Common Questions & Answers About the ADA Amendments Act

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General Questions

Q: Why did Congress amend the ADA?

A: Congress amended the ADA to respond to a series of Supreme Court decisions. These decisions narrowed coverage of the ADA and many individuals – whom Congress intended to protect in drafting the ADA – were excluded from coverage. The ADAAA rejects these rulings and restores the broad coverage envisioned by the framers of the ADA.

Q: What is the goal of the ADAAA?

A: The goal of the ADAAA is to provide a clear and comprehensive national mandate for the elimination of discrimination of individuals with disabilities. It accomplishes this goal, primarily, by clarifying the definition of "disability."

The ADAAA states that one of its purposes is "to carry out the ADA's objective of providing 'a clear and comprehensive national mandate for the elimination of discrimination' and 'clear, strong, consistent, enforceable standards addressing discrimination' by reinstating a broad scope of protection . . . under the ADA." [1] In keeping with this goal, the ADAAA states that "[t]he definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act." [2]

Q: How exactly does the ADAAA change the definition of disability?

A: The ADAAA broadens the definition of disability. A rule of construction in the ADAAA requires courts to interpret the definition of disability broadly, to the maximum extent permitted by the terms of the ADA.

Before the ADAAA, courts engaged in a long, arduous process to prove that a person qualified as disabled.[3] Often, courts dismissed cases on the threshold question of disability and never reached the question of whether or not discrimination occurred. Congress rejected this approach in the ADAAA. Specifically, it redefined terms in each prong of the definition of disability and added a rule of construction requiring that the definition be construed in favor of broad coverage of individuals, consistent with the Findings and Purposes of the ADAAAA.[4] Under this generous standard for the determination of disability,

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[1] ADA Amendments Act (ADAAA), Pub. L. No. 110-325, § 2(b)(1), 122 Stat. 3553, 3555 (2008) (to be codified at 42 U.S.C. § 12101) [hereinafter ADAAA].
[2] ADAAA at §3(4)(A).
[3] While the ADAAA may not entirely prevent the investigation into the personal lives of people seeking protection from discrimination, if should afford many people a way to avoid delving into personal activities by focusing instead on the impact of their conditions on a major bodily function.
[4] ADAAA at § 3(4)(A).

"courts [are required] to focus primarily on whether discrimination has occurred or accommodations properly refused."[5]

Q: Is the ADAAA considered a civil rights law?

A: Yes! The ADAAA and the original ADA are both civil rights statutes. This means that, like other civil rights laws, Congress intends the ADA and ADAAA to be construed broadly in accordance with their remedial purposes.

The ADAAA updates the language in the ADA that prohibits discrimination, making it parallel to other civil rights statutes.[6] Specifically, the ADAAA eliminates the language prohibiting discrimination of an individual "with a disability because of a disability" and replaces it with a prohibition on "discrimination on the basis of disability."[7] As the Judiciary Report explains, "[t]his change harmonizes the ADA with other civil rights laws by focusing on whether a person who has been discriminated against has proven that the discrimination was based on a personal characteristic (disability), not on whether he or she has proven that the characteristic exists."[8] Under the ADAAA, courts should now focus primarily on whether or not discrimination occurred, not on whether or not a person meets the definition of disability. This is similar to how courts treat other civil rights statutes (for example, Title VII) and highlights the place of the ADAAA as a civil rights law.

Q: How do I qualify for coverage under the ADAAA?

A: You can meet the definition by establishing that you have (1) a physical or mental impairment that substantially limits one or more major bodily functions or major life activities; (2) a record of such an impairment; or (3) discrimination based on a perceived or actual impairment that is not both transitory and minor.

Under the ADAAA, a person can meet the definition of disability under one of three "prongs." In the first prong, a person can qualify by showing that they are substantially limited in one major bodily function (for example respiratory, neurological, or immune function) or one major life activity (for example sleeping, walking, or breathing).[9] In the second prong, a person can qualify by showing that they have a history of a physical or mental impairment that substantially limits a major bodily function or a major life activity.[10] In the third prong, a person can qualify by showing that they are regarded as disabled by being subjected to an act prohibited by the ADAAA (for example termination, demotion, or segregation) because of a perceived or actual impairment.[11]

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[5] 154 CONG. REC. S8843 (daily ed. Sept. 16, 2008) (Statement of Managers).
[6] ADAAA at §5(A).
[7] H. Rep. 110-730, at 16 (2008).
[8] H.R. Rep. 110-730, at 21 (2008).
[9] ADAAA at §3(1)(a).
[10] ADAAA at §3(1)(b).
[11] ADAAA at §3(1)(c).

Q: Does the ADAAA affect my ability to seek a reasonable accommodation?

A: Yes. The ADAAA only allows accommodations for persons who establish that their impairment qualifies as a disability under prongs 1 or 2 of the definition. This means you must have an impairment that substantially limits a major life activity or major bodily function or a record of such an impairment. If you have an impairment or record of an impairment that does not substantially limit a major life activity, you do not qualify for a reasonable accommodation. If your impairment is not both transitory and minor and you were subjected to an adverse action under the Act, you may still qualify for protection against discrimination.

It is important to note that the key difference between the first, second, and third prongs is that the third prong of the disability definition only requires that a person be treated adversely because of an impairment and does *not* require that the impairment limit or be perceived to limit a major bodily function or a major life activity.[12]

Because it is easier to qualify for protection under the third prong, people who do not need accommodations should bring their claim there. However, if individuals need an accommodation, they must bring their claim under the first or second prong because they are not entitled to accommodations under the third prong.[13]

Prong One

Q: What is the "first prong"?

A: The "first prong" - or "prong one" - refers to the first standard for determining whether someone qualifies as disabled under the ADAAA. Individuals qualifiy as disabled under the first prong if they can show they have a physical or mental impairment that substantially limits them in a major life activity or major bodily function.[14]

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[12] 154 CONG. REC. S8842 (daily ed. Sept. 16, 2008) (Statement of Managers); *see* H.R. Rep. No. 110-730, pt. 1, at 14 (2008) (Committee on Education and Labor Report); H.R. Rep. No. 110-730, pg. 2, at 18 (2008) (Committee on Education and Labor Report).
[13] H.R. Rep. No. 110-730, pt. 1, at 14 (2008) (Committee on Education and Labor Report).
[14] ADAAA § 3(1)(A).

The ADAAA maintains the same definition of "physical and mental impairments"[15] promulgated by the Equal Employment Opportunity Commission ("EEOC") and included in the Department of Justice, and Department of Education regulations.[16] "Substantially limits" is not defined with any new terms but, as explained below, the ADAAA rejects past interpretations of the term in favor of a more inclusive standard. The definition of "major life activities" is more clearly defined and expanded to include "major bodily functions."

Substantially Limits

Q: Does the ADAAA change the definition of "substantially limits"?

A: The ADAAA, like the original ADA, does not define "substantially limits" in new terms. However, the law specifically rejects past Supreme Court and agency interpretations of the term and provides that "substantially limits" should now be given a broad interpretation.

The ADAAA expressly rejects past interpretations that created a high standard for meeting the standard of "substantially limits." The Findings and Purposes of the ADAAA make clear that the Supreme Court in *Toyota*, "interpreted the term 'substantially limits' to require a greater degree of limitation than was intended by Congress."[17] Furthermore, Congress found that the EEOC regulations were "inconsistent with congressional intent, by expressing too high a standard."[18]

To guide the courts' future interpretation of "substantially limits," Congress directed the EEOC to revise its regulations, including the portion that defines the term "substantially limits" as "significantly restricted," to be consistent with the Act.[19] The ADAAA also requires that the term "substantially limits" shall be

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[15] 28 C.F.R. §36.104 ("The phrase physical or mental impairment means -- (i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; (ii) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities; (iii) The phrase physical or mental impairment includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism;(iv) The phrase physical or mental impairment does not include homosexuality or bisexuality.")

[16] 154 CONG. REC. S8841 (daily ed. Sept. 16, 2008) (Statement of Managers); H.R. Rep. No. 110-730, at 9 (2008).
[17] ADAAA at. § 2(a)(7).
[18] ADAAA at § 2(a)(8).
[19] ADAAA at § 2(b)(6).

interpreted consistently with the Findings and Purposes of the law.[20] One of the central Findings and Purposes is that Congress rejects the *Toyota* holding that the term "substantially limits" "need[s] to be interpreted strictly to create a demanding standard for qualifying as disabled."[21] The law also rejects the *Toyota* standard that to be substantially limited in performing a major life activity, "an individual must have an impairment that prevents or *severely restricts* the individual from doing activities that are of central importance to most people's daily lives."[22] Instead, the ADAAA conveys Congress' belief that *Toyota* created an "inappropriately high level of limitation necessary to obtain coverage under the ADA."[23]

To qualify as a disability, an impairment need only substantially limit <u>one</u> major life activity.[24] Multiple impairments that together substantially restrict a major life activity may also constitute a disability.[25] Throughout the analysis, the ADAAA sets a "lower standard that provides broad coverage," so that "the burden of showing that an impairment limits one's ability to perform common activities is not onerous."[26] In other words, the term "substantially limits" is "not meant to be a demanding standard."[27]

b. <u>Major Life Activities</u>

Q: What is the new category of "major bodily functions" and what is covered by it?

A: The definition of a "major life activity" now includes "the operation of a major bodily function." If an individual has an impairment that substantially limits the operation of a major bodily function, then that individual qualifies as disabled under the ADAAA. The ADAAA provides an illustrative, but non-exhaustive, list of major bodily functions that includes "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."

Q: Why was "major bodily functions" included in the ADAAA?

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[20] ADAAA at § 3(4)(B).
[21] *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 182, 197 (2002).
[22] *Id.* at 198 (emphasis added).
[23] ADAAA at § 2(b)(5).
[24] ADAAA at § 3(4)(C).
[25] H.R. Rep. No. 110-730, pt. 1, at 10 (2008) (Committee on Education and Labor Report).
[26] 154 CONG. REC. S8289 (daily ed. Sept. 17, 2008) (statement of Rep. Nadler); *see* 154 CONG. REC. S8355 (daily ed. Sept. 11, 2008) (statement of Sen. Kennedy) ("[O]ur Senate bill avoids this problem and provides the broader coverage needed to correct the excessively restrictive and unintended interpretation in the litigation.").
[27] 154 CONG. REC. S8841 (daily ed. Sept. 16, 2008) (Statement of Managers); *see* 154 CONG. REC. H8288 (daily ed. Sept. 17, 2008) (statement of Rep. Miller) ("We expect the courts and agencies to apply this less demanding standard when interpreting 'substantially limits.'").

A: Congress created the "major bodily functions" category to make it easier for individuals to qualify as disabled. Prior to the ADAAA, some courts held that a substantial limitation in a major bodily function, such as liver function,[28] did not enable an individual to qualify as having a disability. In a rejection of such cases, the ADAAA clarifies the meaning of "major life activities" and expands the term to include "major bodily functions."[29]

With this new definition, individuals no longer need to show how their impairment substantially limits them in a specific activity because demonstrating a substantial limitation of a major bodily function is sufficient. As "major bodily functions" will often be the clearest path to coverage, it should be an individual's primary mechanism for establishing disability under the law.

The ADAAA defines major bodily functions as "including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."[30] A disability can also substantially limit the operation of a major bodily function if the disability causes the operation of the major bodily function to overproduce in some harmful fashion, rather than to under-produce.[31]

Q: Did the Congress make any changes to the "major life activities" provision?

A: Yes. Under the ADAAA, a "major life activity" no longer has to be "of *central importance* to most people's daily lives." Furthermore, the ADAAA clarifies that a person need only show that he or she is substantially limited in <u>one</u> major life activity to qualify as disabled. Finally, Congress added a non-exhaustive, illustrative list of major life activities.

In the statute, "major life activities, include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working." The House of Representatives' Committee on Education and Labor Report provide additional examples: "interacting with others, writing, engaging in sexual activities, drinking, chewing, swallowing, reaching, and applying fine motor coordination."[32]

Q: If I have a learning disability, can I qualify as disabled under the ADAAA?

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[28] *See Furnish v. SVI Sys., Inc.*, 270 F.3d 445, 450 (7th Cir. 2001) (holding that an individual with a cirrhosis of the liver caused by Hepatitis B did not substantially limit him in a major life activity because liver function was "not integral to one's daily existence").
[29] 154 CONG. REC. S8350 (daily ed. Sept. 11, 2008) (statement of Sen. Harkin).
[30] ADAAA at § 3(2)(B).
[31] H.R. Rep. No. 110-730, Pt. 1, at 11 (2008) (Committee on Education and Labor Report).
[32] H.R. Rep. No. 110-730, Pt. 1, at 11 (2008) (Committee on Education and Labor Report).

A: Yes, if you meet the definition of disability. A learning or intellectual disability ordinarily substantially limits a variety of major life activities. Because many individuals with learning disabilities are substantially limited in a major life activity, these individuals should qualify as disabled under the ADAAA.

Prong Two – "Record Of"

Q: What is the "second" or "record of a disability" prong?

A: The "second prong" – or "record of prong" – refers to the second standard for determining disability under the ADAAA. Individuals can qualify as disabled under the second prong if they can show they have a record of a physical or mental impairment that substantially limits them in a major life activity or major bodily function.[33] As with the other provisions in the law, this analysis will take place under the broadened definitions of "substantially limits," "major life activities," and "major bodily functions."

Q: Am I protected under the ADAAA if I can show that I have a record of disability?

A: Yes. Under the ADAAA, persons who can show a record of an impairment that substantially limits them in a major life activity or bodily function qualify for coverage. As with the other provisions in the act, this analysis will take place under the broadened definitions of "substantially limits," "major life activities," and "major bodily functions."

The second prong of the definition of disability covers "individual[s] [with] . . . a history of, or [who have] been misclassified as having, a mental or physical impairment that substantially limits" a major life activity.[34] The ADAAA does not directly alter the second prong, but the changes made to "substantially limits," "major life activities," and "major bodily functions" apply to it in the same way they apply to prong one.

As before, individuals can qualify as disabled if they have a "record of . . . an impairment" that substantially limits them in a major life activity.[35] However, as the second prong brings in the functionality test of prong one by reference, the analysis must now occur under the broadened definitions of "substantially limits," "major life activities," and "major bodily functions."[36] Similarly, the new rules of

[33] ADAAA at § 3(4)(1)(b).
[34] S. Rep. 101-116, pg. 22.
[35] ADAAA §(4)(a)(1)(b).
[36] *Id.* The structure of the text implies that the functionality test (i.e. the substantially limits a major life activity requirement) applies to both prongs two and three. This is also how the text was traditionally read under the 1973 Rehabilitation Act. Of course, prong three is now explicitly excluded from that test by the language in § (3)(a) of the ADAAA.

construction, codified findings and purposes, and statutory findings and purposes apply to the second prong as well. The only difference between the two determinations is that prong one asks for evidence of a present impairment while prong two asks for a "record" of the impairment. The rest of the analysis is essentially the same.

Rules of Construction

Q: Will a court still factor in "mitigating measures" such as medication, assistive devices, or learned behaviors, when determining whether a person qualifies as disabled?

A: No! In *Sutton v. United Air Lines*, the Supreme Court required that the ameliorative effects of mitigating measures should be considered when determining whether an individual was disabled.[37] As a result, the ADA no longer protected people who took medication or learned to modify their behavior to lessen the effect of their impairments. This situation created a Catch-22: "the more successful a person [was] at coping with a disability, the more likely it [was] the Court [would] find that they [were] no longer disabled and therefore no longer covered under the ADA."[38]

The ADAAA rejects this reasoning and requires that courts determine whether a person is disabled without regard to the "ameliorative effects of mitigating measures." Now under the ADA, court will evaluate an impairment in its unmitigated state, without any medications or behavioral modifications. Unlike previous court decisions, under the ADAAA:

> [t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the effects of mitigating measures such as: (I) medication, medical supplies, equipment or appliances, low-vision devices, prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies; (II) use of assistive technology; (III) reasonable accommodations or auxiliary aids or services; or (IV) learned behavioral or adaptive neurological modifications.[39]

Congress included additional examples of mitigating measures in both the House of Representatives' Committee on Education and Labor and Committee on the Judiciary Reports. Those reports added "the use of a job coach, personal assistant, service animal, surgical intervention, or compensatory strategy that

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[37] *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) (holding that two women with vision impairments were not disabled because they corrected their vision with glasses or contact lenses).
[38] 154 CONG. REC. S8349 (daily ed. Sept. 11, 2008) (statement of Sen. Harkin).
[39] ADAAA at § 3(4)(E)(i).

might mitigate, or even allow an individual to otherwise avoid performing particular life activities."[40]

Q: I have a learning disability but perform well academically thanks to learned behavior. Will I still qualify for coverage under the ADAAA?

A: A court must determine whether a learning disability substantially limits a major life activity without regard to any mitigating measures, such as learned behavior or assistive devices. These might include studying longer, recording lectures, receiving more time to take a test, etc. The fact that the individual uses these successfully should not factor into the analysis.

The rule against considering the ameliorative effects of mitigating measures will likely affect individuals with learning disabilities. It is now clear that individuals with learning disabilities could also qualify as disabled and should be able to secure accommodations in an educational setting [41] or in an employment setting.[42] "When considering the condition, manner, or duration in which an individual with a specific learning disability performs a major life activity, it is critical to reject the assumption that an individual who has performed well academically cannot be substantially limited in activities such as learning, reading, writing, thinking or speaking."[43]

In short, a court must determine whether a learning disability substantially limits a major life activity *without regard* to any mitigating measures, such as learned behavior. As such, a learning disability substantially limits the major bodily function of the brain. A learning disability may also substantially limits the major life activities of reading, learning, concentrating, and writing. A person need only show substantial limitation in one major life activity or major bodily function.

Q: Would a person with epilepsy who takes medication to control seizures be covered under the ADAAA?

A: Yes. Under the ADAAA, a court must determine whether epilepsy substantially limits a major life activity without regard to the ameliorative effects of medication. When considered without the effects of medication, epilepsy substantially limits the major bodily function of the brain.

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[40] H.R. Rep. No. 110-730, Pt. 1, at 15 (2008) (Committee on Education and Labor Report); H.R. Rep. No. 110-730, Pt. 2, at 20 (2008) (Committee on the Judiciary Report).

[41] *See Price v. Nat'l Board of Medical Examiners*, 966 F. Supp. 419, 427 (S.D. W. Va. 1997) (holding that an individual with learning disabilities was not disabled because he was able to read and perform averagely or well compared to most people); 154 CONG. REC. H8296 (daily ed. Sept. 17, 2008) (statement of Rep. Courtney).

[42] *See Wong v. Regents of University of California*, 379 F.3d 1097 (9th Cir. 2004) (holding that an individual with a learning disability was not disabled because he was able to read and perform averagely or well compared to most people).

[43] 154 CONG. REC. S8842 (daily ed. Sept. 16, 2008) (Statement of Managers); H.R. Rep. No. 110-730, Pt. 1, at 10 (2008) (Committee on Education and Labor Report).

Before the ADAAA, many courts held that individuals with epilepsy were not substantially limited because their seizures occurred episodically.[44] Similarly, many courts discounted the impact of an impairment that was in remission as too short-lived to be substantially limiting.[45] The ADAAA rejects these holdings and states "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."[46] Furthermore, Congress clarifies in the Senate Statement of Managers that "the rules of construction provide that impairments that are episodic or in remission be assessed in their active state for purposes of determining coverage under the ADA."[47]

Q: How does the ADAAA affect persons with impairments that are episodic or in remission?

A: The ADAAA specifically states that "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." Prior to the enactment of the ADAAA, many courts held that individuals with episodic impairments were not disabled because their symptoms were infrequent. Similarly, many courts discounted the impact of an impairment that was in remission as too short-lived to be substantially limiting. The ADAAA rejects this approach.

Prong Three – "Regarded As:"

Q: What is the "third" or "regarded as" prong?

A: The "third prong" – or "regarded as prong" – refers to the third standard for determining disability under the ADAAA. Individuals can qualify as disabled under the "regarded as" prong if they can prove they were subjected to an act prohibited by the ADA due to a physical or mental impairment.[48]

Q: Am I covered under the ADAAA if I was discriminated against due to a perceived or actual physical or mental impairment?

A: Yes. The ADAAA covers all persons who can show that they were subjected to an act (e.g. disqualification or removal from a job, program, or service) that is prohibited by the ADA because of an actual or perceived impairment.

The new "regarded as" prong focuses primarily on discrimination. The central question is whether a person is subjected to an action prohibited by the ADA due

[44] *See Todd v. Academy Corp.*, 57 F.Supp. 448, 453 (S.D. Tex. 1999).
[45] *See Pimental v. Dartmouth-Hitchcock Clinic*, 236 F. Supp. 2d 177, 182-83 (D.N.H. 2002).
[46] ADAAA at §3(4)(D).
[47] 154 CONG. REC. S8842 (daily ed. Sept. 16, 2008) (Statement of Managers).
[48] ADAAA at § 3(4)(1)(c).

to a perceived or actual impairment. Both the House of Representatives and the Senate support this principle. In the words of the Education and Labor Report:

> The Committee therefore restores Congress' original intent by making clear that an individual meets the requirement of 'being regarded as having such an impairment' if the individual shows that an action (e.g., disqualification from a job, program, or service) was taken because of an actual or perceived impairment, whether or not that impairment actually limits or is believed to limit a major life activity.[49]

The Senate Statement of Managers adds that "[i]f an individual establishes that he or she was subjected to an action prohibited by the ADA because of an actual or perceived impairment – whether or not that impairment limits or is perceived to limit a major life activity – then the individual will qualify for protection under the Act."[50]

Q: What if my employer discriminates against me because of an impairment they believe I have? Would I still be covered?

A: Yes. The ADAAA explicitly protects persons discriminated against due to either actual or perceived impairments. Congress has long recognized the debilitating effect that stereotypic assumptions can have on persons with disabilities. The prohibition on discriminatory behavior based upon perceived impairments reflects this concern and is designed to help eliminate it.

The original third prong was included in the ADA to "prohibit discrimination founded on [misplaced] concerns or fears."[51] In enacting the ADAAA, Congress reaffirmed that "stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society" continue to negatively affect persons with disabilities and, in many ways, "are just as disabling as the actual impact of an impairment."[52] In the words of the Education and Labor Report:

> The Committee therefore restores Congress' original intent by making clear that an individual meets the requirement of 'being regarded as having such an impairment' if the individual shows that an action (e.g., disqualification from a job, program, or service) was taken because of an actual or perceived impairment, whether or not that impairment actually limits or is believed to limit a major life activity.[53]

[49] H. Rep. 110-730, pg. 13-14.
[50] 154 Cong, Rec. S8346 (Sept. 11, 2008) (Statement of Managers).
[51] H. Rep. 110-730 pt.2, pg. 17.
[52] H. Rep. 110-730, pt.1, pg. 7 and 13.
[53] H. Rep. 110-730, pt. 1, pg. 13-14.

Q: Do I still have to show that my employer believes I am substantially limited in a major life activity to prove that I am "regarded as" disabled?

A: No. Under the ADAAA, whether an employer believes the employee is substantially limited in a major life activity no longer matters. Adverse action taken on the basis of an actual or perceived impairment is all that is required.

The elimination of the functionality test is the most significant change to the third prong of the definition of disability in the ADAAA. Plaintiffs only need to show that they were discriminated against due to an actual or perceived impairment in order to qualify as disabled.

This new language focuses on discrimination and primarily asks whether the person was subjected to an action prohibited by the ADA. One of the concerns surrounding the ADA jurisprudence was that it failed to adequately examine the discrimination question. Instead, the decisions revolved solely on whether a person was disabled. The changes made by the ADAAA to Section 102 of the ADA, pertaining to "discrimination," reflect this concern.[54] The shift in emphasis in the "regarded as" section suggests the same Congressional intent. Thus, the primary focus, under the ADAAA, is on whether discrimination took place – not on whether a person is disabled.

Q: Why does the definition of persons "regarded as" disabled refer to impairments instead of disabilities?

A: The category of impairments that qualify for protection from discrimination under the third prong is much broader than those receiving reasonable accommodations. The use of the term "impairments" reflects Congress' intention that a broad swath of people should receive coverage under the third prong of the definition.

Q: Can I seek an accommodation if I was discriminated against due to a perceived or actual impairment?

A: No. The ADAAA only allows accommodations for persons who show they are either currently "substantially limited" in a "major life activity / major bodily function" or have a record of such a limitation.

Section 6(g) of the ADAAA provides that:,

> [a] covered entity under title I, a public entity under title II, and any person who owns, leases (or leases to), or operates a place of public accommodation under title III, need not provide a reasonable accommodation or a reasonable modification to policies, practices, or

[54] H. Rep. 110-730, pt.1, p16.

procedures to an individual who meets the definition of disability in section 3(1) solely under subparagraph (C) of such section.[55]

Q: What if I can show that I am substantially limited in major life activity or major bodily function in addition to being "regarded as" disabled? Can I still seek an accommodation?

A: Yes. Nothing in the ADAAA prevents a person who qualifies under the "regarded as" prong *and* the first and second prongs from requesting an accommodation. While prohibited from seeking accommodations, persons qualifying under the third prong can, of course, still seek all other remedies available under the ADA.

Q: Why were accommodations eliminated for persons "regarded as" disabled?

A: Congress decided that accommodations for persons qualifying under the third prong were no longer necessary due to the expanded coverage in prongs one and two. All persons needing accommodations should now be eligible under the first or second prong.

The Senate Statement of Managers explains the changes this way: "[w]e believe it is an acceptable compromise given our strong expectation that such individuals would now be covered under the first prong of the definition, properly applied."[56] Essentially, given the addition of "major bodily functions," the expansion of "major life activities," the elimination of "mitigating measures," and the clarification regarding "substantially limits," no impairment that requires an accommodation should fall outside the scope of the first and second prongs. With the expanded first and second prongs, Congress recognized that there is no longer a need for accommodations based solely on the third prong. Every individual who requires an accommodation should now be eligible under the first or second prongs.

Q: What is the "transitory and minor" exception and why was it included in the ADAAA?

A: The transitory and minor exception says that minor impairments with an actual or expected duration of six months or less are not covered under the third prong. This exception was inserted to ensure that individuals with trivial impairments, such as colds or infected fingers, do not qualify as disabled under the ADA.

The ADAAA states that:

[55] ADAAA at §4(a)(6)(g).
[56] 154 Cong, Rec. S8347 (Sept. 11, 2008)(Statement of Managers).

> Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an expected or actual duration of 6 months or less. [57]

The Senate Statement of Managers and the Education and Labor report describe the exception as applying only to "claims at the lowest end of the spectrum of severe limitations."[58] According to the Judiciary Report, "[p]roviding such an exception for claims at the lowest end of the spectrum of severity was deemed necessary under prong three of the definition because individuals seeking coverage under this prong need not meet the functional limitation requirement contained in prongs one and two of the definition . . . absent this exception, the third prong of the definition would have covered . . . common ailments like the cold or flu."[59]

Q: What exactly qualifies as a "transitory and minor" impairment?

A: Not much. For the exception to apply, the impairment must be considered both transitory *and* minor. As such, only trivial impairments such as colds, mild allergies, infected fingers, or stomachaches, will qualify as both transitory and minor. Most other impairments are either not transitory (defined as an impairment with an expected or actual duration of 6 months or less) or not minor.

It is expected that this exception will be, in the words of the Judiciary Report, "construed narrowly" as it runs counter to the general rule of broad coverage under the ADAAA and few ailments are, in fact, both transitory *and* minor.[60]

Apart from the examples of the cold and flu given in the Judiciary Report (these are also mentioned in the Senate Statement of Managers), other ailments described as both transitory and minor in the debates included: "stomachaches," "mild seasonal allergies," "a hangnail," and "an infected finger."[61] Clearly, these are all "trivial impairments" and the scope of the exception should be considered in light of them.[62]

Q: What if my impairment causes symptoms that are irregular but not minor? Am I still covered?

A: Yes. Impairments must be both transitory *and* minor to fall within the exception. As such, a person who is treated adversely because of an impairment (perceived or actual) with irregular or episodic symptoms such as colon cancer,

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[57] ADAAA at §4 (a)(3)(b).
[58] H. Rep. 110-730, pt. 2, pg. 18.
[59] *Id.*
[60] *Id.*
[61] 154 Cong. Rec. H6064, H6074 (Sept, 17, 2008)(statements of Rep. Nadler and Rep. Smith).
[62] *Id,* (statement of Rep. Smith).

epilepsy, or bipolar disorder could proceed under the "regarded as" prong because these impairments are not both transitory *and* minor.

Q: What if my employer claims that they believed my perceived or actual impairment was transitory and minor? Does that mean that I am not covered?

A: No! The subjective beliefs of the employer are not relevant. If the action taken is based upon a perceived impairment, the relevant inquiry is whether that perceived impairment would *objectively* be considered transitory and minor.

When determining the presence of an actual or perceived impairment, an objective standard is used. The findings in the ADAAA clearly state that Congress "reject[s] the Supreme Court's reasoning in *Sutton v. United Air Lines, Inc*. . . with regard to coverage under the third prong of the definition of disability and . . . reinstate[s] the reasoning of the Supreme Court in *School Board of Nassau County v. Arline*."[63] In *Arline*, the Supreme Court held that a teacher with tuberculosis fell under both the "regarded as" and "record of disability" prongs of the Rehabilitation Act.[64] In making the "regarded as" determination, the Court did not dwell on the subjective beliefs of the employer. Rather, the Court only looked at whether the teacher had tuberculosis and was discriminated against because of misperceptions about that illness. This analysis stands in sharp contrast to the multiple levels of subjective proof required by *Sutton*.

Retroactivity

Q: When does the ADAAA take effect?

A: The ADAAA comes into force, according to its terms, on January 1st, 2009.

Q: I want to file a claim about an incident that occurred prior to January 1st, 2009. Will the ADAAA apply to my case?

A: Probably not. For the ADAAA to apply, a court would have to decide that Congress intended it to cover acts occurring prior to its effective date. While this outcome is possible, current Supreme Court precedent makes it exceedingly unlikely.

Under current Supreme Court precedent, a statute such as the ADAAA can only be applied retroactively if it contains a clear statement from Congress or its terms carry no "retroactive consequences," i.e. the law does not impair the rights of persons when they acted, increase liability for past conduct, or impose new duties to transactions already completed. For the most part, only procedural or

[63] *See* H. Rep. 110-73 pt. 1, pg. 12; H. Rep. 110-73 pt. 2,, pg. 7; 154 Cong. Rec. 8346 (Sept. 11, 2008)(Statement of Managers).
[64] *See* School Board of Nassau County v. Arline 480 U.S. 273 (1987).

remedial statutes fall into the no "retroactive consequences" category.[65] The few statutes that the Court has applied retroactively post-*Landgraf* generally rely upon this rationale.[66]

In *Rivers v. Roadway Express*,[67] proponents of a "restorative" statute similar to the ADAAA argued that they should avoid the presumption against retroactivity for reasons similar to procedural and remedial statutes. They maintained that the act in question, the Civil Rights Act of 1991, did not expand existing rights. Rather, they believed that the Act "restored" the civil rights law to its condition prior to a series of misguided Supreme Court decisions. They also argued that any statute which explicitly seeks to return law to a status quo ante by overturning a court decision should qualify as a clear statement in favor of retroactivity.[68] The Supreme Court rejected both of these positions stating that their decisions do not support a presumption of retroactivity for "restorative" statutes.[69] With the presumption against retroactivity in place, the Court held that the plain text and legislative history behind the 1991 Acts did not show a clear congressional intent favoring retroactivity.[70] The Court took particular notice of the removal of "Restoring" from the title of the relevant section of the Act.[71]

The result in *Rivers* appears to foreclose the no "retroactive consequences" argument for statutes like the ADAAA. It also seems to remove the argument that statutes like ADAAA are, by their nature, intended to apply retroactively. Consequently, the presumption against retroactivity will likely apply to the ADAAA. The only way to overcome this presumption is through a clear statement from Congress. Recent decisions from the Court state that a clear statement can be found through the traditional tools of statutory construction.[72] These tools include reference to the structure of an act, the drafting history, legislative history, floor statements, and numerous other methods. This memorandum does not take a position on how that analysis plays out, but the legislative history around the ADAAA is comprehensive enough to make passable arguments.

Q: What if the incident is part of a pattern of discrimination that started before January 1st, 2009 but continued past that date? Would the ADAAA apply then?

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[65] Landraf 511 US at 285 fn. 37 *and* 2 Sutherland Statutory Construction § 41:4 (6th ed.)
[66] *See* Republic of Austria v. Altmann 541 U.S. 677 (2004) (holding that the Foreign Sovereign Immunities Act of 1976 had no "retroactive effect" as it merely opened U.S. courts to pre-existing claims).
[67] 511 US 298 (1994)
[68] *See* Rivers 511 US at 304
[69] *Id.* at 310
[70] *Id.* at 308-09.
[71] *Id.* at 307.
[72] *See* Fernandez-Vargas 548 U.S. at 37.

A: In this instance the ADAAA probably would apply. There is a long line of precedent from civil rights claims that says a law will apply to all acts in an ongoing, continuous, series of discrimination so long as one falls after the enactment date. Likewise, if there is a longstanding and demonstrable policy of discrimination in effect post January 1, 2009 then the ADAAA should apply as well.

We expect that the jurisprudence currently covering "continuing acts" in Civil Rights claims will apply to the ADAAA. So, if there is an ongoing, continuous, series of discriminatory acts and one of those acts falls after the January 1st, 2009 date the ADAAA should apply.[73] Likewise, if there is a longstanding and demonstrable policy of discrimination in effect post January 1, 2009 then the ADAAA should apply as well.[74]

[73] See Cox. v. City of Memphis 230 F.3d 199, 202 (6th Cir. 2000).
[74] *Id.*