HUNTON& WILLIAMS

CLIENT ALERT

UPDATE FROM THE LABOR & EMPLOYMENT TEAM

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Contacts

If you have questions or would like more information, please contact any of the attorneys listed at the end of this Alert. Hunton & Williams' labor and employment law practice covers the entire spectrum of labor and employment litigation, arbitration, administrative practice before the NLRB, EEOC, and the DOL, federal contract compliance, wage-hour standards, workplace safety and health standards, workers' compensation, contractual rights and remedies, Sarbanes-Oxley and whistleblower claims, workplace investigations and client counseling under federal and state labor and employment laws. Hunton & Williams LLP provides legal services to corporations, financial institutions, governments and individuals, as well as to a broad array of other entities. Since our establishment more than a century ago, Hunton & Williams has grown to more than 1,000 attorneys serving clients in 100 countries from 19 offices around the world. While our practice has a strong industry focus on energy, financial services and life sciences, the depth and breadth of our experience extends to more than 100 separate practice areas, including bankruptcy and creditors' rights, commercial litigation, corporate transactions and securities law, intellectual property, international and government relations, regulatory law, products liability, and privacy and information management.

The New ADA: What Employers Need to Know

The new ADA means that many of the old rules concerning disability claims and accommodation requests no longer apply. Recently enacted amendments to the Americans with Disabilities Act are likely to generate changes in how employers deal with workplace disability issues. The Americans With Disabilities Amendments Act (signed into law September 25, 2008) effectively reverses the Supreme Court's interpretation of key provisions of the 18-year-old Americans with Disabilities Act. The amendments require that courts interpret the Act broadly, expanding the definition of "disability" and rejecting the impact of most "mitigating measures."

How Does ADA 2008 Expand the Definition of "Disability"?

Until the amendments, the ADA was ambiguous on the meaning of "disability," leaving the courts to decide at what point a medical condition substantially limited a "major life activity." In 2002, the Supreme Court held that the terms "substantially" and "major" should be interpreted to create a "demanding standard" for qualifying as disabled (*Toyota Motor Mfg., Ky., Inc. v. Williams*). Reversing this approach, the new ADA admonishes courts to interpret the law expansively. Furthermore, the new ADA gets specific by enumerating a laundry list of major life activities including:

> "caring for oneself; performing manual tasks; seeing; hearing; eating; sleeping; walking; standing; lifting; bending; speaking; breathing; learning; reading; concentrating; thinking; communicating; and working."

Under the new ADA, the operation of any "major bodily function" also is considered a major life activity. The amendments define "major bodily functions" to include "neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." Under the new amendments, many individuals not previously within the ambit of the ADA now will be able to assert ADA coverage and may now be entitled to reasonable accommodations.

What Are Some Examples of How the Expanded Definition may be Applied?

Individuals with sleeping disorders, eating disorders, fertility-related issues, hearing problems (even if corrected with a hearing aid), learning impairments and ADD now may be considered disabled. ADA 2008 also includes a clarification that episodic impairments and those in remission may be considered a disability if sufficiently severe when active. This provision makes it more likely that ADA protection will be expanded to sufferers of chronic illnesses such as cancer or

diabetes. Additionally, under the Act, an individual need not prove his impairment limits or is perceived to limit a major life activity to demonstrate he is "*regarded as*" disabled, thereby expanding ADA coverage.

Is The New "Regarded As" Language as Open-Ended as it Appears?

Yes. Congress rejected a regulation promulgated by the EEOC holding that "substantially limited" means "significantly restricted." Under the amendments, an individual now must show only that that the employer perceived him or her as having a mental or physical impairment (and need not show that the impairment actually substantially limited a major life activity). While the full impact remains unclear, this change could broadly expand coverage under the ADA. As mentioned below, however, if an impairment lasts or is expected to last for six months or less and is minor, it will not qualify for the "regarded as" definition. Whether this limitation will have a real impact in limiting the scope of the "regarded as" provision remains to be seen.

Under the New Law, What is the Impact of Mitigating Measures?

The new law will prohibit the consideration of measures—such as medication, prosthetics and assistive technology—that reduce or mitigate the impact of an impairment in determining whether an individual has a disability. The amendment therefore repudiates *Sutton v. United Airlines Inc.*, a 1999 Supreme Court decision, with regard to all but the most minor of mitigating measures, such as eyeglasses.

Are There Any Limits to Coverage under ADA 2008?

Under ADA 2008, an individual still would be required to demonstrate that he or she is "qualified" under the ADA, meaning that, with or without reasonable accommodation, the individual must prove he or she is able to perform the essential functions of the job. The final version of ADA 2008 rejected earlier proposals by making it clear that the ADA does not cover minor and transitory impairments (those that last or are expected to last six months or less). Under ADA 2008, employers have no obligation to provide reasonable accommodation to someone who does not have a disability, even if he or she is erroneously "regarded as" as disabled.

What is the Effective Date of ADA 2008?

ADA 2008 becomes effective on January 1, 2009. Since parts of ADA 2008 are styled as a "restoration" of the ADA, it is possible that plaintiffs' lawyers will argue these changes should apply to cases pending on that date.

Will the New ADA Increase Litigation?

While commentators thus far are divided on this issue, we believe the new law *will* increase litigation, at least in the short-term. Under the new law, more individuals will be covered by the statute and more cases are likely to survive summary judgment. In addition, new lawsuits will be filed with the intent of testing the impact of the amendments. Litigation also could be more expensive as lawsuits move from focusing on "threshold" issues (whether the person has a disability) to "liability" issues (whether the person actually was discriminated against). Employers will be forced to rebut inferences of discrimination (by showing legitimate, non-discriminatory reasons for adverse decisions) and cases will focus more on accommodations, specific job qualifications and particular job duties.

What Should Employers Do?

Employers should get ready for the new ADA now. More requests for accommodation are going to pass muster under the new ADA, and employers should engage in an interactive process with employees making such requests with that change in mind. Employers should also take this opportunity to audit and modify existing policies, handbooks, HR training, interactive process protocols and job descriptions in light of the impact of the ADA amendments.

As the new law goes into effect, good counsel will be more important than ever. The Labor Team's ADA Compliance Group leverages the collective experience of the firm and its clients to assist employers in identifying best practices under the new ADA and similar federal and state statutes.

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