

# EMPLOYMENT LAW

## A L E R T

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

## ADA Amendments Act

September 18, 2008

On September 17, 2008, the House passed by voice vote Senate Bill 3406 ("S. 3406), the ADA Amendments Act of 2008. The White House has announced that President Bush will sign the bill and it will become effective on January 1, 2009. S. 3406 broadens the reach of the Americans with Disabilities Act in several ways, including defining disability in a manner which will cover many more individuals.

### **I. Definition of Disability**

S. 3406 maintains the ADA's basic definition of "disability." An individual is disabled if she: (1) has a physical or mental impairment that substantially limits a major life activity; (2) has a record of such impairment; or (3) is regarded as having such impairment. However, S. 3406 explicitly rejects the U.S. Supreme Court's finding in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams that "major" life activity and "substantially limits" must be "interpreted strictly to create a demanding standard for qualifying as disabled." In order to expand the ADA's reach, S. 3406 for the first time defines "major life activities" doing so quite broadly, and renders "substantially limits" less restrictive.

#### ***a. Major Life Activity***

Under S. 3406, a major life activity includes, but is not limited to, basic tasks such as caring for oneself, performing manual tasks, seeing, hearing, thinking, working, eating, sleeping, reading, walking, standing, lifting, bending, speaking, breathing, learning, concentrating, thinking, communicating and working. The definition also notes that the operation of a major bodily function is to be considered a major life activity. Examples provided in the bill are functions of the immune system, normal cell growth, digestive, brain, respiratory, bowel, bladder, neurological, circulatory, endocrine and reproductive functions.

#### ***b. Substantially Limits***

The bill also directs the EEOC to revise its regulations that currently define "substantially limits" to mean "significantly restricted" because such a standard is "too high" and "inconsistent with

Congressional intent.” Furthermore, S. 3406 states that “an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”

One of the most publicized goals of S. 3406 is the rejection of the U.S. Supreme Court’s finding in Sutton v. United Air Lines, Inc. and its companion cases that the ameliorative effects of mitigating measures must be considered in determining whether an impairment substantially limits a major life activity. In Sutton, the Supreme Court held that an individual with poor vision who wears glasses was not “disabled” if the individual’s eyesight was not substantially limited while wearing the glasses. In Murphy v. United Parcel Service, Inc., the Court held that an individual with high blood pressure was not “disabled” if the ameliorative effects of his medication prevented him from being substantially limited in a major life activity. S. 3406 specifically provides that the ameliorative effects of mitigating measures will not be considered in such determinations, and therefore, will have no effect on the classification of an impairment as a disability. The bill provides several examples of mitigating measures, including medication, prosthetics, hearing aids, oxygen therapy equipment, assistive technology, reasonable accommodations, mobility devices, and low-vision devices which magnify, enhance, or augment a visual image.

S. 3406, however, explicitly exempts ordinary eyeglasses and contact lenses, stating that the ameliorative effects of these two mitigating measures are to be considered in determining whether an impairment substantially limits a major life activity. In order to provide some protection to individuals using ordinary eyeglasses and contact lenses, S. 3406 does prohibit the use of employment tests, standards, or selection criteria based on an individual’s uncorrected vision unless the employer can show that such requirements are job-related and consistent with business necessity.

## **II. Protection Against Discrimination Based on Impairment that Does Not “Substantially Limit” a Major Life Activity**

Perhaps the most significant effect of the ADA Amendments Act is that discrimination against an individual with a physical or mental impairment is prohibited even if the impairment does not substantially limit a major life activity. Under S. 3406, the ADA will prohibit discrimination against “a qualified individual on the basis of disability.” The bill defines the third prong of the disability definition - “being regarded as having such an impairment” - to include “if the individual establishes that he or she has been subject to an action prohibited under this Act 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.” The extraordinarily broad sweep of this particular amendment is limited only by the additional provision that it will not apply to conditions that are “transitory and minor” with “transitory” defined as having a duration of less than six months. Nevertheless, a plaintiff must no longer establish that he has a physical or mental impairment which “substantially limits” (or is even perceived to so limit) a major life activity in order to be protected from discrimination on the basis of the impairment. As long as such impairment is not “transitory and minor,” an individual is protected from discrimination on the basis of such impairment.

As a result, with respect to discrimination claims under the ADA, the threshold question will likely no longer be whether an individual has a disability that entitles them to protection but whether the person is “qualified,” i.e., able “with or without a reasonable accommodation” to “perform the essential functions” of the job.

The ADA Amendments Act does make clear that an individual is not entitled to an accommodation for a condition that meets the definition of “disability” only under the “regarded as” prong. Therefore, the scope of “substantially limits” continues to impact employers but only with respect to whether or not an employer is required to accommodate an individual’s impairment.

### III. Reverse Discrimination

Of little comfort to employers may be the explicit provision under the ADA Amendments Act that “reverse discrimination” claims may not be brought under the ADA. In other words, an individual without a disability may not bring an ADA claim alleging that the individual was discriminated against based on a lack of disability.

Congress has, as it explicitly intended, reversed the prior court decisions since the passage of the ADA that have made it difficult for individuals to establish entitlement to protection under the ADA. We anticipate that activity under the ADA will be significantly increased and that the plaintiff’s bar will again be energized with respect to bringing claims under the ADA. In the course of advising clients over the years on how to deal with questions arising under the ADA, we have often suggested that we “assume” that employee’s “condition” is a “disability,” particularly when the issue was a close one, and then consider the employer’s obligations to accommodate and/or avoid discrimination based on such assumption. Such an approach will now most certainly be advisable in almost all situations.

If you have any questions about this Alert, please call one of our labor attorneys listed below.

### Bass, Berry & Sims Labor and Employment Attorneys

**Karen L.C. Ellis**  
(615) 742-6226  
kellis@bassberry.com

**Robert W. Horton**  
(615) 742-7708  
rhorton@bassberry.com

**Carolyn V. Moore**  
(615) 742-7944  
cmoore@bassberry.com

**Justin A. Page**  
(615) 742-7786  
jpage@bassberry.com

**Davidson French**  
(615) 742-6240  
dfrench@bassberry.com

**Lymari Martinez**  
(615) 742-7903  
lmartinez@bassberry.com

**Michael S. Moschel**  
(615) 742-6297  
mmoschel@bassberry.com

**Leslie G. Sanders**  
(615) 742-7711  
lsanders@bassberry.com

**Tim K. Garrett**  
(615) 742-6270  
tgarrett@bassberry.com

**Alonda W. McCutcheon**  
(615) 742-7717  
amccutcheon@bassberry.com

**William N. Ozier**  
(615) 742-6232  
bozier@bassberry.com

**Annie M. Warnock**  
(615) 742-6517  
awarnock@bassberry.com

*The materials contained herein have been abridged from the statutory sources and should not be construed or relied upon for legal advice. Readers are urged to consult legal counsel concerning particular situations and specific legal questions.*

*To ensure compliance with requirements imposed by the IRS, we inform you that this message is not intended to be used, and cannot be used, by the addressee or any other person for the purpose of avoiding penalties that may be imposed under the Internal Revenue Code.*