

The newly expanded Americans with Disability Act

Are you ready? *By Peter B. Maretz*

Signed into law in September of this year, The ADA Amendments Act of 2008 (the Act) takes effect on Jan. 1, 2009. Here is what the new law provides and what you can do to ensure you are ready for it.

The Act overturns recent U.S. Supreme Court decisions narrowing the definition of “disabled.” The new law no longer requires an impairment to be a severe restriction on a major life activity to be entitled to protection. Rather, any impairment presenting more than a nominal restriction will suffice. Moreover, the Act expands the nonexhaustive list of “major life activities” to include activities not previously listed including reading, bending and communicating.

Virtually all mitigating measures are eliminated from consideration. As such, you must assess whether an individual has a disability without considering the impact of such things as medication or assistive devices. The one exception to this is if the employee has a visual impairment that can be corrected with glasses or contacts, that employee is not considered disabled.

Conditions, such as cancer, diabetes or epilepsy, that are in remission or episodic may constitute a qualifying disability if they substantially limit a major life activity when the condition is active.

Finally, an employee may be considered “disabled” under the Act if you, as the employer, consider the employee disabled, even if that person is not.

What’s the bottom line? With the Act, many more people will be entitled to



protection under the ADA. To prepare, make sure you have written policies in place that accurately reflect the newly expanded law. Educate your managers and supervisors on the Act, and particularly to avoid “regarding” someone as disabled who is not otherwise considered disabled under the law. Engage in the interactive discourse with employees presenting with disabilities potentially entitled to protection to identify what accommodations are called for, making sure to disregard assistive devices other than glasses or contacts. Lastly, consult your employment counsel with any questions.

Meal break update

In last month’s *Legal Alert*, I reported on the *Brinker v. Superior Court* appellate decision, which, among other things, held that under the Labor Code and governing Wage Orders, an employer need not ensure its employees take their meal breaks. Rather, the employer need only provide the break, free employees of all duties to enable the break and not discourage the employees from taking their break. Since going to press last month, the Supreme Court accepted *Brinker* for review meaning *Brinker* can no longer be relied upon for that point of law. Subsequently, however, another appellate decision issued — *Brinkley v. Public Storage* — which held, consistent with *Brinker*, that an employer need only provide meal breaks but not ensure its employees take them.

It’s likely the plaintiffs in *Brinkley* will seek review by the Supreme Court, and there is a reasonable likelihood the Supreme Court will accept it as a companion to *Brinker*. Stay tuned!



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