



# THE WORKPLACE WORD

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## The Updated and Expanded ADA: What You Need To Know

On September 25, 2008, President Bush signed legislation that significantly amended the federal Americans with Disabilities Act (the "Act"). The statute, which expands protection of persons with disabilities in the workplace, will become effective on January 1, 2009.

Some of the more significant changes to the law include an expanded definition of "major life activity," a disregard of mitigating measures, the inclusion of a condition in remission as a disability, a restriction of the "regarded as" disabled definition, and a liberalization of the "substantially limits" element of the definition of a disability. Each of these new changes is addressed in turn below.

### Major Life Activities

Under the ADA, a disability is defined as a physical or mental condition that substantially limits a "major life activity." The ADA did not include a definition of "major life activity." However, the Equal Employment Opportunity Commission (EEOC) regulations provided examples such as "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." These examples have now been incorporated into the Act. These changes do not represent a major change from established case law because most courts already followed the EEOC regulations.

However, the amendment now adds "major bodily functions" such as "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions," which could lead to a substantial expansion of workers considered disabled under federal law.

### Mitigating Measures

Prior U.S. Supreme Court decisions held that mitigating measures, such as prosthetic devices, should be taken into account when determining whether the workers are disabled. The amendment expressly overturns the Supreme Court's decision in *Sutton v. United Air Lines, Inc.* and specifically directs courts not to consider "the ameliorative effects of mitigating measures" including medication, prostheses, or other aids. A narrow exception allows courts to consider "ordinary



eyeglasses or contact lenses” in determining whether a vision impairment is sufficient to trigger ADA protection.

The amendment also expands the definition of disability to include a condition that is in remission or that is episodic if it would substantially limit a major life activity when active.

### Substantially Limits

In order to qualify as a disability under the ADA, a disability must “substantially limit” a major life activity. Both the Supreme Court and the EEOC have set a high bar for demonstrating that one’s disability “substantially limits” a major life activity. Under the ADA, 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. The amendment rejects this standard, but also fails to provide an alternate definition. It merely states that the existing definition is invalid, and the ADA should be interpreted under a looser standard. In doing so, the ADA overturns *Toyota Motor Mfg. Ky. Inc. v. Williams*, in which the Supreme Court adopted standards making it harder for plaintiffs to prove they are “substantially limited” in a “major life activity.”

Congress also directed the EEOC to issue new regulations clarifying what it means to be “substantially limited” in a major life activity.

### Regarded As

In addition to protecting those workers with an actual disability, the ADA has long protected workers who, while not actually disabled, are regarded as such by their employer. Under the original ADA, persons who claimed discrimination because they were regarded as having a disability were required to prove that the perceived disability substantially limited a major life activity. Now, employees only need to demonstrate that discrimination based on a perceived disability violates the law, regardless of whether the impairment actually limits, or is perceived to limit, a major life activity. The amendment also excludes from “regarded as” claims minor/transitory conditions lasting six months or less.

### No Reverse Discrimination

The amendment makes clear that reverse discrimination claims may not be made under the ADA. Specifically, the Act states that individuals who do not have disabilities may not claim that they were subject to discrimination because of their lack of a disability.

### What Now?

The effects of the ADA will take some time to gauge. Inevitably, however, there will be a period of uncertainty while employers seek to comply with the new standards, which will most likely be followed by an increase in federal disability law litigation. The EEOC will likely issue new regulations, which may help guide employers in complying with these new standards.

At this point, employers should begin to revise any written policies or procedures to ensure they comply with the requirements of the new amendment. Employers should also ensure that those employees involved in handling employment issues with individuals with disabilities, such as making reasonable accommodations, are adequately trained on the new law. In addition, employers should review job descriptions since they are frequently a starting point for an individualized assessment.

Litigation under the new ADA is likely to become more complex as the emphasis shifts away from whether plaintiffs are disabled and toward questions of whether employers have complied with the law. With the threshold issues of whether a person is disabled tipping in the employee’s favor, employers should be prepared to litigate more challenging issues, such as the scope and meaning of “reasonable accommodation,” “undue hardship” and “essential job functions” to establish compliance with ADA obligations.



## Issues, Trends, & Developments: Staying Equipped in a Changing Workplace

In today's workplace environment, labor and employment issues are constantly evolving. Businesses need to be equipped with the latest information and resources in order to facilitate better business decisions and reduce the risk of litigation. Snell & Wilmer L.L.P. invites you to this three-part seminar series exploring some of the latest developments and trends impacting the industry, with a particular focus on the continually changing immigration landscape. If you are a business owner, manager, in-house counsel, or an HR professional, this program is a must-attend event.

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**The FLSA: What You Don't Know Could Hurt You.**  
In *Practice*, The Debate Over  
October 29, 2008

**Passed.**  
Please see our upcoming seminars.

Part II  
**Employee Discipline:** A How-to-Guide for a Hot-Button Issue.  
**Immigration Law:** Making Sense of the I-9 Form.  
November 5, 2008

Part III  
**Election 2008:** Prepare for Impact.  
**Immigration Law:** Why are We Being Investigated?  
December 3, 2008

**Location:** Snell & Wilmer L.L.P., One Arizona Center, 400 E. Van Buren, Phoenix, AZ 85004

**Times:** 7:30–8:00AM Registration and Breakfast • 8:00–9:00AM Program • 9:00–9:10AM Break • 9:10–10:00AM Program.

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