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ROSE, CHINITZ & ROSE EMPLOYMENT LAW UPDATE

MAJOR CHANGES TO THE AMERICANS WITH DISABILITIES ACT ENACTED

President Bush recently signed into law the Americans with Disabilities Amendments Act of 2008 (the “ADAA”), which will become effective on January 1, 2009. The ADAA represents a major change to the federal disability discrimination laws and will likely subject employers to more requests for reasonable accommodations and more claims for disability discrimination. The following paragraphs provide a summary of the amendments. Employers should be aware that applicable state laws may provide even greater protections than those found under the revised federal laws.

Expansion of the Definition of a Covered Disability.

Under the ADA, a person with a “disability” is one who (1) has a physical or mental impairment that substantially limits one or more major life activities, or (2) has a record of such impairment, or (3) is regarded as having such impairment. Under the ADA, employers are required to provide reasonable accommodations to the known physical or mental impairments of an otherwise qualified individual with a disability to enable the individual to perform the essential functions of his position, unless providing such accommodations would present a hardship.

Lower Threshold for “Substantially Limits.”

Under the ADA, as interpreted by the Supreme Court’s decision in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), a “major life activity” had to be an activity that was of “central importance” to most people’s daily lives, and the impairment had to “prevent or severely restrict” an individual’s ability to do the activity on a long term or permanent basis. The ADAA has explicitly rejected the Supreme Court’s standard in *Toyota*, finding that the Supreme Court “created an inappropriately high level of limitation necessary to obtain coverage under the ADA.” The ADAA does not provide a new definition, but states that the term “substantially limits” should be defined and interpreted broadly to be consistent with the purposes of the

ADA as amended. The new amendments direct the Equal Employment Opportunity Commission to revise its regulations accordingly. Under the ADAA, an impairment that is episodic or in remission is to be considered a disability if it would substantially limit a major life activity when active. The ADAA, however, does not apply to “transitory and minor” impairments, which are defined as impairments that last or are expected to last six months or less.

Expanded Definition of “Major Life Activities.”

The ADAA also expands the definition of “major life activities” into both specific and general categories. “Major life activities” are now divided into (1) “General” categories, such as caring for oneself, performing manual tasks, seeing, eating, sleeping, walking, lifting, thinking, breathing, speaking, concentrating, communicating and working, and (2) “Major Bodily Functions” such as functions of the immune system, normal cell growth, digestive, neurological, circulatory and reproductive functions. These definitions, together with the ADAA’s pronouncement that “an impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability,” significantly expand the scope of protection previously available under the ADA.

The Consideration of Mitigating Measures Is No longer Appropriate.

In *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999), the Supreme Court stated that “if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures -- both positive and negative -- must be taken into account when judging whether that person is substantially limited in a major life activity.” Thus, if a mitigating measure corrected an individual’s particular impairment, the individual was no longer a “qualified individual with a disability.” Under the ADAA, the *Sutton* standard no longer applies. Under the new standard, the “determination whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures” such as medication, medical supplies, equipment or appliances, prosthetics, hearing aids, mobility devices, use of assistive technology, learned behavioral or adaptive neurological modifications. For those employers in Massachusetts, this new, expansive standard under the ADAA brings federal law into line with existing Massachusetts law, as set forth in *Dahill v. Boston Dept. of Police*, 434 Mass. 233 (2001).

The ADAA’s rejection of the consideration of mitigating devices does not extend to routine vision impairments. Under the ADAA, the mitigating effects of ordinary eyeglasses or contact lenses should still be considered when determining whether an impairment substantially limits a major life activity. The ADAA does, however, restrict the use of standards, tests or selection criteria on the basis of uncorrected vision, unless those standards, tests or criteria are shown to be job-related and consistent with business necessity.

“Regarded As” Standard Clarified.

Under the ADAA, an individual only needs to establish that he or she has been discriminated against because of an actual or perceived physical or mental impairment to show that he or she was “regarded as” disabled by the employer. The individual need not show whether or not the impairment limits or is perceived to limit a major life activity. An employer is not, however, required to provide reasonable accommodations to individuals who are merely “regarded as” disabled under the ADAA.

For further information, please contact the attorneys at Rose, Chinitz & Rose at One Beacon Street, Fourth Floor, Boston, Massachusetts 02108; Tel. 617-536-0040.

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