LEGAL ISSUES SUMMARY
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HOW THE NEW ADA AMENDMENTS IMPACT ASSISTED LIVING AND NURSING HOME WORKPLACE POLICIES AND PRACTICES

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For more information about Lane Powell, go to [www.lanepowell.com](http://www.lanepowell.com)
I. EXECUTIVE SUMMARY

On September 25, 2008, President Bush signed Senate Bill 3406, the “ADA Amendments Act,” into law. The changes to the ADA set forth in the Amendments went into effect on January 1, 2009. Although the Amendments do not affect which businesses are covered by the ADA, they do affect which persons may be entitled to protection and reasonable accommodation under the Act. The Amendments expand the definition of “disability” and prohibit the consideration of mitigating or ameliorative measures in determining whether an individual is disabled under the Act. The primary changes to the ADA brought about by the Amendments are:

1. Before January 1, 2009, an employee with an episodic impairment very likely would not have been covered under the ADA. The Amendments change that analysis by broadening the definition of disability to include episodic conditions or conditions in remission. Specifically, the Amendments state that an “impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.” With this change, business will have to engage in the interactive process with - and potentially accommodate - employees who suffer from, but may not currently be experiencing, an impairment related to their health condition.

2. The Amendments also state that “An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.” In other words, if an employee’s condition impairs even a single major life activity, such as sleeping, the employee may be considered to have a disability under the Act, even if the employee can still accomplish a broad range of other major life activities like walking, talking, thinking, lifting and eating. This is a substantial change from the previous version of the ADA.

3. Unlike the prior version of the ADA, the Amendments directly prohibit businesses from considering mitigating or ameliorative measures (such as medication, prosthesis, hearing aids, etc.) when determining whether an individual is disabled. For example,
a person with a mental health disorder, such as Obsessive Compulsive Disorder, who controls the disorder with medication will likely be considered disabled under the Act. An exception to this general rule exists for “ordinary eyeglasses or contact lenses” intended to fully correct visual acuity or eliminate refractive error. Again, this is a significant change from the previous version of the ADA, where employers could consider mitigating measures when assessing whether employees had a disability, as defined in the Act.

4. The Amendments state that an individual is “regarded as disabled” if the individual “establishes that he or she has been subjected to an action prohibited under the 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.” In other words, an employee may state a claim under the ADA if he or she was only regarded by the employer as having an impairment, even if the employer did not regard such impairment as a “disability” under the ADA and the impairment was not, in fact, a “disability” under the ADA. The only exception is that a person is not “regarded as disabled” for impairments that are transitory and minor in nature (i.e., impairments that last or are expected to last six months or less).

II. THE EFFECTS OF THE ADA AMENDMENTS ON THE ASSISTED LIVING AND NURSING HOME WORKPLACE

Certain aspects of the ADA remain unaffected by the Amendments. The ADA still prohibits a covered employer from discriminating against a qualified individual with a “disability.” Even under the amended ADA, it remains unlawful to:

- Discriminate against individuals with disabilities in terms of job application procedures, hiring, firing, training, advancement or compensation or with respect to any other terms, conditions, or privileges of employment;
- Refuse reasonable accommodation to the known physical or mental limitations caused by a disability;
- Discriminate against an individual because that person has a relationship or association with an individual with a disability;
• Harass someone because of a disability or because of his or her association with a disabled person; or

• Retaliate against an employee with a disability because he or she has informed the employer of a disability and/or requested an accommodation.

In addition, an employer may not limit, segregate, or classify a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee.

A. **Who Is A Covered Employer Under the ADA?**

As noted, the ADA amendments did not change the definition of “covered employer.” Your company is a “covered employer” for purposes of the ADA if it employed 15 or more persons who worked every working day for a 20-week period during this calendar year or the last calendar year. In other words, if you were a covered employer before the Amendments, you are likely a covered employer now, barring a change in your workforce.

B. **Who Is a “Qualified Individual” Under the ADA?**

Significantly for employers, the ADA Amendments also do not affect the requirement that a person with a disability be “otherwise qualified” to perform the essential functions of the job. As before, under the revised ADA, a person is a qualified individual if he or she can perform the essential functions of the job, with or without a reasonable accommodation.

1. **The definition of “essential functions” has not changed.**

A job function is essential if it is highly specialized, or there are a limited number of employees to perform that function, or the function is one of the purposes of the job position. An employer’s job description may help to determine what the essential functions of a particular job are. Examples of essential functions may include being able to lift a resident in and out of bed if you are seeking employment as a primary caregiver in an assisted living facility or nursing home or being able to hear and talk on the telephone if you are seeking employment as a receptionist in such a facility.

2. **The duty to provide reasonable accommodations has not changed. However, when accommodations are necessary may be affected by the Amendments.**
The ADA amendments have also not affected the definition of reasonable accommodation or the duty to provide reasonable accommodation to an “otherwise qualified” employee or applicant. Under the ADA, a reasonable accommodation is an adjustment to the job environment that enables a person with a disability to perform the essential functions of a job or to be considered for a job. As was the case prior to the Amendments, an employer must provide a reasonable accommodation if a person with a disability needs one in order to apply for a job, perform a job, or enjoy benefits equal to those offered to other employees. Reasonable accommodations may include:

- Making facilities accessible
- Restructuring job duties (e.g. redistributing “non-essential” tasks)
- Acquiring or modifying equipment and tools
- Modifying work schedules so an employee can make a doctor’s appointment
- Reassigning to a vacant position (not promotion or creation of a new job)
- Modifying training materials
- Allowing regularly scheduled breaks during the work day for an employee with diabetes, so that the employee can eat properly and monitor blood sugar and insulin levels
- Providing readers or interpreters (a person to read information posted on a bulletin board to a blind employee; a sign language interpreter during the job interview, for an applicant who has a hearing impairment)

For example, if lifting residents is an essential function of a caregiver’s job, a reasonable accommodation may include providing a device that can assist the caregiver with the lifting function. Of course, what accommodation is needed or required will vary depending upon the needs of the individual applicant or employee. Notably, not all people with disabilities (or even all people with the same disability) will require the same accommodation. Accordingly, it is important for employers to engage in an interactive process with an employee with a disability to determine what, if any, reasonable accommodation should be provided.

C. Amendments Significantly Affect What Constitutes a “Disability” Under the ADA.

The basic three-part definition of disability has not been affected by the ADA Amendments. Under the ADA, a disability is still generally defined as:

- a physical or mental impairment that substantially limits a major life activity;
- a record of such impairment; or
• being regarded as having such an impairment.

To date, there appears to be no change to the “record of impairment” portion of the definition of disability. Accordingly, employers can expect that if an employee has a recorded history of having an impairment with a “substantially limiting” effect on a “major life activity,” that person will be considered disabled under the ADA. What has changed is the meaning of certain words within this definition, such as “substantially limits,” “major life activity,” and “regarded as.”

1. Physical or mental impairments now include conditions that are episodic or in remission, so long as they “substantially limit” a “major life activity” when active.

Federal regulations interpreting the ADA define a physical impairment as any physiological disorder or condition, cosmetic disfigurement, or anatomical loss that affects one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine. This is a broad definition that will very likely remain the same under the ADA Amendments. Similarly, federal regulations define a mental impairment as mental or psychological disorders such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. These regulations clarify that common personality traits like poor judgment, a quick temper, or inability to get along with employees of a specific gender or ethnicity, are not impairments when they are not the result of a mental or physiological disorder. However, stress and depression may be mental impairments where they result from a documented physiological or mental disorder.

What has changed under the ADA is that a physical or mental impairment will still qualify as a “disability” if the impairment is episodic or if it is in remission. Accordingly, a person with epilepsy will likely be considered disabled under the Act when not having an epileptic episode or if the condition is in remission. As mentioned above, this new definition may prove problematic for employers because it will be difficult to know what reasonable accommodations may be needed for a condition that is episodic or in remission, or when such
accommodations will be required. At the very least, however, employers should engage in an interactive process with the employee to determine whether an accommodation is needed. And, of course, employers may not discriminate against or harass an employee with an impairment that is either episodic or in remission.

2. “Substantially limits”: a low threshold that cannot include mitigating measures.

The Amendments specifically state that the term “substantially limits” must be interpreted “consistently with the findings and purposes” of the Act. In other words, the term “substantially limits” is far broader than before. First, unlike the prior ADA, an impairment need only “substantially limit” one major life activity in order for the individual to be considered disabled. For example, if an employee with carpal tunnel syndrome is unable to type for long periods but can still brush her teeth, the carpal tunnel syndrome likely “substantially limits” a major life activity.

Second, and most significantly, mitigating or ameliorative measures cannot be considered when determining whether impairment substantially limits a major life activity. There is only one exception to this prohibition: employers may consider the mitigation or ameliorative effects of “ordinary” eye glasses or contact lenses in determining whether a condition has a substantially limiting effect on a major life activity. The Amendments do not define what “ordinary” glasses or contact lenses may include. For practical purposes, however, it appears that people with typical vision impairments who use glasses or contacts will not be considered “disabled” under the Act. Otherwise, mitigating or ameliorative measures include, but may not be limited to:

- medication, medical supplies, equipment, or 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.
For example, if a resident caregiver has Obsessive Compulsive Disorder that is controlled by medication or therapeutic meditation (a “learned behavior”), that employee is considered disabled under the Act and cannot be discriminated against or harassed. That employee may also need a reasonable accommodation; accordingly, best practice dictates that the employer engage in the interactive process with the employee.

Finally, the U.S. House of Representatives Committee on Education & Labor Committee Report ("Committee Report"), to which courts may or may not give deference, further clarifies that an employer must compare the individual claiming disability with “most people” and not, as some courts had previously adopted, to someone in the same demographics as the claimant (e.g., age, gender).

3. “Major life activities” are defined and expanded.

The prior version of the ADA did not list specific “major life activities,” giving rise to a myriad of conflicts over what activities were considered “major life activities.” One of the more confusing issues was whether someone with a medical condition that only affected internal functions would be covered. For example, some conditions such as gastrointestinal disorders, cancer, sleep disorders, and heart disease may affect only bodily functions without producing any outward limitations. Whether such circumstances qualified a person as “disabled” under the Act was a point of much debate. The Amendments resolve this conflict, however, specifically stating that bodily functions are indeed major life activities.

Under the Amendments, “major life activities” include, but are not limited to:

- caring for oneself;
- performing manual tasks;
- seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, or breathing; and
- learning, reading, concentrating, thinking, communicating, and working.

Under the language in the Amendments Act, bodily functions can include, but are not limited to:

- functions of the immune system;
- normal cell growth;
• digestive functions, and;
• bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

Notably, both of these lists are non-exhaustive and provide only examples of what may be considered a “major life activity.” Indeed, the Committee Report explains that “major life activities” would include an even broader range of activities such as “interacting with others, writing, engaging in sexual activities, drinking, chewing, swallowing, reaching, and applying fine motor coordination.” Accordingly, and considering the intent of the Act to cover a broad range of people, although “major” life activities that are not specifically included in the Amendments may still be debated in courts, it is likely that nearly any life activity that one performs on a regular basis may be considered a “major” life activity.

4. “Regarded As” Includes Actual or Perceived Physical or Mental Impairments.

Congress broadened coverage under the “regarded as” part of the definition to help address prejudice, antiquated attitudes, and the failure to remove societal and institutional barriers that exist for people with physical or mental impairments. Under the new ADA, a person will meet the “regarded as” definition if he or she can establish that:

• he or she has been subjected to an action prohibited under the 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.

Clearly, the Amendments make the “regarded as” definition quite broad. To be covered, an individual need only establish that he or she was discriminated against because of a medical condition, regardless of whether he or she actually has an impairment or whether the employer just thought that he or she did. Moreover, an employee claiming protection under the “regarded as” portion of the disability definition does not have to show that he or she was “substantially limited” in a major life activity. Indeed, this makes sense: the employee may not be substantially limited if the employer only thought the employee had impairment.

One exception to this definition does exist, however. Impairments that are (i) transitory (in other words, those lasting or expected to last six (6) months or less) and (ii) minor are not
covered under the “regarded as” definition. However, impairments that are transitory or minor—
but not both—may be covered. In addition, it is important to note that the Committee Report
specifically states that the six-month rule does not apply to actual and “record of” disability
cases. Accordingly, if an employee or applicant in fact has an impairment lasting several months
(but not six months), that person may still be covered. Likewise, if an employee or applicant has
a record of an impairment lasting several months, that person may be covered by the ADA.

III. WHERE DO EMPLOYERS OPERATING ASSISTED LIVING
FACILITIES AND NURSING HOMES GO FROM HERE?

From a practical standpoint, it is likely that the changes to the ADA will increase the total
number of people—whether employees or applicants—who are legally disabled under the law.
This will likely require assisted living facilities and nursing homes to accommodate a larger
number of employees. Significantly, the legislation may be interpreted to require employers to
engage in the interactive process with and offer reasonable accommodations to employees who
can fully perform their job duties, as long as they are taking medication or using prescribed
medical devices.

There may be a corresponding increase in lawsuits from employees who are (or claim to
be) disabled against employers that allegedly did not properly accommodate them. The
Amendments also are likely to make it more difficult for employers to get cases dismissed on
summary judgment, which, in turn, may lead to higher settlement costs to employers.

To ensure compliance with the new ADA under the Amendments Act, facilities are
count. Encouraged to:

• Review current policies and procedures to ensure compliance with the changes
  established by the Amendments. This may mean drafting new policies for your
  workforce.

• Review company job descriptions for accuracy. Although a job description is not the
  ultimate arbiter of what are an employee’s “essential functions,” it is a first step. Job
  descriptions should accurately reflect an employee’s duties and the real abilities required
  to meet those duties. Physical demands, attendance standards and requirements for
  abilities to interact with others should always be included.
• When a reasonable accommodation is requested by an employee, engage in an interactive process with the employee regardless of whether medication, aids or other mitigating measures may be available to them.

• If an employee or applicant demonstrates a physical or mental impairment that would limit his or her ability to request an accommodation, initiate an informal interactive process to accommodate the individual.

• Remember that the interactive process is ongoing. Do not assume because an employee is in remission or seems to be doing fine that you can stop engaging with them.

• If you find yourself in a questionable situation concerning whether an individual is disabled, whether and what accommodation should be provided, or any employment action for an employee with an impairment, please consult counsel before taking any action.