

Amendments Broadens Disabilities Act



Q: What effect will the recent amendments to the Americans with Disabilities Act have on my association?

A: On September 25, 2008, the president signed into law a bill passed by both the Senate and House of Representatives to amend the Americans with Disabilities Act (ADA). The new law, referred to as the ADA Amendment Act of 2008 (the Act), will be effective as of Jan. 1, 2009. Congress has taken this action in order to halt what it believes has been an impermissible judicial trend of narrowing the broad scope of protection it intended the ADA to provide individuals with disabilities.

The Act significantly broadens the definition of disability in a number of ways and lowers the standard for determining whether an impairment substantially limits an individual's major life activity. Currently under the ADA, the term "disability" includes: (i) a physical or mental impairment that substantially limits at least one of an individual's major life activities; (ii) a record of having such impairment; or (iii) being regarded as having such impairment. The new Act clarifies that an individual could meet the third prong's "being regarded as" definition regardless of whether the impairment is perceived to limit a major life activity. The perceived impairment, however, cannot be "transitory and minor," which the Act defines as having an actual or expected duration of six months or less.

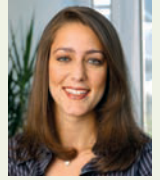
The Act specifically rejects the Supreme Court's ruling that the ADA is to be inter-

preted strictly to create a demanding standard for qualifying as having a disability under the ADA. The Act provides that: (i) the definition of "disability" should be construed broadly to the maximum extent permitted by the Act; (ii) that the term "substantially limits" does not require extensive analysis, must be interpreted broadly (consistent with the findings made in the Act), and does not mean "significantly restricted" as described by Equal Employment Opportunity Commission regulations; (iii) that an impairment that substantially limits one major life activity need not limit other major life activities; and (iv) that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

According to the Supreme Court's decision in a 1999 case, an employee is not "disabled" under the ADA if mitigating measures correct or improve the impairment. The Act expressly rejects this holding and prohibits consideration of the ameliorative effects of mitigating measures in determining whether or not an individual is "disabled." Such mitigating measures include: (i) medication, medical supplies, equipment, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, oxygen therapy equipment and supplies; (ii) the use of assistive technology; (iii) reasonable accommodations or auxiliary aids and services; or (iv) learned behavioral or adaptive neurological modifications.

The ADA regulations provide that the term "major life activities" as used in the ADA's definition of "disability" includes functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. The Act expands the list to also include "major bodily functions," such as functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory,

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circulatory, endocrine and reproductive functions.

By broadening the ADA's definition of disability and lowering the standards as discussed above, the Act will undoubtedly make it easier for individuals to garner protections under the ADA. An individual would still be required to demonstrate that he or she is qualified for his/her job (in accordance with the ADA's criteria), meaning that, with or without reasonable accommodation, the individual can perform the essential functions of the job. Nevertheless, employers can expect to see a major expansion in employees' requests for workplace accommodations and a consequential increase in litigation.

In addition, the Act will have a significant impact outside of the employment context, especially for organizations that administer exams. Under the ADA, organizations that "offer examinations...related to applications, licensing, certification, or credentialing for secondary or post-secondary education, professional, or trade purpose [are required to] offer such examinations...in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals."

Because of the wide scope of the Act and the broader definition of disability, it is likely that organizations will be required to provide accommodations to a wider range of individuals. Accordingly, costs associated with testing are likely to increase. Further, organizations administering exams will likely have greater concern regarding score comparability and fairness if they are required to provide more testing accommodations.

Organizations must take the time to understand the new Act and assess its implications, not only as an employer, but also with respect to the services it provides to members and the public. ■

The answers provided here should not be construed as legal advice or a legal opinion. You are urged to consult a lawyer concerning any specific situations or legal questions you may have.