

**ADA Amendments Act of 2008: A Glass Half Empty or Half Full?**

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The U.S. House of Representatives enacted the “ADA Amendments Act of 2008” to address certain deficiencies in the Americans with Disabilities Act’s (ADA) language that have deprived many people with legitimate disability-based discrimination complaints of meaningful opportunities for legal redress. Supporters of these amendments are reasonably confident that this legislation will be passed by the Senate sometime in July or August and be signed into law by the President. The language agreed upon—like the original ADA it seeks to amend—is a compromise between the disability and business communities that dilutes considerably the original amendments proposed in the ADA Restoration Act of 2007.

The 2008 amendments will do much to broaden the ADA’s disability definition, but will not solve many of the problems that currently exist. For example, in 2007 ADA Title I suits against employers, employees prevailed less than five percent of the time. *See 32 Mental & Physical Disability L. Rep. (MPDLR) 335 (May/June 2008)*. To what extent broadening this definition will benefit people with disabilities is not self-evident. One obvious omission is that the 2008 amendments do not address in any meaningful way the

ADA's qualifications restrictions. These have presented plaintiffs with major problems, particularly in the context of a limited disability definition, which still would be limited to some extent with the amendments.

Congress would benefit from these amendments. In its "findings," Congress casts blame on the Supreme Court for the "mess" that is the ADA disability definition, rather than sharing, much less accepting, responsibility for enacting legislation that clearly was intended to substantially limit the definition of disability in the first place. *See* 32 *MPDLR* 161-63. Disability advocates will also benefit because the amendments will improve the old disability definition in significant ways. Moreover, representatives of the disability community who supported the original ADA will not have to acknowledge that they mistakenly assumed that the federal courts would, or even could, correct the existing limitations contained in the ADA's disability definition. The business community benefits as well. While significant, the new amendments fall short of the sweeping changes proposed in the ADA Restoration Act of 2007, which would have virtually eliminated all the disability definition limitations.

The 2008 House amendments would make three significant and other related changes to the ADA's disability definition. First, by fiat, the definition of "substantially" in the phrase "substantially limits" would henceforth mean "materially restricts." Although this new language is intended to represent a threshold that is considerably easier to meet than the old language, the term "materially restricts" is equally or more ambiguous than "substantially limits." Congress has not learned its lesson in allowing the federal courts considerable room to interpret what the disability definition actually

means. Adopting this term allows the pretense to continue that the federal courts, rather than Congress, are most responsible for the restrictions placed on the disability definition.

The second, and arguably the most meaningful change, is the “regarded as” prong of the definition. Plaintiffs can now meet this prong if they have been subjected to prohibited disability-based discrimination “because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.” In other words, if the defendant has otherwise violated the Act, the complaint will not be dismissed if the actual or perceived impairment does not “limit a major life activity.” This language effectively eliminates the existing legislation’s requirement that the defendant must have viewed the plaintiff as being substantially limited in a major life activity.

The third set of changes are directed at impairments that are “episodic or in remission,” “transitory and minor,” and/or likely to be mitigated by various auxiliary aids and services or medications. Episodic conditions of those in remission will be covered if they “substantially limit a major life activity when active.” Significantly, the determination of who is disabled will be made “without regard to the ameliorative effects of mitigating measures . . . ,” except with regard to “ordinary eyeglasses or contact lenses.” The new amendments exclude “transitory and minor” impairments from coverage and define “transitory” to mean “6 months or less.”

In conclusion, the 2008 amendments are significantly less inclusive than those proposed in the ADA Restoration Act, which would have eliminated the “substantial limitation” on a “major life activity” requirement. The amendments’ failure to change in any meaningful way the “major life activity” restriction, together with the decision to

adopt the “materially restricts” language, will likely result in many people with disabilities being barred from pursuing legitimate grievances.