

# *CLIENT ACTION LETTER*

**HOWE, ANDERSON & STEYER, P.C.**

815 Connecticut Avenue, N.W.

Suite 620

Washington, D.C. 20006

(202) 296-5680

whowe@haspc.com

**DATE:** December 17, 2008

**TOPIC:** Americans with Disabilities Act – 2008 Amendments

**SUMMARY:** Effective January 1, 2009, the Americans with Disability Act (“ADA”) is amended by the ADA Amendments Act of 2008 to undo a number of Supreme Court opinions which have interpreted certain provisions of the Act more restrictively than Congress had intended. By rejecting these Supreme Court opinions, and conveying congressional intent to have the Act more liberally interpreted, many more individuals will come within the scope of the ADA. For the most part, this is accomplished by re-defining the meaning of disability.

**DISCUSSION:** The Americans with Disabilities Act makes it illegal to discriminate against a qualified individual with a disability in regard to hiring, promotion, discharge, compensation, training, or other terms and conditions of employment. A qualified individual is someone with a disability who, with or without a reasonable accommodation, can perform the essential functions of a job. Disability means a physical or mental impairment that substantially limits one or more of an individual’s major life activities, or being regarded as having such an impairment. The Act applies to employers in industries affecting commerce which have 15 or more employees for each working day in 20 or more calendar weeks in the current or preceding calendar year. The ADA is enforced by the Equal Employment Opportunities Commission (“EEOC”).

Supreme Court opinions have upheld the view that an individual was not disabled for purposes of the Act if there were effective measures, such as medications, prosthetics, hearing aids, or other devices or equipment, which would offset or enable the individual to cope with an impairment. This excluded a great number of people from coverage under the Act. The amendments which go into effect on January 1, 2009, require that determination of whether an impairment substantially limits a major life activity must be made without regard to the ameliorative effects of mitigating measures such as medication, prosthetics, hearing aids, mobility devices, oxygen therapy equipment, or any kind of treatment or therapy. The only exception is for ordinary eyeglasses and contact lenses.

The Supreme Court also has held that whether or not an impairment “substantially limited” a major life activity was a strict standard whereby an individual was prevented or severely restricted from performing activities of central importance to most people’s daily lives. As a result, many individuals were denied coverage on the ground that their impairments were not severe enough to substantially limit major life activities. The 2008 amendments require the term “substantially limited” to be more liberally interpreted in accordance with the stated purposes of the amendments, effectively requiring the EEOC to re-define the term to broaden the Act’s coverage. The amendments further provide that an impairment which is episodic or in remission, such as epilepsy or cancer, is a disability if it would substantially limit a major life activity when active.

Finally, the amendments define “being regarded as having an impairment” to mean that an individual only needs to show prohibited discrimination based on an actual or perceived physical or mental impairment, whether or not the impairment limits or is perceived to limit a major life activity. They also make it clear that an impairment that limits one major life activity need not limit other major life activities in order to be considered an impairment, thus enabling an individual to claim disability for not being able to perform one particular job, even though he or she may be able to perform others.

**CONCLUSION:** The full impact of the 2008 amendments will not be known until the EEOC promulgates new regulations. Nevertheless the changes set forth in the amendments will certainly bring more individuals within the coverage of the Americans with Disabilities Act, resulting in more claims against employers for accommodation, and ultimately more cases being filed with the EEOC. It should be noted, however, that whereas the 2008 amendments will accomplish the congressional purpose of broadening the Act’s coverage, they do not affect other provisions of the ADA. Employees must still be qualified to perform the essential functions of their jobs, with or without an accommodation. Employers still are required only to provide accommodations which are reasonable and do not constitute an undue hardship for the employer. And individuals need not be employed in jobs where they pose a direct threat to the health or safety of themselves or others based on an individual assessment of the risks and potential harm.

**RECOMMENDED ACTION:** When confronted by an applicant or employee claiming to have a disability and seeking an accommodation, you should try to negotiate an accommodation which is acceptable to you and the individual. The accommodation process is intended to be interactive, and you are not necessarily required to accept what an individual may propose. If you feel that there is no reasonable accommodation that can be made, or if you contemplate taking action that could be regarded as discrimination based on the individual’s real or perceived disability, before taking such action you should consult with qualified legal counsel.

**NOTE:** As a result of last month’s elections, we expect to see more legislation in the upcoming Congress to broaden and liberalize other federal employment laws. Some possibilities include bills to eliminate caps on damages under Title VII of the Civil Rights Act and the ADA; the addition of compensatory and punitive damages under the Fair Labor Standards Act; expanded damages under the Equal Pay Act; provision for some amount of paid leave under the Family and Medical Leave Act; and the ability of unions to gain representation and collective bargaining rights without a secret ballot election.