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Employers Must Understand Implications of Expanded Americans with Disabilities Act

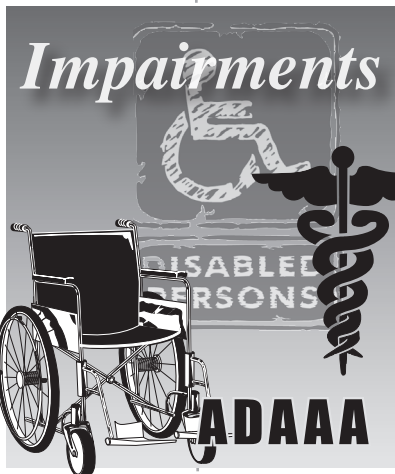
By Eric J. Johnson

On January 1, 2009, the Americans with Disabilities Act Amendments Act of 2008 (ADAAA) went into effect. Congress passed the ADAAA in response to federal court rulings that it believed substantially weakened important protections of the original Americans with Disabilities Act (ADA). The amendments (intended to restore the “spirit and intent” of the original ADA legislation) cause a much larger group of employees to be deemed disabled and, therefore, protected under the law. Employers now need to be even more careful when making decisions affecting applicants and employees who may have physical or mental impairments.

Q: What is a “disability” according to the ADAAA?

A: In assessing what constitutes a “disability,” the ADAAA requires courts construe that term “to the

maximum extent permitted” under the law. This is significant because various other ADAAA revisions increase the number of employees protected by the definition of “disability.” The definition now includes any impairment that is episodic or in remission. Therefore, a condition, like cancer, that is not currently impairing the individual would still be a disability if it would substantially limit a major life activity (MLA) “when active.”



(e.g., hearing aids or prosthetics). The ADAAA explicitly states that, unless they are eyeglasses or contact lenses, such measures may not be considered when analyzing whether the impairment substantially limits a MLA. The employer must now consider whether the impairment is a disability without considering how much the mitigating measures correct the disabil-

Q: Are impairments considered “disabilities” if they are controlled?

A: Under a prior U.S. Supreme Court decision, physical and mental impairments were not considered “disabilities” if controlled by “mitigating measures,” such as medication or corrective devices

ity. Previously, certain employees whose impairments (e.g. asthma, diabetes or epilepsy) were controlled by medication and treatments could be excluded from coverage because their condition was not severe enough. Now, those employees are likely protected as “disabled.”

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Employers Must Respond to ADAAA Changes

By Eric J. Johnson

Q: What should our company do to respond to the January 1 changes?

A: If you have 15 or more employees, consider the following steps:

- Review and, if necessary, revise any applicable handbook policies, interactive process questionnaires and disability-related employment information.
- Train HR personnel, supervisors and interviewers on the ADAAA and how it applies to their daily operations.
- Be prepared to consider offering accommodations to a broader range of employees.
- When addressing specific disability determinations and accommodations concerns, include supervisors, HR personnel and legal counsel in the analysis and apply the revised disability laws.

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Q: How does the ADAAA define “major life activities”?

A: To be deemed disabled, an employee must have an impairment that substantially limits “one or more major life activities.” According to the ADAAA, these activities include: caring for oneself, performing manual tasks, seeing, hearing, breathing, lifting, bending, learning, reading, concentrating, thinking, communicating and working. Further expanding the definition of “MLA,” the ADAAA adds “any major bodily function” to the list, specifically enumerating coverage for immune system; cell growth; digestive, bowel, bladder, reproductive, and other bodily functions.

Q: What does the ADAAA consider to be a “substantially limiting” impairment?

A: The ADAAA rejects the U.S. Supreme Court’s stringent interpretation of the phrase, “substantially limits a major life activity,” which required an impairment to prevent or severely restrict an activity of central importance to the individual’s daily life. While the ADAAA rejects that pro-employer definition, it provides no alternative standard. Instead, the ADAAA requires the EEOC to define “substantially limits,” which likely will be less strict.

Q: What happens under the ADAAA if an employer discriminates against someone “regarded as” having a disability?

A: The ADAAA makes it easier to prove an employer discriminated against someone it wrongly “regarded as” having a disability. Under the original ADA, an individual bringing suit needed to prove that the employer regarded the employee as being substantially limited in a major life activity. This was a difficult standard to meet. Now, the individual only has to show that the employer perceived the individual as having a mental or physical impairment, regardless of whether the impairment substantially limits, or is perceived to limit, a major life activity.

Q: I understand that it will be harder for employers to defend ADA claims. Does any part of the new ADAAA favor employers?

A: The ADAAA does clarify that “regarded as” claims cannot be based on impairments that are minor or “transitory,” i.e., expected to last less than six months. In addition, the ADAAA makes it clear that employers do not have to provide a reasonable accommodation to individuals who are “regarded as” disabled. Finally, the ADAAA prohibits “reverse discrimination” claims. Thus, a non-disabled employee may not claim discrimination if a disabled employee is favored in an employment decision.

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The amendments cause a much larger group of employees to be deemed disabled and, therefore, protected under the law. Employers now need to be even more careful when making decisions...

■ Manage litigation risks proactively by consulting now with your legal advisers to counteract the inevitable rise in the number and expense of disability lawsuits.

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FTC Grants Delay of Red Flags Rule Enforcement

By Alan S. Wernick

A new amendment to the Fair and Accurate Credit Transactions Act of 2003 (“FACTA”) requires covered entities to create programs which must provide for the identification, detection, and response to patterns, practices, or specific activities—known as “red flags”—that could indicate identity theft.

On October 22, 2008, the FTC granted a six-month delay of its enforcement of the Red Flags Rule requiring “creditors” and “financial institutions” to have identity theft prevention programs in place. Now the FTC enforcement of the Red Flags Rule will begin May 1, 2009. The purpose for the delay is to allow covered entities sufficient time to establish and implement appropriate identity theft prevention programs in compliance with the Red Flags Rule. Regardless of the size of your business, if the business extends credit and is a steward of data that, if breached, presents a reasonably foreseeable risk of identity theft, then the rule may apply.

This delay in enforcement is limited to the Identity Theft Red Flags Rule (16 CFR 681.2), and does not extend (a) to the rule regarding address discrepancies applicable to users of consumer reports (16 CFR 681.1), or (b) to the rule regarding changes of address applicable to card issuers (16 CFR 681.3). The FTC delay also does not affect other federal agencies’ enforcement of the original November 1, 2008, deadline for institutions subject to the oversight of these other federal agencies to be in compliance with the Red Flags Rules.

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