

ADA Amendments Act take effect January 1, 2009

The ADA Amendments Act of 2008 (ADAAA) is the most sweeping change to the ADA in the past decade, as it redefines who is considered “disabled” under the ADA, and thus will potentially lead to a larger population of “disabled” employees seeking accommodations and a larger number of employees who claim they were “regarded as” disabled in disparate treatment claims. Importantly, the ADAAA reverses two seminal Supreme Court cases, *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 122 S.Ct. 681 (2002) and *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 119 S.Ct. 2139 (1999), finding the Supreme Court’s interpretation of the ADA, and in particular the Court’s interpretation of who is considered “disabled,” too restrictive and not in keeping with the spirit of the ADA.

In summary, the ADAAA liberalizes the interpretation of the ADA. The ADAAA instructs courts and employers to adopt a broad standard when determining whether an individual is considered disabled. In fact, the ADAAA states it provides “a broad scope of protection” for employees, and instructs courts examining ADA cases to provide coverage for plaintiffs “to the maximum extent permitted” by the statute.

President George W. Bush signed the ADAAA on September 28, 2008. The effective date of the new provisions is January 1, 2009. This means the ADAAA will apply to accommodations requests made on or after January 1, 2009. As for ADA claims (EEOC claims or lawsuits), the ADAAA will apply to employment decisions made on or after January 1, 2009. For instance, if an employment decision was made on December 30, 2008, and the employee filed his claim on January 2, 2009, the ADAAA would not apply; instead, the EEOC and/or court would apply the pre-ADAAA law. On the other hand, if the employment decision occurred on January 3, 2009, and the claim was filed on January 10, 2009, the ADAAA would apply.

The ADAAA includes an express mandate to the Equal Employment Opportunity Commission (EEOC) to issue binding regulations and other interpretative guidance on the ADAAA. This means the EEOC will introduce passage of new regulations in 2009, almost certainly with a pro-employee and expansive bent. Until then, the ADAAA takes effect, without much direction provided to employers. This paper offers an in-depth, behind the headlines analysis of the changes in the law in an effort to assist employers to adapt to the new law.

The ADAAA significantly amends the Americans with Disabilities Act in seven major respects:

1. “Substantially Limits” is Redefined.

The first question that arises in connection with many ADA cases is whether the employee is “disabled” under the ADA’s definition. The ADA defines “disability” as a “physical or mental impairment that substantially limits one or more of the major life

activities of such individual.” This definition has remained in tact; however, the ADAA has specifically overruled the EEOC and the Court’s interpretation of the meaning of the term “substantially limits.”

a. Pre-ADAAA Law.

In its previous Guidance (before enactment of the ADAA), the EEOC instructed that an impairment “substantially limits” a major life activity, if the employee is:

- unable to perform a major life activity that the average person in the general population can perform; or
- significantly restricted as to the condition, manner or duration under which s/he performs the activity as compared to the condition, manner or duration under which the average person in the general population performs the activity.

Likewise, in the *Toyota* case, the Supreme Court held 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.”

Therefore, for the past five years, courts have consistently held that in order for an impairment to “substantially limit” a major life activity, the individual would have to unable to perform or severely restricted from performing the activity. This was considered a very high threshold that few individuals could obtain.

b. The ADAAA Law.

The ADAAA reverses both the EEOC and the Supreme Court’s interpretation of the meaning of “substantially limits,” and in doing so overrules a long line of cases from nearly every circuit in the country holding that employees are not disabled because their impairments do not reach the threshold to “substantially limit” a major life activity. The ADAA rejects the “unable to perform/ severely restricted” standard and instead requires the EEOC to revise the agency’s regulations. While the term “substantially limits” will not change in the law, the ADAAA makes clear that the new standard will be less stringent, and will not require an impairment to be as serious as under prior interpretations of the ADA.

One way to think of these changes is on a numeric scale. On a scale of 1 to 10, the “unable to perform/ severely restricted” standard espoused in the EEOC Guidance and the *Toyota* case required the limitation to be a 10 out of 10. The new interpretation will require more than a “moderate impairment” (which would be a 5 out of a 10), but less than a “severe restriction.” It is widely believed that the new interpretation will require an impairment to be 7 out of 10 to be actionable. However, Congress did not adopt a numeric scale to explain the new definition of “substantial limitation.”

2. “Major Life Activities” are Enumerated.

The U.S. Supreme Court has stated “major life activities” are activities “that are of central importance to daily life.” Since the enactment of the ADA, there have been many cases in which the EEOC and courts have considered what are the “major life activities.”

a. Pre-ADAAA Law.

The EEOC enumerated its list of “major life activities” in its regulations, including caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working. In the Appendix to the regulations, the EEOC added sitting, standing, lifting and reaching.

Although courts generally determined what are life’s major life activities very broadly, they have grappled with some “major life activities,” i.e., most notably holding that thinking, communicating, social interactions, concentrating, sitting and thinking, sex, interacting with others, cooking, crawling, kneeling, crouching, squatting, operating machinery, caring for children, grocery shopping, driving, and ladder climbing were not considered “major life activities.”

b. The ADAAA Law.

The ADAAA contains a very broad, non-exclusive list of conditions that should always be considered major life activities. These activities are broader than the “major life activities” included in the EEOC’s regulations. Now, just about anything is a “major life activity.” The ADAAA states that “major life activities include, but are 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.**” As a result, any controversy is resolved by the ADAAA concerning certain activities such as lifting, concentrating, thinking and working.

Interestingly, however, the ADAAA does not discuss whether certain activities such as sexual relations, driving, using a computer, or “heavy” lifting constitute “major life activities.” Therefore, it is likely that these activities will continue to be litigated. However, with the dictate to read the ADAAA as broadly as possible, these too will likely be considered “major life activities.”

Finally, the ADAAA also provides that “an impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.” This provision of the ADAAA is meant to specifically overrule the Supreme Court’s holding in *Toyota* requiring that person who was substantially limited in the major life activity of “working” also be substantially limited in at least one additional major life activity. The ADAAA clarifies that a person can be considered disabled under the ADA

(and thus require an accommodation) if s/he has an impairment that substantially limits the major life activity of working.

3. “Major Life Activities” are Expanded to Include “Major Bodily Functions.”

a. Pre-ADAAA Law.

Prior to the ADAAA, courts did not find that all bodily functions constituted a “major life activity.” For instance, in *Furnish v. SVI Systems, Inc.*, 270 F.3d 445 (7th Cir. 2001), the court rejected the plaintiff’s allegation that his Hepatitis B impairment was a “disability” because it substantially limited the major life activity of “liver function.” The court held that “liver function” was not a “major life activity,” but rather a “characteristic of the impairment, much as a decline in white blood cells is a characteristic of the HIV Virus.”

b. The ADAAA Law.

Beginning on January 1, 2009, “major bodily function” is a new classification of “major life activities.” Under the ADAAA, major life activities **“also includes the operation of a major bodily function, including, but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”** Therefore, if an individual has a physical or mental impairment that substantially limits any of the list of major bodily functions, then he or she is considered disabled under the ADA. The result in the *Furnish* case above would be different after the effective date of the ADAAA, since “liver function” qualifies as a “major bodily function.”

4. Mitigating Measures Are Eliminated from Consideration.

In analyzing whether an impairment substantially limits a major life activity, one very important issue is whether the mitigating effects of medication, prosthetic devices, or behavioral modifications should be taken into account.

a. Pre-ADAAA law

In *Sutton v. United Air Lines, Inc.*, the Supreme Court held if an individual takes measures “to correct for, or mitigate, a physical impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether that person is ‘substantially limited’ in a major life activity.” In *Sutton*, the Court noted that a “disability” exists only when an impairment “substantially limits” a major life activity, not where it “might,” “could,” or “would” be substantially limiting if mitigating measures were not taken. Therefore, under *Sutton*, a person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that substantially limits a “major life activity” and is not considered “disabled” under the ADA.

Sutton was a widely followed and cited case to restrict the definition of “disability” only to individuals who were not using mitigating measures. For instance, an individual with a hearing impairment who used a hearing aide was not considered disabled; an individual with ADHD was not “disabled” because it was controlled with Ritalin; epilepsy was not considered a “disability” because seizures can be totally controlled through medication; diabetes controlled with insulin did not substantially limit a major life function and thus was not a disability, despite what would or could occur if the individual failed to treat his diabetes; an impaired arm did not substantially limit a major life activity when an individual learned to compensate through the use of the other arm.

b. The ADAAA Law.

The ADA Amendments Act specifically rejects the reasoning of *Sutton v. United Airlines* and its progeny, and instructs courts to analyze conditions “**without regard to the ameliorative effects of mitigating measures, such as medication, medical supplies or equipment, prosthetics, assistive technology, reasonable accommodations or auxiliary aids, or behavioral or adaptive neurological modifications.**” This provision will return the ADA to the position most courts took prior to the *Sutton* decision. In other words, instead of evaluating the individual’s condition as it actually exists (i.e., medicated or using mitigating measures to control the symptoms of the impairment), the ADAAA requires an analysis of the underlying impairment/disability in its unmedicated and unmitigated state. As a result, many more individuals will be covered under the ADA for accommodations purposes.

However, the ADAAA allows for one exception: The ADAAA notes that individuals should be evaluated with their “**ordinary eyeglasses or contact lenses,**” that “**intended to fully correct visual acuity or eliminate refractive error.**” Therefore, the only instance a mitigating measure can be taken into account is for eyeglasses and contact lenses.

5. The ADAAA Expands “Regarded As” Disability Claims.

The ADA Amendments act provides major changes concerning when an individual will be considered “regarded as” having a disability.

a. Pre-ADAAA Law.

Prior to the ADAAA, the “regarded as” category focused on the employer’s perception of an individual. For instance, in order to succeed in a “regarded as” case, plaintiffs would be required to show they did not have an impairment that substantially limited a major life activity, but their employer treated them as having an impairment that substantially limited a major life activity, a difficult burden to meet.

b. The ADAAA Law.

The ADAAA changes the definition of “regarded as” disabled. Rather than requiring an individual to show that s/he was regarded as having a substantially limiting impairment, the ADAAA states that an individual is “regarded as” disabled if s/he “**has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.**”

The Act excludes from this definition “**impairments that are transitory and minor,**” defining “transitory” to mean “**an actual or expected duration of six months or less.**” However, in order for the exclusion to apply, the condition must be **both** transitory and minor.

As a result of this dramatically expanded definition, it is highly likely that most individuals claiming disability discrimination will include a “regarded as” claim, and that case law on this issue will grow.

6. ADAAA Specifies that No Accommodation Is Required for “Regarded As” Disabilities.

a. Pre- ADAAA Law.

The EEOC had publicly taken the position that an employer does not have a duty to provide reasonable accommodation to someone who is only covered under the ADA because s/he is “regarded as” having a disability. This position is based on the underlying reason for providing reasonable accommodation—to dismantle workplace barriers. In “regarded as” cases, the only workplace barrier at issue is the employer’s allegedly discriminatory attitude. Specifically, the EEOC stated, “in the Commission’s view . . . a person who is only regarded as having a disability is not entitled to a reasonable accommodation.”

However, the Third, Tenth Circuit and Eleventh Circuit Courts have opined otherwise, holding that a “regarded as” plaintiff may be entitled to reasonable accommodation because, in part, the ADA statute does not distinguish between categories of “Disability” in requiring reasonable accommodation.

b. The ADAAA Law.

In what may be one of the only “employer-friendly” provisions of the new law, it is now clear employers are **not** required to offer accommodations to employees who claim they were “regarded as” disabled. Therefore, while the ADAAA expands coverage for “regarded as” disparate treatment claims, it will be less important to individuals who require a reasonable accommodation.

7. Employer-Friendly Provisions of the ADAAA

The ADAAA does contain some provisions considered favorable for employers:

- The ADAAA explicitly says that reverse discrimination claims are not cognizable. In other words, discrimination against non-disabled individuals is not a violation of the ADAAA.
- The ADAAA does not make any significant changes to employers' obligations of non-discrimination or reasonable accommodation, apart from dramatically expanding the pool of individuals who are to be considered disabled.
- The ADAAA keeps in tact the existing exclusions for "sex-based conditions," i.e., transvestism and gender-identity disorder, and for "psychological-criminal" conditions (such as kleptomania or pyromania), or current use of illegal drugs.
- The ADAAA does not make any changes to the current requirements of confidentiality of employees' medical information, or to the existing rules regarding post-offer/ pre-employment medical examinations.

WHAT CAN EMPLOYERS DO NOW TO PREPARE FOR THE ADAAA CHANGES?

1. Centralize Decision Making Regarding Medical Conditions and Leaves

Because the ADAAA also impacts an employer's administration of worker's compensation laws and Family and Medical Leave Act (FMLA) entitlement, it might be helpful during the transition period and during the initial period of the ADAAA, for the employer to consolidate and centralize all decision-making regarding medical issues and conditions to one person and/or one department. That "go-to" person/ department can be charged with administration of all disability-related questions, including requests for accommodation, and determining whether any medical conditions necessitating leaves of absence also qualify as a "disability" under the ADA.

2. Revise the Interactive Process

When engaging in the interactive process and communicating with employers and their health care providers, employers will need to specify that the examination being conducted should be without regard to mitigating measures, i.e., medications, prosthetics, hearing aids, mobility devices, and learned adaptations. This is expected to be, at times, a guessing game, as physicians, employers and the court will be forced to make speculative assumptions about "what may be" the employer's impairment or medical condition, instead of "what is."

3. Isolate Managers and Supervisors from Knowledge of Impairments.

An employer's knowledge of an impairment (or alleged impairment) is a critical piece of evidence in "regarded as" cases. Therefore, it is very helpful to an employer's defense if it has no knowledge of an alleged impairment. For instance, in one case, the court held because the decision-maker did not know about the employee's drinking problems, the employer did not regard the employee's alcoholism as a disability. Based upon this reasoning, we suggest removing any medical decisions and knowledge of medical conditions or impairments out of the control or knowledge of front-line managers, supervisors or decision-makers as a way of limiting potential "regarding as" disability claims. Again, issues concerning medical conditions, need for accommodations, or medical leaves of absences should be directed to neutral party, particularly a person/department with no input concerning the employee's job position (i.e., employment decisions such as hiring, promotion, termination, significant change in job duties).

4. Train Managers, Supervisors, and Decision-Makers Not to Connect an Impairment to an Employment Decision.

All too often, decision-makers, managers and supervisors, inform employees that an employment decision (decisions regarding hiring, promotion, termination, etc.) was connected to an the employee's impairment or perceived medical condition. This sets up a "regarded as" disability claim. For instance, in one court case, a supervisor re-assigned an employee "because he had cancer." In so doing, the supervisor regarded the employee as disabled and believed the employee's condition was significantly more disabling than it actually was. Likewise, any time a manager or supervisor makes stereotypes or generalizations about an illness when making employment decisions, they potentially violate the ADAAA and will be subject to a "regarded as" claim. Instead, front-line managers should avoid ever commenting on an employee's medical condition or impairment and, instead, only to refer to actual work performance. In other words, while it would be permissible for a supervisor to counsel an employee as to the slow work pace, it would be impressive for the supervisor to state his belief that it was caused by a medical impairment or condition.

5. Seek Outside Counsel Regarding Accommodations Decisions.

Because ADAAA enacts new broad, standards regarding who will be considered "disabled," employers are wise to seek independent, outside counsel in handling accommodations requests and should err on the side of considering employees "disabled." Employers should recognize that employees are now more likely to be held protected under the ADA. That is not to say that every "disabled" employee will be able to be accommodated with his or her preferred reasonable accommodation. However, under the ADAAA, employers should never dismiss outright an accommodations request relying on the fact that the employee is not disabled. The ADAAA's intentions are to expand the definition of disability, allowing more employees to engage in the interactive process.

This paper was prepared by Renee Culotta. Ms. Culotta is a partner in Frilot's labor and employment section.