

## PRESIDENT SIGNS LEGISLATION AMENDING THE AMERICANS WITH DISABILITIES ACT

On Thursday, September 25, 2008, the President signed the ADA Amendments Act (ADAAA) into law. This legislation, which received broad bipartisan support as well as the support of various advocacy groups, will take effect on January 1, 2009.

The ADAAA seeks to broaden the coverage of the Americans with Disabilities Act (ADA) substantially. The law continues to bar discrimination on the basis of a "disability" with respect to hiring, advancement, firing, compensation, job training, and other aspects of employment. The three-pronged definition of "disability" also remains virtually unchanged:

- (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment . . .

The ADAAA, however, emphasizes that the meaning of "disability" is to be construed "in favor of broad coverage of individuals under this Act." This liberal rule of construction is an attempt to overrule the Supreme Court's decisions that the terms of the ADA are "to be interpreted strictly to create a demanding standard for qualifying as disabled." The ADAAA also requests that the EEOC rewrite a regulation reflecting this broadened intent, but presently it is difficult to measure "how broad is 'broad.'"

The ADAAA also clarifies that, in determining whether an impairment rises to the level of a disability, the effects of mitigating measures such as medication and prosthetics must *not* be considered. Ordinary eyeglasses and contact lenses must still be considered as mitigating measures, however. Again, this reverses a Supreme Court decision that all mitigating measures must be taken into account. In such cases where mitigating measures are used, employers may be required to judge hypothetically whether an impairment would rise to the level of a disability if the employee was not using mitigating measures.

The third major change in the ADAAA addresses the last prong of the definition of "disability." The Supreme Court had held that proving a "disability" required that the employer perceive that an impairment substantially limited a major life activity. Under the ADAAA, however, proving a "disability" does not require that the employer perceive the impairment to be substantially limiting. For example, an employer who believes that a qualified employee's bipolar disorder (which would otherwise be disabling) only slightly limits his concentration will likely violate the law by firing the employee on the basis of this belief alone. However, the ADAAA clarifies that this prong will not apply in the case of an impairment that is "transitory and minor." A "transitory impairment" is one that has an "actual or expected duration of 6 months or less." A "minor impairment" is left undefined.

The ADAAA has the potential to increase the number of claims filed by employees alleging discrimination on the basis of a disability. Until the courts and the EEOC provide further clarification of the amended provisions, however, complying with them may pose special problems of judgment for employers.

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