LINDNER & MARSACK

**EMPLOYMENT LAW E*ALERT**

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## ADA Amendment Act Becomes Law

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On September 25, 2008, President George W. Bush signed into law amendments to the Americans with Disabilities Act ("ADA") that will restore certain protections to disabled individuals that had been originally intended by Congress, but had been stripped away from the ADA by the federal courts. The new law, entitled the ADA Amendments Act of 2008 ("ADAAA"), expressly overturns several landmark Supreme Court decisions that had narrowly interpreted the definition of "disability." The changes in the ADAAA take effect on January 1, 2009.

Foremost, the ADAAA explicitly directs courts to construe the concept of disability more broadly. As a result, far more people are likely to be "disabled" within the meaning of the ADA. For example, under the ADAAA, the use of medication and devices (e.g., mediations, hearing aids) cannot be used as the basis for ruling that a person does not have a disability under the ADA. This reverses the Supreme Court's decisions in *Sutton v United Airlines*, 527 U.S. 471 (1999), *Murphy v. United Parcel Service Inc.*, 527 U.S. 516 (1999), and *Albertson's Inc. v. Kirkingburg*, 527 U.S. 555 (1999), which held that persons who used mitigating measures to control the disability did not fall within the ADA's definition of disabled. The ADAAA also expressly includes as disabled persons that have an impairment that is episodic or in remission, like cancer or multiple sclerosis, if the impairment substantially limits a major life activity when active. These changes will have a major impact on people with conditions for which medication and other treatments are available, such as epilepsy, HIV/AIDS, diabetes, and mental illness.

The ADA is also amended to include a non-exhaustive list of examples of major bodily functions that are considered major life activities, for purposes of establishing whether an individual has a disability under the ADA. In addition to the activities recognized in the regulations promulgated by the Equal Employment Opportunity Commission (EEOC), the ADAAA adds the following as constituting major life activities: Eating, sleeping, bending, reading, concentrating, thinking, and communicating. Notably, the reference to "bending" is likely to result in recognition, as disabled, of claimants with back conditions, whose claims had been routinely dismissed by federal courts. The ADAAA specifically rejects the restrictive

interpretation of major life activity used by the U.S. Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams,* 534 U.S. 184 (2002).

The ADAAA also lowers the standard to prove an employer discriminated against an individual whom it "regarded as" having a disability under the ADA. Previously, individuals claiming that they were "regarded as" having a disability had to prove that the employer mistakenly regarded them as having an impairment that substantially limited a major life activity. The ADAAA holds an employer liable under the "regarded as" theory if an individual can prove discrimination because of an actual or perceived physical or mental impairment, regardless of whether or not the impairment actually limits or is perceived to limit a major life activity. The ADAAA clarified, however, that "regarded as" claims cannot be based on transitory and minor impairments where the impairment is expected to last less than six months. Finally, employers are not required to provide a reasonable accommodation to individuals who are regarded as disabled – an issue which had previously split the federal courts of appeals.

This significant change in the manner in which disabilities are interpreted under the ADA will undoubtedly increase litigation in the area of disability discrimination. It will also make it much more difficult for employers to prevail by asserting that an individual does not have a disability under the ADA. This will likely lead to more litigation involving other issues such as whether an accommodation is reasonable, whether a proposed accommodation creates an "undue hardship," and whether the employee is able to perform all of the "essential job functions" of a position.

Apart from the ADAAA's impact on litigation, employers will be obligated to provide reasonable accommodations to a broader group of persons and with much greater frequency. As a result, it is imperative that employers implement a formal process for addressing job accommodation requests or review existing procedures. Employers should also review job descriptions as they are critical to the job accommodation process.

These changes may have a lesser impact for Wisconsin employers, as the Wisconsin Fair Employment Act (WFEA), the State law that prohibits discrimination against individuals with disabilities, has long broadly defined the term "disability." In fact, a "disability" under the WFEA has been interpreted to include conditions that could be controlled with medications and/or medical devices. Nevertheless, employers must be mindful of the changes brought about by the ADAAA and ensure that their policies and practices comport with the new provisions.

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If you have any questions about the issues raised by this e-alert, please feel free to contact Oyvind Wistrom at (414) 273-3910 or by e-mail at or owistrom@lindner-marsack.com

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