

# LABOR & EMPLOYMENT ALERT

## Stroke of the President's Pen Changes How Employers Must Comply with U.S. Disability Discrimination Law

The **ADA Amendments Act of 2008** goes into effect **January 1, 2009**. The Act was signed into law on September 25, 2008.

**Employers with 15 or more employees** (already subject to ADA) are covered by the Amendments.

**The definition of "Disability" is broadened.** Until now, courts dismissed many ADA cases on the grounds that the plaintiffs were not "disabled." Under the Amendments, courts are instructed to provide coverage to individuals **"to the maximum extent permitted."** A disability remains "an impairment that substantially limits a major life activity," but new provisions significantly broaden what that means.

**A long list of "major life activity" examples is now IN the statute.** Until the Amendments, the courts decided what was a major life activity. Now, the amended statute has a laundry list of identified major life activities from thinking and concentrating to eating and working; **and** the operation of any major bodily function, "including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."

**"Substantially limits" has been watered down.** Courts used to take a hard look at how much an impairment actually affected a major life activity. The Amendments make clear the standard is to be more lenient and expressly provide that conditions in remission or episodic qualify as disabilities if they would substantially limit a major life activity when active.

**Mitigating measures no longer factor in whether a person has a disability.** Previously, the effect of mitigating measures, such as prosthetics, medications or hearing aids, was included in the determination of whether a person's impairment substantially limited a major life activity. The Amendments now require that such measures be ignored in making that judgment. The Amendments contain an express exception for **ordinary eyeglasses and contact lenses**. Thankfully, those items **can** be considered when determining if someone is disabled.

**Protection for being "regarded as" a person with a disability is much broader.** Under the Amendments, an individual now must show only that the employer perceives him or her as having a mental or physical impairment – but not also, as pre-Amendment law had required, that the employer perceives the impairment to substantially limit a major life activity. While the Amendments specify that reliance on an impairment that is minor and lasts for six months will not qualify, the employer's exposure to liability is still unquestionably much greater than it was.

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**Takeaway For Employers?**

ADA cases are likely to move **from "threshold" issues** (whether the person has a disability) **to "liability" issues** (whether the person was actually discriminated against). Legitimate, non-discriminatory reasons for employment actions will be as important here as in defense of many other types of discrimination claims:

The **interactive process** of working with an employee to try to devise an effective **reasonable accommodation** will be even more **important to undertake and to document**.

Employers may need to provide **more accommodations** to more of their workforce.

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