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CLIENT ALERT - THE ADA AMENDMENTS ACT

Dear Client:

In September, Congress passed and President Bush signed into law the ADA Amendments Act ("ADAAA"). The ADAAA becomes *effective January 1, 2009*. With less than three months until the effective date, it is essential for employers to examine and understand the law and the impact that it will have on the workplace.

Overview

Under the new law, many more American workers will be covered. Congress was explicit that the Americans with Disabilities Act ("ADA") is meant to cover a broad group of people and passed the law in part to reverse some specific Supreme Court decisions issued about the ADA and regulations, which Congress considered to be inconsistent with the purpose and intent of the ADA.

The Statutory Changes

The ADA defined "disability" to mean three things: a physical or mental impairment that substantially limits a major life activity; a record of disability; or being regarded as having a disability. The ADAAA redefines the term "disability" in several ways.

1. It no longer permits employers to take into account mitigating measures (items like hearing aids or insulin) when determining whether someone has a disability. The only exceptions are ordinary eyeglasses and contact lenses; these still may be taken into account.
2. It defines "major life activities," providing an illustrative list of major life activities which includes caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping,

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walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working. It also specifies that a “major life activity” includes the operation of a major bodily function, such as functions of the immune system, normal cell growth and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions.

3. It clarifies that an impairment that substantially limits one major life activity need not limit other major life activities.
4. With respect to the “regarded as” definition of disability, the ADAAA removed the “substantially limits” requirement; now, someone with an impairment can be regarded as having a disability, even if there is no perception that the impairment limits a major life activity. However, an individual with a transitory impairment (an impairment with an actual *or expected* duration of six months or less) can not be regarded as disabled.
5. It clarifies that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

The ADAAA further requires the EEOC to revise its regulatory definition of “substantially limits,” stating that the EEOC’s determination that the term means “significantly restricted” is too restrictive and inconsistent with the congressional intent of ADA.

Finally, the ADAAA also clarifies that employers do not have to reasonably accommodate someone who is only regarded as having a disability. There had been a school of thought that even those persons whom an employer regarded as being disabled were entitled to reasonable accommodation under the ADA; the ADAAA is clear that such an entitlement does not exist.

Practical Impact for Employers

Employers now will face many more workplace situations where applicants and employees will qualify as being “disabled” for purposes of the ADA. Before the ADAAA, employers had to look on a case-by-case basis to determine whether many diseases or conditions were covered by determining whether the person was substantially limited in a major life activity. For example, a person living with diabetes previously might not be seen as being substantially limited in a major life activity. Because the ADAAA now includes major bodily functions like immune systems as a major life activity, diabetics likely are covered unless they are just on the borderline. This means that employers will have to address many more requests for reasonable accommodations. It also may put employers at risk for more ADA damages awards and increase the pressure to settle earlier and for more.

What Employers Should Do

To ensure that they are ready for the ADA changes, which become effective January 1, 2009, employers should consider taking the following steps:

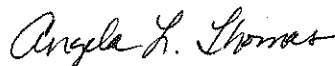
- Review and revise policies, as needed, to ensure compliance with the new law.
- Revisit job descriptions. Although nothing in the ADAAA imposes new requirements on employers with respect to job descriptions, it will be even more important to ensure that job descriptions accurately describe what employers believe are the essential functions of the position with so many more persons likely to be covered by the ADA.
- Provide training to supervisors and managers to notify them that the ADA has been amended to apply to a much broader group of people and to remind them of the duty to accommodate employees and applicants with disabilities. The training should underscore the requirement that managers and supervisors must notify Human Resources of reasonable accommodation requests. Although the training should address the new law, a refresher on the ADA basics would be appropriate.
- As part of the training, or as a separate exercise, review the interactive accommodation process with managers and supervisors. Ensure that they understand the employer's obligation to engage in the informal discussion with employees about accommodations and the importance of having Human Resources involved. The process should be directed by Human Resources and should also be well-documented. To prevail in ADA litigation, it is critical for an employer to fulfill the interactive process obligation. It may be a good idea for employers to develop internal policies and procedures on how to approach requests for reasonable accommodations and the interactive process.

If you need any assistance in preparing for the ADA, whether with training, policy review or review of job descriptions, please contact either Glenn Davis or Angela Thomas at 717-620-2424.

Sincerely,



Glenn R. Davis



Angela L. Thomas