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Recent Amendments to the Americans with Disabilities Act (“ADA”)

On September 25, 2008, President Bush signed the “ADA Amendments Act of 2008”. The amendments will become effective on January 1, 2009. The ADA was amended because Congress found that several United States Supreme Court opinions narrowed the broad scope of protection intended to be afforded to the disabled by the ADA.

In particular, Congress found that the holdings in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) and companion cases resulted in eliminating protection for many individuals whom Congress intended to protect. The amendments are intended to restore the protection eliminated by those opinions. They provide new or expanded definitions that must be reviewed in evaluating whether or not an individual is entitled to protection under the ADA.

Overview

Under the ADA an individual will be considered disabled if: 1) he has a physical or mental impairment that substantially limits one or more major life activities; 2) has a record of such an impairment; or 3) is regarded as having such an

impairment. The amendments which affect the definition of “major life activities”, “substantially limited” and “regarded as having such an impairment” are discussed in this article.

Major Life Activities

The term “major life activities,” originally defined by the Equal Employment Opportunity Commission (“EEOC”) in its regulations includes caring for oneself, performing manual tasks, seeing, hearing, walking, speaking, breathing, learning and working. The amendments create a new statutory definition of “major life activities” which adds to the EEOC’s non-exclusive list.

The new activities are included in bold letters: “caring for oneself, performing manual tasks, seeing, hearing, **eating, sleeping**, walking, **standing, lifting, bending**, speaking, breathing, learning, **reading, concentrating, thinking; communicating** and working” and **major bodily functions**.

The term “major bodily functions” is defined to include, but not be limited to “. . . functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”

Substantially Limits

The amendments revoke the holding of the United States Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) which allowed the consideration of an individual's ability to mitigate the effects of an impairment when considering whether the impairment was a substantial limitation on a major life activity. With one exception, ordinary eye glasses or contact lenses, the determination of whether an impairment substantially limits a major life activity must be made without regard to ameliorative effects of mitigation measures. A list of non-exclusive mitigating measures includes such measures as medication, prosthetics, hearing aids, mobility devices, learned behavioral or adaptive neurological modifications, reasonable accommodations, auxiliary aids or services, low-vision devices which magnify, enhance or otherwise augment vision, etc.

Ordinary Eyeglasses or Contact Lenses Exception

While low-vision devices that magnify, enhance or otherwise augment visual image are mitigating measures that cannot be considered in the determination of whether an impairment substantially limits a major life activity, ordinary eyeglasses or contact lenses are treated differently. Ordinary eyeglasses or contact lenses, which are intended to fully correct visual acuity or eliminate refractive error, may be considered in determining whether an impairment substantially limits a major life activity.

Regarded as Having Such an Impairment

The amendments add a definition of "regarded as having such an impairment" to include an individual that: "...has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." Impairments that are transitory

or minor are not included in the definition of regarded as having an impairment if the transitory impairment is expected to have an actual or expected duration of six months or less.

Practical Pointers

The amendments discussed in this article as well as additional amendments to the ADA are significant in the evaluation of whether or not an individual is entitled to protection under the ADA. You should contact your employment counsel if you are resolving workplace issues that may evoke the protections of the ADA, and to evaluate whether changes to your human resource policies are necessary.

It's All in the Genes

In the 1997 film *Gattaca*, a future is portrayed in which a person's DNA is the single most important factor in determining each person's lot in life. *Gattaca* was shown on the big screen just over a decade ago. However, the fictional story in the film seemed much more realistic after the multi-national effort to map and sequence the human genetic code culminated in 2000 with the Human Genome Project. With its completion, researchers entered a new frontier in medical technology, examining genetic information at a cellular level to detect certain diseases or disorders. Genetic tests enable physicians to discover whether an individual has a predisposition to certain genetic diseases, often before symptoms have begun.

But for all its benefits, genetic testing also opens the door for discrimination against individuals on the basis of their genetic information. Specifically, the ability to access genetic information ignites fear that employers may use a person's genetic information in employment decisions (hiring, firing, or promotions).

Despite the fact that use of genetic information by employers is uncommon, several states, including Oklahoma, have enacted laws to prevent employers or health insurance companies from discriminating on the basis of genetic information. These state laws vary with respect to their scope and level of protection. Recently, Congress responded on a national level by enacting the Genetic Information Nondiscrimination Act of 2008 (H.R. 493), which establishes a national and uniform standard to protect employees from genetic discrimination.

Signed by President Bush on May 21, 2008, the new law, among other things, makes it an unlawful employment practice for an employer to “fail or refuse to hire, or to discharge, any employee, or otherwise to discriminate against any employee with respect to the compensation, terms, conditions, or privileges of employment . . . because of genetic information . . .” It is also an unlawful employment practice for an employer to request, require, or purchase genetic information with respect to an employee or an employee’s family member, except in limited circumstances. The language

of H.R. 493 parallels existing language in federal employment discrimination laws, but notably, Congress expressly stated that it did not intend for the disparate impact theory of discrimination to extend to genetic discrimination.

In addition, the new law dictates how employers must manage genetic information in their possession. If an employer obtains genetic information about an employee, the information must be treated as confidential medical information, which must be maintained on separate forms and kept in separate files.

Practical Pointers

Although the use of genetic information is not prevalent yet, a Gattaca like future is not as far-fetched as it once seemed. Employers must be aware that while the availability of genetic information creates a litany of benefits, it can also expose employers to liability under federal or state discrimination laws, including the newly enacted Genetic Information Non-Discrimination Act.

SAVE THE DATE!

“Winning at High Stakes Employment Law Issues” Employment Law Seminar

January 16, 2008

Tulsa, OK

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