

In Focus

Accommodate This!

January 1, 2009 is less than two months away. As always, the New Year will ring in many changes; some of them voted for; some of them anxiously awaited and many of them fraught with uncertainty. One change that meets each of these criteria is the Americans with Disabilities Act Amendments Act of 2008 (the Act). The Act was signed into law by President Bush on September 25 and takes effect on January 1, 2009.

In some quarters, the Act is creating quite a stir. This is due to its repudiation of U.S. Supreme Court holdings that narrowed the definition of disability and raised the burden of proof for those claiming disabled status. In the text of the Act, Congress pointedly scolds the Court for misinterpreting the definition of disability used in the original Americans with Disabilities Act (ADA) and establishes broad parameters for how the law is to be interpreted in the future.

Here are some examples of what the ADA Amendments Act will do:

In treating the term "major life activities", the Act states that this and other foundational terms should *not* be interpreted strictly and that "the question of whether an individual's impairment is in fact a disability should not demand extensive analysis". Moreover, "major life activities" will now include bending, speaking, seeing, breathing, hearing, learning, eating, reading, sleeping, concentrating, walking, thinking, and standing, to name but a few.

"Major life activities" will also include a subset of activities called "major bodily functions", that if impaired, are tantamount to the person being disabled. These major bodily functions include: normal cell growth, digestive, bowel and bladder, neurological, circulatory and reproductive functions. The Act does not require that the impaired functions relate to the ability to perform one's job.

Prior U.S. Supreme Court decisions held that disability status was to be denied if a person's impairment could be favorably impacted by taking medicine or other medical treatment. In direct contradiction, the Act states that a disability can exist without taking into account the beneficial effects of measures like medication, medical supplies, prosthetics, oxygen therapy equipment, or learned behavioral modifications. The only exceptions are eyeglasses and contact lenses.

Additionally, the Act provides that a person can be disabled even if the impairment is in remission and having no adverse effect on the individual. Why? Because the condition could arise at some time in the future.

Provisions like those described above compelled HR blog host John Post to comment, "Under the Act, no one is ever cured. The disability is continuous."

Some benefits managers may well wonder how this law got passed and why President Bush signed it. In fact, the Act was broadly supported. Consider:

- | The Act was co-sponsored by 64 Senators, including John McCain, Barack Obama, Joe Biden and George Voinovich. The U.S. Senate passed the Act unanimously. It was passed by the House 402-17. All of Ohio's Congressmen voted in favor of the Act.
- | The Act was endorsed by the U.S. Chamber of Commerce. In an open letter to the U.S. House of Representatives, the Chamber wrote: "The Chamber believes that (the Act) represents a balanced approach to ensure appropriate coverage under the ADA and urges you to support the bill without further amendments."
- | The Society of Human Resource Management said, "SHRM supports this legislation because it strengthens the ADA, as Congress had originally intended, and balances the rights of individuals with disabilities and the needs of employers".
- | After Congress passed the Act, the White House issued a statement saying: "The Administration believes the ADA Amendments Act of 2008, which has just passed Congress, is a step in the right direction, and is encouraged by the improvements made to the bill during the legislative process. The President looks forward to signing the ADAAA into law."

Perhaps this broad support is best explained in the U.S. Senate's Statement of Managers preceding the text of the law. In describing the rationale for the Act's amendments, the Managers basically said that the new law is primarily trying to restore application of the intent of the original ADA as signed by President George H.W. Bush in 1991.

The Managers noted that the original ADA's definition of disability found its source in Section 504 of the Rehabilitation Act of 1973. That law's definition of disability was well settled after 17 years of litigation, when the original ADA was enacted. Because the definition of disability was well understood, the courts initially focused not on whether a person was disabled, but instead on whether the cases before them proved unlawful discrimination against the disabled. And that was the whole point of the ADA, to combat discrimination, not to re-define the meaning of disability. The Managers wrote that more recent U.S. Supreme Court decisions (*Sutton* and *Toyota*) had dramatically drifted away from this original intent and that Congress wanted to reinforce its goal of prohibiting discrimination.

January 1, 2009 is not far away. Even though the EEOC has yet to propose regulations under the Act, over the next few weeks, benefits managers and their HR colleagues should take steps that include:

- | Revising internal policies and medical certification forms related to the

They Said It?

Thomas T. Noland, Jr., Senior Vice President, Humana: "Premiums for our individual health insurance plans reflect claims experience – the use of medical services – which varies by gender and age. Females use more medical services than males, and this difference is most pronounced in young adults."

Mila Kofman, Superintendent of Insurance, Maine: "There's a strong public policy reason to prohibit gender-based rates. Only women can bear children. There's an expense to that. But having babies benefits communities and society as a whole. Women should not have to bear the entire expense."

- ADA, discrimination and complaint procedures
- | Reviewing job descriptions and making sure they spell out essential job functions
- | Training managers and supervisors on the new Act and how to handle requests for accommodation

2009 may be the beginning of a new era for employment related legislation. The easy, bipartisan passage of the ADA Amendments Act may be a signal of what more is to come.

At the core of the ADA is the premise that the employment-related implications of health conditions are important and need to be accommodated. The new amendments to the ADA expand upon that premise and broaden its reach considerably. Successfully managing this broader reach requires more than assiduous compliance efforts. It also requires benefits managers to work even more diligently to create and support programs that promote the improved health and well being of their employees. Both conviction and leadership will be required to accomplish this while contending with the budget pressures exerted by a troubled economy.

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