

The ADA Amendments Act of 2008 (ADAAA)

BROAD COVERAGE

Congress enacted the ADA in 1990. Throughout the congressional deliberations, there was broad agreement that the federal disability law return to the broad coverage that Congress envisioned when it passed the ADA in 1990.

The ADA defines "disability" as: (1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment.

Although the amendments fundamentally maintain the ADA's "disability" definition, the ADAAA takes several steps to achieve a broader interpretation of these terms.

- *Substantially limits*: The ADAAA states that "The term 'substantially limits' shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008." This Findings and Purposes section squarely condemns narrow judicial interpretations of "substantially limits."

The ADAAA also instructs the Equal Employment Opportunity Commission to issue new regulations re-defining "substantially limits," from its current definition ("significantly restricts") to comport with the act's broader view.

- *Major life activities*: The ADAAA now includes a nonexclusive list of major life activities, including sleeping, learning, concentrating, thinking, and communicating. A significant addition now lists the operation of "major bodily functions," including functions of the "immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." These changes will help eliminate the confusion about what conditions may fall under the ADA and direct attention to the underlying medical condition.

- *"Regarded as" analysis*: The ADAAA expands "regarded as" protections by prohibiting discrimination based on the employer's perception of a mental or physical impairment, whether or not the individual can establish that the impairment actually limits, or is perceived to substantially limit, a major life activity.

(1)[*some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older*]

physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably

famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductively.

(b) PURPOSE.--It is the purpose of this Act--

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 USCA <section> 12102

SEC. 3. DEFINITION[S] OF DISABILITY.

As used in this Act:

(1) *AUXILIARY AIDS AND SERVICES.*--The term "auxiliary aids and services" includes--

(A) *qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;*

(B) *qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;*

(C) *acquisition or modification of equipment or devices; and*

(D) *other similar services and actions.*]

([2] DISABILITY.—The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment **(as described in paragraph (3))**.

(2) MAJOR LIFE ACTIVITIES.—

(A) IN GENERAL.—For purposes of paragraph (1), 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.

(B) MAJOR BODILY FUNCTIONS.—For purposes of paragraph (1), a major life activity also includes the operation of major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

(3) REGARDED AS HAVING SUCH AN IMPAIRMENT.—For purposes of paragraph (1)(C):

(A) An individual meets the requirement of “being regarded as having such an impairment” if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

(4) RULES OF CONSTRUCTION REGARDING THE DEFINITION OF DISABILITY.— The definition of ‘disability’ in paragraph (1) shall be construed in accordance with the following:

(A) The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.

(B) The term “substantially limits” shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.

(C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

(D) An impairment that is episodic or in remission is a disability if it would

substantially limit a major life activity when active.

(E)(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as—

(I) medication, medical supplies, equipment, or appliances, 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, or oxygen therapy equipment and supplies;

(II) use of assistive technology;

(III) reasonable accommodations or auxiliary aids or services; or

(IV) learned behavioral or adaptive neurological modifications.

(ii) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

(iii) As used in this subparagraph—

(I) the term “ordinary eyeglasses or contact lenses” means lenses that are intended to fully correct visual acuity or eliminate refractive error; and

(II) the term “low-vision devices” means devices that magnify, enhance, or otherwise augment a visual image.

SEC. 4. ADDITIONAL DEFINITIONS.

As used in this Act:

(1) **AUXILARY AIDS AND SERVICES.**—The term “auxiliary aids and services” includes—

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

([3]2) STATE.--The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of

DEPARTMENT OF JUSTICE

Office of the Attorney General

28 CFR PART 35

Nondiscrimination on the Basis of Disability in State and Local Government Services

AGENCY: Department of Justice.

ACTION: Final rule.

SUMMARY: This rule implements subtitle A of title II of the Americans with Disabilities Act, Pub. L. 101-336, which prohibits discrimination on the basis of disability by public entities. Subtitle A protects qualified individuals with disabilities from discrimination on the basis of disability in the services, programs, or activities of all State and local governments. It extends the prohibition of discrimination in federally assisted programs established by section 504 of the Rehabilitation Act of 1973 to all activities of State and local governments, including those that do not receive Federal financial assistance, and incorporates specific prohibitions of discrimination on the basis of disability from titles I, III, and V of the Americans with Disabilities Act. This rule, therefore, adopts the general prohibitions of discrimination established under section 504, as well as the requirements for making programs accessible to individuals with disabilities and for providing equally effective communications. It also sets forth standards for what constitutes discrimination on the basis of mental or physical disability, provides a definition of disability and qualified individual with a disability, and establishes a complaint mechanism for resolving allegations of discrimination.

EFFECTIVE DATE: January 26, 1992.

FOR FURTHER INFORMATION CONTACT:

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Congress Amends the
Americans with Disabilities
Act; President Bush
Expected to Sign New Law

On September 17, 2008, the U.S. House of Representatives approved the Senate's version (S. 3406) of the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA") sending the legislation to the White House for enactment. It is widely anticipated that President Bush will sign the legislation, clearing the way for the amendments to take effect on January 1, 2009. Previously, on September 11, 2008, the Senate approved the ADAAA by unanimous consent. Earlier, on June 25, 2008, the House of Representatives approved a similar, but slightly different, Bill (H.R. 3195) by an overwhelming vote of 402-17.

The new law effectively rejects a host of U.S. Supreme Court rulings, and their progeny in the lower courts, that narrowed the definition of "disability" contained in the Americans with Disabilities Act ("ADA"). The ADAAA will "carry out the ADA's objectives of providing 'a clear and comprehensive national mandate for the elimination of discrimination'" "on the basis of disability" and "by reinstating a broad scope of protection to be available under the ADA." As approved, "it is the intent of Congress" that the primary object of attention in disability cases be focused on whether covered entities have complied with their obligations to reasonably accommodate disabled applicants/employees.

In this Client Alert, Proskauer's ADAAA Task Force highlights the significant changes being made to the federal disabilities law.

I. ADAAA At A Glance

The ADAAA:

- Amends the definition of "disability" by providing clarification to its terminology;

- Rejects several Supreme Court rulings that narrowed the definition of "disability";

- Lowers the bar an employee must clear to show that his/her impairment is "substantially limiting";

Prohibits consideration of mitigating measures when determining whether an impairment constitutes a disability;

Provides that impairments that are episodic or in remission must be assessed in their active state;

Describes a non-exhaustive list of “major life activities” and expands the meaning of this phraseology by identifying “major bodily functions” that are incorporated therein;

Clarifies that an individual comes within the law’s “regarded as” protective umbrella by showing that s/he has been discriminated against because of an actual or perceived physical or mental impairment, whether or not the impairment limits a major life activity;

Provides that employers are not required to provide a reasonable accommodation to individuals who are “regarded as” disabled;

Reiterates that impairments that are minor and transitory are NOT protected disabilities under federal law (Beware of your state/local law!);

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A report
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Directs the EEOC and other federal regulatory authorities to issue Regulations implementing the definition of “disability” consistent with sections 3 and 4 of the ADAAA. This change will have repercussions, as well, for Title III compliance;

Re-emphasizes that an employee continues to bear the burden of proving that s/he is a qualified individual with a disability;

Clarifies that a person without a disability cannot bring an action for reverse discrimination (on the basis of not

having a disability); and

Leaves untouched several important provisions of the ADA, including those addressing reasonable accommodations, the interactive process, individualized assessments and undue hardship.

Be sure to look for Proskauer's invitation to its ADA AAA Breakfast Seminar, scheduled for October 16, 2008.

II. CHANGES UNDER THE ADA AAA

A. Definition of "Disability"

The ADA defines "disability" as: (1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment. While the amendments fundamentally maintain the ADA's "disability" definition, the ADA AAA takes several steps to achieve a broader, more generous interpretation and application of these terms.

1. "Substantially Limits" Standard

Turning to the first prong of the "disability" definition, although the legislation does not define the term "substantially limits," its unique drafting lowers the bar an employee must clear to establish protection under the ADA by requiring that the courts and agencies look to the language in the "Findings and Purposes" section when interpreting the ADA. To determine whether an individual's impairment meets the definition of "disability," the legislation directs that: The term "substantially limits" shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.

In turn, the legislation's "Findings and Purposes" explicitly rejects the strict standard created by the Supreme Court in *Toyota v. Williams*, 534 U.S. 184 (2002) ("Williams"), and provides that the term "substantially limits" should be viewed broadly. In *Williams*, the Supreme Court concluded that to be substantially limited in a major life activity, an "individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." According to both the House Committee Reports, and the Senate's Statement of the Managers Report, the Supreme Court's holding in *Williams* set an inappropriately high threshold for employees to establish rights and be afforded protection under the ADA by effectively defining "substantially limits" to mean "prevents or severely restricts." The Senate's Statement of Managers Report makes clear that the test is not to be a demanding standard but rather one that ensures "appropriately broad coverage under this Act." Thus, the 2008 amendments delete two findings in the ADA which led

the Supreme Court to narrow the definition of “disability.” The findings, now eliminated, are the references that some 43 million Americans suffered from some disabling condition and that individuals with disabilities are a discrete and insular minority. The ADAAA also specifically provides in its Rules of Construction Regarding the Definition of Disability (“Disability Rules of Construction”) that “[t]he definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.”

Significantly, as well, the Disability Rules of Construction make clear that an impairment that is episodic or in remission must be considered a disability so long as that impairment – in its active state – would be substantially limiting. Finally, the ADAAA also directs the Equal Employment Opportunity Commission (“EEOC”) to revise its regulations to define “substantially limits” consistent with these “Findings and Purposes” and categorically rejects the EEOC’s existing regulation defining “substantially limits” as “significantly restricted” as “inconsistent with congressional intent by expressing too high a standard.” The Attorney General (Title III) and Secretary of Transportation (Title II) are also directed to re-issue regulations compliant with ADAAA’s “disability” definition.

2. Major Life Activities

The ADAAA now provides a nonexclusive list of major life activities, including “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working.” “Major life activities” now also 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.”

The legislation makes it easier for people with disabilities to be covered under the ADAAA because it effectively expands the definition of disability to include many more major life activities, as well as creating a new subcategory of major bodily functions. Additionally, the ADAAA’s Disability Rules of Construction expressly provide that an impairment need only substantially limit one major life activity to be considered a disability. In so stating, the ADAAA rejects that part of the Supreme Court’s holding in *Sutton v. United Airlines*, 527 U.S. 471 (1999) (“Sutton”) to the effect that an individual must be unable to work in a broad class of jobs in order to be considered substantially limited.

3. Mitigating Measures

The ADAAA clarifies that the determination of whether an individual has a disability is to be made without taking into account the ameliorative effects of any mitigating measures (e.g., medication, medical supplies, equipment, or appliances) on an individual's impairment. Prescription eyeglasses and contact lenses are excluded, and may be considered when assessing whether an individual is "substantially limited" in a major life activity. Thus, the ADAAA rejects the Supreme Court's decision in Sutton that a determination of disability requires consideration of the measures taken to correct for or mitigate a physical and mental impairment, and whether the individual, in light of those ameliorative measures, remains substantially limited in a major life activity. Now, the ADAAA mandates that a determination of whether an individual is substantially limited in a major life activity is to be made without regard to mitigating measures.

4. "Physical Impairment" or "Mental Impairment"

The ADAAA does not provide a definition for the terms "physical impairment" or "mental impairment." According to the Senate's Statement of Managers Report, it is expected that the current regulatory definition of these terms, as promulgated by agencies such as the EEOC, the Department of Justice ("DOJ") and the Department of Education Office of Civil Rights ("DOE OCR") will not change.

B. "Regarded As" Having an Impairment

The ADA protects individuals who are "regarded as" having an impairment. The new law clarifies that an individual is protected under the "regarded as" prong so long as s/he establishes that s/he has been subjected to prohibited action based on an actual or perceived physical or mental impairment. Notably, as amended, an individual need not establish s/he is substantially limited in a major life activity to be protected under the "regarded as" prong of "disability."

This section of the legislation expressly rejects the Supreme Court's decision in Sutton, which held that an employer "must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting" to be liable under the "regarded as" prong of the ADA.

Notwithstanding the above, the amendments make clear that individuals who are "regarded as" having impairments that are minor and transitory (i.e., an actual or expected duration of six months or less) are not protected under the ADAAA.

Importantly, as well, although a broader class of individuals may be covered under the "regarded as" prong, the ADAAA makes clear that employers need not provide a reasonable accommodation to those "regarded as" having an impairment.

C. Discrimination on the Basis of Disability

The ADAAA amends Section 102 of the ADA to mirror the structure of nondiscrimination protection in Title VII of the Civil Rights Act of 1964, as amended, changing the language of Section 102(a) from prohibiting discrimination against a qualified individual “with a disability because of the disability of such individual” to prohibiting discrimination against a qualified individual “on the basis of disability.” As explained by the Senate’s Statement of the Managers Report, in restructuring the ADA’s language to mirror Title VII’s protective standard, the ADAAA ensures that “the emphasis in questions of disability discrimination is properly on the critical inquiry of whether a qualified person has been discriminated against on the basis of disability, and not unduly focused on the preliminary question of whether a particular person is a ‘person with a disability.’” Nevertheless, at all times, pursuant to the Burdineburden of proof formulation, it is the employee’s burden to establish he or she is a qualified individual with a physical or mental impairment who can perform the essential functions of the job.

III. IMPLICATIONS FOR EMPLOYERS

The ADAAA will undoubtedly increase the number of disabled individuals in the workplace, and employers will now need to consider individuals with conditions controlled by medication or other mitigating measures as coming within the protective ADA umbrella. While the new law should not require companies to revise their disability employment policies and practices already in place, coverage and protections afforded under the amended ADA will expand significantly.

What will this mean for employers? In our view, this expansion in the federal disability law should have little impact for employers in a number of states, such as California, New Jersey and New York, where state and/or local laws are even more expansive in their coverage and protections. Under the amended federal law, employees or applicants claiming a disability still must be “qualified,” and

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they will have to come forward with some documentary evidence from a health care practitioner supportive of the disability claim and reflecting the limitation(s) resulting from the impairment. As the ADAAA places the emphasis of inquiry squarely on the interactive process, employers must be prepared to engage applicants/employees in a reasonable accommodations conversation and, as appropriate, provide qualified applicants or employees with accommodations to perform their essential job duties.

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Client Alert

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