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## President Signs New Law That Will Expand the Number of Employees Protected by the American with Disabilities Act

By Katharine A. Cole, Mark Stewart Hayes, and Lesley A. Pate

On September 25, 2009, President George W. Bush signed into law the ADA Amendments Act of 2008 (ADAAA), a new law that effectively overturns a series of court decisions that have narrowed the scope of the Americans with Disabilities Act (ADA) since its original enactment in 1990.

As explained below, among other major changes, the ADAAA instructs courts to interpret the definition of “disability” under the ADA broadly, and it provides that employees generally will be protected under the ADA even if they use mitigating measures, such as medications, to treat or control their health conditions.

### Major Provisions of the ADAAA

An overriding goal of the ADAAA is to make sure that individuals with disabilities are, in fact, afforded the protections originally intended by Congress when it enacted the ADA. Under the current version of the ADA, a “disability” is defined as: (1) having a physical or mental impairment that substantially limits one or more major life activities; (2) having a record of such impairment; or (3) being regarded as having such an impairment. The ADAAA maintains but clarifies this definition of “disability” as follows:

- **“Substantially Limits”:** Although the ADAAA does not define what the term “substantially limits” means, it explicitly states that the definition set forth in the regulations issued by the Equal Employment Opportunity Commission, the government agency charged with enforcing the ADA, is “inconsistent with Congressional intent, by expressing too high a standard.” The ADAAA then directs the EEOC to issue revised regulations that are consistent with Congress’s intent to provide broad protection for disabled employees.
- **“Major Life Activities”:** The ADAAA clarifies that a person needs to show an impairment of one major life activity to qualify as disabled. Unlike the original statute, which did not identify what constitutes a major life activity, the ADAAA provides that major life activities include, but are not limited to, 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 also states that “major life activities” include certain bodily functions, such as the

workings of the immune, digestive, circulatory, and endocrine systems.

Because the major life activities identified in the ADAAA are simply illustrative, there will likely be significant litigation in the future regarding what additional activities constitute “major life activities.” In addition, the ADAAA provides that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

- **Use of Mitigating Measures:** The ADAAA clarifies that the use of ameliorative mitigating measures, such as medication or medical equipment, will not remove an individual from protection under the ADA. Two notable exceptions to this new standard are contact lenses and common eyeglasses, both of which are measures that may be considered when determining whether a vision-related condition qualifies as a disability for purposes of the ADA.
- **Regarded as Having an Impairment:** The ADAAA adds clarification to what it means for an individual to be regarded as having an impairment. Under the new law, an individual proves that he or she has a disability if the individual can show that he or she has been subjected to prohibited action based on an actual or perceived physical or mental impairment. This means that a person does not need to show he or she was actually limited in a major life activity. However, the new standard does not apply to impairments that are “transitory and minor,” which is defined as impairments that have an actual or expected duration of six months or less, such as colds or the flu.

Although the ADAAA makes it easier for an employee to show that he or she is disabled under the “regarded as” prong, it does clarify that employers do not have to make accommodations for employees who are not actually disabled but merely regarded as such.

### **Impact of the ADAAA on Independent Schools**

Independent schools have until January 1, 2009, to review and revise their policies and procedures to ensure compliance with the ADAAA. Independent school business managers and/or human resources professionals should consider engaging in refresher training on the ADA’s requirements and providing appropriate training to school supervisors and any other employees who would be in a position to receive ADA-related requests for reasonable accommodations. During this time, schools should pay particular attention to the following two issues:

- **Requests For Reasonable Accommodations:** The ADA requires employers to provide qualified disabled employees with reasonable accommodations. Although the ADAAA does not change the nature of the accommodations that must be provided, it will expand the number of employees who are entitled to such accommodations. Schools should train supervisors on how to recognize requests for accommodations and other situations where accommodations may be appropriate and should take extra caution to ensure legal compliance in determining whether an accommodation is necessary.
- **New Focus on the Interactive Process:** The ADA requires employers to engage in an interactive process with employees when determining what accommodations, if any, will be effective to permit a disabled employee to perform the essential functions of his or her job. Because the ADAAA expands the definition of “disability,” the new focus is expected to be less on whether the employee has a qualifying “disability” and more on the

interactive process itself. Schools should take care to properly engage in this process and document their actions.

If you have questions regarding compliance with the requirements of the ADAAA, please contact one of the Venable lawyers with whom you work. Venable's labor and employment lawyers have wide experience representing employers in disability-related matters.

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