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Congress On The Verge Of Expanding Protections For Disabled Employees

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The Americans with Disabilities Act ("ADA" or the "Act") prohibits discrimination in employment on the basis of a disability or perceived disability. According to many, the Act, while by its nature noble, has fallen far short of its original promise to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."

Presently, one of the greatest hurdles employees face in bringing an ADA claim is establishing that they have a condition that qualifies for coverage. According to at least one study, over 97% of all claims brought under the ADA result in dismissal. Many have attributed this to narrow Supreme Court interpretations regarding what constitutes a disability, as defined under the ADA.

In light of the Supreme Court's stance of this issue, Congress has jumped into action. On June 25, 2008, the House of Representatives passed a major civil rights bill (presently coined the "ADA Amendments Act of 2008") that, if enacted, would significantly expand protections for people with

disabilities. The bill, which passed in the House 402 to 17 (and is likely to pass through the Senate in similar fashion), would overturn several Supreme Court decisions and mark a new direction in ADA jurisprudence -- a direction which, according to many, captures the original intent of the ADA.[\[1\]](#)

Under the current law, a disability is defined as a physical or mental impairment that *substantially limits* one or more major life activities. (i.e. seeing, walking, carrying, etc.) 42 U.S.C. § 12102(2). According to the Supreme Court, 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." Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184, 198, 122 S.Ct. 681, 691 (U.S. 2002). This means, in part, that the impairment's impact must be permanent or long term. Id. [Citations omitted.] The impairment must also "presently" impact a major life activity. In other words, impairments that might, could or would substantially limit major life activities if mitigating measures are not taken do not count. Sutton v. United Air Lines, Inc., 527 U.S. 471, 482-483, 119 S.Ct. 2139, 2146 - 2147 (U.S. 1999). Accordingly, impairments which can be corrected through medication, devices (i.e. eyeglasses, hearing aids, etc.), or other measures do not substantially limit a major life activity. See Id.

The new bill, which expressly denounces the Supreme Court rulings in Toyota, Sutton and their companion cases, attempts to reinstate the broad scope of protections the ADA was originally designed to afford. To start, it flatly rejects the Supreme Court's holding that an impairment must "severely restrict" a major life activity and provides that the term "substantially limits" simply means "materially restricts," a less demanding standard. It also rejects the idea that an impairment must be permanent or long term by providing that a disability would qualify for coverage even if it is episodic or in remission, so long as it substantially limits a major life activity when active. This means that impairments such as epilepsy, multiple sclerosis and certain types of cancers (which have been traditionally excluded from coverage) would come under the purview of the ADA. In addition, the bill almost entirely eliminates the notion that a disability, for purposes of the Act, dissipates when an individual takes steps to accommodate or ameliorate the effects of an impairment, by providing that the use of correctivemeasures such as, but not limited to, medications, prosthetics, hearing aids, mobility devices and other medical equipment should **NOT** be considered in an analysis on whether an impairment substantially limits a major life activity.[\[2\]](#)

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Significantly, the new bill also expands on the concept of what constitutes a major life activity. In addition to codifying a non-exhaustive list of major life activities (such as seeing, hearing, concentrating, learning, breathing, etc.), the bill goes as far as including "major bodily functions" (e.g., immune, nervous, respiratory, reproductive and circulatory systems) into the definition of major life activities. This is especially significant because conditions like cancer, which in some circumstances has been excluded from ADA coverage in light of the fact that it affects bodily functions (i.e. normal cell growth) more than traditional life activities such as seeing, walking, working, breathing, etc., would be guaranteed coverage under the Act.

So what does all of this mean for employers? Very simply, this translates into more litigation and headaches for employers who are not careful in their dealings with individuals with impairments. Employers should take steps to ensure that managers and other decision-makers are fully aware of the breadth of this new bill, should it be enacted into law. The bottom line is that the significantly expanded definition of what constitutes a disability for purposes of the Act will result in: (i) more plaintiff lawyers bringing ADA claims; and (ii) more cases surviving summary judgment. The focus will turn from whether an employee has a disability (which in the past has proved to be a significant hurdle for plaintiffs) to whether an employee was actually subjected to discriminatory treatment. Outside of litigation, the new bill, if enacted, would also likely result in more employees making accommodation requests, which, on occasion, may serve as a precursor for failure to accommodate claims.^[3] Employers should train managers and decision-makers alike to be on the look out for impairments which could implicate the ADA and an employer's obligation to accommodate.

[1] While the bill is expected to pass through the Senate with relative ease, the White House is showing signs of reluctance. The White House recently released a statement that President Bush "supports the overall intent" of the bill but is wary that it would be overreaching and would significantly and unnecessarily increase disability litigation.

[2] Notably, contact lens and eye glasses may still be taken into consideration when doing a substantial limitations analysis.

[3] The definition of discrimination under the ADA includes failures to reasonably accommodate qualifying disabilities. Reasonable accommodations could range from the assignment of different or modified duties to permitting use of accrued paid leave or unpaid leave for treatment.