

## Labor and Employment E-news

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### ADA Amendments Will Expand Act's Scope

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Following in the footsteps of his father, President George H. W. Bush, who signed the original Americans with Disabilities Act ("ADA"), President George W. Bush signed the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA") on September 25, 2008. The amended Act, which becomes effective January 1, 2009, expands the law's scope to provide broader protection to employees with impairments. The text of the Act can be found at [S.3406](#).

Employers will quickly feel the effects of the ADAAA, which is aimed at addressing various judicial interpretations of the ADA that in Congress's view narrowed the Act's scope beyond its original intent. In particular, the ADAAA is intended to address pro-employer interpretations of the ADA, such as the U.S. Supreme Court's decisions in:

- *Sutton v. United Airlines*, which held that mitigating measures must be considered in determining whether an individual is disabled. For example, under *Sutton*, an individual with diabetes may not be considered disabled if the condition is controlled by medication; and
- *Toyota v. Williams*, which held that the ADA's definition of disability--"a physical or mental impairment that substantially limits one or more ... major life activities"--should be interpreted narrowly to create a "demanding standard for qualifying as disabled..."

### How the ADAAA Changes the Current Act

The amendments modify the ADA by more broadly defining some of the key terms in the Act that affect who is considered "disabled":

- **Mitigating Measures:** The amended Act prohibits consideration of the benefits of mitigating measures, such as the use of medication or prostheses, in determining the existence of a disability. So, using the example above, in determining whether an individual who takes medication to control diabetes is disabled, under the amended ADA the effects of the medication will not be considered. However, the amended ADA does specifically allow consideration of the use of "ordinary eyeglasses or contact lenses" when determining whether an individual is disabled. In other words, if vision is corrected by the "mitigating measure" of glasses or contacts, no disability exists.
- **Substantially Limits:** The amendments basically override the Supreme Court's pro-employer definition of the term "substantially limits," by directing the EEOC to revise the definition of that term "to be consistent with the Act," which means that it should be broadly,

not narrowly defined. Significantly, however, the amended Act does not contain a definition of “substantially limits.”

Addressing another “substantially limiting” issue, the amended Act also specifically states that conditions that are episodic or in remission are “substantially limiting” only if such impairments “...would substantially limit a major life activity when active.”

- **Major Life Activities:** Currently, the ADA does not define the term “major life activities,” but courts have relied on a non-exhaustive list from the EEOC regulations. The modified ADA expressly defines “major life activities” to include eating, sleeping, standing, lifting, bending, learning, reading, concentrating, thinking, and communicating. In addition, the term now includes the operation of any major bodily function, including digestive, bowel, bladder, brain, and respiratory functions.
- **“Regarded As” Changes:** The amended Act attempts to clarify the definition of when an individual is “regarded as” disabled: “An individual meets the requirements” if the individual establishes that he was subjected to a prohibited action because of an actual or perceived physical or mental impairment. The amended language means that an individual “regarded as” having a disability does not have to actually be limited, or perceived as limited, in a major life activity.

Addressing a court decision that had drawn substantial criticism, the ADAAA also clarifies that reasonable accommodations are not required if an employee is merely “regarded as” having a disability, but does not actually have one.

## **What the ADA Amendments Mean for Employers**

- The ADAAA will make it much harder for employers to assert that an employee with an impairment is not “disabled” under the Act.
- As a result, employers will more frequently be required to engage in the interactive process of determining whether a reasonable accommodation exists.
- In addition, more charges of disability discrimination, and litigation, are likely as employees and employers test the meaning of the amended Act.
- To avoid ADA claims, employers should:
  - Train managers and HR professionals on the ADA amendments.
  - Ensure that employment decisions are based on legitimate, non-discriminatory reasons.

For more information on the ADA amendments and the how these changes may affect your company, please contact your regular Butzel Long attorney, a member of the Butzel Long Labor and Employment Law Practice, or the author of this E-news bulletin.

**Miriam L. Rosen**  
rosen@butzel.com  
284.258.4498

[www.butzel.com](http://www.butzel.com)