On January 1, 2009, the first amendments since the ADA was originally passed in 1990 went into effect. Although quite short, the ADA Amendments Act of 2008 (ADAAA) is sweeping in both changes and general approach.

SUBSTANTIAL LIMITATIONS

The definition of a "substantial limitation of a major life activity" is the most significant change. Congress rejected the interpretation of the 1999 U.S. Supreme Court's trilogy of decisions – *Sutton* v. *United Airlines*, *Murphy* v. *UPS*, and *Albertson's* v. *Kirkingburg* – which held that mitigating measures must be considered when determining whether a disability exists. Under the amendments, a disability must be determined without regard to mitigating measures, except where a vision impairment can be corrected by glasses.

Practical implications: This change will increase the number of individuals protected by the ADA. The vast majority of cases dismissed on summary judgment were dismissed because the plaintiff did not meet the definition of "disability," and the employer's accommodating actions were never discussed. Because those cases will no longer be dismissed on the definition of "disability," there will be greater scrutiny of employment decisions and the accommodation process.

MAJOR LIFE ACTIVITIES

The ADAAA also codifies and expands the definition of "major life activities," adding "major bodily functions" such as the immune system, normal cell growth, and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

Practical implications: This will not have a significant effect because most courts accepted the EEOC's list of major life activities and understood that it was not exhaustive. Congress has now ratified the EEOC's position.

"REGARDED AS" CASES

The amendments make a number of changes involving individuals who are "regarded as" disabled.

- An individual will be covered if he or she is regarded as having an impairment, whether or not the perceived impairment would substantially limit a major life activity.
- Even if the definition is otherwise met, an individual cannot bring a "regarded as" claim if the actual or expected duration of the impairment is six months or less, or the impairment is "transitory and minor."
- The ADAAA makes it clear that an employer has no duty to accommodate an individual who is regarded as impaired but does not have an actual disability as defined by the Act.

Practical implications: The six-month rule will be very helpful in weeding out "regarded as" cases for certain minor conditions. However, the elimination of the "substantial limitation" requirement will greatly expand the number of potential "regarded as" cases. Employers must be very careful not to make comments regarding an employee's medical condition or inject medical issues into what would otherwise be performance or behavior discussions. Disability must be treated like other protected categories and not come into play unless it is raised by the employee and directly relevant to the job. This will require greater training of supervisors.

While the changes discussed above are significant, perhaps the greatest change is in attitude. Congress altered the legislative history of the ADA to take out any reference to the number of individuals affected by the Act (which had previously been used by the Supreme Court to reject expansive interpretations), to delete the reference to individuals with disabilities as a "discrete and insular minority," and to reject the Supreme Court's language in *Toyota* v. *Williams* indicating that the definitions in the Act should be strictly construed, instead mandating broad construction. It is difficult to anticipate how this general change in tone, which does not affect any specific provisions of the ADA, will be interpreted and implemented by the courts.

In January President Obama signed into law the "Lilly Ledbetter Fair Pay Act," which provides that an employee who alleges pay discrimination in violation of various federal laws has up to 300 days to file a legal claim after receiving each new paycheck alleged to contain discriminatory pay.

Then-Senator Obama made passage of the law one of the banner promises of his presidential campaign throughout 2008. Indeed, Obama often campaigned with the law's namesake, Lilly Ledbetter, the former Goodyear Tire employee whose pay discrimination case before the U.S. Supreme Court first brought attention to the issue.

In Ledbetter's case, decided in May 2007, the U.S. Supreme Court ruled that an employee who alleges pay discrimination must make her complaint to the EEOC within 180 or 300 days

Understanding
THE EMPLOYEE FREE CHOICE ACT

The Employee Free Choice Act (EFCA), as recently introduced in Congress, contains three provisions that would significantly alter the National Labor Relations Act (NLRA): (1) card check provisions; (2) binding arbitration provisions; and (3) enhanced penalties against employers.

The EFCA would amend the NLRA to require the National Labor Relations Board (NLRB) to certify a union as the employees' exclusive representative solely if a majority of employees sign valid authorization cards, without holding a secret ballot election. Currently under the NLRA, a secret ballot election is required to determine whether employees wish to join a union if an election is requested by an employer.

Also under EFCA, parties that are unable to reach a first collective bargaining agreement within 90 days of the commencement of bargaining could refer the dispute to mediation conducted by the Federal Mediation and Conciliation Service (FMCS). If FMCS is unable to bring the parties to agreement within 30 days, the dispute then would be referred to binding arbitration, and an arbitrator would craft a collective bargaining agreement that would be binding for two years. Under current NLRA law, there is no time limit imposed on parties bargaining a first contract, and the parties are generally free to agree to whatever terms they are able to agree upon (as long as they are not illegal).

Finally, the bill would provide for increased penalties for labor law violations by employers. Employers who illegally fire employees engaged in lawful union activities will be subject to punitive fines and increased prosecution.

The EFCA passed the House of Representatives on March 1, 2007, on a vote of 241-185. The Senate had a cloture vote (to stop a filibuster) on June 26, 2007, which failed 51-48 (60 votes are needed to enforce cloture). The bill has been reintroduced in the current Congress.

The makeup of the current Congress' U.S. Senate now includes 60 Democrats, including Independents Joseph Leiberman of Connecticut and Bernie Sanders of Vermont, who both caucus with the Democratic Party, the recent switch from the Republican Party of Arlen Spector of Pennsylvania, and Al Franken of Minnesota, who was recently sworn in after a long court fight over his slim election victory. This brings the majority to the 60 votes necessary to invoke cloture in the event there is another filibuster, assuming that all of the Democrats that initially supported the bill stay supportive, and all of the new Democratic Senators support the bill (it is assumed that the bill will easily pass in the house of Representatives).

However, due in large part to increased pressure from business interests, including lobbying by the United States Chamber of Commerce and National Association of Manufacturers, several Democrats have expressed their opposition to the bill as it is currently drafted including Senators Mark Pryor (Arkansas), Blanche Lincoln (Arkansas), Thomas Carper (Delaware), Dianne Feinstein (California), Ben Nelson (Nebraska), Michael Bennet (Colorado), and Mark Udall (Colorado). Further, now Democratic Senator Arlen Spector (the only Republican who originally voted to bring the bill to the Senate for a vote) has expressed his opposition to the bill as drafted.

We will continue to monitor the legislation and any amendments or compromises to the legislation that are introduced. Visit our website: millercanfield.com.

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(the time period varies by state; in Michigan, it's 300 days) of when an employer makes a decision to set a discriminatory pay rate. According to the Court's decision, the employee's regular receipt of paychecks thereafter, with the discriminatory rate of pay in them, did not give the employee a new 300-day time period to file a complaint after each check.

The new law reverses the Supreme Court's May 2007 decision. Now, a limitations period starts to run when a discriminatory pay decision is made, when the employee learns about it, or whenever the employee receives a paycheck containing discriminatory pay. The law is retroactive to May 2007 and applies to any pay discrimination claims filed since then and now pending.

Though President Obama's signing of this law received significant national media attention, it has more political than legal significance for employers already in compliance with the law.

Discrimination — paying less because of race, gender, national origin, or disability — was against the law before, and it still is.

Employers who pay employees of different genders different rates for the same work, must still be able to show that the disparity is unrelated to the employee's gender (or race, etc.) or run the risk of liability for the pay discrepancy. And the new law does not change the amount of back pay an employee can recover if she were to prevail in a pay discrimination action. Existing law caps an employee's recovery to two years of back pay in such cases. Ledbetter law does not change that cap.

Given the political attention being paid to this issue, employers are wise to review any pay discrepancies that otherwise happen to affect employees of different genders, races, etc., to determine the legitimacy of the pay rates. Employers who are presently defending against pay discrimination claims where the Ledbetter Supreme Court decision provided a basis for defense will need to recalculate risk and potential liability. Call us if you'd like some help.

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