

President Signs Major Overhaul of the Americans with Disabilities Act

The Bottom Line

By: Robert R. Bruce, Labor, Employment & Benefits Law Counsel

On September 25, 2008, President George W. Bush signed into law a measure (S. 3406 or The ADA Amendments Act of 2008) that significantly amends the Americans with Disabilities Act (ADA). The current measure replaces the impending ADA Restoration Act (which business groups in Washington feared would become law) that would have made it far easier to sue employers by elevating virtually any impairment into a legally actionable "disability." While the new bill is far from perfect, it appears to be the best deal employer groups could negotiate in an employer-hostile environment.

Details of the New Law

Under the ADA Amendments Act, which becomes effective on January 1, 2009, courts are to "broadly" construe the definition of "disability" in favor of coverage of individuals under the ADA. Some sponsors of the bill thought the courts had gone beyond the ADA's original intent by making it more difficult for individuals to sue employers for disability discrimination.

The original ADA prohibits discrimination in employment with regard to whether an individual is (a) disabled; (b) has a record of disability; or (c) is regarded as disabled.

Past U.S. Supreme Court decisions and EEOC regulations have narrowed the definition of disability to such a degree that people with serious conditions such as epilepsy, muscular dystrophy, cancer, diabetes, and cerebral palsy had been determined to not meet the definition of "disability" under the ADA. The result: in 2004, plaintiffs lost 97% of ADA employment discrimination claims that went to trial, often due to the interpretation of the definition of disability.

Significantly, whether an impairment substantially limits a major life activity (e.g. caring for oneself, seeing, hearing, standing, breathing, etc.) must be determined without regard to any "mitigating factors" such as prescriptive medicines or equipment (except for ordinary eyeglasses or contact lenses) that would help control the effects of the disability. In other words, the ADA Amendments Act eliminates "mitigating factors" from the definition of a disability.

Changes to "Substantially Limits" a Major Life Activity

The new Act also applies a looser standard in determining whether an individual with an impairment is "substantially limited" in a major life activity and, therefore, "disabled" under the ADA. While the new law retains the "substantially limits" phrase, it directs the Equal Employment Opportunity Commission (EEOC) to use less restrictive rules, thereby providing broader coverage and potentially endless lawsuits.

Changes to "Regarded as Disabled"

Importantly for employers, the ADA Amendments Act also clarifies the so-called "third prong" of the ADA's definition of disability (see above) where an individual is "regarded as" disabled by the employer. An employee now meets that definition if they can establish that they were subjected to discrimination 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. Again, the potential for litigation abuse here is obvious.

Interestingly, the new ADA Amendments Act provides that reasonable accommodations are only required for individuals who can demonstrate they have an impairment that substantially limits a major life activity, or a record of such impairment. Accommodations need not be provided to an individual who is only "regarded as" having an impairment.

Claims of “Reverse Discrimination”

The new act does make clear that claims of “reverse discrimination” are not actionable and that individuals without a disability have no protections under the law.

The Bottom Line

Certainly, the ADA Amendments Act is less favorable for employers than the current ADA as interpreted by the Supreme Court and the EEOC. Clearly, it may lead to increased litigation under the broader definitions of disabled individuals under the new ADA Amendments Act, especially for those employers who fail to recognize the impact of these changes and the overall protections of the Act. It is, however, much less of a problem for employers than the original proposed ADA Restoration Act would have been.

Employers would be well advised to seek the assistance of legal counsel to determine the effects of these legislative changes on their current policies and practices and how their policies and handbooks may need to be adapted to comply with the new Act.

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