On September 25, 2008, President George W. Bush signed into law the ADA Amendments Act of 2008 (ADAAA or the Act). The Act became effective January 1, 2009, overturning several recent Supreme Court decisions in which the Court had narrowly construed the Americans with Disabilities Act (ADA). As a result, the ADAAA has expanded the group of individuals covered by the Act and limited the defenses available to employers.

Background

In 1990, President George H.W. Bush signed into law the ADA. When drafting the ADA, Congress adopted the definition of disability from Section 504 of the Rehabilitation Act of 1973. In the years that followed, courts have narrowly interpreted the ADA. As a result, according to a 2006 study, plaintiffs had lost more than 97% of all ADA employment discrimination claims. In most instances, employees’ claims were rejected because the courts determined that they did not meet the statute’s strict definition of “disability.” Concerned that the federal courts, including the U.S. Supreme Court, had unduly narrowed the group of people Congress had intended to protect when it enacted the ADA in 1990, Congress proclaimed its purpose in passing the ADAAA to “restore the intent and protections of the Americans with Disabilities Act of 1990.”

The ADAAA was first introduced in 2007 as the Americans with Disabilities Act Restoration Act (S. 1881/H.R. 3195). Although it received overwhelming support in the House and Senate, during hearings on the legislation in the fall of 2007, some members of Congress expressed concern that the amendments extended protections too far and would result in excessive litigation. After extensive negotiations, involving representatives of business and disability
rights organizations as well as Congressional leaders, the ADAAA was overwhelmingly approved by both the House and Senate and ultimately signed by the President.

The Broad Coverage of the ADAAA

The ADAAA overturns several judicial interpretations of the scope of coverage under the ADA, including *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999), and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002). By overturning these Supreme Court decisions, the Act reinstates a broad scope of protection as originally intended by the ADA. Specifically, the Act rejects the requirement enunciated in *Sutton* that the determination of whether an impairment substantially limits a major life activity is to be determined with reference to ameliorative effects of mitigating measures. The Act also rejects the standard enunciated in *Toyota* that the terms “substantially” and “major” in the definition of disability be interpreted strictly to create a demanding standard for qualifying as disabled.

The ADAAA retains key language from the original ADA – i.e., defining a “disability” as an actual, perceived or recorded “physical or mental impairment” that “substantially limits” one or more “major life activities.” But the Act also includes language fundamentally altering the way those terms are to be interpreted, and explicitly rejecting the approach embraced in *Sutton* and *Toyota* and their progeny in lower federal courts.

In particular, the Act expressly directs courts to construe disability “in favor of broad coverage … to the maximum extent permitted by the terms [of the Act].” In addition, the ADAAA declares that proof of disability from now on “should not demand extensive analysis.”

The Act also includes a non-exhaustive list of major life activities, some of which have been recognized by the EEOC (in its ADA regulations), and others which have not. The major life activities now specified in statutory text include:

- caring for oneself
- performing manual tasks
- seeing
- hearing
- eating
- sleeping
- walking
- standing
- lifting
- bending
- speaking
- breathing
- learning
- reading
- concentrating
thinking
communicating
working

The ADAAA also expands the definition of “major life activities” to include a non-exhaustive list of “major bodily functions,” which include:

- normal cell growth
- normal immune system
- digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions

With these changes, the analysis of whether an individual is disabled likely will be less exhaustive, and the class of individuals who are disabled under the ADA is greatly expanded.

Expansion of the “Regarded As” Provision

The Act also expands coverage under the ADA’s “regarded as” provision. The ADA provides protection to individuals who are “regarded as having … an impairment” that “substantially limits one or more major life activities” by their employers. The ADAAA expands the class of individuals protected under this provision by establishing that such protection is afforded where an individual has been subjected to 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.” Prior to the Act, many courts had strictly construed the “regarded as” provision as requiring employees to establish that their employer perceived them to be unable to perform a broad range (or a class) of jobs or perceived them to have an impairment that substantially limits a major life activity. With the new definition, employees face a less exacting standard in establishing a claim of disability discrimination under the “regarded as” provision. However, the “regarded as” provision specifically excludes impairments that are both transitory and minor, with a transitory impairment defined as one with an actual or expected duration of six (6) months or less. Thus, employees with minor short-term illnesses, such as a cold or flu, likely will be unable to qualify for protection under the “regarded as” provision.

On an important related note, the ADAAA provides that an employee who only has a “disability” by virtue of being “regarded as” disabled is not entitled to a reasonable accommodation. Under the ADA federal appellate courts were split on this point of law. The ADAAA resolves it. Thus, the ADAAA’s expanded definition of being “regarded as” having a disability does not apply to discrimination claims for which the relief sought includes “reasonable accommodation.”

The ADA Now Covers Impairments that are Episodic or In Remission

In a significant expansion of the ADA, the Act amended the definition of “disability” to include impairments that are episodic or in remission if they “would substantially limit a major life activity when active.” Congress enacted this amendment in response to court rulings that have found that individuals with episodic impairments or impairments with varying symptoms, such as epilepsy or cancer were not protected under the ADA, because the individuals were not
presently suffering symptoms sufficient to demonstrate they were disabled. As a result of this change, employers may find it increasingly difficult to determine whether an employee is disabled, because the employee’s impairment may not manifest itself in any observable form because it is episodic or in remission.

The ADAAA Overturns the Mitigation Defense Set Forth in the Sutton Trilogy

In one of the most significant changes to the ADA, the ADAAA overturns a series of Supreme Court decisions often called the Sutton trilogy, based on the lead case of *Sutton v. United Airlines*, 527 U.S. 471 (1999), by mandating that courts evaluate an employee’s disability without regard to “the ameliorative effects of mitigating measures.” In the Sutton trilogy, the Supreme Court held that the ADA did not protect an employee who was able to manage the symptoms of an impairment by using medication, prosthetics, or other means mitigating his or her impairment. Under Sutton, an employee who was successfully able to mitigate the symptoms of an impairment faced great difficulty in establishing that he or she was disabled.

Now, the determination of whether an employee has a disability (i.e., whether he or she has an impairment that substantially limits a major life activity) must be made without taking into account such mitigating measures. The ADA identifies a non-exhaustive list of examples of mitigating measures, including:

- medication
- medical supplies, equipment, or appliances
- low-vision devices (excluding ordinary eye glasses or contact lenses)
- prosthetics
- hearing aids and implantable hearing devices
- mobility devices
- oxygen therapy equipment and supplies
- use of assistive technology
- reasonable accommodations or auxiliary aids or services
- learned behavioral or adaptive modifications

Because such mitigating measures are not to be considered in determining whether an individual is disabled, the ADAAA significantly expands the class of individuals protected by the ADA. Thus, for example, if an employee is able to manage or control an impairment through the use of medication or other mitigating measures, the employee still may be disabled under the ADA if such impairment substantially limits a major life activity when untreated or unmitigated.

As a result of this amendment to the ADA, employers likely will face increased difficulty in assessing whether an employee has a disability under the ADA. Previously, when an employer was required to take into account mitigating measures, the employer could determine whether an employee had a disability by assessing the employee’s present condition with the ameliorative effect of mitigating measures. Now, when conducting such an assessment, the employer must look not at the employee’s present condition with the ameliorative effect of mitigating measures, but must consider the employee’s impairment absent any mitigating measures, which may require some amount of speculation. In some circumstances, such as a situation involving an
individual with an amputation, the analysis should not be difficult because one can actually identify and observe the limitations that result from the unmitigated impairment. However, in other circumstances, such as a situation involving an individual on long-term medication, the analysis may be difficult and may require a certain level of speculation to determine whether the individual would be disabled if he or she were not taking medication. Generally, a health care provider can observe an employee’s impairment in its mitigated form and identify the limitations that result, but a health care provider may face difficulty in accurately identifying such limitations when asked how the impairment would affect the employee if he or she were to cease using a mitigating measure. (On the other hand, some conditions, as affected by mitigating measures, pose employers with “close calls” on the question of “disability”; but without taking into account such measures, the same employee may have a much stronger claim of “disability.”) Thus, at least in some instances, employees and employers may face greater uncertainty under this provision of the ADA.

Notably, the list of mitigating measures specifically excludes ordinary eye glasses or contact lenses, addressing a concern raised by the Supreme Court in *Sutton* that if mitigating measures were not taken into account in determining whether an employee is disabled under the ADA, many people who wear eye glasses or contact lenses - a substantial percentage of the general population - would be deemed disabled under the ADA. However, the ADAAA provides that an employer cannot use qualification standards, employment tests or other selection criteria based on an individual’s uncorrected vision unless it is shown to be job-related for the position at issue and consistent with business necessity. Thus, the ADAAA affords some protection to individuals with ordinary eye glasses and contact lenses.

**Conclusion**

The ADAAA expands the coverage of the ADA and provides protection to individuals who previously were denied such protection as a result of the original language of the ADA and the narrow interpretations of such language by courts around the country. In addition to those Supreme Court cases explicitly cited in the ADAAA itself, the Act overturns and casts into doubt countless appellate and trial court decisions that were consistent with, and relied on, those Supreme Court cases. For the near future, employers and employees may find themselves sailing in uncharted waters when attempting to navigate under the ADA.