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ADA Amendments Act Update Legal Brief[1]
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I. The ADA Amendments Act and EEOC Proposed Regulations - Introduction

The Americans with Disabilities Act of 1990 (ADA) was passed "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[2] However, decisions of the U.S. Supreme Court and other courts have resulted in ADA protections that are neither clear nor comprehensive. As a result of these court decisions, Congress amended the ADA to ensure that the ADA can fulfill its original promise, passing the ADA Amendments Act ("ADAAA") in September 2008 and putting it into effect beginning January 1, 2009. Since the ADAAA's passage, the EEOC issued its Notice of Proposed Rulemaking (NPRM) to revise its ADA regulations and accompanying interpretive guidance in order to implement the ADAAA. To assist individuals, employers, and courts in analyzing ADA claims, the NPRM frequently uses examples to illustrate its points. While these proposed regulations (NPRM) have not been officially approved, some courts have been looking to the proposed regulations for guidance. For convenience, under the various subject headings below, the language of the ADAAA statute will be discussed followed by a discussion of the NPRM's proposed regulations. In the final section of this brief, recent case law and potential litigation under the ADAAA will be discussed.

A. Broad Interpretation of the Definition of Disability

ADAAA

One stated purpose of the ADAAA was to convey that the inquiry into whether a person's impairment is an ADA disability should not demand the "extensive analysis" that had been done by the Supreme Court and many lower courts. Rather, the focus should be on whether entities "have complied with their obligations…." [3]

While Congress did not alter the language of the definition of disability when it passed the ADAAA, it clearly stated the definition of disability "shall be construed in favor of broad coverage… to the maximum extent permitted by the terms of this Act."[4] In addition, the ADAAA expressly overrules U.S. Supreme Court cases that unduly restricted the definition of who is a person with a disability, specifically rejecting the Supreme Court decisions in *Toyota Motor v. Williams,* (holding that the definition of disability "needs to be interpreted strictly to create a demanding standard for qualifying as a disability" and requiring that an individual demonstrate a substantial limitation in activities of "central importance to daily life")[5], and the *Sutton Trilogy,* (holding that mitigating measures should be taken into account when assessing whether an impairment causes a "substantial limitation.")[6]

EEOC NPRM

The EEOC NRPM reinforces the Congressional mandate that courts should assess whether covered entities have complied with their obligations.[7] As a result, disability should now be much easier to prove as the EEOC notes in its fact sheet, *Questions and Answers on the Notice of Proposed Rulemaking for the ADA Amendments Act of 2008*, available at:http://eeoc.gov/policy/docs/qanda_adaaa_nprm.html, (hereafter "EEOC Q&A"[8]). This fact sheet notes that "far more ADA cases will focus on whether discrimination actually occurred."[9]

B. Broad Interpretation of "Substantially Limits"

ADAAA

The ADAAA makes clear that courts should use a less stringent standard when determining whether a particular impairment is substantially limiting so that more people with disabilities will be able to proceed with their ADA cases[10]. The term "substantial limitation," like all of the terms in the definition of disability, must be construed as broadly as possible.[11]

The Act rejects the *Toyota Motor* view that "substantial" requires proof of a severe restriction noting that the *Toyota Motor* standard for assessing "substantially limits," both in the Supreme Court and as applied by lower courts in numerous decisions, "has created an inappropriately high level of limitation necessary to obtain coverage under the ADA."[12] The ADAAA further states that the EEOC Title I regulation defining the term "substantially limits" to mean "significantly restricted," sets too high a standard, rejects that standard, and requires that the EEOC redefine the term, "substantially limits" in its revised ADA regulations[13]. Under the ADAAA, substantial limitations are measured against "most people in the general population."[14]

EEOC NPRM

In attempting to redefine "substantially limits," the EEOC states in the NPRM that: "an impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered a major life activity."[15] The NPRM incorporates the ADAAA statutory language that, consistent with Congressional intent, the focus in ADA cases should be on whether discrimination occurred and not on the disability definition, with "the term 'substantially limits'… construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA and should not require extensive analysis."[16] The NPRM also incorporates the ADAAA's overruling of *Toyota Motor*, stating that, "[a]n individual whose impairment substantially limits a major life activity need not also demonstrate a limitation in the ability to perform activities of central importance to daily life in order to be considered an individual with a disability." The EEOC provides an example stating, "[s]omeone with a 20-pound lifting restriction that is not of short-term duration is substantially limited in lifting, and need not also show that he is unable to perform activities of daily living that require lifting in order to be considered substantially limited in lifting."

In defining "substantially limited," the NPRM uses the term "most people" rather than the previous term "average person," and emphasizes that "[t]he comparison of an individual's limitation to the ability of most people in the general population often may be made using a common-sense standard, without resorting to scientific or medical evidence."[17]

The EEOC proposed regulations no longer use the condition/manner/duration terminology, in order to reduce the possibility that courts will rely on earlier precedent, to reduce the intensity of focus on the definition of disability, and because those terms were not used in the DOJ's Title II and Title III regulations[18]. As the Commission's counsel testified, "Give a judge or a lawyer a three-part definition or three terms and they will obviously go through the analysis under each one." [19]

On the other hand, a substantial limitation may be based, for example, on the length of time a person can perform the activity, the distance the person can walk, or the weight the person can lift.[20] Other factors (for example, in cases involving mental impairments) include "the time and effort required to think or concentrate, the diminished capacity to

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effectively interact with others, the length or quality of sleep the individual gets, the individual's eating patterns or appetite," or the amount of pain experienced.[21] An impairment's duration for "several months" is sufficient to show a substantial limitation[22], and "[a]n impairment may substantially limit a major life activity even if it lasts, or is expected to last, for fewer than six months."[23]

However, the NPRM also states that "[t]emporary, non-chronic impairments of short duration with little or no residual effects" will not be disabilities, and give as examples the common cold, seasonal or common influenza, a sprained joint, minor and non-chronic gastrointestinal disorders, or a broken bone that is expected to heal completely.[24] The EEOC confirms that pregnancy is not a disability, although "[c]ertain impairments resulting from pregnancy … may be disabilities if they substantially limit a major life activity."[25]

C. Episodic Conditions and Those in Remission

ADAAA

Under the ADAAA, an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.[26] It is anticipated that this change will help people with disabilities that may be episodic including mental illness, epilepsy, diabetes, cancer, and HIV/AIDS.

EEOC NPRM

The EEOC NPRM reinforces the ADAAA's statement that impairments that are episodic or in remission can still qualify as disabilities and includes a non-exclusive list of impairments that may be episodic: "epilepsy, hypertension, multiple sclerosis, asthma, cancer, and psychiatric disabilities such as depression, bipolar disorder, and post-traumatic stress disorder."[27] The NPRM Draft Regulations note that individuals with these impairments can experience flare-ups that may substantially limit major life activities such as sleeping, breathing, caring for oneself, thinking, or concentrating.[28]

The Draft Regulations also state that epilepsy is a disability because during a seizure it substantially limits functions such as seeing, hearing, speaking, walking, or thinking.[29] Further, the EEOC lists cancer is an example of an impairment that may be in remission.[30] The Draft Regulations also state that a person with a past diagnosis of prostate cancer who, after treatment, is told that he "no longer has cancer," has a "record of" disability[31]. However, the Draft Regulations point out that "episodic conditions that impose only minor limitations are not disabilities."[32]

D. Expansion of Definition of "Major Life Activities"

ADAAA

To be covered under the ADA, a plaintiff has to demonstrate that a physical or mental impairment substantially limits a major life activity. Prior to the ADA Amendments Act, the ADA did not contain a list of major life activities, although the ADA regulations did contain a non-exclusive list. Over the years, courts have issued a number of decisions on what constitutes a major life activity under the ADA. However, because there was no list of major life activities in the text of the ADA, courts were frequently split over whether a particular activity constituted a major life activity.

When Congress passed the ADA Amendments Act, it decided to explicitly list examples of major life activities in the text of the ADA. For its list of major life activities, Congress included major life activities previously identified by the EEOC in its regulations, publications and court filings. These major life activities are: caring for oneself, performing manual tasks, walking and standing, seeing, hearing, eating, sleeping, learning, thinking and concentrating, lifting, speaking, breathing, and working. Congress also added three major life activities that had not previously been identified by the EEOC, *i.e.*, bending, communicating and reading.[33] Congress made clear that the list of major life activities in the ADAAA was not an exclusive list.

Moreover, in addition to an explicit list of major life activities, Congress explained that the term major life activity also includes the operation of the following major bodily functions: immune system, neurological, normal cell growth, brain, digestive, respiratory, bowel, circulatory, bladder, endocrine

and reproductive functions.

It is anticipated that this addition of major bodily functions to the text of the ADA will make it much easier for certain impairments to be deemed a disability by the courts.[34] Again, Congress made clear that the list of major bodily functions was illustrative and not an exclusive list.

The ADAAA also rejects the Supreme Court's holding in *Toyota Motor* that the term "major" in the ADA's definition of disability be interpreted strictly to create a demanding standard for disability, as well as rejecting the Court's finding that major life activities refers only to "activities that are of central importance to most people's daily lives."[35] In addition, the ADAAA clarifies that an individual's impairment needs to limit only one major life activity to be considered a disability.[36]

EEOC NPRM

The NPRM explains the definition of Major Life Activities including the ADAAA's creation of a second category of major life activities, major bodily functions. Major life activities are defined as: "Those basic activities, including major bodily functions that most people in the general population can perform with little or no difficulty."[37]

1. Additional Major Life Activities Identified by the EEOC

Part 1 of this rule contains the major life activities previously identified by the EEOC with the new additions of reading, bending, and communicating, major life activities identified in the ADAAA. In addition, the EEOC's NPRM identifies three additional major life activities: interacting with others, reaching and sitting.[38] Although Congress made clear that the list of major life activities in the ADAAA is illustrative and not exclusive, and gave the EEOC express authority to interpret the definition of disability, there will likely be litigation over the deference given to the EEOC's interpretation and whether these three activities are deemed major life activities under the ADA. For instance, prior to the ADAAA, the lower courts differed over whether interacting with others is a major life activity under the ADA. *See McAlindon v. County of San Diego,* 192 F.3d 1226 (9th Cir. 1999)("because interacting with others is an essential, regular function, like walking and breathing, it easily falls within the definition of 'major life activity); and *Soileau v. Guilford of Maine, Inc.* 105 F.3d 12 (1st Cir. 1997)(finding that interacting with others is different than major life activities like breathing and walking).

The inclusion of these new categories will make it easier for people with many different types of impairments to gain the protection of the ADA. Working is again listed as a major life activity, however the definition of being substantially limited in working is defined differently under the ADAAA than it was previously. This will be discussed further below.

2. Additional Major Bodily Functions Identified by the EEOC

As noted above, Congress stated that major life activities include major bodily functions and provided a non-exclusive list of examples of major bodily functions in the ADAAA. The listing in the NPRM generally includes bodily functions mentioned in the ADAAA and adds the following major bodily functions to the list: special sense organs, and skin; genitourinary, cardiovascular, hemic, lymphatic, and musculoskeletal.[39] The Draft Regulations also cite approvingly cases recognizing "eliminating waste" as a major life activity.[40] In particular, the addition of musculoskeletal bodily functions should help employees with back impairments show that they meet the definition of disability. The NPRM clarifies that the list is not exhaustive and that there is no negative implication by omission of an activity.[41]

The draft EEOC Regulations also provide examples of individuals with limited major bodily functions. Examples of "major bodily functions" affected by various impairments are provided in the NPRM as well. The NPRM explains that:

> Kidney disease affects bladder function; cancer affects normal cell growth; diabetes affects functions of the endocrine system (e.g., production of insulin); epilepsy affects neurological functions or functions of the brain; and Human Immunodeficiency Virus (HIV) and AIDS affect functions of the immune system and reproductive functions. Likewise, sickle cell disease affects functions of the hemic system, lymphedema affects lymphatic functions, and rheumatoid arthritis affects musculoskeletal functions.[42]

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Likewise, the regulatory list of examples are illustrative only, and the "impairments listed may affect major life activities other than those specifically identified." The Draft Regulations also clarify that the fact that some major life activities previously identified by the EEOC are not on the list does not create any negative implication. Although not provided in the NPRM, here is a partial suggested list of major bodily functions and impairments that may limit those functions.

- ***immune system:*** *HIV/AIDS, auto-immune disorders, lupus*
- ***normal cell growth:*** *cancer*
- ***digestive:*** *Crohn's disease, celiac*
- ***bowel:*** *ulcerative colitis*
- ***bladder, genitourinary:*** *kidney impairments*
- ***reproductive functions:*** *infertility, HIV/AIDS*
- ***special sense organs and skin:*** *environmental/chemical sensitivities*
- ***musculoskeletal:*** *spine/disc conditions, rheumatoid arthritis, fibromyalgia, paralysis*
- ***neurological:*** *multiple sclerosis, epilepsy, paralysis*
- ***brain:*** *schizophrenia, epilepsy, developmental disabilities*
- ***respiratory:*** *asthma*
- ***circulatory:*** *heart disease, high blood pressure*
- ***endocrine:*** *diabetes*

The Appendix to the NPRM states the examples of bodily systems are drawn from the existing "definition of physical impairment in section 1630.2 (h)" as well as from U.S. Department of Labor (DOL) regulations "implementing section 188 of the Workforce Investment Act of 1998."[45] The examples are included "to emphasize that the concept of major life activities is to be interpreted broadly" and the EEOC anticipates "that courts will have occasion to recognize other examples…"[46]

3. Only One Major Life Activity Need Be Limited

As noted above, an individual only needs show a substantial limitation in one major life activity. The Draft EEOC Regulations provide examples, stating that an individual whose endocrine system is substantially limited by diabetes need not show a substantial limitation in eating or any other major life activity, and a person whose normal cell growth is substantially limited by cancer need not also show a substantial limitation in working, *etc.*[47] This confirms that an individual is not excluded from coverage because of an ability to do many things, as long as the individual is substantially limited in one major life activity. Importantly, the Draft EEOC Regulations state: "The determination of whether an individual has a disability does not depend on what an individual is able to do in spite of an impairment."[48] This provision will help insure that an individual's successes are not held against them.

Specific Major Life Activities

The EEOC NPRM lists specific major life activities with explanations as to what must be demonstrated to show coverage under the ADA. These are explored below.

1. Seeing

The EEOC NPRM states that, "[s]omeone with monocular vision whose depth perception or field of vision would be substantially limited, with or without any compensatory strategies the individual may have developed, need not also show that he is unable to perform activities of central importance to daily life that require seeing in order to be substantially limited in seeing." [49]

2. Performing manual tasks

Draft EEOC Regulations suggest that a substantial limitation in writing or typing (for example, as a result of pain related to carpal tunnel syndrome) is also a substantial limitation in the major life activity of performing manual tasks.[50]

3. Learning

The EEOC NPRM states that, "[a]n individual with a learning disability who is substantially limited in reading, learning, thinking, or concentrating compared to most people, because of the speed or ease with which he can read, the time required for him to learn, or the difficulty he experiences in concentrating or thinking, is an individual with a disability, even if he has achieved a high level of academic success, such as graduating from college. The determination of whether an individual has a disability does not depend on what an individual is able to do in spite of an impairment."[51]

The Draft Regulations note that although the "substantial limitation" comparison is to "most people" and not to those similarly-situated, there are certain conditions that by definition are based on a disparity between aptitude and expected achievement, or through a comparison with a particular class of people rather than with the general population. "For example, an individual with dyslexia may be substantially limited in reading and/or learning as evidenced by information about how the impairment affected his learning as compared to what would otherwise be expected of the individual or others of a certain age, school grade, level of education, or aptitude."

4. Working

Draft EEOC Regulations specifically state that the application of the term "substantially limits" to the major life activity of working "shall be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA and should not require extensive analysis."[53] Thus, the statistical analysis previously required by some courts is rejected, as is the requirement for expert testimony in most cases, and the vocational factors previously relied on are eliminated.[54] That said, it appears that the EEOC still considers working to be the major life activity of last resort.[55]

EEOC Draft Regulations further reject the "broad range or class" analysis, finding that those terms are inconsistent with the mandate that "the term 'substantially limits,' including the application of that term to the major life activity of working, shall be construed in favor of broad coverage of individuals to the maximum extent permitted."[56] Rather, the Draft Regulations look at the "type of work" involved, stating, "[a]n impairment substantially limits the major life activity of working if it substantially limits an individual's ability to perform, or to meet the qualifications for, the type of work at issue."[57] The type of work at issue may often be determined by reference to "the nature of the work" an individual is unable to perform because of an impairment, as compared to most people having comparable training, skills, and abilities. Examples of types of work include, but are not limited to: Commercial truck driving (i.e., driving those types of trucks specifically regulated by the U.S. Department of Transportation as commercial motor vehicles), assembly line jobs, food service jobs, clerical jobs, or law enforcement jobs.[58] The EEOC does note that many examples of types of work will also make up either a class or broad range of jobs.[59]

The type of work at issue may also be determined by reference to "job-related requirements that an individual is substantially limited in meeting because of an impairment, as compared to most people performing those jobs. Examples of job-related requirements that are characteristic of types of work include, but are not limited to, jobs requiring: Repetitive bending, reaching, or manual tasks; repetitive or heavy lifting; prolonged sitting or standing; extensive walking; driving; working under certain conditions, such as in workplaces characterized by high temperatures, high noise levels, or high stress; or working rotating, irregular, or excessively long shifts."[60] For example, standing for extended periods is a characteristic of, *e.g.*, the retail industry.[61]

The Draft Regulations further state that the fact that "an individual has obtained employment elsewhere is not dispositive of whether an individual is substantially limited in working," and provides two examples:

> Example 1: Someone who, because of an impairment, cannot perform work that requires repetitive bending or heavy lifting is substantially limited in working, even if he also has skills that would qualify him to perform jobs that do not include these requirements.
>
> Example 2: An individual whose impairment substantially limits the ability to do repetitive tasks associated with certain manufacturing positions and who is denied a reasonable accommodation for a manufacturing job by one employer could be substantially limited in working, even if the individual performed similar work for another employer who provided an accommodation for this limitation.[62]

E. Impairments

ADAAA

Although the ADAAA does not include a definition for the term "impairment," it does provide some interpretive guidance. First, the term must be as broadly construed as possible.[63] Second, the fact that the Act explicitly states that regarded-as disability claims are not actionable if the

impairment is both transitory and minor suggests that in "present" or "record of" cases, the term "impairment" may include conditions that are both transitory and/or minor.[64]

EEOC NPRM

The definition of "impairment" in the Draft EEOC Regulations is substantially similar to the original EEOC definition, although the preferred term "intellectual disability" is used instead of the disfavored term, "mental retardation."[65]

Some examples of physical impairments in the Draft Regulations (beyond those listed in the definition itself) include asthma, back impairments, carpal tunnel syndrome, hypertension, hyperthyroidism, leg impairments[66], a facial tic[67], carpal tunnel syndrome, Hepatitis C, and heart disease[68]. The Draft Regulations also state that mental impairments include panic disorder, anxiety disorder, and forms of depression beyond just major depression[69], as well as dyslexia[70].

1. Examples of Impairments

In order to provide concrete guidance for employers, individuals, and the courts, the EEOC provided two lists in the NPRM: impairments that "will consistently meet the definition of disability" and impairments that are "disabling for some people but not for others."[71]

a. Impairments That Will Consistently Meet the Definition of Disability

According to the Draft EEOC Regulations, there are impairments that because of certain characteristics associated with them, "will consistently meet the definition of disability."[72] These include, but are not limited to:

- Deafness, blindness, intellectual disability (formerly termed mental retardation), partially or completely missing limbs, and mobility impairments requiring the use of a wheelchair;
- Autism, which substantially limits major life activities such as communicating, interacting with others, or learning;
- Cancer, which substantially limits major life activities such as normal cell growth;[73]
- Cerebral palsy, which substantially limits major life activities such as walking, performing manual tasks, speaking, or functions of the brain;
- Diabetes, which substantially limits major life activities such as functions of the endocrine system (e.g., the production of insulin);
- Epilepsy, which substantially limits major life activities such as functions of the brain or, during a seizure, seeing, hearing, speaking, walking, or thinking);[75]
- HIV or AIDS, which substantially limit functions of the immune system;
- Multiple sclerosis and muscular dystrophy, which substantially limit major life activities including neurological functions, walking, performing manual tasks, seeing, speaking, or thinking;
- Major depression, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, or schizophrenia, which substantially limit major life activities including functions of the brain, thinking, concentrating, interacting with others, sleeping, or caring for oneself.[76]

The Draft Regulations point out, however, that the above list does not intend to list all of the major life activities that each of the above impairments substantially limits, nor does it include all of the conditions that will consistently meet the disability definition (which may also include, e.g., some forms of depression other than major depression, and some seizure disorders other than epilepsy.)[77]

b. Impairments That Are Disabling for Some but not Others

The Draft EEOC Regulations also list some examples of impairments that are "disabling for some people but not for others," including:

- Asthma, which may substantially limit respiratory functioning and breathing because of the effects experienced when exposed to cleaning products, perfumes, and cigarette smoke;
- Hypertension, which may substantially limit functioning of the circulatory system because of decreased circulation caused by narrowed arteries;
- A learning disability, which may be

substantially limiting depending on the speed or ease of reading, the time or effort required to learn, or the difficulty in concentrating or thinking;

- A back or leg impairment may be substantially limiting because of the length of time the person can stand, the distance that he or she can walk, or the weight that can be carried;
- A psychiatric impairment may be substantially limiting because of the time or effort required to think or concentrate, a diminished capacity to interact with others, the length or quality of sleep, or the effect on eating patterns or appetite;
- Carpal tunnel syndrome causing pain when writing or typing, or limiting the amount of time manual tasks can be performed; and
- Hyperthyroidism that substantially limits endocrine functioning because of the overproduction of a hormone that controls metabolism.[78]

The Draft Regulations point out, however, that the above list does not intend to list all of the major life activities that each of the above impairments may substantially limit, nor does it include all of the conditions that may meet the disability definition for some people.[79]

F. Mitigating Measures are Not Considered in Assessing Disability

ADAAA

As noted above, the ADAAA rejects the Supreme Court's holding in the *Sutton trilogy* and provides that the determination of whether an impairment substantially limits a major life activity must be made "without regard to the ameliorative effects of mitigating measures."[80] Mitigating measures are defined very broadly in the ADAAA by way of a non-exhaustive list:

- Medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;
- Use of assistive technology;
- Reasonable accommodations or auxiliary aids or services; or
- Learned behavioral or adaptive neurological modifications.[81]

The legislative history lists other mitigating measures, including "use of a job coach, personal assistant, service animal, surgical intervention, or compensatory strategy that might mitigate, or even allow an individual to otherwise avoid performing particular major life activities."[82] Mitigating measures do not, however, include "ordinary eyeglasses or contact lenses."[83] Therefore, whether or not a person's vision is substantially limited may be assessed in light of his or her use of ordinary eyeglasses. The statute defines "ordinary eyeglasses or contact lenses" as lenses that are intended to fully correct visual acuity or eliminate refractive error and differentiates these from assistive technology devices that provide magnification or other visual aid.[84] However, the ADAAA makes clear that an employer cannot use qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless they are job-related and consistent with business necessity.[85]

EEOC NPRM

The Draft EEOC Regulations are consistent with the language of the ADAAA stating that, "[a]n individual who, because of use of medication or another mitigating measure, has experienced no limitations, or only minor limitations, related to an impairment nevertheless has a disability if the impairment would be substantially limiting without the mitigating measure."[86] Thus, for example, an individual who is "taking a psychiatric medication for depression, or insulin for diabetes, or anti-seizure medication for a seizure disorder has a disability if there is evidence that … [such impairment], if left untreated, would substantially limit a major life activity."[87]

The Draft Regulations also explicitly reject pre-ADAAA case law to the contrary, including, *e.g.*, *McClure v. General Motors Corp.*, 75 Fed. Appx. 983 (5th Cir. 2003) (individual with muscular dystrophy who with the mitigating measure of "adapting" how he performed manual tasks had successfully learned to live and work with his condition and was therefore not an person with a disability); *Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720 (8th Cir. 2002) (Sutton required consideration of ameliorative effects of plaintiff's careful regimen of medicine, exercise, and diet, and court declined

to consider impact of uncontrolled diabetes); *Todd v. Academy Corp*., 57 F. Supp. 2d 448, 452 (S.D. Tex. 1999) (because medication reduced frequency and intensity of plaintiff's seizures, he did not have disability).[88]

To the list of mitigating measures contained in the ADAAA, the Draft EEOC Regulations add "surgical interventions, except for those that permanently eliminate an impairment." [89] In addition, the EEOC also lists a "telephone audio device" for people with hearing impairments as a mitigating measure.[90]

Regarding eyeglass and contact lenses, the Draft EEOC Regulations are consistent with the ADAAA in stating that these items do not constitute mitigating measures.[91] Note, however, that eyeglasses or contacts that do not fully correct simply because they have the wrong, or outdated, prescription are still "ordinary eyeglasses or contact lenses" if there is evidence that the proper prescription would fully correct the person's vision.[92] It is important to note that, "Ordinary eyeglasses or contact lenses" do not include "low-vision devices,"[93] that magnify, enhance, or otherwise augment a visual image,[94] such as magnifiers, closed circuit television, larger-print items, and instruments that provide voice instructions.[95]

The Draft EEOC Regulations also follow the ADAAA in stating that use of uncorrected vision tests as a selection criteria must be job-related and consistent with business necessity.[96] The Appendix to the Draft EEOC Regulations clarifies that an individual need not have a disability to challenge selection criteria using uncorrected vision standards although the EEOC notes that it "believes that such individuals will usually be covered under the 'regarded as' prong of the definition of disability."[97] Keep in mind that it is only the ameliorative effects of mitigating measures that are no longer considered; negative side effects of such measures are still relevant. [98]

G. "Record Of" Disability

ADAAA

The ADAAA does not explicitly change the "record of" prong of the disability definition. Pursuant to the statutory language and the *expressio unius* doctrine, the ADA presumably requires the provision of reasonable accommodations to those with a "record of" disability if necessary.[99]

EEOC NPRM

The Draft EEOC Regulations continues to define a person with a "record of" disability as an "individual [who] has a history of, or has been misclassified as having, a mental of physical impairment that substantially limits one or more major life activities." [100] The Draft Regulations state, however, that whether an individual has a "record of" disability "shall be construed broadly to the maximum extent permitted by the ADA and should not demand extensive analysis."[101] Some examples of "record of" disabilities include a person with a past diagnosis of prostate cancer who, after treatment, is told that he "no longer has cancer," and a person who was misdiagnosed in the past with bipolar disorder and hospitalized because of what was in actuality a temporary reaction to medication.[102]

EEOC Guidance confirms that an employer need not have relied on an actual written record of a disability, stating:

> "[C]overage under the 'record of' prong … does not depend on whether an employer relied on a record (e.g., medical, vocational, or other records that list the person as having a disability) in making an employment decision… An employer's knowledge of an individual's past substantially limiting impairment relates to whether the employer engaged in discrimination, not to whether an individual is covered."[103]

The Draft EEOC Regulations also clarify that a "record of" disability will support a failure-to-accommodate claim.[104]

H. "Regarded As" Having a Disability

ADAAA

The "regarded as" prong of the definition of disability is changed substantially by the ADAAA. An individual is "regarded as" having a disability if the individual is subjected to a prohibited act (*e.g.*, non-selection, demotion, termination, or denial of any other term, condition or privilege of

employment) based on an actual or perceived physical or impairment, whether or not the impairment limits or is perceived to limit a major life activity.[105] In other words, "regarded as" simply requires proof of an actual or perceived impairment; there is no requirement that the impairment be limiting in any way (either actually or perceived).

But the impairment, (whether actual or perceived), cannot be something that is both transitory and minor. [106] "Transitory" is defined as having an actual or expected duration of six months or less.[107] The term "minor" is not defined in the statute, but the legislative history suggests that it refers to trivial impairments.

The ADAAA explicitly states that individuals who are "regarded as" having a disability are not entitled to a reasonable accommodation although any other conduct that violates the ADA is actionable under this prong of the definition of disability.[108]

EEOC NPRM

The Draft EEOC Regulations conform with the statutory text in that an individual does not need to show he was regarded as having a substantial limitation.[109] The Draft EEOC Regulations also clarify that "'regarded as' coverage can be established whether or not the employer was motivated by myths, fears, or stereotypes."[110] In this section, the NPRM provides:

> An individual is "regarded as" having a disability if the individual is subjected to an action prohibited by this part, including non-selection, demotion, termination, or denial of any other term, condition, or privilege of employment, based on an acal or perceived physical or mental impairment, whether or not the impairment limits or is perceived to limit a major life activity.
>
> Proof that the individual was subjected to a prohibited employment action…because of an impairment (other than an impairment that is transitory and minor, as discussed below) is sufficient to establish coverage... Evidence that the employer believed the individual was substantially limited in any major life activity is not required.[111]

As noted above in Section E, Draft EEOC Regulations are consistent with the ADAAA that individuals who are regarded as having a transitory or minor impairment do not qualify under the Act.[112] The EEOC Draft Regulations give examples of transitory and minor impairments that are generally not considered disabilities including a sprained wrist preventing typing for three weeks or a broken leg expected to heal normally.[113] On the other hand, the EEOC states that carpal tunnel syndrome, Hepatitis C, and heart disease are examples of impairments that are not transitory and minor.[114] However, even if the impairment is transitory and minor, it will still be sufficient to support a "regarded as" claim if there is evidence that the employer mistakenly believed that it was more than transitory and minor. [115]

The Draft EEOC Regulations further state that, "[a] prohibited action based on an actual or perceived impairment includes, but is not limited to, an action based on a symptom of such an impairment, or based on medication or any other mitigating measure used for such an impairment." [116] For example, an employer that does not hire someone for a driving job because the applicant takes anti-seizure medication is regarded as having a disability, even if the employer is unaware of the reason the employee is taking the medication. Also, an employer that refuses to hire someone with a facial tic regards the individual as having a disability, even if the employer does not know that the facial tic is caused by Tourette's Syndrome.[117] Note, however, that EEOC Guidance states that an employer that asks if an employee needs a reasonable accommodation is not necessarily regarding the employee as having a disability.[118]

However, as stated in the ADAAA, a "regarded as" disability will not support a failure-to-accommodate claim, although the EEOC Draft Regulations state that a "regarded as" disability will support claims of non-selection, demotion, termination, or denial of any other term, condition, or privilege of employment.[119]

I. Authority to issue regulations

ADAAA

The Act clarifies that the authority to issue regulations implementing the Act's definition of disability is granted to the EEOC, DOJ, and DOT.[120] This change responds to the Supreme

Court's hesitation to accept EEOC regulations defining disability because the definition of disability is not in Title I of the ADA.[121]

J. Rehabilitation Act Conformed

ADAAA

The Act makes clear that definition of disability claims under the Rehabilitation Act of 1973 conform to the ADAAA standards.[122]

K. Does the ADA Amendments Act Apply Retroactively?

ADAAA

When Congress passed the ADAAA, it stated that the effective date of the law would be January 1, 2009. Clearly, any alleged discrimination occurring on or after January 1, 2009 would fall under the provisions of the ADAAA.[123] But what about cases involving alleged discriminatory conduct prior to the ADAAA's effective date? As explained below, courts have almost unanimously agreed that the ADAAA does not apply retroactively.

EEOC NPRM

EEOC Guidance sides with those courts that have found the ADAAA not to apply retroactively.[124] The Commission contrasts the ADAAA with the Lilly Ledbetter Act, in which there was a clear Congressional intent that it apply retroactively, observing that although the law is "indisputably restorative … the Supreme Court has said that's not enough, you need a clear Congressional intent to make it retroactive. And that's not here."[125] The EEOC also confirms, however, that "the ADAAA would apply to denials of reasonable accommodations where a request was made, or an earlier request was renewed, on or after January 1, 2009."[126]

II. Litigation and Potential Litigation Under the ADA Amendments Act

Thus far, there have not been many cases interpreting the new ADAAA as employment discrimination cases must first be investigated by the EEOC.[127] Most of the litigation has focused on whether the ADAAA should be applied retroactively, although there have been a handful of cases that have interpreted whether a particular impairment is a disability under the ADAAA. On rare occasions, courts have even looked to the EEOC Draft Regulations, the NPRM, for guidance. Due to the expanded protection that the ADAAA offers, some specific issues that will likely be litigated are discussed below.

A. Courts Have Agreed That Congress Greatly Expanded the Scope of the ADAAA by Reinstating its Intended Broad Definition of Disability

Courts have noted that the ADAAA expanded coverage for people with disabilities. ***See, e.g., Rohr v. Salt River Project Agricultural Improvement and Power District,* 555 F.3d 850, 861 (9th Cir. 2009)** (stating that beginning "in January 2009, 'disability' was to be broadly construed and coverage will apply to the 'maximum extent' permitted by the ADA and the ADAAA"); ***Verhoff v. Time Warner Cable, Inc.*, 299 Fed. Appx. 488, 494 (6th Cir. 2008) (unpublished)** ("Congress has instructed courts that [t]he definition of disability in [the ADA] shall be construed in favor of broad coverage of individuals under this Act"); ***Fournier v. Payco Foods Corp.*, 611 F. Supp. 2d 120, 129 n.9 (D.P.R. 2009)** (The "overarching purpose of the [ADAAA] is to reinstate the 'broad scope of protection' available under the ADA"); ***Kingston v. Ford Meter Box Co., Inc.*, 2009 WL 981333, at *4 n.4 (N.D. Ind. Apr. 10, 2009)** (Congress criticized the judicial elimination of "protection for many individuals whom Congress intended to protect"); ***Brodsky v. New England School of Law*, 617 F. Supp. 2d 1, 4 (D. Mass. 2009)** (opining that the ADAAA is undoubtedly intended to ease the burden of plaintiffs bringing claims pursuant to that statute").

In ***Gil v. Vortex,* 697 F. Supp. 2d 234 (D. Mass. March 25, 2010),** an employee with monocular vision was terminated on January 2, 2009, (the day after the ADAAA's effective date), when he sought to return to work following surgery. The employee sued under the ADA claiming that his vision impairment substantially limited him in the major life activities of seeing and working. The court found that the employee had a disability as set forth in the broader interpretation of disability under the ADAAA and proposed regulations. The court found that the employee's claim that his employer took adverse action against him because of the fear that he would injure himself due to his impairment also created a claim for "regarded as"

discrimination under the ADAAA. The court noted that the employee likely would not have been successful with his claim prior to the ADAAA.

In ***Pridgen v. Department of Public Works/ Bureau of Highways*, 2009 WL 4726619 n.17 (D. Md. Dec. 1, 2009)**, the court did not ultimately determine whether plaintiff had a disability or whether the ADAAA applied but did state that "[u] nder the ADA Amendments Act of 2008, a person who has lost sight in one eye but retains full use of his other eye is 'disabled.' Disability is to be construed 'in favor of broad coverage….'"

B. Substantial Limitation

In post-ADAAA cases, courts have often referenced Congress's disapproval of the way the ADA's definition of "substantial limitation" had previously been interpreted. ***See, e.g., Rohr v. Salt River Project Agricultural Improvement and Power District*, 555 F.3d 850, 861 (9th Cir. 2009)** (the ADAAA rejects the view that 'substantial' requires proof of a severe restriction); ***Verhoff v. Time Warner Cable, Inc.*, 299 Fed. Appx. 488, 494 (6th Cir. 2008) (unpublished)** ("Congress has expressly rejected the EEOC's regulations that 'defin[e] the term 'substantially limits' as 'significantly restricted' because that definition 'express[es] too high a standard' and is 'inconsistent with congressional intent'"); ***Brown v. Board of Regents for Oklahoma Agr. and Mechanical Colleges for Langston University*, 2009 WL 467754, at *2 n.2 (W.D. Okla. Feb. 24, 2009)** (the "Amendments to the ADA … changed the definition of 'substantially limits' that courts should apply in determining whether a person is disabled.").

Further, courts that have applied the ADAAA's definition of disability have found plaintiffs to have a "substantial limitation." In ***Franchi v. New Hampton School*, 656 F. Supp. 2d 252, 258–259 (D.N.H. 2009)**, the court found there to be a sufficient showing that plaintiff's eating impairment substantially limited her in eating under the ADAAA's broad construction when, despite spending six weeks in outpatient and inpatient eating disorder clinics, plaintiff still lost nearly five pounds in subsequent 16-day period, dropping her weight to 93% of its ideal. The court found that her "alleged condition … required a careful watch over her food intake to protect against potentially dangerous weight loss," and thus, was substantial.

One way that the ADAAA has expanded the definition of disability is to include conditions that are episodic in nature and conditions in remission. In ***Carmona v. Southwest Airlines Co.*, 604 F.3d 848, 855 (5th Cir. 2010)**, the Fifth Circuit applied the pre-ADAAA definition of disability to find that a plaintiff with psoriatic arthritis was not disabled as a matter of law. In so doing, the court explained that under the ADAAA, it would be "easier for a plaintiff with an episodic condition" to establish that he is disabled.

The language in the text of the ADAAA and the EEOC's regulations should provide useful guidance to courts on how to interpret the term substantially limits going forward, but it is still anticipated that there will be litigation over this issue.

C. Courts Have Applied An Expanded List of "Major Life Activities"

In ***Horgan v. Simmons*, 2010 WL 1434317 (N.D. Ill. April 12, 2010),** an employee with HIV was terminated after he disclosed his HIV status to his employer. The employee filed suit claiming discriminatory termination and impermissible disability inquiries. Finding that the ADAAA governs the case, the court held that "functions of the immune system" constitute major life activities under the definition of disability. The court noted that the EEOC's proposed regulations implementing the ADAAA list HIV as an impairment that consistently meets the definition of disability. The court also took note that when Congress passed the ADAAA, it instructed courts that the "question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." ***See also Verhoff v. Time Warner Cable, Inc.*, 299 Fed. Appx. 488, 494 (6th Cir. 2008)** (unpublished) ("there is no longer any dispute that 'sleeping' and 'thinking' are major life activities.")

As courts now recognize that most plaintiffs will more easily meet the definition of disability, the focus of the courts' inquiry in ADA cases will be on whether covered entities have met their legal obligations under the ADA. As Congress intended, it is expected that there will be less litigation over issues involving whether a plaintiff has an ADA disability, with more litigation on other ADA issues. This will include some issues that have previously been occasionally litigated, such as qualified and direct threat issues, as well as issues where there

has been relatively little litigation, for example on what constitutes an "undue hardship" under the ADA.[128]

Again, although Congress made clear that the list of major bodily functions in the ADAAA is illustrative and not exclusive, and gave the EEOC express authority to interpret the definition of disability, there may well be litigation over the deference given to the EEOC's interpretation and whether these additional major bodily functions are deemed major life activities under the ADA. This is especially true for major life activities in the EEOC's Draft Regulations that were not in the text of the ADA. For instance, a significant number of ADA claims involve people with back impairments. Plaintiffs will likely allege that their back impairments are covered under the ADA because they have a substantial limitation in the major bodily function of the musculoskeletal system, identified as a major bodily function in the EEOC's proposed regulations, but not in the text of the ADAAA. Further, prior to the ADAAA's passage, there was litigation regarding whether sexual relations is a major life activity under the ADA.[129] Since neither Congress nor the EEOC listed sexual relations as a major life activity, and since the ADAAA and Draft Regulations listing of major life activities is not exhaustive, litigation over this issue will likely continue. Similarly, litigations likely to continue over whether driving and commuting are major life activities, as neither the ADAAA nor the EEOC proposed regulations included these activities, and courts have previously grappled with the issues of driving[130] and commuting[131].

D. Mitigating Measures Are No Longer Considered In Assessing Disability

One large hurdle to proving disability was the Supreme Court's holding that courts needed to take the use of mitigating measures in determining disability. Courts thus far have suggested that they will interpret the ADAAA as placing a clear ban on such considerations. ***See, e.g., Rohr v. Salt River Project Agricultural Improvement and Power District*, 555 F.3d 850, 861–862 (9th Cir. 2009)** ("Impairments are to be evaluated in their unmitigated state, so that, for example, diabetes will be assessed in terms of its limitations on major life activities when the diabetic does not take insulin injections or medicine and does not require behavioral adaptations such as a strict diet."), [Ed. Note: preferred language is person with diabetes]; ***Verhoff v. Time Warner Cable, Inc.*, 299 Fed. Appx. 488, 494 (2008) (unpublished)** (sleep problems will have to be assessed without regard of use of sleep medication); **Godfrey v. New York City Transit Authority, 2009 WL 3075207, at *6 n.4 (E.D.N.Y. Sep. 23, 2009)** (hearing aids not considered); ***Handley v. General Security Services Corp.*, 2009 WL 2132626, at *4 n.5 (S.D. Ohio July 10, 2009)** (similar); ***E.E.O.C. v. Burlington Northern & Santa Fe Ry. Co.*, 621 F. Supp. 2d 587, 593 n.3 (W.D. Tenn. June 3, 2009)** (prosthetics no longer considered); ***Geoghan v. Long Island R.R.*, 2009 WL 982451, at *17 n.28 (E.D.N.Y. Apr. 9, 2009)** (ADHD must be considered without Adderall medication); ***Compare Sulima v. Tobyhanna Army Depot*, 602 F.3d 177, 186 n.3 (3d Cir. 2010)** (explaining that the ADAAA's prohibition on the consideration of ameliorative mitigating measures does not prohibit considering the potentially negative side effects of medical treatment as side effects from medication may themselves constitute an impairment under the ADA).

E. "Regarded As" Claims

Courts have agreed that to be "regarded as" having a disability, plaintiffs must supply proof of an actual or perceived impairment; however, there is no longer a requirement that the impairment be limiting in any way (either actually or perceived). **See, e.g., *Milholland v. Sumner County Bd. of Educ.*, 569 F.3d 562, 566 (6th Cir. 2009); *Gil v. Vortex, LLC*, 697 F. Supp. 2d 234, 240 (D. Mass. 2010)** (under ADAAA, and "contrary to *Sutton*, an individual who is 'regarded as having such an impairment' is not subject to a functional test"); ***Brooks v. Kirby Risk Corp.*, 2009 WL 3055305, at *3 (N.D. Ind. Sep. 21, 2009)** ("Congress dramatically expanded the reach of the ADA by protecting individuals who are 'regarded as' having a disabling impairment even when the impairment neither is, nor is perceived to be, substantially limiting."); ***Loperena v. Scott*, 2009 WL 1066253, at *12 n.10 (M.D. Fla. Apr. 21, 2009)** (prior "regarded as" case law is superseded by the ADAAA).

F. List of Specific Disabilities

In ***Horgan v. Simmons*, 2010 WL 1434317 (N.D. Ill. April 12, 2010),** the court noted that the EEOC's proposed regulations implementing the ADAAA list HIV as an impairment that consistently meets the definition of disability. The court stated

that "it is certainly plausible—particularly, under the amended ADA—that Plaintiff's HIV positive status substantially limits a major life activity: the function of his immune system. Such a conclusion is consistent with the EEOC's proposed regulations to implement the ADAAA which lists HIV as an impairment that will consistently meet the definition of disability." ***See also Geoghan v. Long Island R.R.*, 2009 WL 982451, at *17 (E.D.N.Y. Apr. 9, 2009)** (ADAAA is intended to cover those with ADHD).

G. The New Standards in the ADAAA Also Apply to the Rehabilitation Act

***See Franchi v. New Hampton School*, 656 F. Supp. 2d 252, 258 n.4 (D.N.H. 2009)** (noting that ADAAA applies to Rehabilitation Act claims, and in the absence of contrary argument by the defendant, to the Fair Housing Act as well).

H. The ADAAA's Effect on State Law

The effect of the ADAAA on state laws that track the ADA's disability definition is not yet clear. ***See Damron v. Butler County Children's Services*, 2009 WL 5217086, at *10 n.14 (S.D. Ohio Dec. 30, 2009)** ("It is yet unclear whether federal caselaw applying the ADAA will also be applicable to the analysis of Ohio law disability discrimination claims or whether disability claims under Ohio law will continue to be analyzed using the pre-amendment standards.").

Some states have amended their own statutes to track the ADAAA, e.g., Tex. H.B. 978, 81st Leg., R.S. (2009), although it is unclear if such amendments are necessary if case law already required conforming state law to the ADA. ***See Munoz v. Echosphere*, L.L.C., 2010 WL 2838356, at *10 (W.D. Tex. July 15, 2010).**

Courts in other states appear to assume that state laws that follow ADA guidance will conform to the ADAAA. ***Compare Gil v. Vortex*, LLC, 697 F. Supp. 2d 234, 239 (D. Mass. 2010)** (ADAAA standards apply under Mass. state law based on state-law precedent rejecting Sutton and adopting more liberal disability standard); ***Medlin v. Springfield Metro. Hous. Auth.*, 2010 WL 3065772, at *7, n.5 (Ohio App. Aug. 6, 2010)** (suggesting ADAAA analysis may apply to state-law claim after effective date of the statute); ***Sansom v. Cincinnati Bell Telephone*, 2009 WL 3418646, at *7 n.1 (S.D. Ohio Oct. 19, 2009)** (similar).

I. Effect on Post-*Iqbal* Pleading Standards

In the first two ADAAA cases decided under Rule 12 of the Federal Rules of Civil Procedure, containing some pleading requirements including Motions for Judgment on the Pleadings, the court found that the broadened disability definition made pleading disability easier. **See *Horgan v. Simmons*, ___ F. Supp. 2d ___, 2010 WL 1434317, at *3 (N.D. Ill. April 12, 2010)** ("[I]t is certainly plausible—particularly, under the amended ADA—that Plaintiff's HIV positive status substantially limits a major life activity: the function of his immune system."); and ***Gil v. Vortex*, LLC, 697 F. Supp. 2d 234, 239–240 (D. Mass. 2010)** (recognizing that meeting Twombly pleading standard on disability, concerning requirements for notice and fact pleading, should be easier under ADAAA; "[h]ere, the facts viewed in the light most favorable to Gil establish a plausible allegation that Vortex believed him to be disabled, and terminated him as a result."). ***But cf. Broderick v. Research Foundation of State University of New York*, 2010 WL 3173832, at *2 (E.D.N.Y. Aug. 11, 2010)** (dismissing complaint with leave to replead because plaintiff who was proceeding under the first, "present disability" prong did not allege what major life activities were substantially limited).

J. Whether the ADAAA applies retroactively

The Supreme Court has held that generally, statutes are *not* applied retroactively. ***See, e.g., Landgraf v. USI Film Products*, 511 U.S. 244 (1994), and *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298 (1994).** The reasoning is that it is unfair to hold a defendant liable for a standard that is articulated after the alleged violation occurred.

All courts that have looked at this issue so far have held that the ADAAA, as a general matter, does not apply retroactively. ***See e.g., Nyrop v. Indep. Sch. Dist. No. 11*, ___ F.3d ___, 2010 WL 3023665, at *4 n.4 (8th Cir. Aug. 4, 2010); *Carreras v. Sajo, Garcia & Partners*, 596 F.3d 25, 33 n.7 (1st Cir. 2010); *Hennagir v. Utah Dept. of Corrections*, 587 F.3d 1255, 1261 n.2**

(10th Cir. 2009) (implicitly finding no retroactivity).[132]

However, a court has applied the ADAAA retroactively when the plaintiff was only seeking prospective injunctive relief, as opposed to monetary damages. In ***Jenkins v. National Board of Medical Examiners,* 2009 WL 331638 (6th Cir. Feb. 11, 2009),** the plaintiff had a reading disorder and was seeking an accommodation of additional time on a medical licensing examination. Relying on previous Supreme Court precedent taking a narrow view of the definition of disability, the trial court found that the plaintiff did not have an ADA disability. On an appeal taken after the ADAAA was enacted, the Sixth Circuit reversed and held that the ADAAA should be applied to the case relying on Supreme Court precedent that allows statutes to be applied retroactively when the only remedy is prospective injunctive relief. To support its position, the court reasoned that rather than seeking damages for some past act of discrimination, the plaintiff was seeking the right to receive an accommodation on a test that will occur in the future, well after the ADAAA's effective date. The Sixth Circuit also allowed for the recovery of attorneys' fees. Relying on Supreme Court precedent that recovery of attorneys' fees is collateral to the main cause of action, the court found that seeking attorneys' fees did not convert the case into a damages action. ***See also Michael M. v. Board of Educ. of Evanston Tp. High School Dist. No. 202*, 2009 WL 2258982, at *3 (N.D. Ill. July 29, 2009)** (non-employment case in which plaintiff sought meeting to determine student's future eligibility for § 504 accommodations under the ADAAA).

However, several courts have distinguished ***Jenkins*** in the employment context. In ***Nyrop v. Independent School Dist. No. 11*, 2009 WL 961372 (D. Minn. April 7, 2009)**, the court held that because the focus of the plaintiff's complaints were on the employer's past conduct, retroactive application of the ADAAA is not warranted. ***See e.g., Lawson v. Plantation General Hosp.*, L.P., ___ F. Supp. 2d ___, 2010 WL 1258058, at *14 (S.D. Fla. March 30, 2010); *Strolberg v. U.S. Marshals Service*, 2010 WL 1266274, at *4–5 (D. Idaho March 25, 2010).**[133]

Notably, because the ADAAA simply clarifies past misinterpretations of the ADA, courts have occasionally consulted the ADAAA in cases that are not controlled by binding precedent. **See, e.g., *Green v. American University*, 647 F. Supp. 2d 21, 29–30 (D.D.C. 2009)** (relying in part on ADAAA to determine that bowel functioning is a major life activity); ***Menchaca v. Maricopa Community College Dist.*, 2009 WL 166923, at *4–6 (D. Ariz. Jan. 26, 2009)** (relying on the Amendments Act as guidance in interpreting the ADA); ***Rohr v. Salt River Project Agricultural Improvement and Power District*, 555 F.3d 850, 862 (9th Cir. 2009)** ("While we decide this case under the ADA, and not the ADAAA, the original congressional intent as expressed in the amendment bolsters our conclusions."); ***Geoghan v. Long Island R.R.*, 2009 WL 982451, at *11 (E.D.N.Y. Apr. 9, 2009)** (using ADAAA to bolster holding that concentrating is a major life activity). This trend will likely continue.

Similarly, there are a few cases that seem to follow ADAAA standards without expressly finding retroactivity. ***See, e.g., Quinones v. Potter*, 661 F.Supp.2d 1105, 1119 (D. Ariz. 2009)** (holding that the definition of "disability" and "substantially limits" are "to be broadly construed"); ***Franchi v. New Hampton School*, 656 F. Supp. 2d 252, 258 (D.N.H. 2009)** (a person with an eating impairment is covered under the ADA).

III. Conclusion

The ADA Amendments Act is a Congressional ef fort to restore the civil rights protections originally intended under the ADA. The EEOC Draft Regulations provide further clarity and guidance for analyzing definition of disability issues. The goals of the ADA and the ADA Amendments Act are consistent with business goals of hiring, employing, and retaining qualified employees while enabling them to be as productive as reasonably possible. Just as the ADA had widespread support nationally when it was enacted, business should not fear the ADA Amendments Act, but should work to understand their obligations under the law and develop a blueprint for efficient and effective ADA compliance.

Notes

1. Funding for some of the legal research for this document was provided pursuant to a subcontract with the DBTAC: Great Lakes ADA Center, University of Illinois at Chicago, U.S. Department of Education, National Institute on Disability Rehabilitation and Research Award No. H133A060097
2. 42 U.S.C. § 12101(b)(1).
3. Pub. L. 110–325, § 2(234b)(5), 122 Stat. 3553 (Sep. 25, 2008), set out in the Note to 42 U.S.C. § 12101.
4. 42 U.S.C. § 12102(4)(A), as amended.
5. *Toyota*, 534 U.S. at 197; Pub. L. 110–325, § 2(b)(4), 122 Stat. 3553 (Sep. 25, 2008), set out in the Note to 42 U.S.C. § 12101.
6. *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002); *Sutton v. United Air Lines*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service*, 527 U.S. 516 (1999); *Albertsons Inc. v. Kirkingburg*, 527 U.S. 555 (1999); Pub. L. 110–325, § 2(a)(5) and (b)(4), 122 Stat. 3553 (Sep. 25, 2008), set out in the Note to 42 U.S.C. § 12101.
7. 29 C.F.R. § 1630.2(j)(2)(i), 74 Fed. Reg. at 48440; 29 C.F.R. § 1630.2(j)(5)(i), 74 Fed. Reg. at 48441; 29 C.F.R. § 1630.2(j)(6)(i), 74 Fed. Reg. at 48442; 29 C.F.R. Part 1630 App., Intro., 74 Fed. Reg. at 48444.
8. *Questions and Answers on the Notice of Proposed Rulemaking for the ADA Amendments Act of 2008*, Question 2 (EEOC Sep. 23, 2009), available at: http://eeoc.gov/policy/docs/qanda_adaaa_nprm.html, (hereafter "EEOC Q&A").
9. *Id*.
10. See 42 U.S.C. § 12102(4)(A).
11. *See* 42 U.S.C. § 12102(4)(A).
12. Pub. L. 110–325, § 2(b)(5), 122 Stat. 3553 (Sep. 25, 2008), set out in the Note to 42 U.S.C. § 12101.
13. Pub. L. 110–325, §§ 2(a)(8), 2(b)(6); 122 Stat. 3553 (Sep. 25, 2008), set out in the Note to 42 U.S.C. § 12101.
14. H.R. Rep. 110-730, Pt. I, 110th Cong., 2d Sess., at p. 9 (June 28, 2008) (describing the legislative history of the original ADA).
15. 9 C.F.R. § 1630.2(j), 74 Fed. Reg. at 48440.
16. 29 C.F.R. § 1630.2(j)(2)(i), 74 Fed. Reg. at 48440.
17. 29 C.F.R. § 1630.2(j)(2)(iv), 74 Fed. Reg. at 48440. See also 29 C.F.R. Part 1630 App., § 1630.2(j), 74 Fed. Reg. at 48446; EEOC Q&A, supra, Question 6.
18. 29 C.F.R. Part 1630 App., § 1630.2(j), 74 Fed. Reg. at 48446.
19. Transcript of Commission Meeting of June 17, 2009, http://eeoc.gov/abouteeoc/meetings/6-17-09/transcript.html.
20. 29 C.F.R. § 1630.2(j)(6)(i)(D), 74 Fed. Reg. at 48442. Regarding the length of time an activity can be performed, see also 29 C.F.R. § 1630.2(j)(6)(i)(F), 74 Fed. Reg. at 48442.
21. 29 C.F.R. §§ 1630.2(j)(6)(i)(E), (F); 74 Fed. Reg. at 48442.
22. 29 C.F.R. § 1630.2(j)(6)(i)(D), 74 Fed. Reg. at 48442,
23. 29 C.F.R. § 1630.2(j)(2)(v), 74 Fed. Reg. at 48440. *See also*, 29 C.F.R. Part 1630 App., § 1630.2(j), 74 Fed. Reg. at 48446–48447.
24. 29 C.F.R. § 1630.2(j)(8), 74 Fed. Reg. at 48443. See also 29 C.F.R. Part 1630 App., § 1630.2(j), 74 Fed. Reg. at 48448 (appendicitis).
25. EEOC Q&A, supra, Question 18.
26. 42 U.S.C. § 12102(4)(D).
27. 29 C.F.R. § 1630.2(j)(4), 74 Fed. Reg. at 48441. See also 29 C.F.R. Part 1630 App., § 1630.2(j), 74 Fed. Reg. at 48447 (listing as further examples diabetes and schizophrenia).
28. 29 C.F.R. Part 1630 App., § 1630.2(j), 74 Fed. Reg. at 48447.
29. 29 C.F.R. § 1630.2(j)(2)(iv)(A), 74 Fed. Reg. at 48440.
30. 29 C.F.R. Part 1630 App., § 1630.2(j), 74 Fed. Reg. at 48447.
31. 29 C.F.R. § 1630.2(k)(1)(i), 74 Fed. Reg. at 48443.

32. 29 C.F.R. Part 1630 App., § 1630.2(j), 74 Fed. Reg. at 48448.
33. 42 U.S.C. § 12102(2)(A), as amended.
34. 42 U.S.C. § 12102(2)(B), as amended.
35. Pub. L. 110–325, § 2(b)(4), 122 Stat. 3553 (Sep. 25, 2008), set out in the Note to 42 U.S.C. § 12101.
36. 42 U.S.C. § 12102(4)(C), as amended.
37. 29 C.F.R. § 1630.2(i), 74 Fed. Reg. at 48440.
38. See 29 C.F.R. § 1630.2(i)(1), 74 Fed. Reg. at 48440.
39. *Id*.
40. 29 C.F.R. Part 1630 App., § 1630.2(i), 74 Fed. Reg. at 48446.
41. 29 C.F.R. § 1630.2(i)(3), 74 Fed. Reg. at 48440.
42. 29 C.F.R. § 1630.2(i)(2), 74 Fed. Reg. at 48440.
43. 29 C.F.R. § 1630.2(i)(3)(ii), 74 Fed. Reg. at 48440.
44. 29 C.F.R. Part 1630 App., § 1630.2(i), 74 Fed. Reg. at 48446.
45. 29 C.F.R. Part 130 App. § 1630.2(i)(2), 74 Fed. Reg. at 48446.
46. *Id*.
47. 29 C.F.R. § 1630.2(j)(2)(iii), 74 Fed. Reg. at 48440.
48. 29 C.F.R. § 1630.2(j)(6)(i)(C), 74 Fed. Reg. at 48442. See also 29 C.F.R. § 1630.2(j)(2)(vi), 74 Fed. Reg. at 48440.
49. 29 C.F.R. § 1630.2(j)(2)(ii), 74 Fed. Reg. at 48440. See also 29 C.F.R. § 1630.2(j)(6)(i)(D), 74 Fed. Reg. at 48442.
50. 29 C.F.R. § 1630.2(j)(6)(i)(F), 74 Fed. Reg. at 48442.
51. 29 C.F.R. § 1630.2(j)(6)(C), 74 Fed. Reg. at 48442.
52. 29 C.F.R. Part 1630 App., § 1630.2(j), 74 Fed. Reg. at 48446.
53. 29 C.F.R. § 1630.2(j)(2)(i), 74 Fed. Reg. at 48440; 29 C.F.R. § 1630.2(j)(7)(ii), 74 Fed. Reg. at 48442; 29 C.F.R. § 1630.2(j)(7)(ii), 74 Fed. Reg. at 48442.
54. 29 C.F.R. Part 1630 App., § 1630.2(j), 74 Fed. Reg. at 48448.
55. 29 C.F.R. § 1630.2(j)(7)(i), 74 Fed. Reg. at 48442. See also 29 C.F.R. Part 1630 App., § 1630.2(j), 74 Fed. Reg. at 48447.
56. See 29 C.F.R. Part 1630 App., § 1630.2(j), 74 Fed. Reg. at 48447.
57. 29 C.F.R. § 1630.2(j)(7)(ii), 74 Fed. Reg. at 48442.
58. 29 C.F.R. § 1630.2(j)(7)(iii)(B), 74 Fed. Reg. at 48442.
59. 29 C.F.R. Part 1630 App., § 1630.2(j), 74 Fed. Reg. at 48447.
60. 29 C.F.R. § 1630.2(j)(7)(iii)(C), 74 Fed. Reg. at 48442.
61. 29 C.F.R. § 1630.2(j)(7)(iii)(C)(2), 74 Fed. Reg. at 48442. For an additional explanation of the above, see 29 C.F.R. Part 1630 App., § 1630.2(j), 74 Fed. Reg. at 48447–48448; and EEOC Q&A, Question 14.
62. 29 C.F.R. § 1630.2(j)(7)(iv), 74 Fed. Reg. at 48443. See also 29 C.F.R. Part 1630 App., § 1630.2(j), 74 Fed. Reg. at 48448.
63. 42 U.S.C. § 12102(4)(A), as amended.
64. *See* 42 U.S.C. § 12102(3)(B), as amended.
65. 29 C.F.R. § 1630.2(h)(2), 74 Fed. Reg. at 48440.
66. 29 C.F.R. § 1630.2(j)(6)(i), 74 Fed. Reg. at 48442.
67. 29 C.F.R. § 1630.2(l)(2)(ii), 74 Fed. Reg. at 48443.
68. 29 C.F.R. § 1630.2(l)(3)(iii)–(v), 74 Fed. Reg. at 48443.
69. 29 C.F.R. § 1630.2(j)(6)(i)(E), 74 Fed. Reg. at 48442.
70. 29 C.F.R. Part 1630 App., § 1630.2(j), 74 Fed. Reg. at 48447.
71. 29 C.F.R. § 1630.2(j), 74 Fed. Reg at 48441.
72. 29 C.F.R. § 1630.2(j)(5)(i), 74 Fed. Reg at 48441; *See also,* 29 C.F.R. Part 1630 App., § 1630.2(j), 74 Fed. Reg. at 48447.
73. *See also*, 29 C.F.R. § 1630.2(k)(1)(i), 74 Fed. Reg. at 48443 (past diagnosis of cancer is also a "record of" disability).
74. See 2008 House Judiciary Committee Report at 17); see also 29 C.F.R. § 1630.2(j)(2)(iv)(B), 74 Fed. Reg. at 48440.
75. *See also*, 29 C.F.R. § 1630.2(j)(2)(iv)(A), 74 Fed. Reg. at 48440.

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76. 29 C.F.R. § 1630.2(j)(5)(i), 74 Fed. Reg at 48441; *See also,* 29 C.F.R. Part 1630 App., § 1630.2(j), 74 Fed. Reg. at 48447.
77. 29 C.F.R. § 1630.2(j)(5)(ii) and (iii), 74 Fed. Reg. at 48441.
78. 29 C.F.R. §§ 1630.2(j)(6)(A-G), 74 Fed. Reg. at 48442.
79. 29 C.F.R. § 1630.2(j)(6)(ii) and (iii), 74 Fed. Reg. at 48442.
80. *See* 42 U.S.C. § 12102(4)(E)(i), as amended; Pub. L. 110–325, § 2(a)(4), 122 Stat. 3553 (Sep. 25, 2008), set out in the Note to 42 U.S.C. § 12101.
81. 42 U.S.C. § 12102(4)(E)(i).
82. H.R. Rep. 110-730, Pt. I, 110th Cong., 2d Sess., at p. 15 (June 28, 2008).
83. 42 U.S.C. § 12102(4)(E)(ii) and (iii).
84. 42 U.S.C. § 12102(4)(E)(iii)(I).
85. 42 U.S.C. § 12113(c), as amended.
86. 29 C.F.R. § 1630.2(j)(3)(i), 74 Fed. Reg. at 48440.
87. 29 C.F.R. § 1630.2(j)(3)(iii), 74 Fed. Reg. at 48441. See also 29 C.F.R. Part 1630 App., § 1630.2(j), 74 Fed. Reg. at 48447.
88. *Id*., 74 Fed. Reg. at 48440–48441.
89. 29 C.F.R. § 1630.2(j)(3)(ii)(E), 74 Fed. Reg. at 48441. See also 29 C.F.R. Part 1630 App., § 1630.2(j), 74 Fed. Reg. at 48447.
90. 29 C.F.R. § 1630.2(j)(3)(iii)(B), 74 Fed. Reg. at 48441.
91. 29 C.F.R. § 1630.2(j)(3)(iv), 74 Fed. Reg. at 48441.
92. 29 C.F.R. § 1630.2(j)(3)(iv)(C), 74 Fed. Reg. at 48441.
93. 42 U.S.C. § 12102(4)(E)(i)(I).
94. 42 U.S.C. § 12102(4)(E)(iii)(II),
95. H.R. Rep. 110-730, Pt. I, 110th Cong., 2d Sess., at p. 15 (June 28, 2008). *See also Edwards v. Marquis Companies I, Inc*., 2009 WL 2424670, at *6 n.6 (D. Or. Aug. 6, 2009) (ordinary glasses do not include a magnifying glass).
96. 29 C.F.R. § 1630.10(b), 74 Fed. Reg. at 48444.
97. 29 C.F.R. Part 1630 App., § 1630.10(b), 74 Fed. Reg. at 48450. See also EEOC Q&A, Question 23 (EEOC Sep. 23, 2009), http://eeoc.gov/policy/docs/qanda_adaaa_nprm.html.
98. See EEOC Q&A, Question 10.
99. Compare 42 U.S.C. § 12201(h).
100. 29 C.F.R. § 1630.2(k)(1), 74 Fed. Reg. at 48443.
101. 29 C.F.R. § 1630.2(k)(2), 74 Fed. Reg. at 48443.
102. 29 C.F.R. § 1630.2(k)(1)(ii), 74 Fed. Reg. at 48443.
103. EEOC Q&A, Question 19.
104. 29 C.F.R. § 1630.2(o)(4), 74 Fed. Reg. at 48443; 29 C.F.R. § 1630.9(e), 74 Fed. Reg. at 48444; 29 C.F.R. Part 1630 App., §§ 1630.2(o) and 1630.9(e), 74 Fed. Reg. at 48449.
105. 42 U.S.C. § 12102(3)(A), as amended.
106. 42 U.S.C. § 12102(3)(B), as amended.
107. *Id.*
108. 42 U.S.C. § 12201(h), as amended.
109. 29 C.F.R. § 1630.2(l)(1), 74 Fed. Reg. at 48443. See also 29 C.F.R. Part 1630 App., § 1630.2(l), 74 Fed. Reg. at 48448.
110. 29 C.F.R. Part 1630 App., § 1630.2(l), 74 Fed. Reg. at 48448 and 48449.
111. 29 C.F.R. § 1630.2(l)(1), 74 Fed. Reg. at 48443.
112. 29 C.F.R. § 1630.2(l)(3), 74 Fed. Reg. at 48443. See also 29 C.F.R. Part 1630 App., § 1630.2(l), 74 Fed. Reg. at 48449.
113. 29 C.F.R. § 1630.2(l)(3)(i) and (ii), 74 Fed. Reg. at 48443.
114. 29 C.F.R. § 1630.2(l)(3)(iii)–(v), 74 Fed. Reg. at 48443.
115. 29 C.F.R. § 1630.2(l)(3)(v), 74 Fed. Reg. at 48443 (employer mistakenly believed that mild intestinal virus was heart disease); 29 C.F.R. Part 1630 App., § 1630.2 (l), 74 Fed. Reg. at 48449.
116. 29 C.F.R. § 1630.2(l)(2), 74 Fed. Reg. at 48443.
117. *Id*. *See also,* 29 C.F.R. Part 1630 App., § 1630.2(l), 74 Fed. Reg. at 48449; EEOC Q&A, Question 21.
118. EEOC Q&A, Question 22.
119. 29 C.F.R. § 1630.2(l)(1), 74 Fed. Reg. at 48443.

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120. 42 U.S.C. § 12205(a).

121. *See, e.g., Toyota Motor, supra,* 534 U.S. at 194.

122. 29 U.S.C. § 705(9)(B) and (20)(B), as amended.

123. Pub. L. 110–325, § 8, 122 Stat. 3553 (Sep. 25, 2008), codified at, e.g., 42 U.S.C. § 12101 (Note).

124. EEOC Q&A, Question 1.

125. Transcript of Commission Meeting of June 17, 2009, online at http://eeoc.gov/abouteeoc/meetings/6-17-09/transcript.html.

126. EEOC Q&A, , Question 1, cited in *Lawson v. Plantation General Hosp.*, L.P., ___ F. Supp. 2d ___, 2010 WL 1258058, at *13 (S.D. Fla. March 30, 2010).

127. *Thornton v. United Parcel Service, Inc.,* 587 F.3d 27, 31 (1st Cir. 2009) ("[I]t is well-settled that an employee alleging discrimination must file an administrative claim with the EEOC or with a parallel state agency before a civil action may be brought."); Williams v. Little Rock Mun. Water Works 21 F.3d 218, 222 (8th Cir. 1994) ("Exhaustion of administrative remedies . . . provides the EEOC the first opportunity to investigate discriminatory practices and enables it to perform its roles of obtaining voluntary compliance and promoting conciliatory efforts.") (citing *Patterson v. McLean Credit Union,* 491 U.S. 164, 180-81 (1989)).

128. **42 U.S.C**. § 12111(10).

129. *Squibb v. Memorial Medical Center*, 497 F.3d 775, 785 (7th Cir. 2007) (declining to decide whether sexual relations constitutes a major life activity); *McAlindin v. County of San Diego,* 192 F.3d 1226, 1234 (9th Cir. 1999) (recognizing the sexual relations as a major life activity).

130. *See Winsley v. Cook County,* 563 F.3d 598, 603 (7th Cir. 2009) (concluding that driving is not "so important to everyday life that almost anyone would consider himself limited in a material way if he could not"); *Chenoweth v. Hillsborough County,* 250 F.3d 1328, 1329-30 (11th Cir.2001) (driving is not a major life activity); *but see Anderson v. N.D. State Hosp.,* 232 F.3d 634, 636 (8th Cir.2000) (assuming without deciding that driving may be a major life activity).

131. *Darcy v. Lippman*, 356 Fed.Appx. 434, 437 (2d. Cir. 2009) (declining to determine whether commuting is a major life activity). *Sinkler v. Midwest Property Management Ltd. Partnership*, 209 F.3d 678, 685 (7th Cir. 2000) (finding that commuting is not a major life activity); *Poindexter v. Atchison, Topeka and Santa Fe Railway Co*., 168 F.3d 1228, 1234 (10th Cir. 1999) (Lucero, J. dissenting) ("Given the nature of our geographically dispersed, transportation-dependent society and the ubiquity of commuting, it is certainly debatable whether commuting is an activity of sufficient 'significance' to deserve 'inclusion under the statutory rubric' of major life activity.").

132. See also, Milholland v. Sumner County Bd. of Educ., 569 F.3d 562 (6th Cir. 2009); Lytes v. D.C. Water and Sewer Authority, 572 F.3d 936 (D.C. Cir. 2009); Fredricksen v. United Parcel Service, Co., 581 F.3d 516 (7th Cir. 2009); Becerril v. Pima County Assessor's Office, 587 F.3d 1163 (9th Cir. 2009); and *EEOC v. Agro Distribution,* 555 F.3d 462 (5th Cir. 2009).

133. *See also, Pinegar v. Shinseki*, 2010 WL 891700, at *1 n.2 (M.D. Pa. March 10, 2010); *Britting v. Shineski*, 2010 WL 500442, at *5 (M.D. Pa. Feb. 5, 2010); *Dave v. Lanier*, 681 F. Supp. 2d 68, 72 n.3 (D.D.C. 2010); *Jones v. Wal-Mart Stores, East, L.P.*, 2009 WL 1588656 (E.D. Tenn. June 5, 2009); *Geiger v. Pfizer, Inc*., 2009 WL 973545 (S.D. Ohio Apr. 10, 2009).