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Emerging Issues Report

The ADA Amendments Act: An Overview and Analysis

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Introduction

On June 25, 2008, the United States House overwhelmingly passed, by a 402-17 vote, its version of the ADA Amendments Act of 2008 (H.R. 3195).[i] On September 11, 2008, the Senate passed its version of this bill (S. 3406).[ii] This bill likely will become law soon.

In general, the ADA Amendments Act would expand the scope of the Americans with Disabilities Act of 1990. There is no question that the legislation will increase the number of individuals considered to have a "disability"—that is one of the key objectives of the new legislation. As a result, it also means colleges and universities will have to provide reasonable accommodations to more students and employees.

There are questions though as to the potential impact the legislation would have on entities that must comply with the ADA. This report is designed to inform readers about some of the key changes that would be made to the ADA if the legislation becomes law, and provides analysis on what it *could* mean to colleges and universities.

Definition of a "Disability"

Under current law, there is a three-prong test to determine if an individual does in fact have a "disability."

> The term disability means with respect to an individual:
>
> - a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
> - a record of such an impairment; or
> - being regarded as having such an impairment.[iii]

"Substantially Limits"

Both the House and Senate versions of the ADA Amendments Act attempt to redefine what it means for an impairment to "substantially limit" a major life activity.

The House bill literally defines the term to mean "materially restricts." This change is in response to the United States Supreme Court case *Toyota Motor Manufacturing, Kentucky v. Williams*,[iv] in which the Court interpreted "substantially limits" to mean "prevents or severely restricts."[v] Proponents of the legislation contend that this is an excessive standard.

The proposed change provides little guidance to entities that must comply with the law. The goal of the legislation is to expand the ADA's coverage so it is reasonable to assume that it means something less than "prevents or severely restricts." The question is how much less.

The House report on H.R. 3195, which may or may not be used as guidance by a court if faced with interpreting this language, states:

> In the range of severity of the limitation, ''materially restricted'' is meant to be less than a severe or significant limitation and more than a moderate limitation, as opposed to a minor limitation.[vi]

The Senate bill does not redefine the term "substantially limits" but instead indicates that it should be interpreted consistent with the findings and purposes section of the legislation. In that section of the bill, the standard espoused in the Toyota case ("prevents or severely restricts") is rejected as being too demanding. No further guidance is provided.

Unless more clarity is provided in the legislation, there will be significant confusion as to what constitutes "significantly limits." This would be one of the core issues colleges and universities would have to wrestle with when complying with the changes to the ADA.

"Major Life Activities"

The proposed legislation identifies numerous examples of major life activities. Many of the activities, such as "learning," already have existed through regulations. However, two new activities are particularly worthy of attention: "thinking" and "concentrating."

In an academic setting, the potential for problems due to these new activities is significant. Students that have either a thinking or concentration "problem" could take advantage of these new "major life activities." The underlying flaw is the difficulty in documenting such problems.

Eight organizations, including the Association of American Medical Colleges (AAMC) sent insightful analysis to members of Congress regarding the proposed legislation.[vii] In discussing the accommodations made for students with learning disabilities (LD) and Attention Deficit/Hyperactivity Disorder (ADHD) on standardized tests, they wrote, "these requests are based upon diagnoses that are often poorly documented and as to which considerable room for professional disagreement is possible."[viii]

The inclusion of thinking and concentrating is problematic because testing is done *in order to* measure a student's ability to think and concentrate. If students have an impairment that substantially limits their learning, then the ADA already protects those students.

The joint analysis (that included the AAMC) argues:

> We are particularly concerned about the addition of the terms "thinking" and "concentrating" as independent major life activities. These activities should be excluded from the bill. Including elements such as "thinking" and "concentrating" as major life activities in defining whether a person has a disability is extremely problematic in an instructional or testing context. For example, individuals who have an LD or ADHD diagnosis but have not experienced substantial limitations in the long-recognized major life activity of learning will nonetheless claim to be entitled to course waivers, note-takers, additional testing time, or other accommodations because of purported limitations in their ability to "think" or "concentrate."[ix]

Ameliorative Effects

In 1999, the United States Supreme Court in a case called *Sutton v. United Air Lines*,[x] held that the ameliorative effects of mitigation measures, such as contact lenses, can be considered in determining whether an individual has a disability. In plain English, if an individual can correct the impairment, then there is no disability.

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The proposed legislation attempts to overrule this decision by expressly prohibiting these corrective steps from being considered. Both the House and Senate bills have similar language as to what types of corrective measures may *not be* considered. The following is not exhaustive:

> medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies.

The legislation also has a provision that would expressly *allow* ordinary eyeglasses or contact lenses to be considered. However, for some reason, the mitigation measures that can be considered do not include hearing aids and other measures that arguably are comparable with glasses and lenses.

Given the exclusion of hearing aids, it would be difficult to identify what measures other than glasses and lenses could be considered—likely none. It also is strange that individuals with visual problems have less protection than individuals with hearing problems.

Transitory and Minor

The legislation excludes impairments that are transitory and minor when determining if an individual is "regarded as" having an impairment. An impairment is transitory if it has "an actual or expected duration of 6 months or less."[xi]

This exception though does not apply to the first two prongs (i.e. ways) of determining if an individual is "disabled." It is limited only to whether someone is "regarded as" having a disability (the third prong of the disability definition).

As a result, it could mean that a transitory and minor impairment could constitute a disability in some situations (i.e. when a person has a "disability" but is not "regarded as" having a disability).

For example, consider someone that has a disability based on an impairment that substantially limits a major life activity (the first prong). The term "substantially limits" may suggest that the impairment could not be "minor." However, the meaning of this term would be put into question because of the legislation's attempts to redefine the term.

More troubling though is the transitory issue. There is nothing in the term "substantially limits" or "major life activity" that would negate the possibility that a transitory impairment (one that lasts six months or less) would not qualify as a disability.

The United States Office of Management and Budget (OMB) also identified this problem, and another critical problem regarding the transitory and minor language:

> The bill does exclude impairments that are *both* transitory *and* minor; however, those that are one or the other would be covered. As a result, the bill could extend ADA protection to a short bout with the flu or a mild seasonal allergy. The Administration believes that the bill should exclude from coverage impairments that are *either* transitory *or* minor.
>
> Finally, the placement of the "transitory and minor" exception of the "regarded as" prong within H.R. 3195 could lead to an unintended and undesirable interpretation of the definition of disability. Specifically, the bill does not explicitly apply the "transitory and minor" exception to the definition of disability in general. This means that some transitory and minor impairments could be covered as actual disabilities.[xii]

Broad Interpretation

Both the House and Senate bills direct that the definition of "disability" be interpreted broadly.[xiii] Due to this language, if there are any questions as to whether someone has a disability, courts likely will conclude that a disability does exist. There already were concerns that the law would be overbroad—this general requirement to read the law broadly makes it even more likely that its scope will be expansive.

Conclusion

If the ADA Amendments Act becomes law, which is likely, its effective date would be January 1, 2009. Several agencies, including the Equal Employment

Opportunity Commission (EEOC) would have to interpret the law and publish regulations.

The law's changes would be significant. For nearly two decades, case law has been developed regarding what it means for an individual to be "disabled." This past precedent may have little value now. Attorneys and administrators are going to need to work together regarding what this law means both legally and practically.

There is no crystal ball that can provide a clear answer as to whether the law would cause as many unintended consequences as is feared by some individuals, including this author. However, the language of the bill is problematic and is likely to lead to at least a significant number of unintended results.

Notes

[i] H.R. 3195, 110th Congress, http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR03195:
[ii] S. 3406, 110th Congress http://thomas.loc.gov/cgi-bin/bdquery/z?d110:s.03406:
[iii] Americans with Disabilities Act of 1990, 42 U.S.C. § 12102(2), http://www.ada.gov/statute.html
[iv] Toyota Motor Manufacturing, Kentucky v. Williams, 534 U.S. 184 (2002), http://laws.findlaw.com/us/000/00-1089.html
[v] *Id*.
[vi] H.R. 3195, Rept. 110-730 Part 1, June 23, 2008 at 10. http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_reports&docid=f:hr730p1.110.pdf
[vii] Letter from ACT, AAMC, et al. to Senate leaders, July 14, 2008, http://www.aamc.org/advocacy/library/educ/corres/2008/071408s.pdf
[viii] *Id*.
[ix] *Id*.
[x] Sutton v. United Air Lines, 527 U.S. 471 (1999). http://laws.findlaw.com/us/000/97-1943.html
[xi] *Supra*, notes 1 and 2.
[xii] "Statement of Administration Policy," H.R. 3195, Office of Management and Budget, June 24, 2008, http://www.whitehouse.gov/omb/legislative/sap/110-2/saphr3195-r.pdf
[xiii] *Supra*, notes 1 and 2.

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