How the ADA Amendments Act of 2008 Affects Wisconsin Employers

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Practice Area: Health Industry Labor, Employment and Immigration & Labor and Employment

Amendments to the ADA

ADA Amendment Act of 2008 (the "Act") was signed into law on September 25, 2008. The Act takes effect on January 1, 2009. The purpose of the Act is to shift the focus of litigation away from the issue of whether a person is covered by the ADA and toward the question of whether a person has experienced discrimination. Because Wisconsin law already had a more protective definition of "disabled," Wisconsin employers already face more protective requirements like those in the Act. However, the Act may encourage increased litigation in Federal Court and will certainly require revised regulations that personnel professionals must be prepared to understand and follow.

The most significant changes, as described below, address Congress's desire for coverage to be inclusive and ensure a broad interpretation of the original ADA. To that end, the Act clarifies the definition of "disability" and overturns several Supreme Court cases that eroded the protections Congress intended under the ADA. Specific changes under the Act include the following:

- Mitigating measures (other than ordinary eye glasses) may not be considered in determining whether an individualis disabled within the meaning of the ADA. This overturns the 2003 U.S. Supreme Court's decision in *Sutton v. United Airline*s, in which the Supreme Court held that if an impairment is correctable by medication, prosthetics, or other devices, the assessment as to whether or not there is a disability focuses on the impairment after corrective measures.
- The Act prohibits the use of qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless such criteria is shown to be related to the position and consistent with business necessity.
- The Act overturns the decision of *Toyota Motor Manufacturing,* Kentucky*, Inc. v. Williams*, in which the Supreme Court held that an impairment that renders an employee unable to perform tasks specific to a particular occupation is not a disability. Congress responded to the *Toyota* decision by directing the Equal Employment Opportunity Commission to promulgate new rules that provide "broad coverage" in the definition of disability.
- In response to the *Toyota* decision, the Act expands the list of examples of "major life activities," at least one of which must be limited by a person's impairment to constitute a disability. The examples include: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. Congress specified that certain bodily functions constitute major life activities, including functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.
- The Act states that "an impairment that substantially limits one major life activity need not limit other major life activities to be considered a disability."
- The Act makes it clear that that "an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." This means that asymptomatic conditions could now be considered disabilities under the ADA.

Wisconsin Employers Should Already Be in Compliance

The Wisconsin Fair Employment Act (the "WFEA") was already more protective than the ADA on many of the above-referenced points, so Wisconsin employers are not facing stricter requirements than they should be accustomed to. Under the WFEA, an individual with a disability is someone who (a) has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work, (b) has a record of such an impairment, or (c) is perceived as having such an impairment. This definition already includes the notion that a record of impairment is sufficient, which is one of the changes made in the federal law by the ADA Amendments Act.

In several ways, Wisconsin law has been and will continue to be more protective than the ADA. In its 2003 decision of *Crystal Lakes Cheese Factory v. LIRC*, the Wisconsin Supreme Court made clear that a disability exists where a claimant is unable to perform the particular job in question. Under the pre-amendment ADA, the claimant was required to show that his disability significantly restricted major life activities, which could include his ability to perform an entire class or range of jobs, but not just one job. Even after the ADA Amendments Act, the federal law does not focus on the complainant's ability to perform the specific job in question. Rather, it continues to focus on the effect of the impairment on a major life function (though the Act does expand the list of major life functions that must be considered).

The Wisconsin Supreme Court had already provided an avenue of relief for claimants whose impairments are corrected by mitigating measures. The Wisconsin Supreme Court held that an impairment that is correctable by mitigating measures may still trigger protection from discrimination if the employer perceives the impairment as a disability. In contrast, the U.S. Supreme Court had found that the complainant whose impairment was corrected by mitigating measures was not regarded as disabled because he was not regarded as substantially limited with respect to a major life function or an entire class of jobs, only his own job. As explained above, the ADA Amendments Act broadens the federal law by assessing an impairment before mitigating measures. The new federal approach is different than Wisconsin's in that the Act requires courts to simply disregard the mitigating measure whereas Wisconsin considers the mitigating measure but examines whether the employer regards the employee as disabled.

Finally, though this area of the ADA has not necessarily been effected by the ADA Amendments Act, it is worth noting that Wisconsin law remains significantly more protective of claimants in its assessment of what constitutes a reasonable accommodation of a disability. Federal law generally does not require an employer to eliminate job duties or employ another person to accommodate an employee who, because of a disability, is unable to perform all his job functions. Under the WFEA, Wisconsin employers may be required to shift job duties around or create new jobs to accommodate a disabled employee. This difference stems from the fact that the ADA requires a disabled employee to be able to perform the "essential functions" of his job before considering an accommodation, whereas the Wisconsin Supreme Court, in *Crystal Lakes Cheese Factory*, found that a change in job duties may in itself be a reasonable accommodation.

Implications
The implications of the ADA Amendments Act on Wisconsin employers are limited because Wisconsin employers were already faced with the more protective interpretations of the Wisconsin Supreme Court. The ability of employees or applicants in Wisconsin to bring claims, therefore, will not necessarily expand under the ADA Amendments Act beyond what was already available under the WFEA.

Increased Federal Litigation
The number of claimants filing ADA claims in Federal Court may, however, increase. Now that the federal definition of disability is more inclusive, claimants who were previously inclined to take advantage of Wisconsin's more protective laws may be more likely to file in Federal Court under the ADA. Unlike the WFEA, the ADA allows for punitive damages in cases where the complainant can demonstrate that the employer engaged in discriminatory practices with malice or reckless indifference to the complainant's federally protected rights. Under the amended ADA, claims which would have previously been dismissed on summary judgment may be able to proceed in Federal Court and secure the greater damages than are available under Wisconsin law.

Further Court and Agency Interpretation Necessary
The courts' interpretations of the provisions of the ADA Amendments Act are obviously yet to be determined and could have a significant impact, as they did under the original ADA, on what is required of employers to comply with the law. Once the law becomes effective on January 1, 2009, its language will likely be challenged and clarified through the courts. It is quite likely that suits will be filed to "test the waters" and determine the scope of claimant's rights under the Act. Because the EEOC is required to promulgate new regulations to implement the Act, personnel professionals will need to gain an understanding of the new regulations and their effects on compliance with the ADA.
