

Preparing for the Effects of the Americans with Disabilities Act Amendments Act of 2008

Joseph M. Aldridge, J.D. and Nichole S. Bogen, J.D.

The Americans with Disabilities Act (“ADA”) has recently changed with the passage of the ADA Amendments Act of 2008 (“ADA Amendments Act.”) Employers need to have an understanding of the ADA to protect their interests and their employees. The list below highlights key aspects of the ADA and the ADA Amendments Act. It is not a substitute for professional legal advice.

- The ADA covers employers with 15 or more employees.
- The ADA prohibits discrimination against disabled persons in job application procedures, hiring, firing, advancement, compensation, training, and other terms, conditions and privileges of employment.
- The ADA requires employers to make reasonable modifications to their facilities, policies and procedures in order to allow disabled people to participate fully in employment opportunities.
- The ADA prohibits retaliation for reporting disability discrimination or participating in an investigation of disability discrimination.
- Employers may not ask applicants about the existence, nature, or severity of a disability. Job offers can be conditioned on medical exams, but only if all employees applying for similar jobs have to take a similar exam. All exams must be job-related and consistent with the employer’s business needs.
- The definition of “disabled” is not exhaustive and includes bodily functions.
- The effects of “mitigating measures” such as hearing aids for the hearing impaired or medicine for diabetics may not be considered when evaluating whether an employee has a disability.
- “Episodic or in remission” type ailments may be a “disability” under the ADA if the condition substantially limits a major life activity when active.

The article that follows provides a more detailed summary of the ADA Amendments Act, its potential effect on employers, and some suggestions for employers to protect their interests and make sure that all employees can fully participate in employment opportunities free from discrimination.

As of January 1, 2009, many disabled employees who were not previously protected under the Americans with Disabilities Act of 1990 (“ADA”) may now be covered. The scope of disabilities covered by the ADA is expanded by the ADA Amendments Act of 2008 (the “Amendments Act”). Some previously valid employer defenses to disability claims may no longer be available. The Act’s expanded definition of “disability” is expected to cause an increase in disabled employees and those employees seeking a reasonable accommodation. Employers need to review their workplace policies, procedures, and employee handbooks for compliance with the new amendments to avoid potential liability.

The Amendments Act is intended to remedy the effects of federal cases that Congress believes improperly narrowed the definitions of “disability” and “major life activities” effectively “narrow[ing] the broad scope of protection intended to be afforded by the ADA[.]”¹ Congress believed the Amendments Act was necessary because “lower courts have incorrectly found . . . that people with a range of substantially limiting impairments are not people with disabilities.”² The Amendments Act represents Congress’ attempt to restore what it regards as the initial objectives of the ADA. This article will only address the most significant changes to the ADA by the Amendment Act and assume the reader already has a general understanding of the ADA.

1. Rejecting “Demanding Standards” in Favor of “Broad Coverage”

Although the Amendments Act contains sweeping interpretive changes and guidelines, it retains the original definition of disability:

The term “disability” means, with respect to an individual –

- (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 ...³

In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,⁴ the United States Supreme Court held that the terms in the ADA’s definition of disability must be strictly interpreted in order to create a “demanding standard” for being qualified as disabled.⁵ **The Amendments Act rejects a “demanding standard” approach and states that “[t]he definition of disability shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.”**⁶ In the

¹ Pub. L. No. 110-325 § 2(a); 122 Stat. 3553 (2008); *see also* 42 U.S.C.A. § 12101(a)(4).

² Pub. L. No. 110-325 § 2(a); 122 Stat. 3553; *see also* 42 U.S.C.A. § 12101(a)(6).

³ Pub. L. No. 110-325 § 4(a); 122 Stat. 3553, 3555; 42 U.S.C.A. § 12102 (1).

⁴ 534 U.S. 184 (2002).

⁵ *Id.* at 197.

⁶ Pub. L. No. 110-325 § 4(a); 122 Stat. 3553, 3555; *see also* 42 U.S.C.A. § 12102(4)(A) (emphasis added).

Amendments Act, Congress explicitly rejected the Court’s standard that “substantially limited” requires an impairment that “prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives.”⁷ **Instead, Congress now instructs that whether an individual has a disability under the ADA “should not demand extensive analysis.”**⁸

2. Prohibiting the Consideration of “Mitigating Measures”

Until the Amendments Act, consideration of “mitigating measures” has been an effective defense for employers. In *Sutton v. United Airlines, Inc.*,⁹ the United States Supreme Court held that corrective measures an individual takes to lessen the effects of a physical or mental disability are taken into account when determining whether the individual is disabled under the ADA. Thus, an individual who has 20/20 vision through the use of eyeglasses is not considered disabled even if the individual is legally blind without eyeglasses. The same holds true for individuals with other medical conditions (e.g. diabetes) as long as the individuals were able to control their conditions through the use of medication and devices. Even a person’s natural or adaptive ability to compensate for the effects of an impairment qualifies as a “mitigating measure” to consider when determining whether the individual had a disability.¹⁰

The Amendments Act rejects the “mitigating measures” doctrine outright. **“The determination of whether an impairment substantially limits a major life activity shall be made *without regard to the ameliorative effects of mitigating measures*[.]”**¹¹ Thus, an individual with epilepsy may qualify as disabled even if medication controls their seizures. The Amendments Act makes a sole exception for prescription eyeglasses and contact lenses, which may still be considered as a “mitigating measure” when considering whether an individual is “substantially limited in a major life activity.”¹²

3. The New Expanded List of Major Life Activities

The definition of “disability” requires an individual’s impairment to “substantially limit” one or more “major life activities.” The ADA authorized the Equal Employment Opportunity Commission (“EEOC”) to define “major life activities” and it assembled an illustrative, but not exhaustive, list: “Major life activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”¹³ This definition led to confusion in the courts as to

⁷ Pub. L. No. 110-325 § 2(b); 122 Stat. 3553, 3554; *see also* 42 U.S.C.A. § 12101(b)(4).

⁸ Pub. L. No. 110-325 § 2(b); 122 Stat. 3553, 3554; *see also* 42 U.S.C.A. § 12101(b)(5) (emphasis added).

⁹ 527 U.S. 471 (1999).

¹⁰ *See* *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 565-66 (1999) (explaining that the mitigating measures rule applied not just to artificial measures, but to “measures undertaken, whether consciously or not, with the body’s own systems”).

¹¹ Pub. L. No. 110-325 § 4(a); 122 Stat. 3553, 3556; *see also*, 42 U.S.C.A. § 12102(4)(E)(i) (emphasis added).

¹² Pub. L. No. 110-325 § 4(a); 122 Stat. 3553, 3556; *see also*, 42 U.S.C.A. § 12102(4)(E)(ii).

¹³ 29 C.F.R. § 1630.2(h)(2)(i) (2008).

whether more specific activities were included (e.g. household tasks and sporting activities)¹⁴ or non-volitional activities (e.g. eliminating waste from the bloodstream).¹⁵

The Amendments Act clarifies the definition of “major life activities” and states that “[a]n impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.”¹⁶ The Amendments Act expands upon the original EEOC list:

[M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.¹⁷

The new additions to the list are eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating. Another significant change is the inclusion of “major bodily functions” as “major life activities.” **The non-exhaustive list of “major bodily functions” includes functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.**¹⁸

4. Impairments that are Episodic or In Remission

The Amendments Act provides that “[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”¹⁹ This represents a substantial break from the previous standard focused only on the overall effects of the impairment. Now, an employer making an accommodation decision will need to determine if the impairment substantially limits a major life activity when the effects of the impairment are at their *most severe*, regardless of the current state.

5. Expansion of “Regarded as Disabled” Protections

Employees who believe that their employers engaged in prohibited conduct because the employers wrongfully regarded them as disabled benefit from the Amendments Act. Dissatisfied with the United States Supreme Court’s interpretation in later decisions, Congress specifically intended in the Amendments Act “to reinstate

¹⁴ See *Weber v. Strippit, Inc.*, 186 F.3d 907, 914 (8th Cir. 1999) (“Weber did identify specific activities that were impacted by his heart disease, including eating, walking up stairs, shoveling snow, gardening, mowing the lawn, playing tennis, fishing, and hiking. Aside from eating and walking, however, none of these activities qualify as major life activities.”).

¹⁵ See *Kammuller v. Loomis, Fargo & Co.*, 383 F.3d 779, 785 (8th Cir. 2004).

¹⁶ Pub. L. No. 110-325 § 4(a); 122 Stat. 3553, 3556; *see also*, 42 U.S.C.A. § 12102(4)(C).

¹⁷ Pub. L. No. 110-325 § 4(a); 122 Stat. 3553, 3555; *see also*, 42 U.S.C.A. § 12102(2)(A).

¹⁸ Pub. L. No. 110-325 § 4(a); 122 Stat. 3553, 3555; *see also*, 42 U.S.C.A. § 12102(2)(B) (emphasis added).

¹⁹ Pub. L. No. 110-325 § 4(a); 122 Stat. 3553, 3556; *see also*, 42 U.S.C.A. § 12102(4)(D) (emphasis added).

the reasoning of the Supreme Court²⁰ in *School Board of Nassau County v. Arline*²¹ that “society’s accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.”²² The Amendments Act removes a major hurdle for employees by taking the focus off of whether the employer incorrectly believed the impairment was “substantially limiting:”

An individual meets the requirement of ‘being regarded as having such an impairment’ if the individual establishes that he or she has been subjected to an action prohibited under [the ADA] because of an actual or perceived physical or mental impairment *whether or not the impairment limits or is perceived to limit a major life activity.*”²³

This represents a major shift in how the ADA should be interpreted by courts in the future. If an employee does not have a “substantially limiting” impairment, but the employer discriminates against the employer due to a perceived impairment, then the employee’s claim will remain viable under the “regarded as” prong. **The only exceptions provided under this prong are conditions which are “transitory and minor,” meaning a condition “with an actual or expected duration of 6 months or less.”**²⁴

6. Preparing for Impact: Tips for Employers

- Get your workplace policies and procedures reviewed by an attorney for compliance with the Amendments Act.
- Review existing written job descriptions, or create new ones, identifying the essential functions of individual positions. Specifically determine which duties, responsibilities and tasks are essential as disabilities affecting the essential functions may require your company to provide a reasonable accommodation.
- Have forms prepared to obtain sufficient medical documentation of disabilities and other medical conditions, *e.g.* release form and an ADA questionnaire. This will allow your company to make informed and competent decisions rather than decisions based upon an employee’s personal preference. Remember, however, that the ADA prohibits medical inquiries of job applicants and employees as to whether they are individuals with a disability or as to the nature or severity of their disability. The ADA makes a limited exception to this rule for employees when the

²⁰ Pub. L. No. 110-325 § 2(b); 122 Stat. 3553, 3554; *see also*, 42 U.S.C.A. § 12101(b)(3).

²¹ 480 U.S. 273 (1987)

²² *Id.* at 284.

²³ Pub. L. No. 110-325 § 4(a); 122 Stat. 3553, 3555; *see also*, 42 U.S.C.A. § 12102(3)(A) (emphasis added).

²⁴ Pub. L. No. 110-325 § 4(a); 122 Stat. 3553, 3555; *see also*, 42 U.S.C.A. § 12102(3)(B) (emphasis added).

examination or inquiry is shown to be job-related and consistent with business necessity.

- Determine before a situation arises as to what type of reasonable accommodations may be available for your company, *e.g.* working from home, flexible scheduling and assistive devices. Be prepared to provide qualified individuals with accommodations that enable them to perform their essential job functions.
- Be aware that if an employee has a disability that could be regarded as “obvious,” there may be a duty to accommodate even if the employee has not specifically requested an accommodation.
- Whenever accommodations are sought, keep careful records of what actions, if any, were taken and why. Retain all documentation that may later be needed to justify an accommodations decision.
- Make sure that key decision-makers such as managers and human resources personnel are prepared for the effects of the ADA Amendments Act.

The content of this article is for informational purposes only and is not intended as specific legal advice.