

November 9, 2008

[Dallas Business Journal](#):

by [Michael A. McCabe](#)

Lost in the din of the presidential campaign and economic anxiety is recently enacted legislation that almost certainly will have a significant impact on any employers with 15 or more workers.

Eighteen years ago, the Americans with Disabilities Act, or ADA, was signed into law by the first President Bush. It prohibits discrimination against individuals with disabilities and requires employers to make reasonable accommodations for qualified individuals to perform the essential functions of their jobs.

Critics, however, have complained for years that court decisions limited the ADA to the point that it has never achieved its intended purpose. This September, Congress passed the ADA Amendments Act of 2008, which President George W. Bush signed into law shortly after it landed on his desk. The act will go into effect on Jan. 1 and could prove costly for employers.

The act's intended purpose is not to expand rights under the ADA, but to "carry out the ADA's objectives ... by reinstating a broad scope of protection to be available under the ADA." Nonetheless, the goal is being achieved with several major changes to the ADA.

It leaves the current definition of "disability" intact, meaning that a person must still be "otherwise qualified" to perform the essential functions of his or her job. However, the new act instructs courts to adopt a broad standard when determining whether an individual is considered disabled. In addition, the act adds definitions for several key terms that are currently undefined by the ADA. For example, the term "major life activities" is defined for the first time to include the operation of major bodily functions.

The ADA always has provided protection not only to individuals with an impairment that substantially limits a major life activity, but also to individuals with a "record of" such an impairment or who are "regarded as" having such an impairment. The revamped ADA clarifies that a covered individual is "regarded as having such an impairment" when "he or she has been subjected 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."

In the future, it is a virtual certainty that more individuals will allege that they qualify for

protection under the “regarded as” prong of the ADA because their employer regarded them as having an “impairment,” rather than the more difficult task of showing that the employer regarded them as being substantially limited in a “major life activity.”

The amended law further qualifies that individuals with impairments that are episodic or in remission will not be barred from coverage under the act. In response to court decisions, the act specifically prohibits considering the impact of mitigating measures an individual may use when determining whether they have a qualifying impairment. Prohibiting the consideration of “mitigating measures” will allow individuals who use, for example, medications, artificial limbs, hearing aids or similar ameliorative effects, to argue that they qualify for protection under the ADA, even though those measures overcome the limiting effects of an impairment.

Employer impact

The impact of the act on employers and qualifying employees cannot be overstated. The Act arguably represents one of the most significant changes to employment law of the Bush administration. The expanded scope of the act will cover more employees and will more often trigger an employer’s duty to provide reasonable accommodation to covered individuals. It is anticipated that employers will experience an increase in the number of filings of employment discrimination suits based on disability and an uptick in the number of those cases that go to trial. Employers in the past have focused on defeating employees’ claims early in litigation by showing that an employee did not qualify for coverage under the ADA. While this defense remains viable, under the act, employers will need to place additional emphasis on whether an employee is otherwise qualified for the position and the legitimate, nondiscriminatory reason for the adverse employment action at issue — a fact-intensive and costly analysis.

Consequently, more than ever, it will be important for employers to have well-drafted job descriptions that accurately describe their positions and documentation of legitimate, nondiscriminatory business reasons for adverse employment actions against employees with impairments. Finally, the act also will require employers to reevaluate how they handle disability-related matters in the workplace.

Employers should immediately prepare for the changes in the ADA by reviewing policies and procedures, retraining human resources personnel and supervisors and planning to provide accommodations for a larger number of employees with disabilities. While addressing the new challenges presented by the changes will be time-consuming and costly, failure to comply will certainly expose employers to increased liability and cost.