

## **Are You Ready for the ADA Amendments Act of 2008?**

by Tina M. Maiolo

Anyone reading the recently passed ADA Amendments Act might be tempted to ask, who *isn't* covered? Created with the intent to restore the protections that were originally laid out in the Americans with Disabilities Act of 1990, but which have been steadily eroded since by the courts, the new amendments are so expansive and cover so many individuals and impairments, they might as well be called the “Americans Accommodation Act.”

Kidding aside, employers need to be aware that the standard for what is classified as a disability has been altered significantly. There could be an initial wave of litigation aimed at companies to test the new boundaries of the amendments, so it's critical that employers are prompt and thorough in managing employment processes and are fully educated on the new compliance requirements. The ADA Amendments Act becomes effective January 1, 2009.

Previously under the ADA, individuals were denied protection if their condition could be treated with medication or was in remission. A main change under the ADA Amendments Act is that an impairment now qualifies as a disability if, when active, it would substantially limit a major life activity, such as hearing, walking or communicating.

In 1990, Congress targeted private employers with a directive to eliminate discrimination against qualified individuals with disabilities, after recognizing the fact that individuals with physical and mental disabilities were unfairly being denied private sector employment because of prejudice and antiquated societal barriers, even though they were qualified to perform their essential job functions. The enactment of the ADA essentially expanded to the private sector the protections that were first created by the Rehabilitation Act in 1973, which applied to federal employment and programs that were funded or operated by federal agencies or contractors.

Over the years, the broad definition of disability as set by the ADA in 1990 has been considerably narrowed by various court rulings. Specifically, the Supreme Court's rulings in *Sutton v. United Air Lines, Inc.* (1999) and its companion cases significantly narrowed the scope of protection allowed under the ADA by ruling that measures that lessen a person's impairment, such as medications, should be weighed in determining whether an impairment substantially limits a major life activity.

The intended scope of protection was further limited by the Supreme Court's decision in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* (2002), which interpreted the term “substantially limits” to require a more significant degree of limitation. In addition, the current Equal Employment Opportunity Commission's ADA regulations define the term “substantially limits” as “significantly restricted,” which is too high a standard to be consistent with Congressional intent, according to the ADA Amendments Act. As a result of these Supreme Court cases and the EEOC regulations, individuals with a variety of substantially limiting impairments that were intended to be covered by the ADA were denied its protections.

## A New Standard

Thus we have the ADA Amendments Act of 2008, which is intended to restore the original intent and broad scope of the ADA, and, in the process, reject the Supreme Court's decisions and EEOC regulations that have improperly narrowed the scope of its protections. A key nuance for human resource professionals is that under the ADA Amendments Act, workers now will be presumed to meet their initial burden of proving that they have a disability, and the scrutiny will shift from determining whether an individual is "disabled" to whether the employer covered by the ADA met its legal obligations. Whether an individual's impairment qualifies as a disability will not receive extensive analysis.

With the goal to "restore the ADA to its original purpose," the ADA Amendments Act takes these noteworthy actions, which human resource professionals should note. The act:

- **Outlines boundaries for the definition of "disability," including:**
  - a. The term "disability" shall be interpreted in favor of broad coverage of individuals;
  - b. An impairment that substantially limits one major life activity does not need to limit other major life activities;
  - c. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active; and
  - d. The determination of whether an impairment substantially limits a major life activity shall be made without regard to specified measures that work to lessen an impairment—excluding ordinary eyeglasses or contact lenses.
- **Specifically identifies "major life activities" as including but 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.
- **Includes within the definition of "major life activity" the "operation of major bodily functions."** This includes, without limitation: functions of the immune system; normal cell growth; digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions.
- **Defines the standard for being "regarded as disabled" as:** "establishing that the individual has been subjected to action prohibited under the [ADA Amendments 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."
- **Provides that employers do not need to reasonably accommodate "regarded as" cases,** and says that "regarded as" cases cannot arise out of an impairment that is "transitory and minor." A "transitory" impairment is defined as having an actual or expected duration of less than six months.
- **Purposefully remains silent on any requirement of permanency to meet the definition of "disability."** The ADA Amendments Act only excludes "transitory or

minor” impairments from the definition of “regarded as” disabled. It does not provide similar limitation to the definition of a “disability.” It should be presumed, therefore, that transitory impairments that substantially limit a major life activity constitute disabilities under the ADA Amendments Act.

- Prohibits employment discrimination against a qualified individual due to the *type* of their disability, as opposed to prohibiting employment discrimination against a qualified individual due to the mere existence of a disability.
- Prohibits the use of qualification standards, employment tests or other selection criteria based on an individual's uncorrected vision unless those standard criteria are directly related to the position and are necessary for the job.

Among other critical points to be aware of, this new legislation states that nothing in the act alters the standards for determining eligibility for benefits under state worker's compensation laws or under state and federal disability benefit programs. Nothing alters the requirement to make reasonable modifications in policies or procedures, unless such modifications would fundamentally alter the nature of the goods, services, facilities, or accommodations involved. And nothing provides the basis for a claim by an individual without a disability that the individual was subject to discrimination because of the individual's lack of disability.

### **The next steps for employers**

So, what does this all mean to employers? That's the big question, and we will not truly know the answer until various agencies, including the EEOC, the U.S. Attorney General and the Secretary of Transportation, issue regulations providing more guidance.

In the meantime, it is best for employers to take a cautious approach by following these seven steps to ADA Amendments Act compliance:

1. Assume all employees are perfectly healthy. Never assume any employee has an impairment of any type. This will prevent employers from making the mistake of determining that an employee has a disability, regardless of whether the regarded disability limits a major life activity. Avoid that trap by presuming nothing.
2. When an employee comes to you claiming an impairment, assume that the impairment does in fact qualify as a disability under the ADA Amendments Act. To re-iterate a key point: In determining whether an employer had unlawfully discriminated against a qualified individual with a disability, there will be little scrutiny or analysis of whether the claimed impairment qualifies as a disability. Moreover, the ADA Amendments Act's all-expansive list of what qualifies as a “major life activity” leaves little doubt that practically any impairment will be deemed a disability. The employer will be safer to assume from the onset that an impairment qualifies as a disability than trying to argue later that it does not.
3. Make all reasonable attempts to accommodate an employee's impairment. The only instance in which an employer will not have to reasonably accommodate a disability is if the

accommodation would create an “undue hardship.” Numerous factors can constitute an “undue hardship,” but the bottom line is that unless the reasonable accommodation is so burdensome or expensive that it will completely change the nature of the business or the ability to provide services, the employer will have to provide a reasonable accommodation.

4. Review and revise all of your job descriptions. An employer’s defense against an ADA Amendments Act claim is likely to rest on whether the disabled employee was “qualified” to perform the essential functions of his or her job. Thus, employers will be better able to prove what the essential functions of the job are, and that the employee is not qualified, if the employer has detailed and current job descriptions for each position.

5. HR and managers should start training now about the ADA Amendments Act. The act imposes so many changes to the ADA and the cases interpreting the ADA over the last 10 years that employers need to act as if they are starting from scratch. HR should treat the ADA Amendments Act as an entirely new law. Both HR and managers should immediately be trained about its requirements.

6. Implement new disability policies, or modify existing ones. It’s very likely that most employers’ disability policies will need to be updated based upon the act. Employers should make changes to those current policies or implement entirely new policies as soon as possible.

7. HR and managers should update their training as regulations are issued and as the courts interpret the ADA Amendments Act. The impact of the ADA Amendments Act will not be static; its effects are going to continue to unfold over time. By staying up to date and knowledgeable about these changes, organizations will be able to avoid unintentionally violating the vastly expanded provisions of the new act.

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