

Soaring with the Blinders Off: Doing Business in a Post-ADAAA World

Presented by:

Jennifer P. Keller

100 Med Tech Parkway, Suite 200

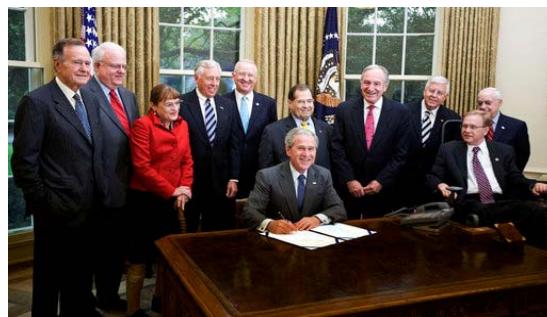
Johnson City, TN 37604

423.928.0181

jkeller@bakerdonelson.com



THE NEW ADAAA



- **Signed into law September 25, 2008 by former President George W. Bush**
- **Provisions of the ADAAA became effective January 1, 2009**
- **Considered an expansion of the ADA**
- **Will most likely result in increased legal and administrative expenses for employers**

Out with the old, in with the new....

Issue	ADA	ADAAA
Scope of the Definition of Disability: In General	<p>A disability is “a physical or mental impairment that substantially limits a major life activity of an individual.”</p> <p>The Supreme Court has narrowly construed this definition to exclude coverage to individuals with diabetes, epilepsy, cancer, muscular dystrophy, and artificial limbs.</p>	<p>A “disability” is “a physical or mental impairment that substantially limits a major life activity of an individual.”</p> <p>ADAAA rejects the Supreme Court’s interpretation of “substantially limits” and makes clear that Congress intends to apply a less demanding standard than that applied by the courts, and to cover a broad range of individuals.</p> <p>Definition of disability shall be construed in favor of broad coverage of individuals, to the maximum extent permitted by the terms of the ADA.</p>

More Differences

Issue	ADA	ADAAA
Mitigating Measures	<p>In <i>Sutton v. United Airlines</i>, the Supreme Court said that mitigating measures (such as medication or devices) were to be taken into account in determining whether a person was substantially limited in a major life activity.</p> <p>Thus, if medication or devices enabled a person with an impairment to function well, that person was often held by a court NOT to have a disability under the ADA – even if the impairment was the basis for discrimination.</p>	<p>The ADAAA provides that the ameliorative effects of mitigating measures should NOT be considered in determining whether an individual has an impairment that substantially limits a major life activity.</p> <p>An exception is made for “ordinary eyeglasses or contact lenses,” which may be taken into account.</p>

More Differences

Issue	ADA	ADAAA
The “Major Life Activity” Requirement	In <i>Toyota Motor Mfg. of Kentucky v. Williams</i> , the Supreme Court ruled that a “ major life activity ” must be an activity that is “of central importance to most people’s daily lives.”	<p>The ADAAA includes a non-exhaustive list of major life activities, such as seeing, hearing, eating, sleeping, walking, learning and concentrating.</p> <p>Major life activities also include the operation of “major bodily functions,” such as the immune system, normal cell growth, and the endocrine system.</p>

ADAAA Regulations

Proposed.....



Commented on.....

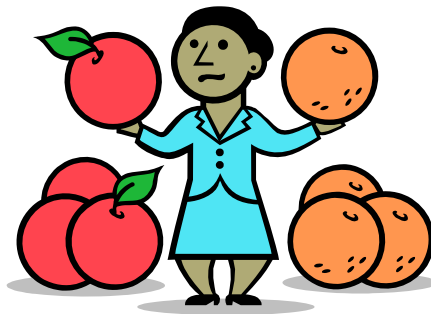


Final Version?



Proposed Regulations

What's the Difference?



Broad interpretation of the term "disability"



- The proposed regulations state that the focus of an ADA case should be on *whether discrimination occurred*, **NOT** whether an individual meets the definition of "disability."
- The proposed regulations note that "because of certain characteristics associated with these impairments, the individualized assessment of the limitations on a person can be conducted **quickly** and **easily**, and will consistently result in a determination that the person is substantially limited in a major life activity."

Broad interpretation of the term "substantially limits"

- Like the ADAAA, the proposed regulations state that a limitation **need not** "significantly" or "severely" restrict a major life activity in order to be considered substantially limiting.
- The proposed regulations also **delete** reference to the terms "condition, manner, or duration" under which a major life activity is performed.
- According to the proposed regulations, an impairment is a disability if it "**substantially limits**" the ability of an individual to perform a major life activity "**as compared to most people in the general population.**"



Major Life Activities - - This is MAJOR!

- The ADAAA includes a **non-exhaustive** list of major life activities, to which the proposed regulations add *sitting, reaching, and interacting* with others.
- The ADAAA also states that major life activities include the operation of **major bodily functions** and lists some bodily functions considered to be major life activities. The proposed regulations add several examples to the ADAAA's list of bodily functions.
- Additionally, the proposed regulations state that an individual whose impairment substantially limits a major life activity is **not also required** to show that he or she is limited in the ability to perform activities of central importance to daily life to be considered an individual with a disability.



Mitigating Measures

- In accordance with the ADAAA, the proposed regulations state that the **ameliorative effects** of mitigating measures are **NOT** to be considered in determining whether an individual is substantially limited in a major life activity.
- However, both the ADAAA and proposed regulations provide that the **use of ordinary glasses or contact lenses** can be considered in determining whether an individual has a disability.



Reasonable Accommodation



- The proposed regulations clarify that **both the positive and negative** effects of mitigating measures can be considered when determining whether a reasonable accommodation is needed and whether an individual poses a direct threat.
- The EEOC's Q/A states "For example, if an individual with a disability uses a mitigating measure which eliminates the need for a reasonable accommodation, then an employer will have **no obligation** to provide one."

"Substantially Limited in Working"

- The proposed regulations provide that the determination of whether an individual is substantially limited in working should be made by addressing whether an individual is limited in the ability to perform a "**type of work**" (such as commercial truck driver).
 - This definition replaces the concepts of a "class" or "broad range" of jobs from the 1991 ADA regulation.
- Therefore, "evidence from the individual regarding his educational and vocational background and the limitations resulting from his impairment may be sufficient for the court to conclude" that he is substantially limited in performing a type of work.
 - Thus, the statistical analysis previously required by some courts will not be needed in order to establish that an individual is substantially limited in working.

Bottom Line for Employers



- Like the ADAAA, the proposed regulations emphasize that the determination of whether an individual is disabled **should not** be the primary focus of ADA cases.
 - Instead, the focus should be on whether prohibited discrimination has occurred.
- Thus, from a practical standpoint, employers in most situations will be better able to defend an ADA lawsuit by showing that they made a **good faith effort** to accommodate the employee, rather than by challenging the employee's disability.

What impact will the ADAAA have on the workplace?



- **Increased** number of individuals in the workplace who are protected
- Range of coverage and protections afforded will **expand** significantly
- Likely to be an **uptick** in litigation:
 - Involving the employer's "undue hardship" defense;
 - Individuals claiming to be "regarded as" disabled and
 - First two prongs of the "disability" definition, in the event employers resist the broad coverage envisioned by Congress as incorporated in the ADAAA
- Remove the focus from a "disability" inquiry, and place it squarely on the **interactive process**

Strategies for Compliance



Strategies for ADAAA Compliance: Be Cautious!



- Follow the proposed regulations as if they were already in effect!
 - Even though the proposed regulations are technically not applicable to employers yet, there have been reports that the EEOC is applying them in its investigations of *disability discrimination* charges.
 - But in general, employers are required only to undertake good-faith efforts to comply with the ADAAA's new requirements, which may or may not entail following the approach set out in the proposed regulations.

Strategies for ADAAA Compliance: Document, Document, Document!

- It is absolutely critical that employers have the documentation to back up their actions with regard to disabled employees or applicants. In particular, make sure you:
 - Have **current, detailed job descriptions** that specifically identify the job's essential functions.
 - Always **initiate the interactive process** and follow it through to a good-faith resolution.
 - Make sure you **contemporaneously document all employment actions and decisions**, no matter how mundane.



Strategies for Compliance: The Interactive Process



- Employers should review their policies and practices governing the ADA's interactive process, and **focus** on their reasonable accommodations procedures.
- Upon request for a reasonable accommodation, **engage** in an interactive process with employees or applicants regardless of whether medication, aids, or other mitigating measures are available to them.
- If an employee or applicant demonstrates a physical or mental impairment that would limit his ability to request an accommodation, **initiate** an informal interactive process to accommodate the employee.

The Bermuda Triangle of Employment Law: Interplay Between ADAAA, FMLA and Workers' Compensation



What are the Differences?

- Employers cannot assume that an employee qualifies for protection under all laws, simply because he qualifies under one law.
- Key phrases under each area of law:
 - “**Work-related**” for workers’ compensation purposes (i.e., it occurred in the course of and arising out of the employee’s employment)
 - A “**disability**” under the ADA
 - A “**serious health condition**” under the FMLA



Purpose of Each Law

- The **ADAAA** prohibits discrimination against employees who are qualified individuals with a “disability.”
- The **FMLA** sets minimum leave standards for employees for the birth and newborn care of a child, placement of a child for adoption or foster care, as well as care for an immediate family member with a serious health condition and for the employee’s serious health condition.
 - **NEW: Military Caregiver Leave**
 - **NEW: Qualifying Exigency Leave**
- **Workers’ Compensation** laws provide for payment of compensation and rehabilitation for workplace injuries while minimizing employer liability.



ADA & ADAAA	<ul style="list-style-type: none">•EEOC enforces•15 or more employees for each of 20 or more calendar weeks in current or preceding year•Employee must be qualified and able to perform essential functions with or without reasonable accommodations
FMLA	<ul style="list-style-type: none">•DOL enforces•50 or more employees within a 75 mile radius for at least 20 weeks in current or preceding year•Employee who has worked at least 12 months <u>and</u> 1250 hours prior to the start of the leave <u>and</u> works at worksite where 50 or more employees within 75 mile radius
Worker's Compensation	<ul style="list-style-type: none">•State Workers' Compensation Commission; In Tennessee, DOL & Courts•5 or more employees (state law governs)•Employee who has an injury arising out of or in the course and scope of employment (possible exceptions)

ADA & ADAAA	<ul style="list-style-type: none">•No specific limit on the amount of leave (Reasonable accommodation unless an undue hardship)•Cannot discriminate with respect to provision of benefits•Required reinstatement to previous job unless an undue hardship
FMLA	<ul style="list-style-type: none">•12 weeks of leave in defined 12 month period•Health care coverage continued; other benefit continuation as determined by policy for provision of such when employee on other forms of leave•Required reinstatement to the same or an equivalent job
Worker's Compensation	<ul style="list-style-type: none">•No specific limit on amount of leave•Not required to be continued (but watch for FMLA coverage)•No reinstatement requirements under most state laws (but watch for retaliatory discharge)



**HOW DO I KNOW IF THE
SITUATION I'M DEALING
WITH FALLS UNDER THE
ADA OR THE ADAAA ?**



**WHAT DO I DO WHEN THE
EMPLOYEE'S FMLA
LEAVE RUNS
OUT?**



© PWCPhoto.com



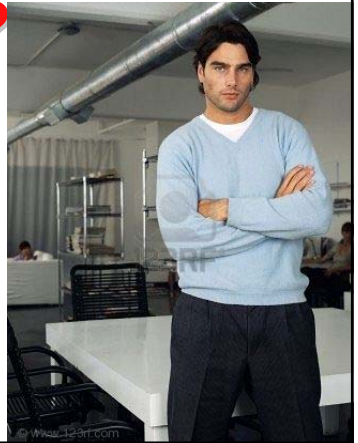
**ARE ALL SERIOUS
HEALTH CONDITIONS
GOING TO BE
DISABILITIES ?**



**IF AN EMPLOYEE UTILIZES
A MITIGATING
MEASURE,
WHY/HOW WILL I BE
EXPECTED TO
ACCOMMODATE?**



WHAT IF THE EMPLOYEE
SIMPLY WILL **NOT**
INTERACT WITH ME?



HOW DO I KNOW IF I'VE
LOOKED AT **ALL**
POSSIBLE
ACCOMMODATIONS?





WHAT DOES IT MEAN TO "REGARD" AN EMPLOYEE "AS **DISABLED**"?



Questions?

