



**CAMBRIDGE**  
PROPERTY & CASUALTY

**DO NOT LET THE NEW ADA LEGISLATION DISABLE YOUR BUSINESS:  
SETTING PROPER LIMITS ON EMPLOYMENT PRACTICES  
LIABILITY POLICES CAN PROTECT YOU**

The Americans with Disabilities Act (“ADA”) prohibits employers from discriminating against qualified individuals based on their disabilities and requires employers to provide reasonable accommodations to enable an individual with a disability to meet qualification standards or to perform an essential function of the job.

On September 25, 2008, the President signed the Americans with Disabilities Act Amendments Act of 2008 (the “Amendments” or “ADAAA”). These Amendments expand the interpretation of the ADA’s coverage and broaden the number of people who are considered “disabled” under the ADA.

This means that effective January 1, 2009, it will be easier for employees to bring ADA discrimination claims against their employers.

**Effective January 1, 2009, the ADA Amendments Act will make it easier for employees to bring ADA discrimination claims against their employers.**

**I. Does the ADA Apply to My Business?**

The Amendments covers all private employers, state and local governments, and educational institutions that employ 15 or more individuals.

**II. Who Does the ADA Protect?**

Under the ADA, workers must satisfy a three-part test before they are entitled to the benefits and protection of the act:

1. The employee must demonstrate that *he or she has a physical or mental impairment*;
2. The employee must establish that *his or her impairment substantially limits a major life activity*; and
3. The employee must establish that even with the disability, *he or she can perform the essential functions of the job, with or without reasonable accommodation*.

**III. What are the Implications of the Amendments?**

While the Amendments do not change the current three-part test for disability, they do reject specific Supreme Court interpretations of the ADA which have previously resulted in pro-employer decisions. Essentially, the Amendments reverse those effects.

**The Amendments reject specific Supreme Court interpretations of the ADA which previously resulted in pro-employer decisions and reverses those effects.**

In rejecting these decisions, the Amendments specifically adopt a broad standard to determine if someone is disabled. In short, the Amendments now allow for the following:

- The new definition of “*substantially limits*” increases the number of individuals who will meet the threshold of the disability test.
- The extensive list of tasks which constitute a major life activity have broadened the definition of disability.
- Episodic impairments or impairments that are in remission are now considered a disability whereas previously they were not.
- The ameliorative effects of mitigating measures, such as the effects of medication, are no longer used to determine whether a disability exists.
- An individual no longer has to establish that his or her impairment limits or is perceived to limit a major life activity in order to be “regarded as being disabled.”

A. The Amendments now incorporate a new definition of “*Substantially Limits*” which increases the number of individuals who will meet the threshold for a recognized disability.

The Amendments provides that the term “substantially limits” must be interpreted consistently with the “findings and purposes” of the Act. This requires an interpretation that favors broad coverage of individuals under the ADA to the maximum extent permitted by the terms of the Act.

**“Substantially limits” requires an interpretation that favors broad coverage of individuals under the ADA to the maximum extent permitted by the terms of the Act.**

Specifically, the Amendments reject the standard created by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc v. Williams* citing that the standard set for demonstrating that an impairment “substantially limits” a major life activity is inappropriately high and shifts too much focus from whether the employer has complied with ADA regulations to whether the individual has a disability.

As a result, the Amendments explicitly state that the definition of “disability” now includes an impairment that substantially limits one or more major life activities. An impairment that substantially limits *only one* major life activity need not limit others in order to be considered a disability.

**The definition of disability now includes an impairment that substantially limits *only one* major life activity.**

Accordingly, the Amendments further define “substantially limits” as meaning “materially restricts,” a much lower threshold.

These definitions, along with the list of general and specific requirements found in the “findings and purposes” section of the act, means that more ADA cases are going to pass initial threshold tests whereas previously they would have been dismissed.

**More ADA cases are going to pass initial threshold tests whereas previously they would have been dismissed.**

- B. The Amendments incorporate an extensive list of tasks which are now recognized as major life activities thus broadening the definition of a disability.

Prior to the Amendments, the ADA was silent on what constituted a “major life activity,” leaving the issue for courts to decide on a case-by-case basis. Now, the Amendments expand the definition of a major life activity by laying out a non-exhaustive, laundry list of activities which include everything from thinking and concentrating to eating and working.

Additionally, the operation of any major bodily function is now considered a major life activity and the Amendments specifically identify digestive, bowel, bladder, brain and reproductive functions as such examples.

The inclusion of this list indicates that the definition of “disability” is going to be considered in the broadest sense, and that the courts will have far less discretion in deciding what constitutes a “major life activity.”

- C. The Amendments now allow of episodic impairments and impairments that are in remission to be included as a qualifying disability.

In expanding the definition of “disability” the Amendments have now allow for a number of impairments that did not previously qualify under the ADA. The Amendments

specifically provides that “an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”

**“An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”**

This is a significant departure from how the courts previously interpreted the ADA. Previously, many individuals who suffered from mental illnesses were denied protection under the ADA because their impairments are episodic. The Amendments now ensure that these individuals would be granted protection from discrimination based on their illnesses.

- D. A disability will no longer be determined with reference to the ameliorative effects of mitigating measures.

Another significant change instituted by the new Amendments is that any measure a person takes to control the effects of a disability cannot be held against them in determining whether they meet the disability threshold test. Formerly, many individuals were denied protection under the ADA because the effects of their disabilities could be controlled by medication, therapy or other measures.

The Amendments now specifically reject the Supreme Court’s decision in *Sutton v. United Air Lines* which held that whether one has a disability should be determined in light of mitigating measures such as eyeglasses or medications. This holding meant that an individual who suffered from seizures without medication was not

considered “disabled” if medication would prevent them.

The Amendments now provide that people with disabilities will not lose their ADA protection simply because their condition may be treatable with medication or assistive technology. However, an exception still remains for the mitigating ameliorative effects of ordinary eyeglasses. A court may still consider an individual’s ability to see as corrected by eyeglasses in determining whether the individual is “disabled.”

**The Amendments provide that people with disabilities will not lose their ADA protection simply because their condition may be treatable with medication or assistive technology.**

- E. An individual no longer needs to establish that his or her impairment limits or is perceived to limit a major life activity to be “regarded as being disabled.”

Lastly, the ADA has always prohibited discrimination where the individual has a record of an impairment or is being regarded as having an impairment.

Under the former law, to be “regarded as having an impairment” the individual had to prove that his impairment actually limited or was perceived to limit a major life activity.

The Amendments now require only that an individual show that the employer perceived the individual as having a mental or physical impairment, regardless of whether the

employer also perceived that impairment as limiting a major life activity.

If, however, the perceived impairment is minor and transitory (meaning it would last six months or less), it will not be enough to meet the definition of disability for “regarded as being disabled.”

Quite simply, the new Amendments mean that it is easier for employees to establish a disability under the law and therefore, it will be easier for employees to sue their employer under the ADA.

#### **IV. What Happens When an Employee Files a Disability Discrimination Charge?**

An employee must first file a charge with the EEOC before filing a complaint alleging an ADA violation against the employer.

Employees (or the EEOC) can sue for lost wages, benefits, reinstatement, and attorneys’ fees. An employer may also be liable for capped compensatory damages as well as punitive damages if the court finds that the discrimination was intentional.

**Employees (or the EEOC) can sue for lost wages, benefits, reinstatement, and attorneys’ fees.**

Defending against ADA discrimination charges is similar to many other types of discrimination claims. Once the employee meets the threshold of showing both a disability and an adverse employment action, the employer will have the burden to prove that there was a legitimate, non-discriminatory reason for its decision.

## V. How Can I Protect My Business?

It is a fact that employment practices liability (EPL) lawsuits constitute the most common type of liability lawsuit today. Once a claim is initiated it is difficult to stop the financial devastation.

Employment practices liability insurance (“EPLI”) is designed to protect employers against claims by their employees alleging that the employer has violated some part of the employment contract implied in the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act of 1964 (Title VII), and so forth.

Such claims usually involve harassment or discrimination, but might also include wrongful termination, improper treatment, wrongful infliction of emotional distress, or any other alleged violation of the employment contract.

The insuring agreement for the standard EPLI insurance policy provides, in relevant part, as follows:

“We will pay those sums the insured becomes legally obligated to pay as damages resulting from a "wrongful act" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. ...”

The policy defines a “Wrongful Act” to include a wide variety of allegations, namely:

J. “Wrongful act” means one or more of the following offenses, but only when they are employment-related:

1. Wrongful demotion or failure to promote, negative evaluation, reassignment, or discipline of your current “employee” or wrongful refusal to employ;
2. Wrongful termination, meaning the actual or constructive termination of an “employee”:
  - a. In violation or breach of applicable

law or public policy; or

- b. Which is determined to be in violation of a contract or agreement, other than any employment contract or agreement, whether written, oral or implied, which stipulates financial consideration if such financial consideration is due as the result of a breach of the contract;
3. Wrongful denial of training, wrongful deprivation of career opportunity, or breach of employment contract;
4. Negligent hiring or supervision which results in any of the other offenses listed in this definition;
5. Retaliatory action against an “employee” because the “employee” has:
  - a. Declined to perform an illegal or unethical act;
  - b. Filed a complaint with a governmental authority or a “suit” against you or any other insured in which damages are claimed;
  - c. Testified against you or any other insured at a legal proceeding; or
  - d. Notified a proper authority of any aspect of your business operation which is illegal;
6. Coercing an “employee” to commit an unlawful act or omission within the scope of that person’s employment;
7. Harassment;
8. Libel, slander, invasion of privacy, defamation or humiliation; or
9. Verbal, physical, mental or emotional abuse arising from “discrimination.”

An organization that maintains EPLI insurance would generally be covered for claims brought pursuant to the American Disability Act or any of its Amendments.

## VI. Conclusion

Considering the recently relaxed standards to the ADA, employers are more vulnerable than ever to lawsuits alleging discrimination or wrongful discharge. With this in mind, we recommend that all organizations maintain high limits of EPLI coverage.