

Cray • Huber

Labor and Employment Law Notes

BEWARE: Potential Major Expansions to the ADA Could Lead to Increase in Lawsuits

First, the Illinois Human Rights Act was amended to permit employees to sue employers directly in Circuit Court rather than going through the Illinois Human Rights Commission which is leading to an increase in employment related lawsuits and litigation costs. Now, Congress has proposed drastic changes to the Americans with Disabilities Act (ADA) that will undoubtedly lead to an increase in the number of ADA claims being filed in federal court and a corresponding increase in litigation costs for insurers who write Employment Practices Liability Insurance (EPLI). On July 6, 2007, the ADA Restoration Act of 2007 was introduced in the House of Representatives. It is identified as a bill to restore the intent and protections of the ADA. The House Education and Labor Committee, House Judiciary Committee and the Senate Health, Education, Labor and Pension committees already have held hearings and more are expected soon.

A. In the ADA Restoration Act of 2007 Congress Notes:

- 1) In enacting the ADA, Congress intended that the Act establish a clear and comprehensive prohibition of discrimination on the basis of disability, and provide broad coverage and vigorous effective remedies without unnecessary obstructive defenses;
- 2) Decisions and opinions of the Supreme Court have unduly narrowed the broad scope of protection afforded in the ADA, eliminating protection for a broad range of individuals who Congress intended to protect;
- 3) In enacting the ADA, Congress recognized that physical and mental impairments are natural parts of the human experience that in no way diminish a person's right to fully participate in all aspects of society, but Congress also recognized that people with physical or mental impairments have the talent, skills, abilities and desire to participate in society are frequently precluded from doing so because of prejudice, antiquated attitudes or the failure to remove societal and institution barriers;
- 4) Congress modeled the ADA definition of disability on the 1973 Rehabilitation Act and it had been construed broadly to encompass both actual and perceived limitation, and limitation imposed by society;
- 5) The broad conception of the definition of disability has been underscored in the Supreme Court's decision in School Board v. Nassau County v. Arline, (1987) which

“acknowledged that societies accumulated myths and fears about disability and disease are as handicapping as are the physical limitation that flow from actual impairment;”

- 6) In adopting its definition of disability in the ADA, Congress understood that adverse action based on a person’s physical or mental impairment is often unrelated to the limitation caused by the impairment itself;
- 7) Instead of following congressional expectations that disability would be interpreted broadly in the ADA, the Supreme Court has ruled in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, (2002), that the elements of the definition of disability “need to be interpreted strictly to create a demanding standard for qualifying as disabled,” and, consistent with that view has narrowed the application of the definition in various ways; and,
- 8) Contrary to explicit Congressional intent expressed in the ADA committee reports, the Supreme Court has eliminated from the Act’s coverage individuals who have mitigated the effects of their impairments through the use of such measures as medications and assistive devices.

B. The ADA Restoration Act of 2007 Identifies the Following as Purposes of the ADA:

- 1) To provide “a clear and comprehensive national mandate for the elimination of discrimination” and “clear, strong, consistent, enforceable standards addressing discrimination” by restoring the broad scope of protection available under the ADA;
- 2) To respond to certain decisions of the Supreme Court that have narrowed the class of people who can invoke the protection from discrimination the ADA provides; and,
- 3) To reinstate original Congressional intent regarding the definition of disability by clarifying that ADA protection is available for all individuals who are subjected to adverse treatment based on actual or perceived impairment, or record of impairment, or are adversely affected by prejudiced attitudes, such as myths, fears, ignorance, or stereotypes concerning the disability or particular disabilities, or by the failure to remove societal and institutional barriers, including communication, transportation, and architectural barriers, and the failure to provide reasonable modification to policies, practices, and procedures, reasonable accommodations, and auxiliary aids and services.

C. In Addition to Other Changes, Section 501 of the ADA Would be Amended to Add the Following “Rules of Construction:”

- 1) Broad Construction – In order to ensure that this Act achieves its purpose of providing a comprehensive prohibition of discrimination on the basis of disability, the provisions of this Act shall be broadly construed to advance their remedial purpose.
- 2) Regulations – In order to provide for consistent and effective standards among the agencies responsible for enforcing this Act, the Attorney General shall promulgate regulations and guidance in alternate accessible formats implementing the provisions herein. The Equal Employment Opportunity Commission and Secretary of Transportation shall then issue appropriate implementing directives, whether in the nature

of regulations or policy guidance, consistent with the requirements prescribed by the Attorney General.

- 3) Deference to Regulations and Guidance – Duly issued federal regulations and guidance for the implementation of this Act, including provisions implementing and interpreting the definition of disability, shall be entitled to deference by administrative bodies or officers and courts hearing any action brought under this Act.

LIKELY IMPACT OF THE EXPANSION OF EMPLOYEE PROTECTIONS PROPOSED IN THE ADA RESTORATION ACT OF 2007

The ADA Restoration Act of 2007 would redefine “disability” to include “a physical or mental impairment” or a record of a “physical or mental impairment” or “being regarded as having a physical or mental impairment.” This bill is meant to counteract and circumvent certain U.S. Supreme Court decisions that Congress believes resulted in the narrowing of the scope of the ADA’s protections. An individual would no longer need to prove that an impairment “substantially limits” one or more “major life activities.” Moreover, courts and employers would not be able to consider the effects of mitigating measures such as medication or devices, when determining whether individuals are disabled.

There appears to be a shift in the burden of proving whether an individual is “qualified” to perform a job from the employee to the employer. Under the restrictions laid out under the proposed ADA Restoration Act of 2007, poor eyesight correctable by wearing glasses would be considered a “disability” and unfairly trigger the employer’s duty to accommodate. By eliminating an entire body of case law under the ADA, these current proposals would undermine the original intent of the ADA and could substantially expand the federally protected group of disabled persons from individuals with a serious disability to individuals with a simple or temporary impairment – perhaps as minor as the flu. Essentially, this legislation would establish that anything less than a perfect bill of health would qualify an employee under the ADA. This broad expansion of the ADA negates the original intent of the law and those with serious disabilities who rely on current regulations to protect them against unfair discrimination.

The only upside to the possible passage of the ADA Restoration Act of 2007 would likely be an increase in the sale of Employment Practices Liability Insurance and the premiums that those policies would bring. Only time will tell whether the increase in premiums from the sale of additional EPLI would be offset by the increase in litigation under what would be the newly expanded ADA and the likely expansion of the litigation costs associated with these additional claims/lawsuits. The passage of the ADA Restoration Act of 2007 is not a foregone conclusion. There is considerable opposition to these amendments. Should the amendments pass as presently structured the cost to employers and their insureds is expected to increase dramatically.