



Background and Brief Summary of the Proposed "ADA Amendments Act (ADAAA) of 2008"

The proposed ADA Amendments Act is a substitute for the "Americans with Disabilities Act Restoration Act" (ADARA), introduced on July 26, 2007, as S. 1881. A companion ADARA bill in the House, H.R. 3195, also introduced on July 26, 2007, ultimately garnered over 250 cosponsors, including many from both sides of the aisle.

S. 1881 was a response to decisions by the Supreme Court and by lower courts that had narrowed the group of people whom Congress had intended to protect under the Americans with Disabilities Act (ADA).

The Supreme Court had interpreted the ADA to impose a "demanding" standard for coverage as a person with a disability. It had also held that the ameliorative effects of "mitigating measures" that people use to control the effects of their disabilities must be considered in determining whether a person has an impairment that substantially limits a major life activity and hence is protected by the ADA. In response to these court decisions, the ADARA amended the ADA to provide broad protection for any individual who has a physical or mental impairment, a record of an impairment, or who was treated as having an impairment.

In both House and Senate hearings on the ADARA during fall 2007, some argued that the bill extended the protections of the ADA beyond Congress' original intentions and that it would therefore cause additional and unnecessary litigation for those subject to the law. For that reason, Members and staff in both Houses and on both sides of the aisle urged the disability and business communities to develop a consensus proposal that could rectify the harmful interpretations of the courts, could ensure necessary protection for people with disabilities, and could be workable from the perspective of those who would be governed by the law.

Intensive negotiations between representatives of the disability and business communities began in February 2008 and culminated in May 2008. Initial tentative agreements were reached between the negotiators both in early April and in mid-April. These initial proposals were modified based on reactions from the wider disability and business communities and from interested Senate and House offices that were briefed on and that commented on the deal. A final compromise was reached on May 15, 2008.

The compromise proposal formed the basis of the "ADA Amendments Act of 2008" (ADAAA). Offered as an amendment in the nature of a substitute during House Committee markups, the substitute was voted out of the House Education and Labor Committee by a vote of 43-1, and out of the Judiciary Committee by a vote of 27-0, both on June 18, 2008. The substitute passed the House by an overwhelming vote of 402-17 on June 25, 2008.

The Provisions of the Proposed ADAAA of 2008

The primary purpose of the ADAAA is to make it easier for people with disabilities to qualify for protection under the ADA. First, it explicitly establishes that the definition of disability must be interpreted broadly to achieve the remedial purposes of the ADA. The bill specifically rejects the Supreme Court's holdings, contrary to clear Congressional intent, that the ADA's definition of disability must be read "strictly to create a demanding standard for qualifying as disabled," and that an individual must have an impairment that "prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives" to qualify for protection.

Of key importance for those governed by the law, the ADAAA retains the ADA's familiar reference in the definition of disability to an impairment that "substantially limits" a major life activity. The bill defines "substantially limits" as "materially restricts" to make clear Congress' rejection of the overly narrow standard applied by the Supreme Court and to emphasize its adoption of a broader standard. On the severity spectrum, "materially restricts" is meant to be less than "severely restricts," and less than "significantly restricts," but more serious than a moderate impairment which would be in the middle of the spectrum.

Second, the bill provides that the ameliorative effects of mitigating measures (other than eyeglasses or contacts lenses) are not to be considered in determining whether a person has a disability. This provision is intended to eliminate the "Catch-22" that exists under current law, where individuals who are subjected to discrimination on the basis of their disabilities are frequently denied protection when the ameliorative effects of their medication, medical supplies, behavioral adaptations, or other mitigations are considered.

Third, the bill provides that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. Courts had ruled that certain conditions -- such as epilepsy or post traumatic stress disorder -- were not protected by the ADA because such conditions were episodic or intermittent.

Fourth, the bill broadens coverage under the ADA's "regarded as" prong of the definition of disability. It clarifies that an individual can establish coverage under the "regarded as" prong by establishing that he or she was subjected to an action prohibited by the ADA because of an actual or perceived impairment, whether or

not the impairment limits or is perceived to limit a major life activity. This provision does not apply to impairments that are both transitory (lasting six months or less) and minor.

This provision is designed to restore Congress' intent to allow individuals to establish coverage under the "regarded as" prong by showing that they were treated adversely because of an impairment, without having to establish the covered entity's beliefs concerning the severity of the impairment.

Impairments that are transitory and minor are excluded from "regarded as" coverage so as to prevent litigation over conditions like the common cold. For the first two prongs of the definition of disability, there is no need for the transitory and minor exception because it is clear that a person can bring a claim only if the person's impairment substantially limits one or more major life activities.

The bill also provides that a covered entity has no obligation to provide reasonable accommodations, or reasonable modifications to policies, practices or procedures, for an individual who qualifies as a person with a disability solely under the "regarded as" prong. This clarifies conflicting court opinions on this question under the ADA.

Fifth, the bill modifies the ADA to conform to the structure of Title VII and other civil rights laws by covering discrimination "on the basis of disability" rather than discrimination "against an individual with a disability" because of the individual's disability. This should be an important signal to lawyers and courts to focus less on the minutiae of an individual's impairment, and more on the merits of the discrimination case.

The bill thus provides both enhanced coverage, as well as balancing limitations, to make the law clearer and more workable for both its beneficiaries and for entities governed by the law. For example, those who are affirmatively seeking reasonable accommodations or modifications must be covered under the first or second prong of the definition of disability, as such prongs have now been clarified with regard to the level of severity required. Those discriminated against because of an actual or perceived impairment, but not seeking a reasonable accommodation or modification, will be able to proceed under the third prong of the definition, without showing the severity of their impairment

The bill retains the requirement in Title I of the ADA that an individual must be "qualified" for the position in question. The original version of S. 1881 might have been interpreted to alter the burden-shifting analysis concerning whether an individual is "qualified" under the ADA. The negotiated proposal clearly leaves the burdens the same as under current law.

The only regulated groups that have raised questions about the possible adverse impact on them of the ADAAA have been the educational community. Their

concerns appear to rest on a misunderstanding of either current law or the proposed law.

For example, some in the higher education community have expressed concern that the ADA AAA will affect how they apply academic standards. This concern has no basis. **The ADA AAA will have absolutely no effect on the ability of higher education institutions to set academic standards.** It addresses only the standards for determining who qualifies as an individual with disability, and not the standards for determining whether an accommodation or modification is required in a particular setting or context. It has always been the law, and it will remain the law upon passage of the ADA AAA, that an academic institution need not make modifications that would fundamentally alter the essential requirements of a program of study.

Second, the K-12 educational groups had been concerned that the original ADARA might have required them to assess a larger number of students than they currently do in order to determine whether the student's impairment requires an accommodation. The language of the ADA AAA should alleviate any such concerns. Unlike the employment field, students in the educational arena have rarely been denied accommodations because they are found not to have a "disability." Thus, the current language will have little impact on these schools. While there are legitimate concerns with the under-identification of students with disabilities that should be considered, the new compromise language of ADARA does not address or change this important, yet complex, issue.