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ADA AMENDMENTS EXPAND EMPLOYEES' RIGHTS

A new statute that becomes effective January 1, 2009 is likely to increase the number of employees' discrimination claims while making it more difficult for employers to defend against those claims. The Americans With Disabilities Act (ADA), originally enacted in 1990, prohibits discrimination against qualified individuals with disabilities in all phases of the employment relationship, including the interview and hiring process. In certain circumstances, it imposes upon employers an obligation to provide reasonable accommodation that will enable disabled individuals to perform the essential functions of their jobs. To qualify for this protection, an individual must have a "disability," as defined by the ADA – that is, a physical or mental impairment that substantially limits one or more major life activities; a record of such an impairment; or being "regarded as" having such an impairment. Until now, courts have generally construed the ADA conservatively, extending its protection only to those individuals who suffer major impairments that severely restrict them from performing activities that are of central importance to most people's daily lives on a permanent or long-term basis. For example, at present an individual is not "regarded as" disabled merely because his employer is aware of some physical condition; he must be perceived as severely limited in a major life activity. Recent decisions by the U.S. Supreme Court have set a demanding standard for qualifying as disabled and becoming entitled to the ADA's protection. The Supreme Court has also ruled that an individual's impairment should be assessed with the benefit of mitigating measures, such as eyeglasses, prostheses, and medication, which would alleviate its effects on daily life.

The ADA Amendments of 2008 will change all that. The Amendments' stated purpose is to reject those Supreme Court rulings and to mandate a broad definition of "disability," expanding the scope of protection to individuals with far less severe impairments. By redefining critical terms within the ADA's definition of "disability," the Amendments drastically lower the bar for qualifying as disabled. For example, the Amendments state that the term "substantially limits" must be broadly interpreted in favor of extended coverage. In addition, the Amendments specify that an individual may now be "regarded as" disabled merely by showing that he has been subjected to any adverse action because of an actual or perceived physical or mental impairment, regardless of whether or not it limits, or is even perceived to limit, any major life activity. (The Amendments do provide, however, that employers are not required to provide accommodation for employees who qualify solely under the "regarded as" definition, and specify that this definition does not include minor and transitory impairments, *i.e.*, lasting less than six months).

The definition of “disability” is further broadened by the Amendments’ expansion of the term “major life activities” beyond its former limitation to “activities that are of central importance to most people’s daily life.” The non-exhaustive list now includes not only caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working, but also extends to operation of bodily functions such as the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. The Amendments further broaden the definition by clarifying that even an impairment that is episodic or in remission qualifies as a “disability” if it would substantially limit one of these “major life activities” when it became active. Clearly, because so many impairments implicate these bodily functions – and because the standard for “substantially limited” is so relaxed – a far greater number of people will be considered “disabled.”

In addition, individuals who were not formerly considered “disabled” because their impairments are controlled by medication or medical devices will now most likely qualify for protection. With the exception of ordinary eyeglasses and contact lenses, the Amendments prohibit consideration of any medication, equipment, appliances (such as hearing aids), mobility devices, assistive technology, auxiliary aids, modifications, or other mitigating measures in assessing whether a physical or mental condition constitutes a “disability.”

Needless to say, the EEOC is already evaluating the impact of these Amendments on its enforcement and regulatory processes. The agency has been authorized to issue regulations, interpretive guidance, and rules of construction implementing the Amendments’ changes to the definition of “disability.” It remains to be seen how courts will deal with these changes, but the Amendments clearly mandate that the definition should be construed in favor of broad coverage. Employers are encouraged to familiarize themselves with these changes, modify their policies and practices, and implement training of human resource and management personnel so as to be in full compliance with the ADA Amendments by January 1, 2009.