

# CLIENT ALERT

THE OTHER BIG NEWS FROM WASHINGTON:

## THE ADA AMENDMENTS ACT of 2008

In recent weeks, the national media has focused almost exclusively on two issues: the economic bailout plan and the Presidential election. As a result, many employers may be unaware of the fact that, on September 25, 2008, President Bush signed into law the most significant piece of federal workplace law passed by Congress in more than a decade. The ADA Amendments Act of 2008, or "ADAAA," greatly expands the protection of employees with physical and mental impairments, and requires that employers adopt entirely new ways of handling workplace disability issues.

The ADAAA amends the Americans with Disabilities Act ("ADA"), and goes into effect as of January 1, 2009. Under the ADA, employers are prohibited from discriminating against employees and applicants based on disability, and must provide "disabled" employees with reasonable accommodations that will enable them to perform the essential functions of their jobs. One of the most litigated issues under the ADA is whether a requested accommodation, such as a leave of absence or change to the employee's work environment, constitutes a reasonable accommodation. Thus, determining whether an employee is "disabled" under the ADA is absolutely critical.

The ADA does not include a laundry list of conditions that qualify as "disabilities." Instead, the term "disability" is ambiguously defined as a physical or mental impairment which substantially limited one or more major life activities. Federal courts, particularly the United States Supreme Court, have limited the scope of the ADA's coverage by narrowly interpreting the terms "substantially limited" and "major life activity." By significantly expanding the definition of disability, the ADAAA reverses nearly two decades of case law favoring employers. Now, employers must dramatically change their existing methods of handling workplace disability issues. The ADAAA's most significant provisions include the following:

**Eliminates requirement that employee be severely restricted in major life activity of central importance to daily life:** The ADAAA expressly overturns the Supreme Court's 2003 decision requiring that an employee prove he or she was "prevented or severely restricted" from performing a major life activity of central importance in most people's daily lives.

**Expands the list of major life activities:** Under the ADA, the term "major life activity" was defined to include a handful of fundamental life activities, such as breathing, caring for oneself, performing manual tasks and working. After being coaxed by plaintiffs' lawyers over the years, federal courts have added various activities to this list and created a lack of uniformity in interpreting the ADA. The ADAAA was intended to create consistency and broaden the ADA's protections, by identifying a non-exhaustive list of 19 "major life activities," including concentration, reading, bending, and operation of a "major bodily function," such as the immune system,

normal cell growth, digestive, bladder, and reproductive functions. The ADAAA's definition significantly expands coverage to persons not previously protected. However, it does nothing to eliminate inconsistency; if anything, the broader definition of major life activity may cause some courts to widen the ADA's coverage far beyond that contemplated by Congress.

**Prohibits consideration of "mitigating measures," such as medication:** The ADAAA overturns Supreme Court cases which required consideration of "mitigating measures" in determining whether an employee was disabled. Thus, even if an employee effectively manages her epilepsy with medication, the employer cannot consider the effect of the medication. Instead, the employer must determine whether the epilepsy, if untreated, would significantly limit her in a major life activity.

**Shifts focus of episodic impairments to "active" status:** The ADAAA requires that, when determining whether an employee with an episodic impairment is significantly limited in a major life activity, the employer must evaluate the employee as though he is actively experiencing symptoms, even though the illness is in remission. This amendment is intended to expand ADA coverage to employees whose illness is in remission or who are not presently experiencing symptoms.

**Expanding protection for "regarded as" disabled:** Prior to the ADAAA, an employee claiming that he was "regarded as" disabled had to prove that the employer viewed him as disabled as unable to perform his specific job and a range of jobs. This analysis was consistent with the requirement that an employee be significantly limited in a major life activity. Now, employees must prove only that they suffered an adverse action because of a perceived disability, not that the perceived disability itself would significantly limit them in a major life activity.

During the next few months, the EEOC will be revising its regulations to conform to these amendments. In the interim, you need to update your company's ADA policies and procedures, and ensure that managers and supervisors handling human resources issues understand these new requirements. These amendments represent a tremendous shift in favor of protecting employees.

**If you need assistance updating your company's disability policies and procedures, or have any questions about workplace disability discrimination, please contact a member of our Labor and Employment Group at 215.564-1700**

*Jonathan Landesman  
Melissa C. Angeline*

215.564.1700  
[www.cohenseglias.com](http://www.cohenseglias.com)

COHEN SEGLIAS PALLAS GREENHALL & FURMAN PC

United Plaza • 30 South 17th Street  
19th Floor • Philadelphia, PA 19103

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