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

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ADAAA EFFECTIVE DATE

*The Americans With Disabilities Act Amendments Act became effective on January 1, 2009

*Courts who have addressed the ADAAA to date have consistently held that the Act is not retroactive, meaning that the Amendments will not apply to employment or accommodation decisions made by facilities prior to January 1, 2009
ADA GENERALLY

- ADA still prohibits a covered employer from discriminating against a qualified individual with a disability by:
  - Discriminating against or harassing a person with a disability
  - Discriminating against or harassing an individual because of his or her association with a person with a disability
  - Refusing to reasonably accommodate a person with a disability
  - Retaliating against a person with a disability who has informed the employer of the disability or requested accommodation
Who is Covered?

For employers of 15 or more employees, ADA covers all employees and applicants who:

- Have a physical or mental impairment that substantially limits a major life activity;
- Have a “record of” such impairment; or
- Are “regarded as” having such impairment

Note: There is no waiting period for coverage
Reasonable Accommodation

Employers are still required to provide reasonable accommodations to individuals with a disability who are otherwise qualified and can perform the essential functions of the position with or without a reasonable accommodation.

*Make sure job descriptions accurately describe the essential functions of a position (e.g., lifting residents).

*Accommodations are always case specific and require the employer and employee to engage in an ongoing interactive process to determine whether a reasonable accommodation is needed and can be provided.

*As discussed herein, the Amendments expanded the definition of disability, thereby expanding the scope of individuals who must be reasonably accommodated.
ADA Amendments Act: New Findings

- Adds findings aimed at a broader scope:
  - Physical or mental disabilities do not diminish right to fully participate in all aspects of society, yet people have been precluded from doing so because of discrimination
  - Individuals who have a “record of” a disability or are “regarded as” having a disability have also been subjected to discrimination
ADA Amendments Act: Broad Rule of Construction

The Act provides that the definition of “disability” shall be construed “in favor of broad coverage of individuals . . . to the maximum extent permitted . . .”

Although it may have little practical meaning, this rule of construction signals courts to err on the side of employees in interpreting the Act.
ADA Amendments Act: Changes Regarding “Impairments”

Covered Impairments Still Include:
*broad list of physical impairments
*broad list of mental impairments (but not common personality traits like poor judgment or a quick temper when they are not the result of a mental or physiological disorder)

NOW Covered Impairments Also Include:
*impairments that are “episodic or in remission” if they would substantially limit a major life activity when active
*e.g., cancer in remission; lupus that “flares up” on occasion
*unclear whether or how courts will require employers to accommodate conditions that are “episodic or in remission” but are not active
ADA Amendments Act: Changes Regarding “Substantially Limits”

Amendments require term “Substantially Limits” to be interpreted “consistently with the findings and purposes” of the Act.

This may signal courts to interpret the term “substantially limits” more broadly than before.
ADA Amendments Act: Changes Regarding “Substantially Limits”

**NOW:** impairment need only “substantially limit” one major life activity (and the activity need not be work-related)

- e.g., you may not need to provide reasonable accommodation for employee whose carpal tunnel syndrome only prevents her from brushing her teeth, but she will be considered “disabled” meaning that you cannot discriminate against or harass her because of this disability
ADA Amendments Act: Changes Regarding “Substantially Limits”

- **NOW:** mitigating or ameliorative measures cannot be considered when determining whether impairment substantially limits one major life activity

- **EXCEPTION:** “ordinary” eye glasses/contacts that fully correct vision

  - e.g., employee who has severe sight limitations that are only partially corrected by eye glasses will be considered “disabled” even if his sight with glasses is near perfect
ADA Amendments Act: Changes Regarding “Mitigating Measures”

Mitigating measures to be ignored include:

- medication, medical supplies, equipment, appliances, prosthetics, hearing aids, mobility devices, oxygen therapy equipment

Mitigating measures to be ignored also include:

- interpreters, readers, acquisition or modification of devices, reasonable accommodations and auxiliary aids or services
ADA Amendments Act: Changes Regarding “Regarded As”

- **NOW:** Person may be “regarded as” disabled even where actual or perceived disability does not limit a major life activity.

- **EXCEPTION:** Person not “regarded as” disabled where actual or perceived disability is transitory and minor.
  - Conditions lasting or expected to last six months or less.
  - House Committee Report states that six-month rule does not apply to actual and “record of” disability cases.

- **EXCEPTION:** There is no need to accommodate a “regarded as” disability if the employee is not otherwise disabled.
ADA Amendments Act: New Definition of “Major Life Activities”

- Prior ADA did not list specific “major life activities”

- “Major life activities” now include, *inter alia*, reading, lifting, bending, learning, concentrating and communicating

- “Major life activities” now also include major bodily functions such as: functions of the immune system, normal cell growth; also, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions
ADA Amendments Act: New Definition of “Major Life Activities”

- Lists are non-exhaustive

- House 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
  - Applying fine motor coordination
CONCLUSION

The Amendments are certain to increase the total number of employees who are “disabled” under the ADA.

This will require assisted living facilities and nursing homes to potentially accommodate a larger number of employees.

- E.g., may require facilities to engage in the interactive process with and offer reasonable accommodations to employees who can perform essential functions as long as they are taking medication or using medical devices.
What Should Facilities Do Now?

- Review current policies and procedures to ensure compliance. This may mean drafting new policies for your workforce.
- Review company job descriptions for accuracy. Physical demands, attendance standards and requirements for abilities to interact with others should always be included.
- When a reasonable accommodation is requested, engage in an interactive process with the employee regardless of whether medication, aids or other mitigating measures may be available to them.
What Should Facilities Do?

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

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

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