# CLIENT ALERT: President Bush Signs Law Expanding Employee Rights Under The Americans with Disabilities Act

## I. INTRODUCTION

On September 25, 2008, President Bush signed into law the Americans with Disabilities Act ("ADA") Amendments Act of 2008 ("the Act"). The legislation, which will take effect on **January 1, 2009**, broadens the definition of "disability" and therefore expands the population eligible for protection under the ADA, the primary federal law prohibiting discrimination against the disabled.

The ADA defines "disability" as "(a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (b) a record of such an impairment; or (c) being regarded as having such impairment." A series of United States Supreme Court decisions in the late 1990's and early 2000's interpreted the term "disability" in a rather narrow fashion. For example in *Sutton v. United Air Lines, Inc.,* 527 U.S. 471 (1999), the Court ruled that mitigating measures which manage or ameliorate a medical condition must be taken into account in determining whether an individual is disabled.

It has long been the position of disability rights groups (and plaintiffs' lawyers) that the Supreme Court's narrow definition of "disability" was contrary to the intent of Congress in passing the ADA in 1990. Efforts to amend the law to overturn these Supreme Court cases have been introduced in Congress for a number of years. However the proposals did not begin to gain traction until the Democrats regained control of Congress in 2007.

At that time, the so-called "ADA Restoration Act" began to advance. The bill ultimately signed by the President was a compromise which won the support of most business groups. The legislation as originally filed would have expanded the ADA's protections even further. For example, the entire concept of "major life activities" would have been eliminated, and the law would have equated "impairment" with "disability".

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## II. MAJOR CHANGES

### A. Overturning of Supreme Court Cases

The Act overturns several Supreme Court rulings which narrowed the range of people found to have a "disability" under the ADA, including *Sutton, supra* and *Toyota Motor Mfg., Ky., Inc., v. Williams*, 534 U.S. 184 (2002). In *Toyota* the Court interpreted "substantially limits" as requiring an individual's impairment to be permanent or long term, and preventing or severely restricting activities that are of central importance to most people's daily lives.

### B. Significant Changes to the Term "Disability"

While the Act leaves the fundamental definition of the term "disability" intact, it still significantly alters the term's interpretation by providing for changes related to the terms "major life activities," "substantially limits," "mitigating measures," and "regarded as."

i. Substantially Limits

The Act itself does not provide a definition for the term "substantially limits." Rather, it provides guidelines as to how the term should be interpreted in the future. Congress provides that such an interpretation should be made "consistently with the findings and purposes of the ADA Amendments Act of 2008." Furthermore, the legislation states that "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."

Perhaps the greatest help in defining "substantially limits" comes from Congress' express rejection of the standard set forth by the Supreme Court in *Toyota* and that of the Equal Employment Opportunity Commission ("EEOC"). In rejecting the *Toyota* standard, the Act states the case "has created an inappropriately high level of limitation necessary to obtain coverage under the ADA," and that instead, "it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations." Congress further rejected the EEOC's definition of "substantially limits" as "significantly restricted."

Congress has left the task of redefining "substantially limits" to the EEOC,

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only requiring that it be done in accordance with the purposes and provisions set forth within the Act. Until this process is undertaken, there will undoubtedly be questions as to how broad the interpretation will need to be. One piece of guidance can be ascertained from the legislative history of the Act however. The bill originally introduced to the House of Representatives included a definition of “substantially restricted” as meaning “materially restricts.” In rejecting this bill and refusing to adopt this definition, Congress seems to be requiring a still broader construction.

Additionally, Congress clarified that impairments which are episodic or in remission are to be considered “disabilities” under the ADA if they would substantially limit a major life activity when active.

ii. Major Life Activities

In an attempt to clarify the meaning of “major life activities” under the ADA, the Act provides a non-exhaustive list of “major life activities” including: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working.

The Act further states that a “major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”

The inclusion of bodily functions is an expansion upon the previous interpretations of “major life activity” and appears to be in direct response to Congress’s intent of expanded coverage under the ADA. In a speech to the Senate on the Act, Sen. Harry Reid emphasized that diseases such as “muscular dystrophy, epilepsy, diabetes, multiple sclerosis, cancer and [intellectual disabilities]” are among the types of things which Congress intends to be covered by the Act.

iii. Mitigating Measures

The Act also requires that mitigating measures are *not* to be considered in determining whether an individual is “disabled” under the ADA. Mitigating measures specifically mentioned within the Act include: medication, medical supplies, equipment, or appliances, low-vision devices (which do not include

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ordinary eye-glasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy instruments; use of assistive technology; reasonable accommodations or auxiliary aids or services; or learned behavioral or adaptive neurological modifications.

Note that the Act sets forth a special rule for “ordinary eyeglasses or contact lenses” which should be considered in determining whether an impairment substantially limits a major life activity.

iv. Regarded As

The Act expands the scope of coverage for people who are perceived as having an impairment. It states that “an individual meets the requirement of ‘being regarded as having such an impairment’ if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment *whether or not the impairment limits or is perceived to limit a major life activity.*” (emphasis added). Congress provided that for purposes of this provision, individuals with impairments that are transitory and minor (defined as impairments with an actual or expected duration of six months or less) are not entitled to protection for being “regarded as” having an impairment. Furthermore, the Act explains that employers are not required to provide reasonable accommodations for individuals who are “regarded as” having impairments, but only for those who actually are disabled.

v. Ban on “Reverse Discrimination” Claims

Finally, the Act makes clear that there is no claim of “reverse discrimination” by a non-disabled individual who claims that he/she was discriminated against because of his/her lack of disability.

## III. OUTLOOK

The practical impact of the ADA Amendments Act of 2008 will to some extent depend on the state(s) in which a particular employer does business. Many state and local disability discrimination laws have been interpreted—by state courts and/or administrative agencies—to provide greater protection to employees than the ADA, and, in some cases, even under the ADA Amendments of 2008. In those jurisdictions, the new Act may not have an impact on the

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advice which is given to clients in handling disability issues.

By expanding the definition of disability, the ADA Amendments Act of 2008 will make it easier for individuals to be protected under the ADA. As a result, employers can expect to see an increase in employees' requests for accommodations and an increase in disability discrimination charges and litigation.

The Act specifically provides the EEOC to issue regulations concerning the construction of the Act, and further charges the EEOC to revise its definition of "substantially limits." Until the EEOC issues such regulations, and likely even thereafter, there will also be a significant amount of litigation to flesh out what "substantially limits" actually means.

The expanded scope of eligible disabilities and the uncertainty over the term "substantially limits" will likely make it more difficult for employers to win summary judgment in disability discrimination cases; whereas prior cases could often be dismissed based upon the stricter construction of "disability" under ADA case law. It will also turn the focus of more cases to motive, the reasonableness of accommodations, etc.

In order to prepare for the enactment of the Act, employers should review their policies and practices to settle on whether any changes are necessary for compliance. While it is unlikely that many changes to the underlying policies themselves will be needed, employers should be more aware of the interactions they have with disabled employees and their requests for accommodations.

Finally, it is important to note that the Act has not affected some of the ADA's important principles. Disabled employees are still required to request reasonable accommodations and they are not permitted to insist upon a specific accommodation if the employer has offered reasonable alternatives. Moreover, disabled employees are still required to be able to adequately perform their essential job functions when provided with reasonable accommodations.

If you have any questions or concerns about disability discrimination, or any other discrimination issue, please contact your MBJ attorney.

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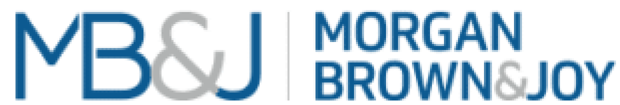

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