



At A Glance

ISSUES THAT IMPACT PUBLIC SECTOR RISK MANAGEMENT

ADA AMENDMENT ACT OF 2008

What's the issue?

The ADA Amendment Act of 2008 (ADAAA) was passed by Congress and signed by the President in September 2008, effective January 1, 2009. The ADAAA was designed to reinstate employment protections for groups of disabled persons that recent Supreme Court decisions had limited.

The effect of this legislation is that many more working Americans will be protected by the ADA and ADAAA than before.

The concern for employers is that their hiring practices, job descriptions, policies concerning time away from work and reasonable accommodation procedures will have to be reviewed to determine whether they meet the intent of the new legislation.

The EEOC will be publishing new regulations to meet its mandate from Congress. Even before the EEOC regulations are published, employers will need to understand and comply with the legislation.

According to Peggy Mastroianni, Associate Legal Counsel for the EEOC, "employers doing the reasonable thing" won't have to make many changes. In her opinion, the law returns to the original intent of the ADA by providing broad protection to those with disabilities.

How does it impact my organization?

The new legislation did not change the definition of disability.

"The term 'disability' means, with respect to an individual:

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

What has changed is the meaning and intent of several of the terms and phrases in the definition of disability. Five of the more significant changes are:

Substantially Limits

Prior to the ADAAA legislation, EEOC regulations had defined "substantially limits" as "significantly restricted." This legislation

instructs the EEOC to write guidelines that revise the definition to make it easier for more disabled persons to meet the requirement of "substantially limits."

Mitigating Effects

With the new legislation, when considering whether a disabled person meets the test of a major life activity impairment, mitigating effects (such as medication or assistive technologies) cannot be considered.

For example, an epileptic successfully controlling seizures with medication (a mitigating effect), was not considered disabled under recent Supreme Court decisions. With the changes in the ADAAA, an employer will now be required to consider what this person's limitations would be without the medication. The epileptic in this example is now protected from discrimination under ADAAA.

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How does it impact my organization? (cont.)

One or More Major Life Activities

The new legislation clarified that internal bodily functions are now considered to constitute a major life activity, including "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."

An insulin-dependent diabetic would now be considered disabled under ADAAA because the functioning of the endocrine system is defined as a major life activity.

Episodic or In Remission

Under the ADA, if the limitation to the major life activity occurred occasionally, only to improve, that person may not have been

protected as disabled, depending on how long the limitation was active. The language of the ADAAA now requires employers to consider the limitations as they are when the condition is in an active state.

An employee, suffering from infrequent bouts of mental illness that require hospitalization, is protected as disabled by ADAAA because the limitations must be considered as when the mental illness is in an active state.

A Record of Such an Impairment

Under ADAAA, protection for persons "regarded as" impaired has been broadened. The person only has to establish that he or she was discriminated against because of a medical condition, whether the medical condition is real or only assumed by the employer.

Further, the person does not have to meet the "substantially limits" or the "major life activity" standards in order to be protected from discrimination.

For example, an employer refuses to hire an applicant because the applicant has had back problems in the past. The employer has not considered whether the applicant can safely perform the job, but has made a decision on the basis of "a record of such an impairment." The applicant could very well be protected from this type of discrimination under the ADAAA.

These five expanded definitions are several of the significant changes between Supreme Court interpretations of the original ADA and the ADA Amendment Act of 2008. There may be other provisions or interpretations that could impact your organization. When the EEOC promulgates its new guidelines as mandated by the ADAAA, employers will want to review those guidelines since they will provide interpretations for compliance with the Amendment Act.

What's the recommended action?

Review job descriptions, qualification standards, and accommodation procedures.

Qualification standards for positions should not be structured to eliminate disabled applicants. Job descriptions should accurately describe the essential elements of the job so appropriate decisions can be made about the ability of a disabled person to handle the position with, or without, a reasonable accommodation.

Accommodation procedures, for the most part, haven't changed. Be certain that your accommodation procedures comply with the ADA.

Focus on performance and conduct.

Avoid making assumptions about an employee that could lead to decisions made on the basis of real or perceived disabilities.

Focus on performance or conduct, and if there are problems, apply your performance policies in a uniform manner.

Train frontline supervisors and managers.

Train them to refrain from mentioning medical conditions, to recognize accommodation requests, and to remember who to contact for assistance.

Document actions and decisions.

The new legislation has shifted focus from "defining who is disabled" to "determining if discrimination has occurred."

Documentation of decisions and actions will be very important if an employee alleges discrimination.



Finally, at times like these, when new legislation is impacting our organizations, it is always recommended to have knowledgeable human resources and legal staff providing advice for anticipating and resolving issues. When the EEOC promulgates its new disability guidelines in response to the ADAAA, your organization will need to be prepared to act to incorporate those changes, too.