

## LABOR &amp; EMPLOYMENT BULLETIN

## FEATURED ARTICLE

**INCREASED PROTECTION FOR  
THE DISABLED UNDER ADA  
AMENDMENTS ACT OF 2008***(Allison J. Garton)*

Starnes &amp; Atchison LLP

[starneslaw.com](http://starneslaw.com)***INCREASED PROTECTION FOR THE DISABLED  
UNDER ADA AMENDMENTS ACT OF 2008***

On September 25, 2008, the ADA Amendments Act of 2008 (the "Act") was signed into law by President Bush. The Act, which goes into effect January 1, 2009, expands the scope of disabilities covered under the Americans with Disabilities Act of 1990 (the "ADA"). By rejecting two Supreme Court decisions which had previously narrowly construed the definition of "disability" under the ADA, the Act seeks to broaden the protections available to employees.

The ADA defines a "disability" as a physical or mental impairment that "substantially limits" one or more major life activities. Throughout the years, the Supreme Court has interpreted this definition quite narrowly, stating that an impairment must prevent or severely restrict the individual from doing activities that are of central importance to most people's daily lives to qualify for ADA protection. In rejecting this restrictive construction, the Act adopts a broad standard to determine if someone is disabled and requires the courts to provide coverage to individuals "to the maximum extent permitted." While the Act leaves the ADA's familiar disability definition intact, it does take significant steps to direct courts toward a more generous meaning and application of the definition.

For instance, the Act states that in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, (2002), the Supreme Court interpreted the term "substantially limits" to impose too high of a standard. Accordingly, the Act now proposes that the determination of whether an individual's impairment is a disability under the ADA "should not demand extensive analysis." The Act seeks to accomplish this task by directing the EEOC to revise that portion of its current regulations defining the term "substantially limits" in order to take into account the Act's more expansive and comprehensive view of the ADA. In doing so, the Act will undoubtedly result in an increased number of employees who were not previously protected under the ADA now being considered as having a covered disability.

The Act further rejects the standards set forth in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), in which the Supreme Court held that the determination of whether an impairment substantially limits a major life activity must be balanced against the "ameliorative effects of mitigation measures." In the past, courts and employers were allowed to consider the impact of mitigating measures such as prosthetics, hearing aids, and medications in their disability determinations. However, the Act now requires employers to make disability determinations without regard to the ameliorative effects of these mitigating measures. Notably, the Act maintains an exception which allows ordinary eyeglasses and contact lenses to still be taken into account when determining if an employee is disabled.

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In addition, the Act broadens coverage under the ADA's "regarded as" prong of the definition of disability. It clarifies that an employer may now be liable under the "regarded as" provision if an employee establishes that he or she was subjected to an action prohibited by the ADA because of an actual or perceived impairment, regardless of whether the impairment actually limits, or is perceived to limit, a major life activity. This provision is designed to allow an individual to establish coverage by showing that they were treated adversely because of an impairment, without having to establish the employer's beliefs concerning the severity of the impairment. Importantly, this provision does not apply to impairments that are both transitory (lasting six months or less) and minor. The Act also provides that an employer has no obligation to provide reasonable accommodations for an employee who qualified as a person with a disability solely under the "regarded as" prong.

Finally, the Act extends protection under the ADA to employees with impairments that are episodic or in remission. The Act provides that if the impairment would substantially limit a major life activity when active, then it will be considered a "disability" even though it is currently in remission or occurring on only an intermittent basis. Essentially, this provision will provide greater coverage for employees with transient conditions such as epilepsy.

Quite simply, the net effect of the Act means that more ADA cases are likely to pass the initial threshold test of whether the employee has a "disability." Employers should now assume that more employees are going to be covered by the ADA and make employment decisions with that assumption in mind. Moreover, when it comes time to defend an ADA claim, it is likely that such lawsuits will now more closely mirror other types of discrimination claims – the focus will be on showing that the employer has a legitimate, non-discriminatory reason for its decision.

- Allison J. Garton

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