

Frank A. Cania, SPHR**From:** CANIAHR, LLC [newsletter@caniahr.com]**Sent:** Tuesday, September 30, 2008 10:15 AM**To:** FRANK@CANIAHR.COM**Subject:** HR AGENDA-Special Edition-The ADAAA and its Impact on NYS Employers

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Not His Father's ADA

Change is inevitable - just ask any Yankees fan - and the Americans with Disabilities Act (ADA) is no exception. After years of what has been called by many "a narrowing of the effective scope of the ADA," Congress and President George W. Bush have given us the Americans with Disabilities Act Amendments Act of 2008 (ADAAA). And with that mouthful of alphabet soup, Congress has implemented broader, more inclusive protections for individuals with disabilities.

Moving Forward by Looking Back

The ADA was signed into law by President George H.W. Bush on July 26, 1990. At that time Congress wanted to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." With a history of broad interpretation of "disability" already in place from the Rehabilitation Act - a law upon which the ADA was modeled - the flexible definition of "disability" triggered claims by individuals with relatively minor or temporary conditions.

By the late 1990s the Supreme Court had ruled on a variety of cases regarding the ADA. Some of the more widely known, and often cited, are *Sutton v. United Airlines* (1999), *Murphy v. United Parcel Service, Inc.* (1999), and *Toyota Motor*

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Manufacturing, Kentucky, Inc. v. Williams (2002), which all helped shape the legal landscape surrounding the ADA.

What They Meant to Say Was....

Congress believed the Supreme Court's narrow view of the ADA placed an "inappropriately high level of limitation necessary to obtain coverage under the ADA." Therefore, the ADAAA clarifies and broadens the definition of "disability."

While the text remains essentially the same regarding the term "disability," congress added that it "shall be construed in favor of broad coverage of individuals . . . to the maximum extent permitted by the terms of [the ADA.]" In order to make the point abundantly clear, several examples of "major life activities" are given.

But wait, there's more! The ADAAA also clarifies that an "impairment that is episodic or in remission is a disability *if it would substantially limit a major life activity when active.*" This change indicates conditions which were not consistently found to constitute disabilities under the ADA -- like cancer, diabetes, and epilepsy -- will now be covered.

"Upon Further Review, We're Changing the Call on the Field!"

The ADAAA will "undo" the Supreme Court decisions in *Sutton* and *Murphy* by eliminating an employer's ability to consider the ameliorative effects of mitigating measures in determining whether an individual is disabled. However, the ADAAA makes a clear exception for the use of ordinary eyeglasses and contact lenses and states that they may be considered in determining whether an individual has an impairment that substantially limits a major life activity.

The ADAAA will also "undo" the Court's decision in the *Toyota* case by rejecting the commonly used definition that states "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." Although the ADAAA provides little clarity, it does indicate that conditions not always considered

disabilities under the ADA, such as depression, learning disabilities, and carpal tunnel, are more likely to be covered under the new law.

In another attempt to “undo” past decisions, more detail is also provided in the ADAAA on what it means to be “regarded as” an individual with a disability. Two important points are the “regarded as” definition does not apply to transitory or minor impairments. This leaves many questions unanswered and may open the door to many more. Also, the ADAAA does offer that employers do not need to provide reasonable accommodations to individuals who are “regarded as” disabled but are not actually disabled.

Business as Usual in New York State

“There are three important points for employers in New York State to understand” says John Bagyi, a partner with the law firm Bond, Schoeneck, and King, PLLC. “First, the New York State Human Rights Law goes beyond the ADA and ADAAA by defining a disability, in essence, as a diagnosed medical condition. Second, state and federal law requires an employer to follow the law most beneficial to the employee or applicant, so if a New York employer is in compliance with the state’s Human Rights Law, the ADAAA will mean little in the way of necessary changes to company policies and procedures. The third point is if an employer is not absolutely sure they are in compliance with the state Human Rights Law, this is an excellent time to make the necessary changes in policies and procedures.” Bagyi offers the following suggestions for employers to help ensure compliance:

- **Human Resource Audits** - If an organization has not done an audit or review of the HR function recently, or ever, this is a good time to find out what’s being done right and what needs attention
- **Job descriptions** - Because job descriptions are often the starting point for individualized assessments regarding disabilities, they should be reviewed and updated regularly to insure they include all the essential functions of the position.
- **Policy review** - Policies, practices, and

processes should be revised and implemented to reflect the requirements of the laws and regulations. Employee handbooks are a good place to start your review.

- **Prior accommodation requests** - Review prior requests for accommodation that were denied to confirm that the denial was appropriate under the NYS Human Rights Law.
- **Training** - Human resource professionals and managers should be aware a variety of employees may qualify for protection under the law and may request reasonable accommodations. When an employee makes them aware of a serious physical or mental impairment they must be prepared to act appropriately.
- **More training** - Human resource professionals and managers must be aware of the risks of disciplining and terminating an employee not identified as disabled prior to the disciplinary action. Knowing how to preserve the employer's right to discipline is important. And now, more than ever, it is imperative to ensure appropriate supporting documentation is maintained for disciplinary action and termination.

“The support for protecting the rights of people with disabilities is clear, as is the intention of the ADAAA and New York Human Rights Law,” says Bagyi. “However, support and implementation are two very different things. Employers should take a proactive, conservative approach to situations related to these laws. Things like encouraging a respectful workplace, maintaining an open-minded and creative attitude when presented with a request for a reasonable accommodation, and having a solid understanding of your responsibilities under the law will go a long way.”

Please note – The information contained in this column is not a substitute for professional counseling or advice.

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