Insights, News & Events

MEET THE NEW ADA: MASSIVE CHANGES AHEAD FOR NATION'S EMPLOYERS

Insights
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In perhaps the most sweeping change to the face of employment law in over 10 years, the recent passage of the "ADA Amendments Act" will mean a massive change for most of the country's employers. These changes, which will go into effect on January 1, 2009, will not only have a tremendous impact on the defense of employment litigation claims, they will require almost all human resource professionals, managers, and business owners to adopt new policies and procedures in dealing with accommodation requests.

Why Were Changes Deemed Necessary?
After the employment provisions of the Americans with Disabilities Act (ADA) went into effect in 1992, it did not take long for most federal courts to reject the majority of ADA claims brought before them. Culminating in a trilogy of pro-employer decisions in 1999 (*Sutton*/*Murphy*/*Kirkingburg*) and a follow-up decision in 2002 (*Toyota v. Williams*), the U.S. Supreme Court narrowed the playing field for disability discrimination plaintiffs. The decisions required lower courts to strictly apply a "demanding standard" when determining whether a plaintiff was considered sufficiently disabled to advance an ADA lawsuit, and also overturned an EEOC regulation that had instructed employers to determine whether an employee was disabled without considering mitigating measures.

Disability advocates reacted angrily to what they considered to be an undermining of the Act's original intent, pointing to a common Catch-22 faced by many plaintiffs: they were either considered not to be disabled enough to file a lawsuit, or too disabled to be considered qualified for the

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employment position in question. Although a consortium of advocates had repeatedly proposed ADA amendments similar to these over the past 10 years, the political climate in Washington D.C. was not conducive for such changes until this year.

What Changed?
The following lists the changes which will go into effect on January 1, 2009. Although the ADA only applies to those workplaces with 15 or more employees, this requirement is not as limiting as it first appears. The number includes part-time and temporary employees, and applies if an employer had 15 or more employees for at least 20 weeks during the current or preceding calendar year.

1. "Disability" Definition To Be Read Broadly
First and foremost, the new ADA instructs courts (and employers) to adopt a broad standard when determining whether an individual is considered disabled. The actual language of the new law states that it provides "a broad scope of protection" for employees, and provides that courts examining ADA cases need to provide coverage for plaintiffs "to the maximum extent permitted" by the statute.

Application: This immediately reverses course from more than a decade of conservative federal court opinions. Employers can expect to see more ADA claims survive motions to dismiss and motions for summary judgment, and it should follow that more ADA cases will be green-lighted for trial. Employers who are faced with making employment decisions involving individuals who might have a disability should recognize that the employee is now more likely to be held protected under the Act. You should tailor employment decisions with that understanding in mind.

2. Mitigating Measures Are To Be Ignored
When making a decision about whether an employee is considered sufficiently disabled to receive protection under the ADA, employers and courts must now ignore any and all mitigating measures being used by the individual in question. This includes medications, prosthetics, hearing aids, mobility devices, and learned adaptations. This will be, at times, a guessing game for the employer and the court, as they will be forced to make speculative assumptions about "what may be" instead of "what is."

Application: When engaging in the interactive process and communicating with employees and their health care

providers, you will need to specify that the examination being conducted should be without regard to mitigating measures. Interactive process questionnaires will need to be adapted to structure questions accordingly.

Good News for Employers: In a minor victory, the Act specifically holds that employers and courts can consider the effect of "ordinary eyeglasses or contact lenses" when examining an individual under the new ADA, excluding this one condition from the new mitigating measures analysis. If this provision had not been included, virtually everyone in your workplace could have been considered disabled under the new ADA.

3. Just About Anything Is A "Major Life Activity"
Up until now, the ADA was silent on what constituted a "major life activity" â€" that is, the areas of life that needed to be adversely affected in order for someone to claim a disability. Although the EEOC had proposed a list of recommended activities, many courts rejected the agency's broad interpretation and even the U.S. Supreme Court expressed skepticism about the list.

But the new ADA includes a thorough and exhaustive list of activities, including caring for oneself, performing manual tasks, eating, sleeping, reading, concentrating, thinking, communicating and working. Moreover, it also expressly states that the operation of any major bodily function is considered a major life activity â€" including functions of the immune system, cell growth, digestive functions, reproductive functions, and neurological and brain functions.

Application: Combined with the broad definitional section noted above, the new and expansive list of major life activities will ensure that almost every employee who wants to file an ADA claim will be able to do so. Even those conditions that might not be readily apparent on the surface will be considered disabilities, such as those that have an impact on the body's internal functions.

4. The "Regarded As" Prong Is More Broadly Read
In addition to impairments that substantially limit a major life activity, the ADA has always offered protection for those employees whom an employer wrongly "regarded" as being disabled. Under previous federal court interpretation, ADA plaintiffs needed to prove that the employer regarded them as being substantially limited in a major life activity, which

was a difficult standard to meet. Under the new ADA, a "regarded as" plaintiff need only demonstrate that the employer perceived the individual as having a mental or physical impairment.

Application: If the door to the courtroom had not been opened up far enough with the other amendments, this amendment will ensure it is thrown as wide open as possible. Even if an employee has an impairment that somehow is not held to substantially limit a major life activity, it seems that it would be likely that courts will grant an expansive definition and make it fairly easy for an employee to prove that the employer regarded the employee as having an impairment.

Good News for Employers: The new ADA states that the "regarded as" prong will not be applicable when an impairment is "transitory" (defined as lasting 6 months or less) and "minor." ***More Good News for Employers:*** Employers can take small comfort in the amendment which clarifies that "regarded as" disabled employees are not entitled to reasonable accommodations under the ADA.

5. EEOC Permitted To Regulate ADA And Define "Substantial Limitation"

The new ADA also provides an express mandate to the Equal Employment Opportunity Commissions (EEOC) to issue binding regulations and other interpretative guidance to further flesh out the statute. This is significant because the U.S. Supreme Court had called into question the EEOC's authority to do so under a technical reading of the old ADA; such concerns are now eliminated. Also, the new ADA specifically requests that the EEOC provide a regulatory definition for the term "substantially limits" that lowers the standard to a level consistent with congressional intent.

Application: 2009 will most likely see the introduction and passage of new EEOC regulations expanding on this definition and the rest of the revised statute, almost certainly with a pro-employee and expansive bent. It will be interesting to see how broadly the regulatory agency classifies the "significantly restricted" definition and how much of the previous definition (involving an analysis of the condition, manner and duration of the restriction) will be retained.

6. Miscellaneous Amendments

Some other amendments included in the new ADA:

Impairments that are “episodic or in remission” can still be considered to be disabling if, “when active,” they substantially limit a major life activity. In other words, employers again need to play a guessing game and determine whether episodic or intermittent impairments could rise to the level of disability and treat employees accordingly.

The statute will attempt to conform to Title VII and other anti-discrimination statutes by changing some technical language of the act to more clearly demonstrate that a plaintiff can prevail in a claim by showing discrimination “because of” the protected disability.

Finally, the new ADA prohibits “reverse discrimination” claims â€“ employees without disabilities cannot sue under the ADA by claiming that an employer impermissibly rejected them in favor of other individuals with disabilities.

Bottom Line: Meet The New ADA
The bottom line is that when it comes to ADA litigation, employers should now have the same expectation for ADA claims as they do for other discrimination claims (gender, race, religion, age, etc.). It is no longer difficult to prove that you have a right to bring such a claim. Although employers still have the same ability to defend a discrimination claim by showing that a legitimate and non-discriminatory reason existed to justify an employment action such as termination or demotion, you can no longer count on being able to defeat such a claim before getting to that point.

When it comes to day-to-day human resource management, you need to be prepared to immediately adapt your interactive process policies, and to offer accommodations to a wider percentage of your workforce. Employers will be well-served to err on the side of caution when determining whether to engage in the interactive process with an employee, and will need to more cautiously react to requests for accommodation.

This Legal Alert provides an overview of a particular piece of important legislation. It is not intended to be, and should not be construed as, legal advice for any specific fact situation.