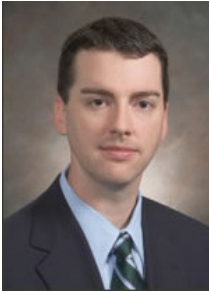


## House of Representatives Seeks to Expand ADA Protection

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On June 25, 2008, the House of Representatives overwhelmingly approved legislation to amend the Americans with Disabilities Act ("ADA"). The legislation, known as the ADA Restoration Act, or H.R. 3195, is intended to strengthen and expand the protections of the ADA, which the House views as having been diminished through judicial review and interpretation.

As currently drafted, the ADA prohibits discrimination against people with disabilities in employment, transportation, public accommodation, communications, and governmental activities and applies to employers with 15 or more employees. The ADA ensures equal opportunity in selecting, testing, and hiring qualified applicants with disabilities; job accommodation for applicants and workers with disabilities when such accommodations would not impose undue hardship; and equal opportunity in promotion and benefits. Additionally, the ADA currently defines disability as: (1) a person who has a physical or mental impairment that substantially limits one or more major life activities, (2) a person with a record of a physical or mental impairment that substantially limits one or more major life activities, and (3) a person who is regarded as having a physical or mental impairment that substantially limits one or more major life activities.

Although the ADA Restoration Act retains the requirement that a disability must substantially limit one or more major life activities, the purpose of the bill is to carry out the ADA's original objectives of providing "a clear and comprehensive national mandate for the elimination of discrimination" and "clear, strong, consistent, enforceable standards addressing discrimination" through the reinstatement of a broad scope of protection to be available under the ADA; to eliminate the judicial requirement that a disability determination is made without consideration of the ameliorative effects of mitigating measures; to eliminate the judicial requirements that the terms "substantially" and "major" in the definition of disability should be strictly interpreted as a demanding standard for qualifying as disabled and that an individual must be severely restricted from doing activities that are of central importance to most people's daily lives; and to redefine the definition of "substantially limits" in an ADA analysis.

Additionally, the term "substantially limits" will be changed to "materially restricts", which is currently undefined and without clarification. Further, current ADA legislation permits a determination of whether an impairment substantially limits a major life activity to be made with regard to the ameliorative effects of mitigating measures such as medication, medical supplies, equipment, appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies; use of assistive technology; reasonable accommodations or auxiliary aids or services; or learned behavioral or adaptive neurological modifications. However, the proposed legislation would not permit such considerations. As with the current ADA analysis, the proposed legislation will continue the consideration of mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether impairment substantially limits a major life activity.

The proposed legislation also expands the definition of a person who is regarded as having a physical or mental impairment that substantially limits one or more major life activities. The bill details 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. However, the "regard as" analysis does not apply to impairments that are transitory and minor, which is impairment with an actual or expected duration of 6 months or less.

It is anticipated that the ADA Restoration Act will become effective January 1, 2009. Of course, the proposed legislation still must be debated by the Senate and ultimately signed into law. If the proposed legislation passes the Senate and is signed into law as currently drafted, the ambiguity of the language and definitions will certainly create interpretation and administration turmoil for human resources professionals and potentially open the floodgates of additional litigation.