

President Bush Signs ADA Amendments Act of 2008

Last Thursday, amidst the continuing tumult in the financial markets, President George W. Bush quietly signed the ADA Amendments Act of 2008. The amendments are effective on January 1, 2009.

When George H. W. Bush signed the original ADA in 1990, the stated purpose of the Act was to protect a minority of disabled Americans who were unfairly being excluded from American workplaces based on unjustified prejudices and assumptions about their ability to perform their jobs. For this reason, the ADA included a seemingly narrow definition of disability: a person was disabled only if he or she had a condition that substantially limited his or her ability to engage in a major life activity. The statute failed, however, to define the term "major life activity," and the courts have struggled with the meaning of the term ever since. In a series of cases from 1999 through 2002, the United States Supreme Court strictly interpreted the ADA's narrow definitional language. In response, many advocates suggested that the effect of these decisions was to wrongly exclude many deserving individuals from the protection of the ADA. By enacting the ADA Amendments Act of 2008, Congress and the President have endorsed the view of these advocates.

Despite the purportedly restorative purpose of this new legislation, the effect is to substantially expand the definition of "disabled" for purposes of the ADA. Here is how:

- **Major Life Activity Broadly Defined.** The 2008 amendments confirm that virtually any activity (e.g., caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working) is a "major life activity." A major life activity also includes the operation of a major bodily function. Any physical or mental condition that substantially affects any such activity is almost certainly a disability.
- **Disability Given Broad Construction.** The 2008 amendments state that the term "disabled" shall be construed broadly to apply to any individual with a limitation as defined in the ADA.
- **Mitigating Factors Disregarded.** A person (in most circumstances) is to be considered disabled even if he or she has the ability to mitigate the consequences of the physical or mental limitation, for example, by taking medication or by learning to manage the limitation. Eye glasses or contact lenses are taken into account, however.
- **Includes Episodic Impairments.** An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
- **Broad Discrimination Standard.** An employer can be held liable for discriminating against someone who is "regarded as" having a disability even if a mental or physical impairment does not substantially limit a major life activity.

Of course, the particulars are more detailed than we can explain in this summary, and we will address some of those particulars in an upcoming Breakfast Briefing in 2009. We expect the EEOC to issue new regulations and other guidance regarding the amended ADA, although this is not likely to happen until 2009. We will keep you informed of any significant developments on this issue.

As a practical matter, Washington employers are not significantly affected by the newly muscular ADA. This is because Washington's Law Against Discrimination was amended in 2007 to enact an equally broad definition of the term "disabled."

Heart Act of 2008

The Heroes Earnings Assistance and Relief Tax Act of 2008 (the "Heart Act") provides retirement plan protections (in addition to those already provided by USERRA) for employees who are serving in the United States Armed Forces. The Heart Act requires qualified retirement plans (such as 401(k) plans), 403(b) and 457 plans, to provide surviving beneficiaries of any employee who dies during military service with any death benefits that would have been available under the plan, as though the participant had resumed employment and then died. This new death benefit provision retroactively applies to participants

dying after 12/31/06. For employers who provide special pay supplements for employees on military leave ("differential pay"), such supplements must be treated as "compensation" for retirement plan purposes and wages for income tax withholding purposes. This provision applies for plan years beginning after 12/31/08, but formal plan amendments are not required until the last day of the 2010 plan year.

For employers that obtain their qualified plans from a third-party vendor, that third party is almost certainly going to amend the plan and provide additional advice regarding Heart Act requirements for that plan. However, for employers that use an individually designed qualified retirement plan (i.e., a custom designed plan that was drafted or substantially amended by the employer's attorneys), it is important to confer with counsel regarding the appropriate administrative changes and plan document revisions that may be necessary. Please let us know if we can assist you with any such matter.

The Heart Act also provides employers with the ability to permit employees to take a full distribution of any unpaid amounts in any Health Flexible Spending Account. Please let us know if we can assist you in amending your Health FSA to provide these additional benefits to qualified reservists called to active duty for at least 180 days.

Genetic Information Nondiscrimination Act of 2008

In late Spring 2008, Congress enacted the Genetic Information Nondiscrimination Act of 2008 (aka "GINA"). The purpose of GINA is to make it unlawful for any employer to use genetic information to make employment decisions and/or to make coverage or other health care decisions. For example, it is now unlawful for an employer to deny employment to someone because the employer learns through a genetic testing regimen that the employee is more likely to have a serious medical condition that may cause the employer to pay increased premiums or incur greater liability for healthcare expenses. GINA also prohibits employers from inquiring about an employee's family medical history to similarly make predictions as to the likely future health of any applicant or employee, and it prohibits an employer from using any such information. For example, suppose an employee has three siblings that die of pancreatic cancer, and the employer suspects or concludes that the employee might similarly be likely to die of such cancer. The employer would be prohibited from taking any employment action or otherwise discriminating against that person (for example, by denying a promotion to that employee) because of its knowledge of this information. Similarly, an employer's medical plan would be prohibited from using such information to charge higher health plan premiums to any such individual.

As a practical matter, GINA does not have implications for most employers because relatively few employers are likely to acquire such information or use it for an improper purpose. Perhaps the most significant danger is the inadvertent acquisition or use of genetic information by employers that self-administer their health plans. In this respect, GINA concerns are much like HIPAA privacy concerns: If an employer's benefits or human resources department comes into contact with genetic information or any other HIPAA-protected health information, great care should be taken to ensure that no such information is disclosed to or used by any individual for purposes of any employment decision.

Please let us know if we can assist you with any concerns regarding the restrictions established by GINA

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