



Congress Passes New ADA

by James B. Yates and A. Brooke Phelps

On September 17, 2008, the House of Representatives passed significant substantive amendments to the Americans with Disabilities Act. In doing so, the House adopted the amendments that recently passed the U.S. Senate (S. 3406). The final version of the amendment significantly expands the scope of the Americans with Disabilities Act. The Americans with Disabilities Act of 2008 (New ADA) greatly increases the number of individuals who are entitled to protection from discrimination as disabled employees. Consequently, the New ADA requires employers to provide reasonable accommodations to a larger number of employees.

The New ADA effectively reverses numerous judicial decisions (including several key United States Supreme Court decisions) interpreting the ADA. The most significant portion of the amendment represents a fundamental change to the concept of disability under established precedent. A “disability” under the ADA is defined as a “physical or mental impairment that substantially limits one or more of the major life activities” of an individual. In 2002, the U.S. Supreme Court held that a major life activity is “substantially limited” when an individual has an impairment that “prevents or severely restricts” the individual from performing activities that are “of central importance to most people’s daily lives.” Many employees seeking the protection of the ADA have had difficulty meeting the basic threshold requirements of being disabled under the above definition. An individual who could take care of basic self-care functions (bathing, teeth and hair brushing, preparing meals) and perform basic physical functions (eating, drinking, breathing, walking, seeing, hearing, talking) was likely not disabled under the ADA.

The New ADA specifically rejects the above U.S. Supreme Court definition of disability as requiring “a greater degree of limitation than was intended by Congress.” Further, the New ADA also rejects the current EEOC regulations (which require an individual to be “significantly restricted” in major life activities) as “inconsistent with congressional intent, by expressing too high a standard.” Therefore, the New ADA directs the EEOC to change its regulations to relax the standard for what constitutes a substantial limitation so that the definition of disability be interpreted “in favor of broad coverage of individuals.”

The New ADA further mandates that an individual can be disabled under the New ADA if only one major life activity is substantially limited and states that individuals are disabled even if their conditions are not active or in remission.

In another significant change to existing law, the New ADA prohibits the consideration of mitigating measures in determining whether an individual is disabled. The only exceptions would be ordinary eyeglasses and contact lenses under specific conditions. Currently, positive or negative effects of mitigating measures such as medication and prosthetic devices may be considered when determining whether a person is substantially limited in a major life activity. For example, under existing law, an individual who can hear with hearing aids (the mitigating measure) is not substantially limited but, under the New ADA, the individual's ability to hear must be assessed without the mitigating measure of hearing aids to determine if he or she is substantially limited in the major life activity of hearing. Likewise, under the New ADA, individuals with chronic conditions (i.e., diabetes, hypertension, high cholesterol) controlled by medication or other means must be evaluated without mitigating measures such as medication which could control or ameliorate the condition. This change will exponentially increase the number of individuals entitled to legal protection as disabled employees.

What Does This Mean for Employers?

Employers currently prevail in most ADA administrative actions or lawsuits because employees cannot prove that they meet the definition of disabled. Under the New ADA, most employees asserting a disability claim will be able to meet the new, extremely broad definition of disabled. The analysis will now shift toward whether the employer has reasonably accommodated employees now considered disabled. The New ADA will result in more employees entering the disabled protected class and more administrative charges and lawsuits being filed by employees claiming disability discrimination. The New ADA will necessitate policy and procedure revisions, more supervisory training and greater emphasis on the interactive process between employers and employees addressing reasonable accommodations.

Status of the New ADA

The New ADA received overwhelming bipartisan support. Both Senators Obama and McCain support the New ADA as does President Bush. The law is effective January 1, 2009.



For more information on this bill, Mr. Yates and Ms. Phelps may be reached at our Toledo office (419-241-6000). Mr. Yates is a member of the Firm while Ms. Phelps is an associate. Both are part of the Labor and Employment Practice Group.



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