

# The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843 - 2008

PHILADELPHIA, FRIDAY, OCTOBER 24, 2008

VOL 238 • NO.82 \$3.00 An incisivemedia publication

VOL P. 7307

FRIDAY, OCTOBER 24, 2008

THE LEGAL INTELLIGENCER • 5

## EMPLOYMENT LAW

### New ADA Amendments Put Damper on New Year Celebration for Employers

The Legal Intelligencer

By Todd Alan Ewan And Carolyn M. Plump

October 24, 2008

While many will be gathering to watch the ball drop on New Year's Eve, employers are likely to be waiting for the other shoe to drop given the recent amendments to the Americans with Disabilities Act. Last month, President George W. Bush signed into law the ADA Amendments Act of 2008, or ADAAA, which will go into effect Jan. 1, 2009. Most authorities in the employment law field say they agree that the expanded coverage provided in the ADAAA will increase litigation under the ADA. This article will address the changes provided by the ADAAA and what steps employers can take to protect themselves against a potential onslaught of lawsuits.

To fully appreciate the particular changes required by the ADAAA, it is important to note the general theme running through the legislation. Specifically, Congress stated that the ADAAA was enacted to restore the original intent and protections of the ADA because, among other decisions, the Supreme Court's rulings in *Sutton v. United Air Lines Inc.* and *Toyota Motor Manufacturing, Kentucky Inc. v. Williams* had narrowed the broad scope of protection that Congress intended to be afforded by the ADA. It is clear that, going forward, courts will construe the ADA in favor of broader coverage of individuals.

The ADAAA contains four significant changes. First, the ADAAA expands the definition of "disability" in two ways. An impairment that is episodic or in remission will, regardless of whether it is "active," be considered a disability if it would substantially limit a major life activity when active. Under this definition, an employee with cancer that has been in remission for years could be covered. Thus, this change opens up the protection of the ADA to a class of individuals that has not previously been afforded the protections of the ADA. In addition, the ADAAA clarifies that an impairment that substantially limits only one major life activity will still be considered a disability. Accordingly, there is no need for an impairment to limit more than one major life activity.

Second, the ADAAA broadens the definition of "major life activity." Under the ADAAA, major life activities now will include, among other things, seeing, hearing, speaking, walking, breathing, performing manual tasks, learning, caring for oneself, working, eating, standing, lifting, bending, reading, concentrating, thinking and communicating. Moreover, the ADAAA makes it clear that the above list is not exhaustive and, therefore, "major life activity" should be construed broadly. Further, the ADAAA defined "major life activity" to include the operation of a "major bodily function," including, without limitation, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions.



Todd Alan Ewan



Carolyn M. Plump

Third, the ADAAA alters the definition of "regarded as disabled." This standard now requires an employee to establish that he or she has been subjected to an action prohibited under the ADA because of an actual or perceived impairment, regardless of whether the impairment limits, or is perceived to limit, a major life activity. It is no longer relevant whether a perceived impairment significantly impacts a major life activity, in reality or in perception. This change will make it more difficult for employers to prevail on summary judgment. The ADAAA goes on to state that the "regarded as disabled" standard does not include transitory or minor impairments (i.e., impairments with an actual or expected duration of six months or less).

Finally, the ADAAA changes whether ameliorative medication or devices may be considered in the analysis of whether an impairment constitutes a disability. Under the previous law, the ameliorative effects of medication or devices could be taken into account when determining whether an individual's impairment rose to the level of disability. Thus, an individual with high blood pressure that was controlled by medication would not be considered disabled. The ADAAA states, however, that determination about whether an impairment substantially limits a major life activity now must be made without regard to the ameliorative effects of mitigating measures such as medication, equipment, appliances, prosthetics, hearing aids, low-vision devices (with the exception of ordinary eyeglasses or contact lenses), mobility devices, oxygen therapy equipment and supplies, other assistive technology, reasonable accommodations or auxiliary aids or services or learned behavioral or adaptive neurological modifications. It is presumed that, for instance, an individual's high blood pressure controlled by medication, which renders that condition to little or no impact on any of the individual's major life activities, will, nevertheless, be considered a disability.

Employers are encouraged to review their job descriptions, policies, handbooks, job qualification standards and any procedures for providing reasonable accommodations to ensure compliance with the ADAAA. Further, employers should retrain their managers regarding the changes in the law so they know for what issues to look and so they can identify potential disability issues. During such training, particular attention should be given to the interactive process required by the reasonable accommodation procedure. Although the ADAAA did not change the definition of the phrase "reasonable accommodation," given the expanded definition of "disability" and "major life activity," there will be even more of a need to engage in the interactive process to determine whether a reasonable accommodation is necessary and, if so, what accommodations are actually reasonable. •

**TODD ALAN EWAN** is a partner in the labor and employment law practice group of Mitts Milavec. Ewan advises and counsels clients in various aspects of the employer-employee relationship, including personnel policies, employment contracts, severance agreements and noncompetition, nonsolicitation and nondisclosure agreements.

**CAROLYN M. PLUMP** is a partner in the firm's labor and employment law practice group. Plump has successfully negotiated labor contracts, counseled clients regarding regulatory compliance, prepared corporate employment policies and handbooks, conducted investigations and advised companies regarding the hiring, firing and disciplining of employees. She has represented clients in litigation, mediation and arbitration matters in federal court and before administrative agencies.