

CHANGES TO THE AMERICANS WITH DISABILITIES ACT (“ADA”) IMMINENT

On September 11, 2008, the Senate unanimously passed the ADA Amendments Act of 2008 (“Act”). The House of Representatives passed the Senate-approved version of the Act on September 17, 2008 and forwarded it to President Bush for his signature. The Act had 77 co-sponsors in the Senate and a similar bill had 255 co-sponsors in the House of Representatives. In keeping with this overwhelming support, President Bush signed the Act on September 25, 2008.

The Act will overturn several Supreme Court decisions that have narrowed the ADA and benefits provided to those considered disabled thereunder. For instance, the Act would reject the requirement contained in *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1991), and its companion cases that require consideration of the effects of mitigating measures in determining whether an impairment substantially limits a major life activity. With the exception of ordinary eyeglasses or contacts, the effects of mitigating measures, such as medication, equipment, prosthetics, hearing aids, mobility devices, assistive technology, auxiliary aids or services, and learned behavioral or adaptive neurological modifications, will no longer be considered in deciding whether an impairment substantially limits a major life activity.

Similarly reversed will be the Supreme Court decision in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 1984 (2002), that required the terms “substantially” and “major” in the definition of disability to be “interpreted strictly to create a demanding standard for qualifying as disabled,” and required that to be deemed substantially limited in performing a major life activity under the ADA “an individual must have had impairments that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives.”

The reasoning of the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), will be reinstated by the Act with regard to coverage under the third prong of the definition of disability, *i.e.*, being regarded as having a physical or mental impairment. The *Arline* decision held that someone would satisfy the requirements of being regarded as having an impairment if the individual established that he or she had been subjected to an action prohibited under the ADA because of an actual or perceived mental or physical impairment, regardless of whether the impairment limits or is perceived to limit a major life activity. This further rejects the Supreme Court’s reasoning in *Sutton v. United Airlines, Inc.*, *supra*.

The Act will also provide a new definition of “substantially limits” that indicates Congress’ intent to depart from the strict and demanding standard applied by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, *supra*, and numerous lower courts by indicating that “substantially limits” means “materially restricts.” In addition, the Act enunciates Congress’ intent to reinstate a broad scope of protection available to individuals under the ADA.

The changes to the ADA discussed above will be effective January 1, 2009. As a result, employers should start to consider the impact of these new provisions and whether changes will be required with respect to an employer’s workforce. An increasing number of requests for accommodations are expected and it will now be harder for an employer to take the position that an employee is not substantially limited in a major life activity and not disabled under the ADA. Employers should be thoughtful about their responses to these requests and expect to engage in the interactive process with an increasing number of employees. If you have any questions about the Act or how it may impact your policies, practices and procedures, please contact a member of Koley Jessen’s Employment, Labor and Benefits Group.

VOTING LEAVE

In anticipation of the upcoming elections, employers should confirm whether applicable state law entitles employees to voting leave. For example, Nebraska requires that employers permit employees who do not have two hours of nonworking time between the opening and closing of the polls (currently 8:00 a.m. and 8:00 p.m.) to take two consecutive hours of paid time off to vote. Iowa law requires that employers permit employees who do not have three consecutive hours of nonworking time between the opening and closing of the polls (currently 7:00 a.m. and 9:00 p.m.) to take three consecutive hours of paid time off in which to vote. Under both Nebraska and Iowa law, employers may require that employees apply for voting leave prior to election day and can specify the period of time the employee may be absent. If you have questions about voting leave laws, please contact a member of Koley Jessen’s Employment, Labor and Benefits Group.

The Koley Jessen Employment, Labor and Benefits Group:

Margaret C. Hershiser

402.343.3711

margaret.hershiser@koleyjessen.com

Julie A. Schultz

402.343.3766

julie.schultz@koleyjessen.com

Leilani M. Harbeck

402.343.3767

leilani.harbeck@koleyjessen.com

Joan M. Cannon

402.343.3753

joan.cannon@koleyjessen.com

Richard D. Vroman

402.343.3810

richard.vroman@koleyjessen.com

Ryan J. Sevcik

402.343.3859

ryan.sevcik@koleyjessen.com