

THE ADA'S "DISABILITY" DEFINITION BROADENED

On September 25, 2008, the President signed the "ADA Amendments Act of 2008," ("ADAAA") which will significantly increase the amount of employees who will be deemed "disabled" and protected under the Americans with Disabilities Act of 1990 ("ADA"). ADAAA accomplishes this by *overturning* a series of Supreme Court interpretations on the ADA's coverage requirements. These decisions imposed a demanding standard, finding that certain types of physical or mental impairments were insufficient to consider the claimant employee "disabled," as defined by the ADA. These amendments become effective on January 1, 2009.

An individual who seeks the ADA's protection must first establish that he/she comes within at least one of the three prongs of the ADA's "disability" definition. Specifically, the individual must show he/she: (1) has an *actual*, "substantially limiting" impairment that limits one or more "major life activities of the individual;" (2) has a *record* of such a substantially limiting impairment; or (3) was *regarded as* having such a substantially limiting impairment, irrespective of whether the individual actually has such an impairment. An individual unable to prove at least one of these three prongs does not meet the threshold question as to whether he/she is a member of the "protected group" under the ADA. Failure to establish this threshold requirement precludes the claimant from reaching the issues as to whether discriminatory intent was involved in the adverse employment decision or whether the employer was required to provide a "reasonable accommodation."

Background

As indicated, through a series of decisions interpreting the ADA's definition of "disability,"

the U.S. Supreme Court narrowed what the term "disability" entails. See, *Sutton v. United Airlines, Inc.*, 527 US 471 (1999); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); and *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).

Sutton and *Murphy* held that when determining whether an individual is substantially limited in a major life activity, courts may consider only the limitations of an individual that persist *after* taking into account mitigating measures (*e.g.*, medication or auxiliary aids and services) and any negative side effects the mitigating measures may cause. *Albertson's* held that a "mere difference" in how a person performs a major life activity does not make the limitation "substantial." How an individual has learned to compensate for the impairment, including "measures undertaken, whether consciously or not, with the body's own systems," also must be taken into consideration. Concerned that an expansive interpretation of the ADA would extend its protections and benefits to a larger portion of the population than intended by Congress, the *Toyota Motor* decision cautioned that the ADA "need[s] to be interpreted strictly to create a demanding standard for qualifying as disabled." Thus, the Court held that the ADA was not meant to cover every person who had problems functioning in a specific job, but only persons whose impairment *also* significantly affected the activities of daily living.

In light of the above standards, in *Albertson's* a truck driver who could only see through one eye was found not to be disabled, because his brain had adjusted to his visual impairment-he had been able to self-mitigate his impairment. In *Murphy* a hypertensive mechanic was found not to be

disabled because his blood pressure was maintained at normal levels with medication. The *Sutton* decision held that two myopic airline pilots were deemed not disabled, because they could see normally with corrective lenses. In *Toyota Motor*, the plaintiff was found unprotected because she did not demonstrate how her impairment also affected her daily life. Since she could engage in the normal activities of daily living outside of work, it was held that her impairment was insufficient to meet the ADA's definition of "disability."

What has Changed?

These are the highlights of the more significant changes made by ADAAA:

Broadened coverage. ADAAA states that the ADA should be interpreted broadly rather than narrowly, as the Supreme Court had held.

"Mitigating measures" discarded. One of the biggest changes is the rejection of the court decisions requiring "mitigating measures" to be taken into account in determining whether an impairment is sufficiently limiting to constitute a "disability." These decisions had concluded that if the condition is treatable with medication or can be addressed with the help of assistive technology, the individual was not "disabled." ADAAA rejects this approach. Now, assistance from medication, technology, equipment, devices and other similar aids that ameliorate the condition will no longer be part of the evaluation. *Notable exceptions:* glasses and contact lenses may still be considered. Further, the new definition considers adverse actions taken as the result of an individual's use of mitigating measures constitute illicit actions taken "on the basis of a disability."

Remission. A condition that is presently in remission, episodic or latent will now qualify as a disability if it *would* substantially limit a major life activity *when active*.

"Substantially Limits" Loosened. ADAAA rejects the Supreme Court ruling that the phrase "substantially limits" should be considered under a "demanding standard." Also rejected are the

EEOC regulations that define the term as "significantly restricted." Specifically, the EEOC is directed to abandon its present interpretation and rewrite its regulation.

"Major Life Activities" Expanded. ADAAA provides specific examples of "major life activities," including "major bodily functions" such as "immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." Further, now an impairment that substantially limits one major life activity need not limit *other major life activities* in order to be a "disability" under the ADA.

"Regarded As" Narrowed. ADAAA makes it much easier for individuals to obtain protection under the ADA by merely showing they were "regarded as" having a disability. Previously, individuals claiming they were "regarded as" having a disability, also had to prove the employer mistakenly regarded them as having impairments that "substantially limited a major life activity." Now, an employer will be held liable under the "regarded as" theory if the claimant can simply prove being *perceived* or *treated* as having a physical or mental impairment, irrespective of whether or not the individual has an impairment that actually limits or is perceived to limit a major life activity. However, the ADAAA excludes from "regarded as" claims those minor/transitory conditions lasting or expecting to last six months or less. Also, the amendment clarifies that employers are not required to provide a "reasonable accommodation" to individuals who are "regarded as" disabled.

Testing Restricted. ADAAA also prohibits the use of qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless the standard, test, or other selection criteria, as used, is shown to be related to the position and is consistent with business necessity.

What Should Employers Do?

Under these new rules, employers need to be more cautious and proactive when handling matters involving individuals with any impairment, as well as when addressing requests for reasonable accommodations. The following is an initial checklist of steps to be taken:

Ensure the Company has a published policy addressing discrimination on the basis of disability; describing the procedures for notifying the need for a reasonable accommodation; and an internal grievance procedure to address claims of discrimination, harassment and failures to provide reasonable accommodations.

Audit all stages of the employment relation (e.g., recruitment, hiring, testing, job descriptions, training, evaluations, leaves, corrective actions and terminations) to ensure they are ADA compliant.

Establish a formal protocol on how to address employee limitations due to injuries or sicknesses and on handling the need for reasonable accommodations.

Establish more periodic and intensive “in house” training/workshops for supervisors and HR personnel on the spectrum of the ADA issues.

TAX-FREE PAYMENTS TO CERTAIN DISCHARGED EMPLOYEES

The election year “less taxes” frenzy has produced tax-free treatment for certain discharge-related payments to employees. Curiously, this significant change in the law was made by amending Puerto Rico’s Wrongful Discharge statute, Law No. 80 of May 30, 1976, as amended.

Law No. 278 of August 15, 2008, amends Article 10 of Law No. 80, to provide that *any* compensation (including profit sharing plan liquidations) made to an employee upon being discharged in the context of a workforce reduction, partial or total plant closing, technological changes

or reorganizations will be *exempt* from income taxation. This would appear to apply to any voluntary severance payment as well. Note that the tax-free treatment is not capped. It is not limited to an amount equivalent to the Law No. 80 discharge indemnity.

It should also be noted that the income tax-free treatment of such payments *does not* apply to employment terminations based on an employee’s conduct, performance or violation of employer rules.

Law No. 278 also amends Article 7 of Law No. 80 to provide that *any* special compensation (including profit sharing plan liquidations) made to an employee upon being discharged in the context of a workforce reduction, partial or total plant closing, technological changes or reorganizations, will *not* be included in the calculations in determining the amount that may be due under Law No. 80, if the discharge is deemed to be “without just cause.” The Law No. 80 liability can be triggered even when the “reason” is one the above-identified circumstances, if the employer fails to follow the Law No. 80 “seniority rules” in selecting the employee terminated.

Also contained in the amendment to Article 7 of Law No. 80, is an almost imperceptible change in the law with regard to the *impact* of any such payments in the above-described circumstances on the employee’s entitlement to the wrongful discharge indemnity under Law No. 80.

Previously, it was recognized that when the employer provided the employee with an express termination payment equal to or greater than the Law No. 80 indemnity, the employee could not subsequently recover an additional payment under Law No. 80. This amendment creates uncertainty as to whether this will still be the case. Given this uncertainty, employers should probably condition any such “voluntary” payment to the signing of a complete *release* for all claims. Another alternative would be to *amend* any program or plan providing the special compensation in such circumstances, to expressly indicate that the amount paid covers and

includes any payment the employee could be entitled to, under any law or contract, on account of the employee's discharge.

INCREASED CRIMINAL PENALTIES FOR EMPLOYMENT DISCRIMINATION

Law No. 250 of August 13, 2008, amends Puerto Rico's General Antidiscrimination Act (Law No. 100) to increase the criminal penalties for violations of the Act. Accordingly, any employment discrimination prohibited under Law No. 100 exposes the employer to a fine up to five thousand (\$5,000) dollars (previously \$500) or imprisonment for up to ninety (90) days, or by both penalties, at the discretion of the court.

TAX BREAKS ON EMPLOYEE BENEFITS

Law No. 186 of August 7, 2008, amends the PR Tax Code to increase the annual limitation on employee pre-tax contributions to Puerto Rico qualified retirement plans with a cash or deferred compensation arrangement.

Prior to the amendment, a plan participant was allowed to defer the lesser of 10% of the annual salary or \$8,000. Law No. 186 eliminates the 10% compensation limitation. The Act increases the deferred contribution limit amount as follows:

Taxable Year	Amount
Ending on or prior to 12/31/08	\$8,000
From 1/1/09 to 12/31/2010	\$9,000
From 1/1/2011 to 12/31/2012	\$10,000
Starting on or after 1/1/2013	\$12,000

In computing the deferred contribution limit, amounts contributed to other plans in which the employee participates and contributions made to an individual retirement account are taken into consideration.

Also noteworthy is Law No. 156 of August 2008, which amends the PR Tax Code to allow the establishment of Health Savings Accounts ("HSA"), Health Reimbursement Arrangements

("HRA"). These benefits can be powerful tools to enhance employee satisfaction.

The funds contributed to the HSA account (as well as the interest accrued) are not subject to income tax at the time of deposit or accrual. Funds may be used to pay for qualified medical expenses at any time without tax liability.

The HRA's are arrangements that allow an employer, as agreed to in the plan document, to reimburse for medical expenses paid by participating employees. Reimbursements claimed by the employee are tax free, provided they are tied to qualified health care expenses.

Note: Because of the general nature of this Labor Newsletter, nothing herein should be considered as legal advice or a legal opinion. For further information, please contact our labor and employment lawyers.

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