

The ADA Amendments Act of 2008: What Employers Should Know Now

By Suzanne Boy, Esq.

The ADA Amendments Act of 2008 (“ADAAA”) will amend the Americans with Disabilities Act of 1990 (“ADA”) to provide broader employee protections.

In June 2008, the House version of the ADAAA passed by an overwhelming margin. On September 11, 2008, the Senate passed a similar bill by unanimous consent. Though the House must sign off on the Senate version before it goes to the White House, the differences between the bills are slight and will likely be resolved quickly. President Bush is expected to sign the bill, which, if passed, will be effective January 1, 2009.

Changes Under the ADAAA

The primary purpose of the ADAAA is to make it easier for people with disabilities to qualify for protection under the ADA. Though the proposed changes are many, those of particular importance to employers are as follows:

- Under the current version of the ADA, a person is disabled if he or she has a physical or mental impairment that substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such an impairment. The ADAAA will explicitly establish that this definition of disability must be broadly interpreted to achieve the remedial purposes of the ADA.
- In determining whether a person's impairment constitutes a disability, the term “substantially limits” has been clarified to mean “materially restricts.” More specifically, an individual is disabled if he or she has more than a nominal restriction, but less than a severe restriction on a major life activity. This is a lower threshold requirement for employees to establish rights and protections under the ADA.
- An expanded, non-exclusive list of major life activities is included in the ADAAA. Some

of these activities include reading, learning, concentrating, thinking, communicating, working, and major bodily functions (immune system, bladder, bowel, digestive, respiratory, reproductive, etc). This may further broaden the scope of impairments for which employers must provide a reasonable accommodation.

- When determining whether a person is disabled, an employer can no longer take into account mitigating measures such as medication, medical devices, or other aids that can help the person function. This change expressly overrules the Supreme Court's decision in *Sutton v. United Airlines*, which ruled that individuals are not considered disabled if they can manage their symptoms with medication or other devices. For example, under the ADAAA, a diabetic meets the definition of disability, even if the person can control the condition with insulin. The only mitigating measure that can be considered when determining if a person has a disability is the use of prescription eyeglasses or contact lenses.
- An individual whose disabilities occur only in episodes must be assessed when their symptoms are present. This is particularly important for many disorders that were not previously protected under the ADA, including depression, epilepsy, and post traumatic stress disorder.
- The requirement that employees must establish or prove their disability in a lawsuit will no longer be effective under the ADAAA. Instead, the employer must show there was no discrimination because of a disability, and that a reasonable accommodation was offered.

What The ADAAA Means For Employers

The ADAAA will significantly expand an employer's duty to make reasonable

accommodations to employees with impairments that it was not required to make under the ADA. It will also make it easier for employees to prove discrimination, and more difficult for employers to win a discrimination case on summary judgment.

What Employers Should Do Now

- Review your current policies and procedures to ensure you are in compliance with the changes to the ADA.
- Consider using a medical consultant or physician who can advise you on medical and mental disabilities, and who can help you determine how to reasonably accommodate these conditions.
- If an employee requests a reasonable accommodation, engage in an interactive process with the employee, without regard to whether medication, aids, or other mitigating measures are available.
- Keep detailed documentation to show poor performance if a disabled employee is going to be terminated. Should litigation ensue, you must be able to prove the termination was not due to the disability, and that you attempted to reasonably accommodate the employee.
- If you are unsure whether an employee is entitled to an accommodation, or if you are considering any employment action with respect to an impaired or disabled employee, consult with your attorney prior to taking action.

.....
Suzanne Boy is member of the Commercial Litigation division and concentrates her practice in appellate and employment law. She can be reached at suzanne.boy@henlaw.com or 239.344.1403.

For previous Employment Law Newsletters please visit www.henlaw.com.

To subscribe to future editions, please e-mail gail.lamarche@henlaw.com

Henderson, Franklin, Starnes & Holt, P.A.

- Fort Myers
- Bonita Springs
- Sanibel

239.344.1100

www.henlaw.com



Henderson | Franklin
ATTORNEYS AT LAW

Professionals committed to serving our clients and communities.

This update is for general information only and should not be construed as legal advice or legal opinion on any specific matter. The hiring of a lawyer is an important decision that should not be based solely on advertising. Before you decide, ask us to send you free written information about our qualifications and experience.