

# The ADA Amendments Act of 2008

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The human resources and employment law communities anticipate several changes to federal employment laws with the incoming administration. In the interim, President Bush and the 110th Congress have taken the most significant action with respect to disability anti-discrimination law since the Americans with Disabilities Act was passed in 1990.

On September 28, President Bush signed the ADA Amendments Act of 2008. The Amendments Act will take effect January 1, 2009. Its explicit purpose is “to restore the intent and protections of the Americans with Disabilities Act of 1990.”

After the ADA became law in 1990, federal courts interpreted the statute in an increasingly restrictive manner. The Amendments Act rejects those restrictive interpretations. As a result of the amendments, claimants will have a much easier time proving that they are “disabled,” and consequently, employers will have an increased obligation to make reasonable accommodations.

## CLARIFICATION OF “DISABILITY”

Under the ADA Amendments Act, the wording of the definition of “disability” has not changed. “Disability” is defined as:

- (a) a physical or mental impairment that substantially limits one or more major life activities of such individual;
- (b) a record of such an impairment; or
- (c) being regarded as having such an impairment.

Although the Amendments Act doesn’t change the definition of “disability,” it does clarify it, and thereby expands its scope far beyond that communicated by the courts over the past several years. Specifically, the Amendments Act:

- Rejects court rulings that “substantially limits” means “prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives.”
- Rejects EEOC regulations that define “*substantially limits* one or more major life activities” to mean “*significantly restricts* one or more major life activities,” and calls on the EEOC to issue new regulations allowing broader coverage.
- Identifies some “major life activities,” providing welcome guidance in determining exactly what constitutes a disability. These activities include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. The Act also defines major life activities to include major bodily functions, including functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.
- Eliminates the consideration of any mitigating measures, such as medication, hearing aids, prostheses, learned behavioral modifications – anything other than ordinary eyeglasses or contact lenses – in the determination of whether an individual is disabled.
- Clarifies that an impairment that is episodic or in remission is a disability if it substantially limits a major life activity when active.



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**“REGARDED AS” DISABLED**

The Amendments Act also provides employers with additional guidance on the third prong of the definition of ‘disability’ – the “regarded as having such an impairment” prong. It states that employers are not required to accommodate employees who only are “regarded as” disabled. It also excludes employees with transitory and minor impairments, i.e., impairments lasting six months or less, from coverage under the “regarded as” prong of the definition of disability. On the other hand, it expands the definition of “regarded as” by eliminating the requirement that the employee’s perceived or actual impairment substantially limit a major life activity.

The Amendments Act also expressly approves the Supreme Court’s 1987 interpretation of “regarded as handicapped” as the correct interpretation of “regarded as disabled.” In *School Board of Nassau Co. v. Arline*, the Supreme Court held that a teacher with tuberculosis was “regarded as handicapped” and was therefore “handicapped” as that term is defined by the 1973 Rehabilitation Act. In reaching its holding, the Court noted that Congress was just as concerned “about the effect of an impairment on others as it was about its effect on the individual,” and that “*Congress acknowledged that society’s accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.*” This approval of the Supreme Court’s language in *Nassau Co.* may be the most profound indication of the intent behind the 2008 ADA Amendments Act. Congress not only desires to eliminate discrimination against individuals with actual and perceived disabilities, but also to eliminate the mindset that fosters discriminatory attitudes.

**COMPLIANCE**

Congress has called on the courts to focus on whether employers covered under the ADA have complied with their obligations, and NOT to engage in extensive analyses of whether impairments are disabilities.

Compliance efforts should include a review of handbooks and policies to insure that the expanded scope of “disability” is taken into consideration. Employers’ application process should also take into account this expanded scope, particularly the elimination of mitigating measures in determining whether an applicant is disabled. And employers should continue to periodically review job descriptions – generally the most important piece of evidence used to determine whether an employee is qualified for a position – to assess whether those job descriptions accurately describe the essential functions of the job.

Finally, the most important step employers can take to insure compliance with the Amendments Act is to train their managers in the accommodation process. Too many charges and lawsuits have resulted from supervisors’ failure to identify requests for accommodation, to respond appropriately, and to involve human resources in responding to and documenting the request and response.

Employers must not only advise their supervisors and managers of the changes in the law, but also provide them with the tools they need to work with employees and applicants to make reasonable accommodations and thereby allow qualified individuals to fully participate in the workforce.