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June 15, 2011

ADA AMENDMENTS ACT OF 2008 (ADAAA): BACK TO BASCIS

Bonnie Jones, Human Resource Consultant

While the majority of Americans were preoccupied with the end of summer and an historic presidential election, Congress was busy passing a popular bipartisan bill that provides expanded protection under the Americans with Disabilities Act (ADA). The extensive support for this bill allowed Congress to move quickly, passing it in the Senate on Sept. 11, 2008, and in the House on Sept. 17, 2008.

On Sept. 25, 2008, the President signed the Americans with Disabilities Act Amendments Act of 2008 (ADAAA) with an effective date of Jan. 1, 2009 (S. 3406). The ADAAA ensures protections for people with disabilities whose conditions have been denied as ADA eligible through years of Supreme Court ADA interpretation. The ADAAA greatly expands the number of persons eligible under the ADA of 1990.

On March 25, 2011, the final regulations implementing the ADA Amendments Act (ADAAA) were made available on the Federal Register's Web site <http://www.federalregister.gov/articles/2011/03/25/2011-6056/regulations-to-implement-the-equal-employment-provisions-of-the-americans-with-disabilities-act-as>.

Most importantly for employers, the new laws bring central focus to employer compliance. "Did the employer reasonably accommodate the disabled employee?" rather than "Is the condition really considered a disability?"

The amendments restore benefits by making changes to the definition of the term "disability" that more closely mirror the intentions of the original act as

passed in 1990. Perhaps just as significantly, the ADAAA overturns more than a decade of court cases involving those with conditions such as epilepsy, diabetes, autism, attention deficit disorder, developmental delays, intellectual disabilities, muscular dystrophy, and cancer. Additionally, other illnesses that affect major life activities such as working, communicating, concentrating, thinking, reading, and other activities of central importance now fall under the protections of ADA and are considered a protected disability under ADA. As stated in the new legislation, the purpose of this act is:

To carry out the ADA's objectives of providing "a clear and comprehensive national mandate for the elimination of discrimination" and "clear, strong, consistent, enforceable standards addressing discrimination" by reinstating a broad scope of protection to be available under the ADA.

In Section 3, DEFINITION OF DISABILITY under the "regarded as" section, coverage is now expanded to persons who are not truly disabled but who may be regarded as disabled, regardless of whether the impairment or perceived impairment limits major life activity.

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 this act 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.

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The new 2008 ADA amendments ensure that those with serious conditions or conditions that “substantially limit” major life activities are now covered by ADA.

In summary, the ADAAA legislation:

- Prohibits consideration of mitigating measures other than “ordinary contact lenses or eyeglasses” when determining whether someone has a disability. The Supreme Court previously allowed medications or assistive devices a person used to control their disability into account when determining if that person qualified as having a disability. The ADAAA will no longer allow such factors to be taken into consideration when determining whether someone is disabled under the ADA. Previously, a diabetic on medication to regulate his/her condition might have been deemed “not to have a covered disability.” Now, items such as medication, cochlear implants, oxygen therapy, hearing aids, prosthetics, etc., cannot be taken into consideration when determining the definition of disability. Additionally, because the definition of disability has been expanded, that person would likely qualify as having a disability under ADA. This change to the law overturns the intent of the Supreme Court ruling in *Sutton v. United Airlines*, which determined that people with disabilities were not covered by the ADA if their condition could be mitigated by medication, assistive technology and equipment, or learned behavioral adaptations. 527 U.S. 471 (1999).
- Redefines the definition of disability to include a condition or impairment that “substantially limits a major life activity” standard. The new law identifies a major life activity as caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading,

concentrating, thinking, communicating, and working. The ADAAA says that the condition or impairment is a disability if it “materially restricts” a major life activity, more specifically, if it is a physical or mental impairment that substantially limits one or more major life activities.

Previously, the courts held that a person had to be “significantly restricted.” Congress deemed this standard too restrictive and attempted to correct over a decade of unfavorable interpretation by passing the ADAAA.

- Includes “bodily functions” as part of major life activities. ADAAA provides that major bodily functions covered under the ADA include functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. This drastically expands the list of conditions that fall under the protections of ADA. In the past, some serious conditions were not considered disabilities under ADA because they did not substantially affect a major life activity. Now, the ADAAA provides that major bodily functions are major life activities.
- Includes impairments that are in remission or episodic in nature. These conditions would count as disabilities even if they do not substantially limit major life activity. Consider certain conditions such as epilepsy, cancer, multiple sclerosis, migraines, and conditions that may be in remission. With the amendments to the law, there is protection under the ADA if the impairment is episodic or in remission but “would substantially limit a major life activity when active.”
- Impairments that are transitory and minor (less than six months in duration) are not considered disabilities under ADA. Also, there is no reasonable accommodation requirement for those who are only “regarded” as being disabled.

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As employers we will face a dramatic increase in the number of employees who qualify as having a disability under the ADAAA. While the primary effects on the educational system are outside the scope of this writing, consider the effects of a student who was previously not deemed substantially limited as a student, who is now transitioning into the workplace and needs reasonable accommodations under ADA in order to perform the essential functions of the job. Information and resources now need to be readily accessible to all employees.

INTERSECTION OF FMLA AND ADA

The FMLA regulations define son or daughter as the “biological, adopted or foster child, a stepchild, a legal ward or a child of a person standing in loco parentis, who is under 18 years of age.” The definition is expanded to include a child 18 years of **age or older** if the child is incapable of self-care because of a mental or physical disability. The FMLA defers to the ADA’s definition of the term “disability.” So, as an employer you need to proceed cautiously when FMLA and ADA intersect.

The new legislation makes it clear that an employee who performs well also may be substantially limited in one of the major life activities of learning, reading, writing, thinking, and speaking. This employee will still need to establish that he or she has limitations

and needs a “reasonable” accommodation. Some clarifications have been made since the ADA Amendments Act of 2008 was passed.

- ADA amendments do not apply retroactively (Sixth Circuit Milholland).
- The regulations clarify that “major life activities” includes “major bodily functions” such as functions of the immune system, normal cell growth, brain, neurological, and endocrine functions.
- Under the old ADA, not every impairment will constitute a disability.
- The new ADA standards will allow more adult children of your employees to qualify as being disabled. This will result in more employees requesting FMLA to care for their adult children with disabilities.

Courts have been clear on one thing; the employee must be able to perform the essential functions of the job to be qualified under ADA. *Jakubowski v. Christ Hospital*, 6th Circuit, 2011.

For more information, visit <http://www.ada.gov/>.

You may also contact MTAS Human Resource Consultants Richard Stokes and Bonnie Jones for assistance.

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