

# Congress vs. U.S. Supreme Court

The Americans with Disabilities Act, or ADA, was originally signed into law by President George H.W. Bush on July 26,

1990. President Bush described the Act, as a “historic new civil rights Act... the world’s first comprehensive declaration of equality for people with disabilities.” President George H.W. Bush, Remarks on Signing the Americans with Disabilities Act of 1990 (July 26, 1990). Through creation of the ADA, Congress sought to ensure “equality of opportunity, full participation, independent living, and economic self-sufficiency” for the over 43 million Americans with disabilities. 42 U.S.C. §12101(a) (2), (8) (2007). Accordingly, the ADA guaranteed equal opportunity for individuals with disabilities in public accommodations, employment, transportation, state and local government services, and telecommunications.

On September 25, 2008, just two months after the 18th anniversary of the original passage of the ADA, President George W. Bush signed the Americans with Disabilities Amendments Act of 2008, or the ADAAA. ADA Amendments Act of 2008, Pub. L. No. 110-325 (codified as amended in scattered sections of 42 U.S.C.) The ADAAA, effective January 1, 2009, reinstates a broad view of the definition of disability, which had been narrowed by recent Supreme Court decisions. Senator Tom Harkin, lead sponsor of the ADAAA,

said the amendment “restores the original promise and protections of the ADA... by passing this bill, we have brought millions of our fellow-citizens, who were previously shut out, back where they belong: under the ADA’s protection.” Teresa Rider Bult, *ADA Amendments Expand Definition of “Disabled,”* 33 LITIGATION NEWS (Winter 2009) at 2 (ABA Section of Litigation).

This article will first walk through the basic provisions of Title I (employment) of the ADA. It will next discuss each provision affected by the ADAAA, including court decisions that triggered the need for the ADAAA. To conclude, you will find recommendations to help your company avoid possible liability.

## ADA Basics

The ADA applies to all employers, including state and local government employers, who have 15 or more employees. 42 U.S.C. §12111(5)(A) (2007). Employers with 15 or more employees are prohibited from discriminating against a qualified individual on the basis of disability. 42 U.S.C. §12112(a) (2009). Discrimination means treating an employee or class of employees differently because of an actual or perceived disability. *See*, §12112(b) (listing actions constituting discrimination). These employers must also provide “reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship.” §12112(b)(5)(A) (emphasis added).

## Disability

There are three categories of individuals that fall under the ADA’s definition of disability. They are individuals:

- with a physical or mental impairment that *substantially limits* one or more of the *major life activities* of such individual;
- with a *record of* such an impairment; or
- that are *regarded as* having such an impairment.

42 U.S.C. §12102(2) (2007).

When determining whether an employee meets the first category requirements, an employer must focus on whether the impairment “substantially limits” a “major life activit[y].” Although the ADA did not originally define “substantially limits,” Equal Employment Opportunity Commission (EEOC) regulations and Supreme Court decisions interpreted it as “significantly restricted” and “prevents or severely restricts,” respectively. *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002); 29 C.F.R. §1630.2(j) (2007). Additionally, the Supreme Court determined any mitigating or corrective measures used by an individual to offset the effects of impairment, such as prosthetic devices or medication, must be considered. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *see also, Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999). The ADA also did not define the phrase “major life activities,” but the EEOC regulations included an illustrative list of activities, and the Supreme Court wrote that it referred to those activities that are of “central importance to most people’s daily lives.” 29 C.F.R. §1630.2(i) (2007); *Toyota*, 534 U.S. 184, 198. Therefore, according to the EEOC and Supreme Court, employees met the ADA’s first category requirements if they had an impairment that “significantly restricts” or “severely restricts” them from performing activities of “central importance to most people’s daily lives.”

The ADA’s second category addresses an individual’s history or classification, not whether the individual currently suffers from such an impairment. The EEOC defined these individuals as those who had “a history of, or ha[ve] been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.” 29 C.F.R. §1630.2(k) (2007). Therefore, employees meet the second category’s requirements if they had a history of a disability or if they were listed or described in someone’s records as having had a disability, irrespective of actual disability. *The Supreme Court’s Decisions Dis-*

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curring the “Regarded As” Prong of the ADA Definition of Disability, No. 15, Policy Brief Series: Righting the ADA, National Council on Disability, May 21, 2003, available at <http://www.ncd.gov/newsroom/publications/pdf/regardedas.pdf>.

To determine whether an employee meets the third category’s requirements, “regarded as,” an employer must analyze how an individual is treated or perceived, not how he or she is classified or whether he or she actually suffers from an impairment. The EEOC regulations defined these individuals as those persons *treated by* an employer as having an impairment that substantially limited a major life activity, or those whose impairment substantially limited a major life activity as the result of the attitudes of others toward their impairment. 29 C.F.R. §1630.2(l) (2007). Beginning in 1999 the Supreme Court focused on the employer’s “perception.” *Sutton*, 527 U.S. 471. Thus, according to the Supreme Court, employees met the third category’s requirements when employers mistakenly perceived them to have impairments that substantially limited a major life activity.

#### Otherwise Qualified

While an employee may meet the requirements of one of the ADA’s three categories, he or she is not entitled to protection under the ADA unless he or she is “otherwise qualified.” An individual is considered “otherwise qualified” for a job under the ADA if he or she can meet the essential functions of a job with reasonable accommodations. 42 U.S.C. §12111(8) (2007). Essential functions of a job include prerequisites such as particular skills, education, training and experience. 29 C.F.R. §1630.2(n)(2). In determining which job functions are essential, courts have considered both an employer’s judgment and written job descriptions provided to applicants. §12111(8).

#### Reasonable Accommodations, Undue Hardship, and the Interactive Process

If an individual is considered disabled as defined by the ADA and is “otherwise qualified” for the job, an employer must provide “reasonable accommodations” so the individual can apply for the job, perform the job, or enjoy benefits equal to

those offered to other employees. 42 U.S.C. §12112(5) (2007). Reasonable accommodations include:

- Making existing employee facilities readily accessible to and usable by persons with disabilities;
- Job restructuring
- Modifying work schedules

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An accommodation imposes  
an “undue hardship” if  
it requires significant  
difficulty or expense.

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- Reassignment to a vacant position
  - Acquiring/modifying equipment/devices, and
  - Adjusting/modifying examinations, training materials, or policies, and providing qualified readers/interpreters.
- 42 U.S.C. §12111(9).

While the ADA requires reasonable accommodations, employers are not required to provide accommodations that cause “undue hardship.” An accommodation imposes an “undue hardship” if it requires significant difficulty or expense. 42 U.S.C. §12111(10)(A) (2007). In making a reasonable accommodation determination employers should consider (1) the nature and cost of the accommodation; (2) the overall financial resources of the business and that business’ particular location; (3) the number of persons employed by the business and at that business’ particular location; and (4) how the accommodation will otherwise affect the operation of that business’ particular location. §12111(10) (B). Importantly, before an employer can argue an accommodation causes an undue hardship due to cost, the employer must determine if outside funding is available to help cover the cost. 29 C.F.R. §1630.2(p) (2)(i).

While an employer is not required to provide whatever accommodation an employee requests, an employer has been required to discuss options and partici-

pate in the “interactive process” in good faith. *Kleiber v. Honda of Am. Mfg., Inc.*, 485 F.3d 862, 870 (6th Cir. 2007); *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 312 (3d Cir.1999); *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 633–34 (7th Cir.1998); *Taylor v. Principal Fin. Group, Inc.*, 93 F.3d 155, 165 (5th Cir. 1996); 29 C.F.R. §1630.2(o)(3). If an employee rejects a reasonable accommodation proposed by an employer acting in good faith and consequently cannot perform the essential functions of the position, the individual is not considered a qualified individual with a disability, and the employer may fire him or her without fear of violating the ADA. 29 C.F.R. §1630.9(d) (2007).

#### What Triggered the ADA Amendments?

When creating the ADA, Congress expected the ADA’s definition of disability to be “interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973.” ADA 2(a)(3). In applying the definition of a handicapped individual under the Rehabilitation Act, courts took a broad view. *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987). As result, for many years courts also took a broad view of disability under the ADA and rarely disputed whether an individual was disabled under this definition. *Morrow v. City of Jacksonville*, 941 F. Supp. 816, 823 n.3 (E.D. Ark. 1996) (holding “it is the rare case when the matter of whether an individual has a disability is even disputed”).

However, starting in 1999, the Supreme Court began narrowing the definition of disability, and in 2002 the Court held it should be “interpreted strictly to create a demanding standard for qualifying as disabled.” *Toyota*, 534 U.S. at 197; *see also*, *Sutton*, 527 U.S. 471. The Supreme Court further narrowed the definition of disability by (1) interpreting “major life activities” to mean activities of “central importance to most people’s daily lives,” (2) considering mitigating measures when determining whether a disability was substantially limiting, and (3) focusing on the employer’s perception rather than treatment under the “regarded as” prong of the definition of disability. *Id.*

Congress believed these Supreme Court holdings “narrowed the broad scope of protection intended” and thereby eliminated “protection for many individuals whom Congress intended to protect.” ADAAA §2(a)(4). To reinstate the ADA’s original legislative intent, Congress created the ADAAA.

### What Does the ADAAA Change?

The ADAAA retains the ADA’s basic definition of “disability” and the employer’s obligation to reasonably accommodate “otherwise qualified” employees. However, the ADAAA changes the way the statutory terms in the definition should be interpreted. Most significantly, the ADAAA:

- requires broad interpretation of the term “disability”
- recognizes the EEOC’s authority to issue regulations regarding the definition of disability
- expands the definition of “major life activities” and “impairment,” and
- clarifies the definition of “substantially limits” and “regarded as.”

### Broad Interpretation of Disability

The ADAAA specifically rejects the Supreme Court standard that required courts to interpret the definition of disability “strictly to create a demanding standard for qualifying as disabled.” ADAAA §2(b)(4). Additional language was also added to the Rules of Construction section of the ADA, stating “[t]he definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.” ADAAA §4(a). Moreover, the ADAAA also states that the “question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis” because the “primary object of attention in cases brought under the ADA should be whether [employers] have complied with their obligations.” ADAAA §2(b)(5).

### EEOC’s Authority to Issue Regulations

The Supreme Court initially indicated in *Bragdon v. Abbott* that the EEOC regulations interpreting the definition of disability were entitled to *Chevron* deference, but in later decisions stated that no agency

had “been given authority to issue regulations implementing the generally applicable provisions of the ADA... Most notably, no agency has been delegated authority to interpret the term ‘disability.’” 523 U.S. 1002 (1998); *Sutton*, 527 U.S. 471. As a result, lower courts were unsure how much weight to assign to regulations. See *Muller*

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*v. Costello*, 187 F.3d 298, 312 (2d Cir. 1999) (deference to the EEOC’s interpretations “remains the law of this Circuit”); *Duncan v. Washington Metropolitan Area Transit Authority*, 240 F.3d 1110, 1115 n.2 (D.C. Cir. 2001) (“The *Sutton* Court declined to resolve whether the deference is owed to the EEOC’s ADA regulations, 527 U.S. at 480, but quoted this regulation’s factors approvingly, *Id.* at 491–92.”). The ADAAA clarifies the weight of EEOC regulations: “The authority to issue regulations granted to the Equal Employment Opportunity... includes the authority to issue regulations implementing the definitions of disability.” ADAAA §6(a)(2). Based on this ADAAA provision, Section 6(a)(2), it is clear the EEOC has authority to issue regulations pertaining to the definition of disability.

ADAAA §6(a)(2) also makes clear that employers should expect additional EEOC regulations implementing the ADAAA. However, it is unclear when those final regulations will be issued. When the EEOC voted on proposed regulations to implement the ADAAA on December 11, 2008, the commission split across party lines, and the vote failed. Unfortunately, even though the ADAAA directed the EEOC to develop regulations, it did not set a deadline. Check

the following website for updates: <http://www.eeoc.gov/policy/regs/index.html>.

### Major Life Activity

As noted above, originally the ADA did not define the term “major life activity,” but instead left this task to the EEOC. To maintain continuity the EEOC chose to define “major life activities” the same as the Senate and House committee reports, and the regulations implementing Section 504 of the Rehabilitation Act: “functions *such as* caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” 29 C.F.R. §1630.2(i) (emphasis added); see also, S. REP. No. 101-116, at 22 (1989); H.R. REP. No. 101-485, pt. 2, at 52 (1990) (Committee on Education and Labor); H.R. REP. No. 101-485, pt. 3, at 28 (1990) (Committee on the Judiciary); 45 C.F.R. §84.3(j)(2)(ii).

The EEOC previously indicated the listed activities were not exclusive through the use of “such as.” In *Bragdon*, the Supreme Court agreed, stating, “Nothing in the definition suggests that activities without a public, economic, or daily dimension may somehow be regarded as so unimportant or insignificant as to fall outside the meaning of the word ‘major.’” *Bragdon*, 524 U.S. at 638. However, activities not specifically listed in the ADA found varying results among lower courts. *Pack v. Kmart Corp.*, 166 F.3d 1300, 1305 (10th Cir. 1999) (communicating not a major life activity); see, e.g., *Lanci v. Andersen*, 2000 WL 329226, \*3 (S.D.N.Y. 2000); *Purcell v. Pennsylvania Dept. of Corrections*, 1998 WL 10236, \*8 (E.D. Pa. 1998) (“ability to communicate with others for extended periods of time is a major life activity”).

As clarification, Congress added the definition of “major life activity” to the ADAAA. ADAAA §4(a). It also used the phrase, “include, but are not limited to,” to show the list of major life activities is not exhaustive, and specifically added numerous activities not originally included in the EEOC’s regulations, to provide consistency in future court decisions. The chart on page 33 provides the best summary of “major life activity” under the original ADA definition and the changes made by the ADAAA.

## Major Life Activities Definition

| ADA and Rehab. Act   | ADAAA  |
|--|--|
| <ul style="list-style-type: none"> <li>• Not defined in the statutes</li> <li>• Defined in the regulations               <ul style="list-style-type: none"> <li>• Identical definitions in ADA and Rehabilitation Act regulations</li> </ul> </li> <li>• <i>Toyota</i> <ul style="list-style-type: none"> <li>• The term “major” in the definition of disability under the ADA “need[s] to be interpreted strictly to create a demanding standard for qualifying as disabled.”</li> </ul> </li> <li>• Major life activities defined as “functions such as”               <ul style="list-style-type: none"> <li>• Caring for oneself</li> <li>• Performing manual tasks</li> <li>• Walking</li> <li>• Seeing</li> <li>• Hearing</li> <li>• Speaking</li> <li>• Breathing</li> <li>• Learning</li> <li>• Working</li> </ul> </li> </ul> | <ul style="list-style-type: none"> <li>• Defined in the statute</li> <li>• Rejected standards from <i>Toyota</i></li> <li>• Major life activities “include, but are not limited to”               <ul style="list-style-type: none"> <li>• All of the activities listed under the original regulations</li> <li>• Eating</li> <li>• Sleeping</li> <li>• Standing</li> <li>• Lifting</li> <li>• Bending</li> <li>• Reading</li> <li>• Concentrating</li> <li>• Thinking</li> <li>• Communicating</li> </ul> </li> <li>• Added to the major life activities list the “operation of major bodily functions which include, but are not limited to”               <ul style="list-style-type: none"> <li>• functions of the immune system</li> <li>• normal cell growth</li> <li>• digestive</li> <li>• bowel</li> <li>• bladder</li> <li>• neurological</li> <li>• brain</li> <li>• respiratory</li> <li>• circulatory</li> <li>• endocrine</li> <li>• reproductive functions</li> </ul> </li> </ul> |

### Major Life Activities and of Such Individual

The ADA refers to “the major life activities of such individual.” Under the ADA’s original language, a plaintiff needed to present personal testimony or facts to show the importance of an activity in *his/her life*. In 2002, the Supreme Court transformed the phrase into “activities that are of central importance in *most people’s daily lives*.” *Toyota*, 534 U.S. 184 (emphasis added).

To meet *Toyota*’s resulting burden, plaintiffs needed to present the testimony of an expert social science or vocational witness. To remove this additional burden and ensure courts applied the original language, the ADAAA rejected the Supreme Court’s reasoning and standard in *Toyota*. ADAAA §2(b)(4). By rejecting the *Toyota* standard, Congress achieved the individualized approach it intended.

### Impairment

In the past illnesses such as diabetes, cancer, or epilepsy were not considered disabilities because these conditions could be

treated with medication or involved remission. See, e.g., *Hirsch v. National Mall & Serv., Inc.*, 989 F. Supp. 977 (N.D. Ill. 1997). To ensure broad application of the ADA, the ADAAA added language that states:

- An impairment only needs to limit one major life activity; and
- An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

ADAAA §4(a).

### Substantially Limits

EEOC regulations had defined the phrase “substantially limits” to mean either total inability to perform an activity or significant restriction. 29 C.F.R. §1630.2(j)(1); see also, *Albertson’s, Inc. v. Kirkingburg* (requiring significant restriction, not simply a difference in the manner in which the individual performed). The Supreme Court went further in *Toyota*, establishing that an impairment must “prevent[] or severely restrict[]” the individual from performing major life activities.

Congress believed the EEOC’s regulations and accompanying case law “were inconsistent with congressional intent” and “express[ed] too high a standard.” ADAAA §2(a)(7). To provide clarification, a 2007 version of the amendments defined “substantially limits” as “materially restricts.” ADA Restoration Act of 2007, §4(a), H.R. 3195, 110th Cong. (2007), available at <http://www.govtrack.us/congress/bill.xpd?bill=h110-3195>. Unfortunately, this 2007 definition did little to clarify the meaning of “substantial limitation.” See *Defining Disability Down: The ADA Amendment Act’s Dangerous Details*, Hearing before the Senate Committee on Health, Education, Labor, and Pensions (July 15, 2008) (statement of Andrew M. Grossman, Heritage Foundation) (noting the lack of prior use of the phrase “materially restricts” and the conflicting dictionary definitions of the terms). Congress chose not to define the term in the ADAAA and instead, chose to allow the EEOC to interpret it, with the understanding that the “significantly restricted” standard is too demanding. ADAAA §2(b)(6).

### “Substantially Limited” and Mitigating Measures

The congressional ADA Committees, the EEOC, and the federal courts of appeal determined that mitigating measures were not to be taken into account when determining whether an individual had a disability. See S. REP. No. 101-116, at 23 (1989); H.R. REP. No. 101-485, pt. II, at 52 (1990); H.R. REP. No. 101-485, pt. III, at 28 (1990); see also, 29 C.F.R. app. §1630 (commentary on §1630.2(h), (j)); *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 859–66 (1st Cir. 1998); *Bartlett v. New York State Bd. of Law Examiners*, 156 F.3d 321, 329 (2d Cir. 1998); *Matczak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933, 937–38 (3d Cir. 1997). Nevertheless, when *Sutton* came before the U.S. Supreme Court, the majority felt differently.

In *Sutton*, the Supreme Court wrote, “the approach adopted by the agency guidelines—that persons are to be evaluated in their hypothetical uncorrected state—is an impermissible interpretation of the ADA.” 527 U.S. at 482. The Court held that persons are not disabled if mitigating measures are of such benefit that the individuals are not

longer “substantially limited” in a major life activity. *Id.*; see also, *Albertson’s Inc. v. Kirkingburg*, 527 U.S. 555, 565 (1999); *Murphy v. United Parcel Service*, 527 U.S. 516, 521 (1999). As a result, lower courts began to consider mitigating measures when determining whether an individual was disabled. See, e.g., *EEOC v. Sara Lee*, 237 F.3d 349 (4th Cir. 2001); *Muller v. Costello*, 187 F.3d 298, 314 (2d Cir. 1999); *Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720 (8th Cir. 2002).

Congress disagreed with the Supreme Court’s approach, rejected the *Sutton* requirement, and went a step further by including specific language in the ADAAA that stated mitigating measures such as medication, prosthetics, hearing aids, or learned behavioral modifications, shall not be considered in determining whether an impairment substantially limits a major life activity. ADAAA §(4)(a). The ADAAA does permit courts to consider the ameliorative effects of ordinary eyeglasses or contact lenses; however, it prohibits qualification standards or employment tests based on an individual’s uncorrected vision, unless the standard or test is related specifically to the job in question and consistent with business necessity. ADAAA §4(a), §5(b).

### Regarded As

When addressing the “regarded as” prong of the definition of disability in *Sutton* the Supreme Court wrote:

...it is necessary that a covered entity entertain misperceptions about the individual—it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting.

527 U.S. at 489.

The decision in *Sutton* focused on an employer’s “perception” of an employee, requiring the employee to prove not only the mental state of the employer, but also that the belief or perception was wrong. Since an employer’s thinking is subjective, it has been difficult for individuals to make this showing, unless an employer actually explained the nature of its motivation.

After the decision in *Sutton*, both the EEOC and the Department of Justice reported they were less likely to pursue

certain cases involving claims that a person had been regarded as having a disability. See Sharon Perley Masling, *The Impact of the Supreme Court’s ADA Decisions on the Rights of Persons with Disabilities* (available at <http://www.ncd.gov/newsroom/publications/2003/decisionsimpact.htm>) text accompanying nn. 67–69 (Feb. 25, 2003),

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quoting Correspondence from The Equal Employment Opportunity Commission to Sharon Masling (Dec. 6, 2002) (on file with the author); and e-mail correspondence from the U.S. Department of Justice to Sharon Masling (Dec. 5, 2002) (on file with the author); see also, <http://www.eeoc.gov/stats/ada-charges.html>; <http://www.eeoc.gov/press/2-6-03.html>. The EEOC maintained that while it had always been conservative in its use of the “regarded as” prong, after *Sutton*, it tended “to rely on the theory even less, in part because of the proof element that the employer must regard the individual as being substantially limited in a major life activity, and evidence of this perception is difficult to obtain.” See, Masling, *supra*, text accompanying nn. 69 (Feb. 25, 2003), quoting Correspondence from The Equal Employment Opportunity Commission to Sharon Masling (Dec. 6, 2002) (on file with the author); see also, <http://www.eeoc.gov/stats/ada-charges.html>; <http://www.eeoc.gov/press/2-6-03.html>.

Congress again disagreed with the Supreme Court’s interpretation and the effect on lower courts and agencies, so the ADAAA specifically rejected *Sutton* regarding coverage under the third prong of the ADA’s definition of disability. ADAAA §2(b)(3). To guide court interpretation of the “regarded as” prong, the ADAAA reinstated “the rea-

soning of the Supreme Court in *School Board of Nassau County v. Arline*, which set forth a broad view of the third prong of the definition of handicap under the Rehab Act of 1973.” ADAAA §2(b)(3); *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987).

In *Arline*, the plaintiff was discharged from her job as an elementary public school teacher because she had infectious tuberculosis. The teacher alleged she had been discriminated against in violation of Section 504 of the Rehabilitation Act of 1973, and the school board argued she was not a “handicapped person” within the statutory definition. *Arline*, 480 U.S. at 277, *reh’g denied*, 481 U.S. 1024 (1987), *on remand*, 692 F. Supp. 1286 (M.D. Fla. 1988) (finding requiring hospitalization was sufficient to establish one or more major life activities was substantially limited and the record of hospitalizations provided a “record of” such an impairment). After providing the statutory definition, the *Arline* Court described its understanding of the definition’s purpose as follows:

The amended definition reflected Congress’ concern with protecting the handicapped against discrimination stemming not only from simple prejudice, but from “archaic attitudes and laws” and from “the fact that the American people are simply unfamiliar with and insensitive to the difficulties confront[ing] individuals with handicaps.” To combat the effects of erroneous but nevertheless prevalent perceptions about the handicapped, Congress expanded the definition of “handicapped individual” so as to preclude discrimination against “[a] person who has a record of, or is regarded as having, an impairment [but who] may at present have no actual incapacity all.”

480 U.S. at 279 (brackets in original) (quoting S. REP. NO. 93-1297, 50 (1974)).

When examining the third prong of the ADA’s definition of disability in support of its conclusion, the *Arline* Court stated:

Congress extended coverage... to those individuals who are simply “regarded as having” a physical or mental impairment. The Senate Report provides as an example of a person who would be covered under this subsection, “a person with some kind of visible physical

impairment which in fact does not substantially limit that person's functioning." Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment.

480 U.S. at 282–83 (quoting S. REP. NO. 93-1297, 64 (1974)).

The Court continued by stating the "basic purpose of Section 504" was "to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others." *Arline*, 480 U.S. at 284–85.

By rejecting the decision in *Sutton*, the ADAAA ensures employees are not required to prove an employer's mistaken mental state but instead only how they were treated. By re-establishing the reasoning of the Supreme Court in *Arline*, the ADAAA reinstates the original legislative intent and ensures an individual can meet the requirement of the "regarded as" prong solely because of negative reactions, misapprehensions, or irrational fears, regardless of whether the individual satisfies the other two prongs of the definition of disability. S. REP. NO. 101-116, 24 (1989) ("[a] person who is excluded from any activity covered under this Act or is otherwise discriminated against because of a covered entity's negative attitudes towards disability is being treated as having a disability which affects a major life activity."); see also, H.R. REP. NO. 101-485, pt. 2, at 53 (1990) (Committee on Education and Labor) ("A person who is excluded from any basic life activity, or is otherwise discriminated against, because of a covered entity's negative attitudes toward that person's impairment is treated as having a disability.").

To provide clarity the ADAAA added "regarded as having such an impairment" to the statute. It also explained that the "regarded as" category does not apply to short-term medical conditions by stating the category "shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less." ADAAA §4(a).

### How Can You Avoid Litigation?

The ADAAA will increase the number of

employees who fall under the ADA's definition of disabled. Therefore, employers will receive more requests for accommodations under the ADA, and invariably, more claims. The following are recommendations you can consider, or discuss with your outside counsel, if appropriate, to help prevent future liability. While these rec-

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If litigation arises, you  
will need to address the  
reasonableness of the  
accommodations offered.

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ommendations may not always prevent litigation, they can ensure you resolve the case as quickly and inexpensively as possible.

#### Provide Training

Employers should provide the following training to supervisors as well as personnel responsible for discussing accommodations with employees.

#### Education on handling requests for an accommodation

In the 1991 Interpretive Guidance on the ADA, the EEOC listed the steps an employer should follow to dialogue appropriately (29 C.F.R. §1630.9 (2007)).

- Analyze the particular job involved and determine its purpose and essential functions;
- Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;
- In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and
- Consider the preference of the individual to be accommodated and select and implement the accommodation that is

most appropriate for both employee and employer.

Additional guidance on the interactive dialogue can be found in *Can We Talk?: The ADA Interactive Dialogue*, Michael J. Solits, Friday, September 5, 2008, The Job Description, the newsletter of DRI's Employment Law Committee (available at [http://www.imakenews.com/employlaw/e\\_article001195835.cfm?x=bdsM2n3,b9fhyCDm](http://www.imakenews.com/employlaw/e_article001195835.cfm?x=bdsM2n3,b9fhyCDm)).

#### Information on the ADAAA's expansive definition of "disability"

Make sure supervisors and other appropriate personnel understand the ease with which many employees may now be covered by the ADA and discuss the "regarded as" prong to prevent actions that might fall into this category.

#### Possible accommodations available for certain requests

Personnel may not realize that flexible work schedules and time off may constitute reasonable accommodations. If litigation arises, you will need to address the reasonableness of the accommodations offered. Therefore, it is important that personnel understand what type of accommodations are reasonable, and that certain accommodations may cause undue hardship in one company department/location but not another.

#### Document, Document, Document

Anytime an employee requests an accommodation, you should document each step of the interactive process. By documenting each step and including the employee's signature, an employer can establish it participated in the interactive process in good faith. Documented information should include:

- Precise limitations suffered by the employee and supporting documentation
- Accommodation requested by the employee
- Accommodations offered by the employer
- Pros and cons of each and every accommodation requested and offered, including why the accommodation may or may not (1) address the employee's limitation; or (2) cause a hardship for the employer

- Accommodation chosen and the choice rationale

Again, the employer will need to be able to address the reasonableness of the accommodations offered. If an employee's preferred accommodation is denied, the employer should be advised to document specifically why it was denied. If it was denied due to cost, the employer should document outside sources contacted for possible funding.

#### **Update Company Materials and Policies**

Ensure the following company materials and policies are up-to-date and accurate.

#### ***Employment applications and job descriptions***

Make sure job descriptions clearly state all essential job functions and functions listed actually are essential, as opposed to preferred, for the position.

#### ***Employment handbooks and manuals***

Review policies to ensure any definitions follow the new law. Specify to whom requests for accommodation should be made. Clearly communicate any handbook changes to all employees.

#### ***HR training materials***

Materials should state mitigating factors

are not to be considered in determining disability status under the ADA.

#### **Review Past Decisions**

If your company previously denied accommodation requests of an employee who is still employed by the company because you or your outside counsel determined the individual was not disabled under the ADA's definition of disability, you should review the decision to determine whether the employee is disabled under the ADAAA. If the employee is within the ADAAA's definition of disabled, the employee should be approached again to determine if they still need accommodations.

#### **Carefully Monitor Employment Actions**

Carefully monitor and document why certain individuals are hired/promoted and others are not. If actions arise, an employer be able to clearly articulate a legitimate, non-discriminatory reason for all decisions.

#### **Benefits to Employers**

While the ADAAA is certainly less favorable to employers than the original ADA as interpreted by the Supreme Court, it does provide some benefits to employers.

- The ADAAA eliminates reverse disability discrimination claims. ADAAA §6(a)(1).

- Employers are not required to provide reasonable accommodations for individuals "regarded as" having disabilities. ADAAA §6(a)(1).
- Ameliorative effects of ordinary eyeglasses or contact lenses may be considered in determining whether an individual is disabled. ADAAA §4(a).
- Employees will not be considered "regarded as disabled" if they have an impairment with an actual or expected duration of six months or less. ADAAA §4(a).
- The ADAAA retains Employers' ability to define the essential functions of a job, as well as the requirement that a disabled person must still be "otherwise qualified" for the position.

#### **Conclusion**

If you have not already consulted with your outside counsel or reviewed your company policies related to the ADA to bring them into compliance with the Americans with Disabilities Amendments Act of 2008, it is important to do so. In the future, employers will need to focus less on determining who is disabled and more on engaging in interactive discussions with employees so employees receive the reasonable accommodations necessary to perform the essential functions of their jobs. 