

# The Americans With Disabilities Act of 1990 (ADA) and The Americans With Disabilities Act Amendments Act of 2008 (ADA Amendments Act)

## **Historical Point of Reference**

- ✓ ADA was initially passed in 1990, with several amendments and clarifications since that time
- ✓ Title I details *employment* provisions and applies to employers with 15 or more employees
- ✓ Title II details applicability to *public services* and applies to any public entity as defined by the Act
- ✓ Title V details *miscellaneous provisions*

## **Purpose of the Act** (as stated in the regulation)

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 chapter 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. [104 Stat. 329, P.L. 101-336, 42 U.S.C. §12101.]

## **Summary of Recent Amendment**

- ✓ ADA Amendments Act signed by President Bush on 9/25/08 and became effective 1/1/09
- ✓ Instituted changes to the definition of the term “*disability*”
- ✓ Broadened the definition of “*regarded as having an impairment*”
- ✓ Rejected several U.S. Supreme Court decisions with regards to the interpretations of such terms as “*substantially limits*”, “*major life activities*”, and “*mitigating measures*”

## **Purpose of the Amendment** (as stated in the regulation)

1. To carry out the ADA's objectives of providing "a clear and comprehensive national mandate for the elimination of discrimination" and "clear, strong, consistent, enforceable standards addressing discrimination" by reinstating a broad scope of protection to be available under the ADA;
2. To reject the requirement enunciated by the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures;
3. To reject the Supreme Court's reasoning in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973;

4. To reject the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), that the terms "substantially" and "major" in the definition of disability under the ADA "need to be interpreted strictly to create a demanding standard for qualifying as disabled," and that to be substantially limited in performing a major life activity under the ADA "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";
5. To convey congressional intent that the standard created by the Supreme Court in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) for "substantially limits", and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis; and
6. To express Congress' expectation that the Equal Employment Opportunity Commission will revise that portion of its current regulations that defines the term "substantially limits" as "significantly restricted" to be consistent with this Act, including the amendments made by this Act.

### **Detailed Amendatory Changes**

- Definition of *disability* – “Should be construed in favor of broad coverage of individuals under the Act, to the maximum extent permitted by the terms of the Act.” Specifically, disability under the law will be construed broadly so that:
  - an impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability under the ADA; and
  - an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
- Definition of *substantially limits* – Directs the Equal Employment Opportunity Commission (EEOC) to revise that portion of its regulations that defines this term.
- Definition of *major life activities* – Expands this term by adding additional activities to those already identified by the EEOC including: eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating. Additional significant activities also now include the operation of a major bodily function, including functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive systems.
- *Episodic impairments* – Clarifies that an impairment that is episodic or in remission is a disability if the impairment would substantially limit a major life activity when active.
- *Mitigating measures* – An employer may no longer take into account an individual's use of mitigating measures when considering whether an impairment substantially limits a major life activity. Mitigating measures include, but are not limited to hearing aids, medication, medical supplies, auxiliary aids and services (such as qualified interpreters for individuals with hearing impairments), reasonable accommodations, and “learned behavioral or adaptive neurological modifications.” Excluded from the list are ordinary eyeglasses and contact lenses.
- Definition of *regarded as* – Clarifies that an individual meet the requirement of being “regarded as” having a disability if he or she has been subjected to an unlawful employment action 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,” unless the impairment is *transitory* and minor. A *transitory impairment* has an actual or expected duration of 6 months or less. Employees who indicate they are *regarded as* disabled are not entitled to reasonable accommodation.

- The issue of whether an individual has an ADA-covered disability will no longer be the focus of most litigation. Instead, it is likely that the focus will be on the individual's ability to perform the *essential functions* of a job; and whether the employer has met its obligations to engage in the interactive process and provide a *reasonable accommodation*.
  - Essential Functions – basic job duties that an employee must be able to perform, with or without reasonable accommodation. EEOC has indicated that the following factors should be considered when determining if a function is essential
    - Whether the reason the position exists is to perform that function.
    - The number of other employees available to perform the function or among whom the performance of the function can be distributed.
    - The degree of expertise or skill required to perform the function.
  - Reasonable Accommodation – any change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to participate in the job application process, to perform the essential functions of a job, or to enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities.

### ***Aspects That Remained Unchanged***

- ✓ Elements to Establish a Claim of Discrimination – Employee must show:
  - S(he) is qualified to perform the essential functions of the position, with or without reasonable accommodation;
  - S(he) has suffered an adverse employment action because of the disability; and
  - there is a causal connection between the disability and the employment action.
- ✓ Elements to Establish Failure to Provide Reasonable Accommodation – Employee must show:
  - The employer had notice of the disability and potential need for accommodation;
  - With reasonable accommodation, s(he) could perform the essential functions of the position;
  - The employer refused to make such accommodation
- ✓ Undue Hardship – an accommodation requiring significant difficulty or expense when considered in light of the following:
  - Nature and cost of the accommodation needed;
  - Overall financial resources of the facility involved, the number of persons employed at such facility, the effect on expenses and resources or the impact otherwise of such accommodation.
  - Type of employer operation, including the composition, structure, and functions of its workforce, the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the employer.
- ✓ Direct Threat - a significant risk of substantial harm and must be based on a reasonable medical judgment that relies on the most current medical knowledge and the best available objective evidence. Factors to consider:
  - Duration of the risk
  - Nature and severity of the potential harm
  - Likelihood that the potential harm will occur
  - Imminence of the potential harm.

### **Probable Impact on Business**

- ✓ Increased protection for employees under the ADA Amendment Act through clarifying definition of disability
- ✓ Increased number of employees claiming to have been regarded as having a disability
- ✓ Increase in ADA claims and lawsuits
- ✓ Increase in legal costs to fight claims
- ✓ Conditions not readily apparent can now be covered
- ✓ Employers will need to be much more proactive in engaging employees in the interactive process of reasonable accommodation and documenting the process.
- ✓ Employers will need to review policies that reference any of the old ADA definitions or language and update the information to current terminology and definitions; as well as review complaint procedures
- ✓ Employers should review job descriptions to ensure that essential functions are spelled out.
- ✓ EEOC has been instructed to issue both regulations and guidance, which will likely come in 2009.

### **How Can Employers' Association Help?**

- ✓ EA members have unlimited access to the HR Help Desk
  - ***Where do you turn when you have questions? It isn't always necessary to ask your legal counsel for assistance, especially when the question merely requires research by a knowledgeable, HR professional.***
- ✓ EA members have 24 x 7 x 365 access to the online research libraries available from BLR (human resources, compensation and safety)
  - ***Your HR responsibilities shouldn't be taken lightly. For those of you who prefer to conduct your own research, you will find the BLR libraries an excellent source of information.***
- ✓ EA provides supervisory training, both publicly and onsite
  - ***Educating your front-line supervisory staff and management personnel can be imperative for reducing your organization's liability***

**For more information about the benefits of TEA membership,  
contact Lynne Goede at 616.698.1167 or visit us at  
[www.teagr.org](http://www.teagr.org)**