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AMERICANS WITH DISABILITIES ACT

Congress strengthens ADA

Effective Jan. 1, amended law expands definition of disability

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In response to what many saw as a weakening of the federal Americans with Disabilities Act by the courts, Congress has broadened the definition of disability as a means to provide greater protection against discrimination for employees and job applicants. The changes went into effect Jan. 1.

For employers, these changes mean they should presume — even more so than they had before — that an employee's or job applicant's claim of being disabled is correct. As a result, companies must be even more willing and prepared to design their workplaces to accommodate the disability as long as the accommodation, in the words of the law, would not impose an "undue hardship" on the employer, said attorneys who represent companies and employees in ADA litigation.

"Fundamentally, this [change to the ADA] puts the burden on employers to focus less on whether an employee is disabled" and more on providing an accommodation, said Bethesda attorney Richard G. Vernon, who defends companies involved in ADA litigation. "You start with the rebuttable presumption that this is a disability."

Examples of these accommodations include ramps for workers who use wheelchairs and assistive listening devices for employees who are hearing impaired.

This advice should not be new for employers, who have been willing whenever feasible to accommodate their employees' disabilities for the nearly 20 years since the ADA was enacted in 1990, added Vernon, who chairs the employment and labor group at **Lerch, Early & Brewer** Chtd. in Bethesda.

Employment-law attorney Abbey G. Hairston, who represents both employers and employees, predicted that the expanded definition of disability will mean that fewer ADA claims will be terminated at the summary-judgment stage. Prior to the recent changes, employers often argued successfully before trial that the plaintiff's asserted infirmity did not qualify as a disability under the law, Hairston said.

"It's going to result in more plaintiffs prevailing on their claims," said Hairston, a partner at the **Thatcher Law Firm** in Greenbelt.

RICH DENNISON

Richard G. Vernon says that changes to the ADA will require employers to focus on accommodation. 'You start with the rebuttable presumption that this is a disability,' he said.

Strict interpretation

The ADA statute has, since its July 26, 1992 effective date, prohibited employers from discriminating against employees and job applicants with a physical or mental impairment that "substantially limits" a "major life activity," such as breathing, seeing, hearing or walking.

Congress, with strong bipartisan support, expanded the law's scope in response to U.S. Supreme Court decisions that sponsors of the measure said limited the intended reach of the ADA.

The high court, for example, ruled in 2002 that the ADA's terms "substantially limits" and "major life activity" must be "interpreted strictly to create a demanding standard for qualifying as disabled."

The court, in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, struck down the claim of an automobile assembly line worker with carpal tunnel syndrome that her employer must make accommodations for her disability. The court said that carpal tunnel syndrome, which causes burning, tingling or itching numbness in the hands, did not qualify as a disability because it did not prevent Ella Williams from performing tasks of "central importance to most people's daily lives," such as household chores, bathing and brushing one's teeth.

In response, the ADA Amendments Act now states that "an impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability."

Expanded list

Under the changes that went into effect Jan. 1, the list of major life activities has been expanded to include "major bodily functions," including digestion, excretion and reproduction.

An employee or applicant is now also considered disabled if his or her disability is episodic or in remission but would limit a major life activity when active, such as a person prone to seizures. The amendments to the ADA also clarify that a person is disabled even if the disability can be mitigated through medication, prosthetic limbs or hearing aids.

But a visually impaired person is not considered disabled, even under the amended law, if his or her impairment can be corrected with corrective lenses.

In *Sutton v. United Air Lines Inc.*, the Supreme Court in 1999 struck down the claim of twin sisters who claimed that the airline violated the ADA when it refused to hire them as pilots because their uncorrected vision did not meet the minimum standard of 20/100. Because their vision could be corrected by wearing eyeglasses or contact lenses, the court held that Karen Sutton and Kimberly Hinton were not substantially limited in the major life activity of seeing and thus were not disabled, the court held.

"Looking at the act as a whole, it is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures — both positive and negative — must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the act," wrote the court.

The ADA Amendments Act states that the court's interpretation was too narrow and that the determination of whether someone has a disability that substantially limits a major life function must be based on how that person is in the absence of any mitigating measures, such as medication or assistive devices.

Though the *Sutton* decision prompted them to change the ADA, federal lawmakers ultimately agreed with the court on the issue of nearsightedness. In a note of legislative irony, the amended ADA reasserts that vision which can be corrected with ordinary eyeglasses or contact lenses is not considered a disability under the new law.

The changes to the ADA also expand the law's provision banning discrimination against employees and job applicants who are "regarded as" disabled due to an actual or perceived impairment, even when they do not claim to be disabled. The amended law states that the regarded-as provision will be interpreted broadly to include all disabilities "whether or not the impairment limits or is perceived to limit a major life activity."

A sobering effect

Baltimore lawyer Stephanie D. Kinder, who trains employers on ADA compliance, said **the changes in the law will have a sobering effect on companies. Employers will have to focus from the outset on accommodating disabilities rather than questioning them**, she said.

"They [companies] are going to have to make sure their managers and their frontline supervisors are trained on these issues," added Kinder, a solo practitioner.

Hairston agreed that the changes to the ADA will compel employers to accept an employee's claim of having a disability and focus even more on how the company can accommodate the worker. As a result, discussions among supervisors, corporate personnel departments and the employee will improve as all three will concentrate more on accommodating the disability rather than feuding over whether the infirmity qualifies as a disability under the law, Hairston said.

"That is always the weak link," Hairston said of the often-frayed communication among the three entities regarding whether the employee's impairment was a disability. The asserted disability "has to be addressed" under the ADA amendments, she added.