distinguishable from "marginal job functions" which may include job duties that an employee performs but which are not necessary to employment. Whether an employer must accommodate a particular employee and the extent of that obligation is often resolved through what is known as the "interactive process." The interactive process is often described as a constructive dialogue between employer and employee about the employee's job-related limitations and any proposed accommodations that would allow the employee to perform the essential functions of the position. Each of these concepts plays an important role in an employer's effort to remain compliant and minimize liability under the ADAAA.

Implement Steps Now to Minimize Exposure Later

Employers should take action now to minimize their liability under the ADAAA and best position themselves in the event of a claim or charge of discrimination. These steps include:

- Regularly analyzing and updating job descriptions;
- Implementing a centralized decision-making process;
- Promptly engaging the interactive process; and
- Giving a proposed accommodation request a test run.

These proactive steps will not only have the effect of minimizing liability to the employer, but they will also likely result in increased efficiencies to the organization.

Analyze and Update Job Descriptions Regularly

Under the ADAAA, a critical issue remains whether an employee or prospective employee can perform the essential functions of the job

to which he or she is assigned. It follows that employers must analyze and fully understand the essential job functions of each position within their organization. To accomplish that objective, employers without job descriptions should create them. And employers with job descriptions already in place should revisit them regularly to ensure that the written descriptions accurately capture the essential functions and exclude marginal functions for each position. The process of creating and updating job descriptions should be a collaborative one between the employer and its employees. If possible, employers should engage their employees in a dialogue about what the employees perceive to be the essential functions of their positions. Ultimately, the employer should seek to have employees sign off on their job descriptions. This approach minimizes the risk that an employee could later claim that he or she requires accommodation to perform an essential job function when the job function is only a marginal function.

This is not a one-time endeavor. Ideally, employers will regularly review existing job descriptions to ensure that the written job descriptions accurately reflect current essential job functions. At a minimum, this process should occur each time the employer engages in any structural or organizational changes. Often these events result in reallocation of work assignments and job functions. Failure to analyze and update all job descriptions during this period can result in exposure to even well-intentioned employers.

In addition to minimizing liability under the ADA for employers, the process of regular review and analysis of existing job descriptions can eliminate inefficiencies and redundancies that exist within the organization. Although this effort may not completely offset the costs associated with the anticipated increased exposure under the ADAAA for employers, regular review of job descriptions provides an opportunity for employers to remain efficient in the competitive marketplace.

Implement a Centralized Decision-Making Process

Employers can realize significant advantages by implementing a centralized decision-making process for handling all requests for accommodation under the ADA. This might be a single person within the organization or a subset of the human resources department depending on the size of the organization. In all cases, the process should be confidential so that employees feel free to share their medical information without risk of disclosure to persons without a legitimate need for access to the information.

The centralized decision-making process has many advantages for employers. First, an employer is entitled to consider the aggregate costs of a proposed accommodation when determining whether a particular accommodation is reasonable. It is much easier for an employer to calculate the true cost of an accommodation to the organization when a

single person or department is responsible for handling all requests for accommodation. Additionally, the centralized process has the advantage of consistency between departments and decision-makers. An employer is poorly positioned in litigation if a manager in one department routinely approves a particular type of accommodation while a manager in a different department denies the same accommodation as being too costly or burdensome to the company. The employee requesting the accommodation in the other division is certain to discover the pattern of approval by other divisions and use that evidence to show feasibility of the proposed accommodation and the arbitrary decision-making by the employer.

Having a single department or person responsible for handling requests for accommodation has the additional advantage of reducing favoritism between employees or classes of employees. Employers should not, for example, provide costly accommodations for one class of employees, *e.g.*, executives, while refusing costly accommodations for another class of lower compensated workers. By providing an accommodation for an executive, and denying the same accommodation for a non-executive, an employer is exposing itself to unnecessary liability because it could be considered relevant evidence that the accommodation is reasonable.

Another advantage of a centralized process is that employers minimize exposure for claims for retaliation and discrimination where they can show that managers and supervisors were not even aware of a particular employee's disability, much less discriminated against him or her on that basis. In order to obtain this benefit, however, employers must take care to protect against improper dissemination of medical information to supervisors as well as other employees. Failure to safeguard this information can result in exposure under the ADA as well as liability under state and federal privacy laws.

Once an employer implements the centralized decision-making process, the employer should update employee handbooks and training materials. Where an employer implements a centralized decision-making process, but its handbook continues to read "contact your manager, supervisor, or the human resources department to request an accommodation," the benefits of the process are completely negated. Moreover, all managers and supervisors should receive regular training to ensure that all personnel understand how requests for accommodation are to be handled within the organization. Finally, employers should remind supervisors and managers to always base employment decisions on their employee's actual job performance and not on any perceived inability to perform the job duties based on a disability or perceived disability.

Promptly Engage the Interactive Process

The ADA does not expressly provide for how the interactive process should be handled. The regulations do, however, provide that "[t]he

appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified individual with the disability."[27] This should be an employer's focus upon receipt of a request for accommodation, because how the employer handles a request is a critical issue should the dispute proceed to litigation. Generally employees, not employers, must initiate the interactive process unless the need for accommodation is obvious to the employer.[28]

The interactive process contemplates a four-step process[29] that the employer should promptly and respectfully engage in good faith each time an employee makes a request for accommodation. The failure to respond to requests for accommodation in a timely manner can lead to claims of discrimination and potential liability.[30] Additionally, employers are currently facing claims for the failure to engage the interactive process.[31] To minimize this potential liability, employers should promptly undertake the following four steps:

First, upon receiving a request for accommodation, the employer must analyze the essential job functions of the position that are involved in the request for accommodation. With updated job descriptions, prepared with employee input, this should be a relatively simple task.

Second, the employer should consult with the employee to ascertain the specific job-related limitations and how the employee could overcome those limitations through a reasonable accommodation. Whenever possible, the employer should request that the employee or potential employee submit these job-related limitations in writing. It is appropriate for an employer to request a medical certification from the employee's or applicant's medical professional. By insisting that the employee or applicant provide this information in writing, the employer minimizes the potential for misunderstanding about the specific job-related limitations encountered by the employee. The documentation will also prove invaluable should litigation ensue, because it will allow the employer to demonstrate precisely what limitations the employee identified when requesting accommodation.

Third, the employer should identify potential accommodations and analyze the effectiveness of each alternative. This includes any modifications to the work environment that will enable the employee to perform all essential job functions and allow the employee to enjoy equal privileges of employment. When considering this issue, employers should consider whether any tax incentives may be available to defray some or all of the cost of the proposed accommodation.[32] Employers faced with a request for accommodation must analyze what steps can be taken to make existing facilities accessible. In some cases, this includes job restructuring, reassignment of the employee to a vacant position, and may include making readers available to the employee or applicant.

Finally, the employer should select the accommodation that the employer believes is most appropriate under the circumstances. In reaching this decision, the employer should take into account the

employee's preferences whenever possible. Employers may properly consider whether the proposed accommodation poses an undue hardship on the organization. This includes an analysis of the cost of the proposed accommodation, the overall financial resources of the employer, the type of operation involved, and whether the accommodation poses a direct threat to other employees. This last step requires the employer to analyze the duration and nature of the threat as well as the likelihood and imminence of harm to others. An employer may properly reject an accommodation when it concludes that the risk of harm to others is too high.

Even if the process is unsuccessful, the employer should always conclude the interactive process with a defensible response to the last request by the employee. Any such response should be in writing and, if possible, signed by the employer and employee. If the employee refuses a particular accommodation, the employer should insist that the employee sign an acknowledgement to that effect. This allows the employer to demonstrate not only the particular job-related limitations identified by the employee but the accommodations proposed by the employer and the fact that they were rejected by the employee. These records are valuable evidence if an employee or applicant later contests the employer's decisions.

Give Accommodation Requests a Test Run

Even if an employer believes that an accommodation might be too expensive or pose too much of a burden in other respects, an employer should consider implementing the requested accommodation on a temporary basis. The advantage of implementing an accommodation on a temporary basis is that the proposed accommodation might turn out to be reasonable, and the employee can continue working for the employer. If, however, the accommodation proves not to be workable for any number of reasons, the employer can later use that information to justify its decision to eliminate the accommodation and refuse similar requests for accommodation in the future relying on empirical data.

CONCLUSION: TAKE STEPS NOW TO AVOID LIABILITY LATER

The ADAAA poses significant challenges for employers. Under the ADAAA, most employees are considered disabled. The battleground has shifted from whether an individual is disabled to whether that same person can perform the essential functions of his or her job, with or without reasonable accommodations. Employers should regularly create or review job descriptions for each position within their organization. Job descriptions should be updated where they are no longer consistent with the actual job functions performed by the employee. When faced

with a request for accommodation, employers should promptly respond to the request for accommodation and document in writing each request by the employee and response by the employer. By implementing these steps, employers can minimize their liability under the ADA and realize some strategic efficiencies within their organizations.

NOTES

1. The EEOC will soon issue new regulations interpreting the ADAAA. These proposed regulations reflect Congress's mandate in the ADAAA to expand the definition of disability and focus the emphasis on whether the disability can reasonably be accommodated by the employer. The EEOC's proposed rules are available at *http://edocket.access.gpo.gov/2009/pdf/E9-22840.pdf* (last visited Oct. 28, 2010).

2. *See* 42 U.S.C. § 12111(5)(A); 29 C.F.R. § 1630.2(e)(1).

3. *See* 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m).

4. *See* 42 U.S.C. § 12102(1)(A)-(C); 29 C.F.R. § 1630.2(g)(1)-(3).

5. *See* 42 U.S.C. § 12101(a) (2006) ("The Congress finds that-(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older.").

6. Ruth Colker, "The Mythic 43 Million Americans with Disabilities," *Wm. & Mary L. Rev.*, 49:1 (2007).

7. 527 U.S. 471 (1999).

8. 534 U.S. 184 (2002).

9. *See* 42 U.S.C. § 12102(4)(E)(i)(I)-(IV).

10. *See* 42 U.S.C. § 12102(4)(E)(ii).

11. 29 C.F.R. § 1630.2(j).

12. *Toyota*, 534 U.S. at 197.

13. *See* 42 U.S.C. § 12102(4)(A)-(C).

14. "EEOC Files Trio of New Cases under Amended Americans with Disabilities Act," EEOC Press Release dated Sept. 9, 2010, available at *http://www.eeoc.gov/eeoc/newsroom/release/9-9-10a.cfm* (last visited Oct. 28, 2010).

15. *Toyota*, 534 U.S. at 185.

16. *See, e.g.*, Adams v. Rice, 531 F.3d 936, 944 (D.C. Cir. 2008).

17. *Id.*

18. *See Sutton*, 527 U.S. at 492 ("To be substantially limited in the major life activity of working, then, one must be precluded from more than one type of job, a specialized job, or a particular job of choice.").

19. *See* 42 U.S.C. § 12102(2)(A)-(B).

20. *Sutton*, 527 U.S. at 489–490.

21. *See* 42 U.S.C. § 12102(3)(A).

22. *See* "EEOC, Fiscal Year 2011 Congressional Budget Justification" (Feb. 2010), *http://www.eeoc.gov/eeoc/plan/2011budget.cfm* (last visited Oct. 28, 2010).

23. *See* 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m).

24. 29 C.F.R. § 1630.2(o).

25. *See* 29 C.F.R. § 1630.2(p) (discussing relevant factors).

26. 29 C.F.R. § 1630.2(n).

27. 29 C.F.R. pt. 1630 App. § 1630.9.

28. *See* "Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act," available at *http://www.eeoc.gov/policy/docs/accommodation.html* (last visited Oct. 28, 2010).

29. *See id.* (outlining process employers should follow).

30. Jodoin v. Baystate Health Sys., Inc., No. 08-40037-TSH, 2010 WL 1257985, *18 (D. Mass. Mar. 29, 2010) (analyzing former employee's claim for disability discrimination arising out of, in part, delaying the interactive process by the employer) (slip copy).

31. Reese v. Barton Healthcare Sys., 693 F. Supp. 2d 1170, 1186 (E.D. Cal. 2010) ("Employers, who fail to engage in the interactive process in good faith, face liability for the remedies imposed by the statute if a reasonable accommodation would have been possible.") (quoting Humphrey v. Mem'l Hosps. Ass'n, 239 F.3d 1128, 1137–1138 (9th Cir. 2001).

32. Resources relevant to this topic are available at *http://www.business.gov/business-law/employment/hiring/people-with-disabilities.html* (last visited Oct. 28, 2010). The Web site contains links to information regarding tax incentives that exist to help employers and small businesses with the cost of complying with the ADA.