

Understanding and Implementing the ADAAA

By Matthew S. Brick and Jack Lipovac

The recent passage of the American's with Disabilities Act Amendments Act (ADAAA) will mean significant changes for most cities. The Act specifically rejected prior court decisions restricting the scope of who was protected by the ADA. These changes went into effect on January 1, 2009, with the primary change being far more people falling within the definition of disabled.

Specifically, the language of the amended statute states that it intends "a broad scope of protection" for employees and provides that courts need to allow ADA coverage "to the maximum extent permitted."

Expanded definition of disability

To be protected under the ADA, a person has to be an individual with a disability who can perform essential job functions, with or without reasonable accommodations. A disability is defined as a physical or mental impairment that substantially limits a major life activity. The ADAAA expands this definition in four general ways:

1. It directs that a person's impairment must be considered without corrective measures, so a person with hearing loss would be considered disabled even if hearing aids allow the person to hear normally.
2. It includes impairments that are episodic or in remission, if the impairment would be disabling when active. So, all conditions in remission are covered by the ADA even if the condition never becomes active again.
3. It expands the definition of major life activities to include: eating, sleeping, walking, standing, lifting, bending, reading, concentrating, thinking and communicating.
4. It directs the Equal Employment Opportunity Commission (EEOC) to adopt a broader interpretation of the definition of a disability.

The ADAAA has an extensive "findings and purposes" introductory section where Congress explicitly states that the amendments are designed to provide "broad coverage" and that the amendments are to specifically overrule several Supreme Court cases. One of the cases overturned held that, under the old regulations, "substantially limits" meant "significantly restricted" so minor or moderate limitations were not enough to qualify as disabled. In the ADAAA, Congress explicitly noted that these regulations were "inconsistent with the congressional intent by expressing too high a standard."

Congress noted in the ADAAA that its intent is not to focus on who has a disability, which Congress believes "should not demand extensive analysis." Rather, "the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations" by providing reasonable accommodations.

Interactive process

Cities need to avoid a 'knee-jerk' response that all work must be "full duty," that every job duty is essential, and that all reasonable accommodations are impractical or too expensive. While many employers would rather not spend any money to provide reasonable accommodations, that is exactly what the ADA requires. Cities must actively engage in an interactive process with a disabled employee to explore the range of accommodations that may make it possible for the employee to perform the essential job functions.

Mitigating measures

When making a decision about whether a person is considered sufficiently disabled to receive protection under the ADA, cities must now ignore any and all mitigating measures used by the employees. This includes medications, prosthetics, hearing aids, mobility devices and learned adaptations. The Act specifically holds that they may consider the effect of "ordinary eyeglasses or contact lenses" when examining an individual under the new ADA, but only this one condition is excluded from the new law.

Major life activities

The new ADA includes a list of tasks considered to be "major life activities," including caring for oneself, performing manual tasks, eating, sleeping, reading, concentrating, thinking, communicating and working. Moreover, it expressly states that the operation of any major bodily function is considered a major life activity – including functions of the immune system, cell growth, digestive functions, reproductive functions and neurological and brain functions. The broad definition of disability together with the new list of major life activities will ensure that almost every person who wants to ask for a reasonable accommodation will be able to do so.

Regarded as being disabled

The ADA has always offered protection for those employees whom a city wrongly regarded as being disabled. Under prior court rulings employees needed to prove that the employer regarded them as being substantially limited in a major life activity, which was a difficult standard to meet. Under the new ADA, an employee regarded as disabled need only show that the employer perceived the individual as having a mental or physical impairment, NOT that the employee was limited in any way. Now, even if an employee has an impairment that is not held to substantially limit a major life activity (such as hearing loss corrected by hearing aids), it is expected that the EEOC and the courts will make it easier for employees to show that a city regarded them as having an impairment.

EEOC to regulate ADA and define "substantial limitation"

The ADAAA mandates that the EEOC issue binding regulations and other interpretative guidance: the new law also provides that the EEOC create a definition for the term "substantially limits" to lower the standard to a level consistent with congressional intent. New EEOC regulations expanding on this definition and the rest

of the revised statute will almost certainly have a pro-employee and expansive orientation. The ADAAA also expands the definition of disability to include impairments that are "episodic or in remission" if, "when active," they substantially limit a major life activity. Cities will now need to determine whether episodic or intermittent impairments could rise to the level of disability and treat employees accordingly.

Preparing for litigation

When faced with litigation, cities, in most cases, will no longer be able to argue that the worker is not disabled and, therefore, not covered by the ADA. The focus now will be on whether the employer engaged in the interactive process and provided reasonable accommodations.

Policy enforcement

Many cities include an ADA policy in their employee handbook and may even have written procedures for how an accommodation request should be handled. However, all too often written policies are ignored if there is no follow up training and/or audits to ensure compliance. This is an area that can have significant consequences for employers as a recent federal case awarded damages (including punitive damages) to an employee when the employer did not take affirmative steps to ensure the compliance policy's implementation.

Management training

As of January 1, 2009, the number of employees protected by the ADA grew exponentially. Cities have to be ready to engage in the interactive process and ensure that they provide reasonable accommodations. It is not enough to have an ADA policy in an employee handbook; cities will need to ensure managers understand what the ADA requires in terms of the interactive process and reasonable accommodations, and that managers do what the law requires of them.

Summary

All cities need to be prepared to update their interactive process policies and to offer accommodations to a wider percentage of the workforce. Cities will be well served to err on the side of caution when determining whether to engage in the interactive process with an employee, and will need to more cautiously react to requests for

accommodation. Based on the changes to the ADA:

1. Expect more lawsuits to be filed. The ADAAA makes it easier to make claims of disability discrimination and the defense of these suits will be more difficult as the more expansive construction of the meaning of disabled will limit prior defenses available to cities.
2. Review all employment policies to ensure the language complies with the new law. Handbook changes should be communicated clearly to all employees.
3. Make sure all managers and supervisors receive training regarding the changes to the ADA. These individuals must understand the implications of the changes in the definition of disability.
4. Focus on the interactive process with disabled workers, wherein the employer discusses with the employee what reasonable accommodations will allow them to satisfactorily perform their essential job duties. Cities will need to make sure their supervisors and department heads know of their obligation to provide reasonable accommodations and that they do not reject requests out-of-hand, without analysis.

In light of the ADAAA changes, cities must make sure that they have clear policies and procedures for dealing with accommodation requests and supervisors properly implement those policies. It will take training to ensure that all supervisors engage in the interactive process and fairly consider all possible reasonable accommodations.

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