

The Employment Counselor

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Employment Alert – August 20, 2008 -- New Legislation Expands the Scope of the ADA

President Bush signed the ADA Amendments Act of 2008 (the “Act”) into law on September 25, 2008. The Act, which becomes effective January 1, 2009, expands the scope and protections of the Americans with Disabilities Act of 1990 (the “ADA”). Prior to January 1, 2009, all employers with fifteen (15) or more employees should review these expanded ADA legal requirements to ensure compliance.

The Act, in part, was an effort to reverse two Supreme Court cases that had narrowed the scope of the ADA. Specifically, the Act rejects the Supreme Court’s standard in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), which required that the determination of whether an impairment substantially limits a major life activity be balanced against the “ameliorative effects of mitigation measures,” such as medication or medical devices. The second Supreme Court decision that the Act reverses is *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, (2002), which held that (1) the terms “substantially limited” and “major life activities” must be strictly construed when determining the existence of a qualifying disability and that (2) an individual must show that such disability prevents or severely restricts him/her from “doing activities that are of central importance to most people’s lives.” Congress’ rejection of the two Supreme Court decisions in the Act now establishes a more “employee-friendly” framework through which ADA protections must be viewed.

In addition to rejecting the Supreme Court’s narrowing of the ADA, the Act also adds new definitions and provisions which provide guidance for determining whether an individual’s impairment is considered a disability. In particular, the Act contains the following amendments:

- The Act states that the term “disability” shall be construed in favor of broad coverage for individuals;
- The Act prohibits the consideration of “mitigating measures,” such as medication, medical supplies, prosthetics, hearing aids, mobility devices and assistive technology, in determining whether an individual has a disability;
- The Act clarifies that an impairment that substantially limits one major life activity need not limit other major life activities in order to be a disability; and
- The Act provides that impairments, that are episodic or in remission, are considered disabilities if they would substantially limit a major life activity when active.

What this means for Employers: After January 1, 2009, it will likely be easier for a plaintiff to bring (and survive summary judgment) a discrimination case under the ADA. As the law currently stands, courts dismissed many cases on the grounds that the individuals were not “disabled” because corrective measures could “remedy” the “disability” or the “disability” did not sufficiently severely limit major life activity. Effective January 1, 2009, these carve-outs will no longer be available for employers – which, in turn, will mean in any potential litigation that the employee will likely be able to meet the initial hurdle that he/she has a “disability,” as defined by the Act. The burden will then shift to the employer to prove a non-discriminatory reason for the employment decision (i.e., not hiring, termination, failure to promote or provide a reasonable accommodation).

What Employers Should Do: (1) Review and, as appropriate, revise employee handbooks; (2) have managers/supervisors/HR staff become familiar with new legal framework; and (3) become more cognizant of potential disability discrimination claims. It is recommended that you consult with your legal counsel on these matters.

About General Counsel, P.C.: Located in McLean, Virginia, General Counsel, P.C. provides full service legal representation to businesses and non-profit organizations in Virginia, Maryland and Washington, D.C. For assistance related to any of the legal matters discussed herein, please contact General Counsel, P.C.’s managing partner, Merritt Green, at (703) 556-0411, via email at mgreen@generalcounselaw.com or visit www.generalcounselaw.com.