by Dena B. Calo, Esq., Genova, Burns & Vernoia, Camden

ADA Amendments Act means changes for employees, employers

Sweeping new ADA legislation passed earlier this fall will completely change the way employers manage disabled employees.

The ADA Amendments Act of 2008 (ADAAA) overruled four U.S. Supreme Court decisions defining disabilities under the ADA, thereby broadening the definition of disability in order to end disability discrimination in the workplace.

Broader disability definition

Under the original ADA, an employee was considered disabled if he or she had a physical or mental impairment that substantially limited a major life activity. The terms "major life activity" and "substantially limited" had been narrowly construed, disqualifying many employees from the disability definition.

The amended law significantly expands those definitions in order to bring more disabled individuals under the ADA's protection. For example, major life activities now include everyday tasks such as sleeping, concentrating, thinking and communicating.

Moreover, employees had previously and unsuccessfully argued that they were disabled because their physical impairments significantly limited other internal biological functions. Those impairments concerned the internal workings of the body—such functions as the immune system, normal cell growth and the digestive, bowel, bladder, neurological, brain, respiratory and reproductive systems.

The ADAAA specifically includes those internal bodily function within the definition of major life activities. It thus brings many unseen physical impairments within the disability definition that courts had previously, expressly rejected.

Mitigation, episodic conditions

The amended act also rejects the Supreme Court's view that a disability must be considered after the employee has mitigated its effects with medication or assistive devices. That means if an employee used medicine, technology or assistive devices to remedy the effects of a disabling condition, then he or she was no longer considered disabled under the law.

Under the new law, impairment must be viewed in its unmitigated state—without regard to any medication or assistive devices. (Eyeglasses and contact lenses are exceptions to this rule.)

Along the same lines, if an employee suffers from an episodic disability, the condition is always considered a disability, even when in remission.

Consider an employee with epilepsy who has occasional seizures. Under the original act, because the condition is episodic and medication usually controls it, the employee was not considered disabled because the employee was not substantially limited in any major life activity most of the time. The amended act changes that notion and makes it clear that an employee with an episodic condition is now disabled under the law.

Good news on 'regarded as'

The ADAAA has actually narrowed the definition of so-called "regarded as" disabilities, which should come as a relief to employers that have been struggling with this obscure area of the disability law for many years.

Now an employee is "regarded as" disabled if the employee establishes that he or she has been subjected to discrimination because of an actual or perceived impairment, whether or not the impairment limits or is perceived to limit a major life activity.

The amended act also limits "regarded as" claims to those where the impairment has an actual or expected duration of more than six months and specifically states that accommodations do not need to be made for "regarded as" disabilities.

What employers must do

Employers must take a more lenient approach to disability-related employment actions. Train supervisors on the ADAAA so they understand that disabilities do not need to be work-related to be protected. In fact, many physical or mental impairments will have limitations that supervisors cannot see in any way.

Focus on the interactive process required between employers and employees. It's the means for determining whether there's a need for an accommodation, or any necessity for additional measures to be taken if the employee has a disability.

The focus of future disability litigation will be whether or not your organization has fulfilled all of its required obligations, not whether or not the employee had a disability under the law.

The ADA Amendments Act of 2008 goes into effect in January 2009. However, your organization should act now to comply with the law before implementation begins. The EEOC is beginning the process of creating new regulations that comply with the act's new standards. It is important to anticipate the broad and liberal nature of the act's definitions and train your managers and supervisors on how to deal with leave and workplace disability issues.

Make sure HR, managers and supervisors treat all disabled employees with respect and in a nondiscriminatory manner. That's the best way to demonstrate your organization's compliance with this law's purpose—and to defend yourself against any litigation that may occur in the future.

Dena B. Calo is an associate at Genova, Burns & Vernoia, a New Jersey-based law firm with offices in Newark, Red Bank, Camden, New York and Philadelphia. She can be contacted at (856) 968-0680 or dcalo@gbvlaw.com.