

Amendments to the Americans with Disabilities Act

On September 25, 2008, President Bush signed into law the ADA Amendments Act of 2008 (the “Act”) amending the Americans with Disabilities Act. The Act will be effective January 1, 2009 and will likely increase employers’ responsibilities and potential liability by expanding the number of individuals who will be covered by the ADA. This bulletin provides a brief overview of the Act and its potential effects.

One objective of the Act is to overturn Supreme Court precedent defining “disability” under the ADA, including the Supreme Court’s rulings in *Sutton v. United Airlines*, 527 U.S. 471 (1999) and *Toyota Motor Manuf., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002). In *Sutton*, the Supreme Court held that measures that improve the condition (in that case, eye glasses) must be considered when determining whether a condition substantially limits a major life activity so as to constitute a “disability” under the ADA. In *Toyota*, the Supreme Court held that a condition “substantially limits” a major life activity when it prevents or severely restricts the individual, either permanently or on a long-term basis, from doing activities that are of central importance to most peoples’ lives.

Both the Senate and House specifically noted in their respective versions of the Act that these cases narrowed the scope of the ADA contrary to congressional intent. To remedy what it perceived as erroneous rulings, Congress amended the ADA with the following objectives:

- Reject the consideration of mitigating measures, such as medication, in determining whether an impairment is a disability and thus protected. In deference to *Sutton*’s facts, the Act excludes vision correctable by normal eyeglasses or contact lenses (the mitigating measure at issue in *Sutton*) from the definition of disability.
- Prohibit discrimination against those suffering from the side effects caused by mitigating measures and require employers to accommodate the effects of the medication, etc., as well.
- Include in the definition of disability impairments that are episodic or in remission if the impairment, when active, would substantially limit a major life activity. In other words, an employee whose cancer is in remission could still be considered disabled.
- Cover less severe impairments than are covered under the current precedent. The Act states that the term “substantially limits” should be interpreted consistently with Congress’ finding that current Supreme Court precedent (*Toyota*) incorrectly requires a greater degree of limitation than Congress intended.
- Include the operation of major bodily functions, such as functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions as major life activities which, if substantially limited, could establish a disability.
- Expand the definition of those “regarded as” disabled by including those subjected to an action prohibited by the Act because of an actual or perceived impairment, regardless of whether the impairment limits or is perceived to limit a major life activity. The “regarded as” prong does not apply to impairments that are both minor *and* transitory (defined as a 6-month or shorter actual or perceived duration).
- Require accommodation of individuals who are merely “regarded as” disabled, resolving a circuit split on the issue.

As noted, these amendments take effect January 1, 2009. While neither Congress nor the EEOC has shed any light on whether these amendments will be applied retroactively, consideration of past amendments to federal employment discrimination laws suggests there are strong arguments an employer can make against retroactive application.

Developments in ADA Litigation Regarding Return-To-Work Notifications

In other ADA litigation news, the EEOC has recently directed its ADA enforcement actions toward the issue of whether employers' return-to-work policies violate the "inquiry" provision of the ADA by requesting too much information about employees' illnesses. The ADA prohibits an employer's inquiries regarding an employee's disabilities unless the inquiry is job-related and consistent with business necessity. The EEOC recently filed suit against Dillard's, alleging that one of the company's California stores required employees returning from sick leave to reveal the specific nature of their illness before their absence would be excused. *EEOC v. Dillard's*, No. 08-CV-1780 (S.D. California) (filed Sept. 28, 2008). In a separate suit filed in the Western District of New York, the EEOC asserts that Delphi Corporation's policy of requiring employees returning from sick leave to sign a consent form allowing their supervisor to contact their physician and determine the employee's diagnosis also violates the ADA. *EEOC v. Delphi Corp.*, No. 07-CV-6430T (W.D.N.Y.) (filed Sept. 28, 2007).

In a recent case expounding on this issue, the Southern District of New York held that an employer seeking to justify a return-to-work policy that inquires into the nature of an employee's illness must show that its justification for the policy is indeed a business necessity, that the policy genuinely contributes to that business necessity, and that the class affected by the policy is reasonably defined. The court held that the employer's proffered business necessity of curbing sick leave abuse was sufficient to justify its policy only with respect to a small class of employees who had been shown to be potential sick leave abusers (defined in this case as persons with at least 6 absences in a one-year period or who had a tendency to be absent around holidays, weekends, or sporting events), and that the employer's proffered business necessity of ensuring safety was sufficient to justify the policy only with respect to those employees who performed safety-sensitive work. The case would have proceeded to trial to determine which employees fit these classes, but settled in June of this year. *See generally Transport Workers Union of Am. v. New York City Transit Authority*, 341 F. Supp. 2d 432 (S.D.N.Y. 2004).

The Fifth Circuit has not yet decided any case on this precise issue. In the interim, employers should examine the conditions under which supervisors inquire into an employee's specific underlying medical condition to consider whether there is a business necessity for such inquiries.

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