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About Face: Significant Changes to the Americans with Disabilities Act that Affect Your Business Right Now

(as of March 2009)

In the fall of 2008, President Bush signed into law the Americans with Disabilities Act Amendment Act (the "Amendments") which became effective January 1, 2009, and made changes to the Americans with Disabilities Act. In the Amendments, Congress literally calls out the United States Supreme Court for its narrow interpretation of what qualifies as a disability and rewrites the law to reverse the Supreme Court's limiting trend. The Amendments make it clear that the ADA covers an extremely broad range of disabilities and radically change the way employers must determine whether an employee is disabled and accommodate the disability.

What the ADA does

Enacted in 1990, the ADA was designed to provide a clear and comprehensive national mandate to eliminate discrimination against employees with disabilities. Under the ADA, employers must not discriminate based on disability and they must make reasonable accommodations to employees or potential employees with disabilities so that the disability does not become a controlling factor in employees' advancement, hiring, termination, or pay.

Specifically, employers cannot discriminate against qualified individuals with a "disability," who can perform the "essential functions" of the job with or without accommodation. Such discrimination is prohibited in the context of not only hiring and firing, but also advancement, training, compensation and any other term or condition of employment.

What constitutes a "disability" is changed by the Amendments, but generally means a documented physical or mental impairment that substantially limits one or more "major life activities", or being regarded as having that type of impairment.

What the Amendments changed

Simply put, Congress reversed the Supreme Court's severe limits on what types of health issues may be called a disability. Under two previous Supreme Court cases, the meaning of "disability" was constricted, in part by interpreting "major life activity" very narrowly, and further by allowing employers to consider aids, such as medicine or a cane, in deciding whether a person is disabled.

With the Amendments, limitations on the meaning of "major life activity" were broadened substantially. Congress specifically said that caring for oneself, performing manual tasks,

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seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working are examples of major life activities. Congress further added that "major life activity" include operation of major bodily functions such as the immune system, cell growth, digestive system, bowel, bladder, brain, respiratory, circulatory, endocrine, and reproductive functions. What is more, even if the individual is in remission or has an intermittent recurring condition they must still be considered as disabled.

Also with the Amendments, employers may no longer consider mitigating aids in determining disability, which is to say, a person's disability turns on their unassisted condition and not how they perform when taking medications or using other aids. If Joe Employee has rheumatoid arthritis that impairs his ability to work unless he takes medicine, he is still disabled even though the medicine allows him to do his job. [1]

What you need to know

When the definition of "disability" was very narrow, there were fewer instances where employers had risk of discrimination. Now that the definition of "disability" is wide open, employers must be very careful in two respects: (1) not to consider a person's disability in hiring, firing, promoting, training, and maintaining them; and (2) to consider any possible disability and make accommodations to allow the prospective or existing employee to perform the job.

Employers should review or create an employee handbook or company policies to make sure that an interactive process is in place for employees to work with the employer to make reasonable accommodations for any disability or to report disability discrimination. Employers should make sure that employees have a specific person to report disabilities or discrimination. Too often, employees complain to their immediate supervisor who is unaware of potential disability issues and the problems go unresolved leaving open the potential for a future discrimination claim. For this reason, it is also important to keep records of interactions and discussions related to disability so that the information is available for future reference should a dispute arise.

Employers should be careful not to consider a person's outward appearance or actions as an indication of disability as the individual may be operating under the aid of medication or some other assistive device which can no longer be considered in determining a disability.

Employers should also remember that they are not required to completely give in to the demands of a disabled employee. Employers are not required to accommodate an employee if: (1) a disability prevents them from being able to perform the essential functions of their job, or (2) the cost of accommodation is unreasonable. That said, employers cannot use essential job functions as an excuse to refuse accommodation. It is better to err on the side of accommodation because a wrong decision may result in costly litigation.

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[1] Employers may still consider eye glasses or contact lenses in determining whether the employee can perform the "essential functions" of their job.

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Looper Reed & McGraw would like to recognize attorney Michael Kelsheimer for his contributions to this Alert.