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**Disability Discrimination Law:  
Developments and Emerging Trends for Employers**

**Miriam J. McKendall, Esq.**  
**Holland & Knight LLP**  
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**I. INTRODUCTION**

Employers continue to face challenges on many levels when managing their workforces. One of those challenges results from employers' obligations to comply with the disability laws impacting employees and job applicants.

With an effective date of January 1, 2009, the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA")<sup>1</sup> is now two years old. Since its enactment, predictions have been made that the ADAAA's unequivocal reversal of two significant United States Supreme Court decisions and intended purpose to broaden the scope of its mandate for the elimination of discrimination against individuals with disabilities will result in more prolonged litigation against employers. The relative newness of the statute, coupled with the slow pace of litigation, does not allow for an analysis of those predictions at this time. While such an analysis, at some point, likely will be instructive, at this time the more useful approach calls for a review of the practical changes imposed under the ADAAA and the identification of how employers can develop effective action plans to address their obligations under the disability laws.

Statutory developments in disability related discrimination laws impacting the workplace extend beyond the ADAAA. On November 9, 2010, the EEOC issued regulations implementing Title II of the Genetic Information Nondiscrimination Act of 2008 ("GINA"). The prohibitions under GINA further impact employers as they work with and manage employees.

In addition, it is clear that advances in technology have impacted all aspects of the workplace. Employers have addressed for some time now the intersection between the disability laws and the expanded use of technology in the context of reasonable accommodations. It is

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<sup>1</sup> The ADAAA (Pub. L. 110-325, 122 Stat. 3553) is codified at 42 U.S.C. § 12101 *et seq.* The ADAAA amended sections 12101, 12102, 12111 to 12114, 12201 and 12210 of the American with Disabilities Act of 1990 ("ADA" or the "1990 ADA"). The ADAAA also enacted sections 12103 and 12205a and re-designated sections 12206 to 12213. For a summary of the ADAAA, *see* [www.eeoc.gov/ada/amendments\\_notice.html](http://www.eeoc.gov/ada/amendments_notice.html). This paper addresses Title I of the ADAAA, which prohibits employment discrimination on the basis of disability. This paper does not address other titles of the ADAAA, including Title II (programs and activities of state and local government entities) and Title III (private entities that are considered places of public accommodation). Colleges and universities may be subject to other titles of the ADAAA, or other statutes, such as the Rehabilitation Act of 1973, which also prohibit disability discrimination.

anticipated that issues pertaining to web accessibility, such as an employers' use of on-line employment applications and other web-based programs, will be subject to increased scrutiny as this area of disability law develops in 2011 and beyond.

These developments in the disability laws impacting employers are discussed in Sections II, III and IV. Section V offers action items for employers to consider to further their compliance efforts.<sup>2</sup>

## **II. THE ADA**

### **A. Congressional Intent and the General Rule Prohibiting Disability Discrimination**

Congress made it clear that the express purpose of the ADA is to broaden the scope of the ADA and to enact legislation effectively overruling the holdings in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and *Toyota Motor Manufacturing v. Williams*, 534 U.S. 184 (2002). Pub. L. No. 110-325. § 2(b)(2-5) (2008). The ADA also has the purpose of reinstating the broad view of “regarded as” disabled as set forth in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987). Pub. L. No. 110-325. § (2)(b)(3).

To achieve its mandate for the elimination of discrimination against individuals with disabilities, the ADA contains directives that: the term “disability” shall be construed broadly; an impairment’s substantial limitation on a major bodily function is sufficient to constitute a disability; the ameliorative effects of mitigating measures (other than ordinary eyeglasses or contact lenses) shall be disregarded in the primary disability analysis; and impairments that are episodic or in remission are disabilities if they would be substantially limiting when active. 42 U.S.C. § 12102(4).

The ADA also expresses the expectation that the Equal Employment Opportunity Commission (“EEOC”) will revise its current regulations to be consistent with the broader coverage of the ADA. On September 23, 2009, the EEOC issued the proposed regulations implementing the ADA (the “Proposed Regulations”).<sup>3</sup> The EEOC received more than 600 public comments to the Proposed Regulations during the comment period that ended November 23, 2009. A final rule implementing the ADA had been expected in July of 2010. However, as of December 10, 2010, the regulations remain in proposed form only.

The general rule established by the ADA (as well as the ADA) in the employment context, on its face, is straightforward. It provides that no covered entity (which includes most

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<sup>2</sup> This paper includes discussion of selected developments in disability law in the employment context, and consideration of various trends going forward. This paper does not provide a comprehensive listing of all legislation or case law and developments relating to disability law, nor is it intended to provide legal advice. Readers should consult with their own legal counsel about the disability laws impacting their own employees and business practices.

<sup>3</sup> References in this paper to the Proposed Regulations are found at 74 Fed. Reg. 48431 *et seq.* and the appendices thereto. Information in this paper regarding the Proposed Regulations is also based on commentary found at [www.eeoc.gov/policy/docs/qanda\\_adaaa\\_nprm.html](http://www.eeoc.gov/policy/docs/qanda_adaaa_nprm.html). Note: As of December 10, 2010, these Proposed Regulations have not become final. The current regulations appear at 29 C.F.R. § 1630 *et seq.*

employers) shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a).<sup>4</sup> As part of this general rule prohibiting disability discrimination in employment, employers may not deny employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the employer's need to make reasonable accommodations to the physical or mental impairments of the employee or applicant. 42 U.S.C. § 12112(b)(5).

It is necessary for employers to understand the significant changes now in effect under the ADAAA (and a number of expansive interpretations contemplated by the Proposed Regulations), and how the courts are likely to apply those changes. This is discussed in Section II, paragraphs B and C. Given the Congressional intent that the ADAAA's primary focus is on whether employers have complied with their statutory obligations (and not an extensive analysis as to whether an individual is disabled), it becomes more important for employers to address the meaning and application of the qualified person and reasonable accommodations aspects of the disability laws. This is discussed in Section II, paragraph D.

## **B. Significant Changes Under the ADAAA**

### **1. The Meaning of Disability and "Regarded As" Disabled**

The ADAAA defines disability as: (a) a physical or mental impairment that substantially limits a major life activity; or (b) a record of such an impairment that substantially limits a major life activity; or (c) being regarded as having such an impairment. 42 U.S.C. § 12102(1).

The ADAAA broadens the definition of "regarded as" having such an impairment. An individual meets the "regarded as" definition of disability by establishing that he has been subjected to an action prohibited under the ADAAA 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. 42 U.S.C. § 12102(3)(A). (The "regarded as" definition does not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of six months or less. 42 U.S.C. § 12102(3)(B).)

### **2. Major Life Activity and Substantially Limited**

The ADAAA also broadens the definition of disability by expanding the interpretation of what constitutes a major life activity and substantial limitation.

The term "major life activity" did not have a statutory definition in the 1990 ADA. It subsequently was defined through regulations and case law to include those basic activities that the average person in the general population can perform with little or no difficulty. Examples included walking, seeing, eating, and reproduction.

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<sup>4</sup> The ADAAA also prohibits retaliating against, or intimidating, coercing or interfering with, any individual in regard to exercising his rights under the ADAAA. 42 U.S.C. § 12203. The ADAAA also contains other specified prohibitions. *See* 42 U.S.C. § 12112.

The ADAAA now contains an expansive, non-inclusive (and broad) list of major life activities, including caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. The ADAAA also includes as major life activities the operation of major bodily functions, including, but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. 42 U.S.C. § 12102(2).

The Proposed Regulations include sitting, reaching, and interacting with others as part of the non-exhaustive list of major life activities. (The inclusion of “interacting with others” as a major life activity is likely to result in much ambiguity and debate as to the appropriate scope of this broad term.)

Under the current EEOC regulations implemented under the 1990 ADA, a person is substantially limited in a major life activity if he is unable to perform the activity; or significantly restricted in the condition, manner or duration under which he can perform the activity as compared to the average person in the general population. 29 C.F.R. § 1630.2(i). The ADAAA rejects that interpretation and the interpretation articulated by the Supreme Court in *Toyota Motor Mfg. v. Williams*, 534 U.S. at 198, that an impairment must prevent, or severely restrict, the individual in performing a major life activity in order to be considered “substantially limiting.” See 42 U.S.C. § 12102(4). Now, the term “substantially limits” is to be construed consistently with the purpose of the ADAAA to broaden the scope of its coverage. To have a disability (or to have a record of a disability) under the ADAAA, an individual must be substantially limited in performing a major life activity, as compared to most people in the general population.

Under the Proposed Regulations, determination of whether an individual is experiencing a substantial limitation in performing a major life activity is a common-sense assessment based on comparing an individual’s ability to perform a specific major life activity with that of most people in the general population. Thus, the focus is on how a major life activity is substantially limited, not on what the individual can do in spite of the impairment.

Over the years, employers have struggled with determining if a disabled person is substantially limited in working. Under the Proposed Regulations, an impairment substantially limits the major life activity of working when it substantially limits an individual’s ability to perform, or to meet the qualifications for, a “type of work.” The concept of a “type of work” replaces the former concepts of a “class” or “broad range” of jobs. For example, a type of work may include jobs such as commercial truck driving, assembly line jobs, food service jobs, clerical jobs, or law enforcement jobs. A type of work may also be determined by reference to job-related requirements, such as jobs requiring repetitive bending, reaching or manual tasks; jobs requiring frequent or heavy lifting; and jobs requiring prolonged sitting or standing.

### **3. Mitigating Measures**

A significant change in the application of the disability laws is the virtual elimination of the mitigating measures in determining the absence of a disability. With the ADAAA, the ameliorative effects of mitigating measures, with the exception of glasses and contact lenses,

may not be considered in the disability determination. 42 U.S.C. § 12102(4). The ADAAA directs that the positive effects from an individual's use of one or more mitigating measures be ignored in determining if an impairment substantially limits a major life activity. In other words, if a mitigating measure eliminates or reduces the symptoms or impact of an impairment, that fact cannot be used in determining if a person meets the definition of disability. Instead, the determination of disability must focus on whether the individual would be substantially limited in performing a major life activity without the mitigating measure. *Id.*

However, the ADAAA allows consideration of the negative effects from use of a mitigating measure in determining if a disability exists. For example, the side effects that an individual experiences from use of medication for hypertension may be considered in determining whether the individual is substantially limited in a major life activity.

The ADAAA's prohibition on assessing the positive effects of mitigating measures applies only to the determination of whether an individual meets the definition of disability. All other determinations, including the need for a reasonable accommodation and whether an individual poses a direct threat, can take into account the positive and negative effects of a mitigating measure. For example, if an individual with a disability uses a mitigating measure which eliminates the need for a reasonable accommodation, then an employer will have no obligation to provide one.

#### **4. Impairments that Consistently Meet the Definition of Disability or *Per Se* Disabilities**

Consistent with the goal to implement a broad interpretation of the ADAAA is the premise that some impairments will consistently meet the definition of disability. The Proposed Regulations therefore identify the following as examples of impairments that consistently meet the definition of disability: deafness, blindness, intellectual disability (formerly known as mental retardation), partially or completely missing limbs, mobility impairments requiring use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV/AIDS, multiple sclerosis, muscular dystrophy, major depression, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder, and schizophrenia.

Although the Proposed Regulations do not use the term *per se* disability, that concept is reflected therein. The Proposed Regulations anticipate that the individualized assessment of whether a substantial limitation exists can be done quickly and easily with respect to the aforementioned types of impairments, and will consistently result in a finding of disability. Practically speaking, however, it can be argued that the Proposed Regulations identify broad categories of *per se* disabilities, and thus eliminate the need for *any* individualized assessments as to the specified type of impairments. Presumably recognizing this reality, the Proposed Regulations also provide examples of impairments (such as asthma, back and leg impairments, and learning disabilities) that may be substantially limiting for some individuals, but not for others. Thus, the Proposed Regulations express recognition that those impairments *may* require somewhat more analysis to determine whether they are substantially limiting for a particular individual before they are deemed to meet consistently the definition of disability. Even then, however, the Proposed Regulations caution that the level of analysis required still should not be extensive.

## 5. Episodic Impairments and Conditions in Remission

Under the ADAAA, an impairment that is episodic or in remission meets the definition of disability if it would substantially limit a major life activity when active. 42 U.S.C. § 12102(4). Therefore, chronic impairments with symptoms or effects that are episodic can be a disability even if the symptoms or effects would only substantially limit a major life activity when the impairment is active.

The Proposed Regulations include epilepsy, hypertension, multiple sclerosis, asthma, diabetes, major depression, bipolar disorder, and schizophrenia as examples of impairments that are episodic. Similarly, an impairment such as cancer that is in remission, with a possibility that it could return in a substantially limiting form, meets the definition of disability under the ADAAA. (Under the Proposed Regulations, temporary, non-chronic impairments of short duration with little or no residual effects usually will not be considered disabilities.)

### C. Court Decisions Addressing the ADAAA<sup>5</sup>

Two years have passed since the January 1, 2009 effective date of the ADAAA. During that time, courts have been asked to apply the ADAAA retroactively to alleged violations occurring before January 1, 2009, but most have refused to do so. *See, e.g., Carmona v. Southwest Airlines*, 604 F.3d 848, 856-57 (5th Cir.2010) (“[we have already declined] to find that Congress intended the ADAAA to apply retroactively”); *Lytes v. D.C. Water and Sewer Auth.*, 572 F.3d 936, 941 (D.C. Cir. 2009) (only explanation for delayed effective date of the ADAAA is that Congress intended the statute to have only prospective effect); *Milholland v. Sumner County Bd. of Educ.*, 569 F.3d 562, 565 (6th Cir. 2009) (recognizing that retroactively applying ADAAA would impose new duties upon parties with respect to transactions already completed and holding that ADAAA does not apply to pre-amendment conduct); *EEOC v. Aero Distrib. LLC.*, 555 F.3d 462, 469 n. 8 (5th Cir. 2009) (ADAAA changes do not apply retroactively); *Becerril v. Pima County Assessor’s Office*, 587 F.3d 1162, 1164 (9th Cir.2009) (“we do not agree with [the plaintiff] that ... the ADAAA, which alters the ADA’s definition of ‘disability,’ applies retroactively”). *Fikes v. Wal-Mart, Inc.*, 322 Fed. Appx. 882, 883 n. 1 (11<sup>th</sup> Cir. 2009) (applying presumption against retroactive application); *Kiesewetter v. Caterpillar, Inc.*, 295 Fed. Appx. 850, 851 (7th Cir. 2008) (amendments do not apply prior to the legislation’s effective date).

The Sixth Circuit Court of Appeals, however, has applied the ADAAA in a case involving an alleged violation that occurred before January 1, 2009, where the plaintiff seeks prospective injunctive relief. *Jenkins v. Nat’l Bd. of Med. Exam’rs*, No. 08-5371, 2009 WL 331638, at \*2 (6th Cir. Feb. 11, 2009). The plaintiff in *Jenkins*, a third year medical student,

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<sup>5</sup> The district court decisions referenced in this section are offered for illustrative purposes, and the reader is cautioned about the scope of their precedent value. Also, the reader is reminded to distinguish between court decisions based upon analysis of prior law under the 1990 ADA, to the extent such is no longer applicable under the ADAAA. For discussion of other recent decisions, *see The Americans with Disabilities Act: Recent Developments and Future Implications*, 833 Practising Law Institute Litigation and Administrative Practice: Litigation 801 (2010).

sought additional time on a medical licensing examination as an accommodation for a diagnosed reading disorder. The district court, relying on the pre-ADAAA and *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002), held that *Jenkins* failed to demonstrate that his reading difficulties limited his ability to perform tasks central to most people’s daily lives. *Jenkins*, 2009 WL 331638 at \*1. The Sixth Circuit determined that because the case involves prospective relief and was pending when the amendments became effective, the ADAAA must be applied. *Id.* The Sixth Circuit, recognizing that reading is a major life activity under the ADAAA (and existing precedent), stated that *Jenkins*’ status as disabled rests on the definition of “substantial limitations” under the ADAAA (and not as had been articulated previously under the *Toyota Motor Mfg.* case). Consequently, the *Jenkins* case was remanded for a factual determination as to whether *Jenkins* was substantially limited (and, if so, to address the accommodations requested). *Id.*; see also *Brodsky v. New England School of Law*, 617 F. Supp. 2d 1, 6 (D. Mass. 2009) (Because plaintiff seeks relief in the form of reinstatement into school with reasonable accommodations, it is “conceivable that he should enjoy the benefit of the ADA amendments with respect to his claim for injunctive relief, but not with respect to his claim for damages.”)

The number of reported cases where courts have applied the ADAAA to evaluate alleged acts of disability discrimination that occurred on or after January 1, 2009 is limited. Those cases illustrate the court’s stringent application of the ADAAA’s clear directives regarding the broad construction of the meaning of disability. See, e.g., *Hoffman v. Carefirst of Fort Wayne, Inc.*, No. 1:09-CV-251, 2010 WL 3940638, at \*1 (N.D. Ind. Oct. 6, 2010) (holding that because the plaintiff had cancer in remission, and that cancer would have substantially limited a major life activity when it was active, under the ADAAA he did not need to show he was substantially limited in a major life activity at the time of the alleged adverse employment action); *Horgan v. Simmons and Morgan Services, Inc.*, 704 F. Supp. 2d 814, 819 (N.D. Ill. Apr. 12, 2010) (holding that it is “certainly plausible – particularly under the amended [ADAAA] that – plaintiff’s HIV positive status substantially limits a major life activity: the function of his immune system).

Review of several cases that have referenced the ADAAA reinforce the important (and hopefully obvious) point that notwithstanding the broadened scope of what constitutes a disability, a plaintiff still must establish a *prima facie* case of disability discrimination.<sup>6</sup> See, e.g., *Cook v. Equilon Enterprises, L.L.C.*, No. 4:09-cv-0756, 2010 WL 4367004, at \*6 (S.D. Tex. Oct. 26, 2010) (holding that although the plaintiff “very well may be disabled under the [ADAAA], which includes ‘lifting’ as a major life activity . . . it is unnecessary to reach the question of whether [he] is disabled . . . because he has failed to establish the remaining elements of a *prima facie* case of disability discrimination.”).

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<sup>6</sup> A plaintiff claiming disability discrimination bears the burden of proving a *prima facie* case of discrimination by showing that he: (1) has a disability within the meaning of the statute; (2) is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodation; and (3) was discriminated against because of the disability. See *Duty v. Norton-Alcoa Proppants*, 293 F.3d 481, 490 (8th Cir. 2002) (addressing ADA); see also *Capobianco v. City of N.Y.*, 422 F.3d 47, 56 (2d Cir. 2005) (addressing ADA). If the plaintiff meets his burden of establishing a *prima facie* case, then the employer has the burden to articulate a legitimate, nondiscriminatory reason for the adverse employment action. If the defendant meets this burden, the plaintiff must then show that the defendant’s proffered reason was a pretext for discrimination. See *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973) (analysis of plaintiff’s disability claims follows the burden-shifting sequence).

The case of *Wurzel v. Whirlpool Corp.*, No. 3:09CV498, 2010 WL 1495197 (N.D. Ohio, Apr. 14, 2010), *appeal docketed*, No. 10-3629 (6th Cir. May 20, 2010) addresses the application of the ADAAA's expansion of the "regarded as" disabled claim in the context of the plaintiff's inability to meet the "qualified individual" element of the *prima facie* case, due to the plaintiff's direct threat to others. In summary, the *Wurzel* case results from the fact that the plaintiff's treating physician opined he could return to work without restriction (notwithstanding his heart condition) and his employer's plant physician and independent medical examiner concluded that the plaintiff's heart condition and its effect made it unsafe for him to work alone, around moving machinery or as a tow motor operator. The plaintiff denies he had a disability, and alleges that his employer (Whirlpool) regarded him as disabled at different times in violation of the pre-ADAAA and post ADAAA. The court determined that Whirlpool's action in 2008 of restricting the plaintiff from driving a tow motor or other company vehicle did not encompass a broad class of jobs, and, therefore, Whirlpool did not regard the plaintiff as disabled under the pre-ADAAA.

The court in the *Wurzel* case went on to analyze the plaintiff's claim that Whirlpool's determination in 2009 that he could not safely perform the essential functions of his job constituted a violation of the "regarded as disabled" prohibition under the ADAAA. The court articulated that to meet his burden under the ADAAA, the plaintiff must show that he was subjected to an action prohibited under the ADAAA because of an actual or perceived physical impairment whether or not the impairment limits a major life activity. Then the court noted that to meet his burden, the plaintiff must show that his employer subjected him to a prohibited action, and stated that actions "motivated by *bona fide* concerns with worker safety cannot be deemed or be found to be prohibited under the ADA, as amended, or otherwise." *Wurzel*, 2010 WL 1495197 at \*7.<sup>7</sup> In furtherance of its argument that the plaintiff cannot establish a *prima facie* case, Whirlpool also argued that the plaintiff was not "qualified" because (based upon objective medical evidence) he created a direct threat to his safety and that of others.

The court analyzed Whirlpool's position in light of the current regulation defining a "direct threat" as a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.<sup>8</sup> The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. 29 C.F.R. § 1630.2(r).

In discussing the case, the court distinguished between the prohibited action of taking action based on stereotypes (*i.e.*, adverse action simply on the basis of the person's disabling, or perceived disabling, condition) and taking action when a condition leads to harm or risk of harm. *Id.* The court held that a rational jury could only find that Whirlpool's decisions had nothing to

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<sup>7</sup> The reader is cautioned not to rely on this portion of the court's analysis in isolation. Also note that this case currently is on appeal.

<sup>8</sup> This is consistent with the ADAAA's definition of "direct threat." 42 U.S.C. § 12111(3).



do with the diagnosis of the heart condition and everything to do with the consequences of that condition when it unforeseeably caused spasms of unpredictable duration and effects. *Id.*

As to the contradictory opinions of the medical experts for each side, the court in *Wurzel* stated that it will not second-guess an adverse employment action where that action rests on an employer's assessment of conflicting evidence. *Smith v. Chrysler Corp.*, 155 F.3d 799, 807 (6th Cir.1998) (holding that "the key inquiry is whether the employer made a reasonably informed and considered decision before taking an adverse employment action"). More specifically, this court held that "Neither I nor a jury is charged with, or has the authority to assess de novo which medical judgment is more likely accurate." *Id.*

Similarly, the ADAAA will not alter a plaintiff's requirement to establish a *prima facie* case for a claim that the defendant failed to reasonably accommodate the plaintiff.<sup>9</sup> This point is illustrated in the case of *Duffy v. McHugh*, 2010 WL 2900673 (D. Hawaii July 22, 2010), which involved an alleged action that occurred prior to January 1, 2009. In addressing the plaintiff's claim that the defendant failed to accommodate her, the court, consistent with the need to focus beyond whether a plaintiff is disabled, stated that even if there were questions of fact as to whether the plaintiff was "disabled," her failure to accommodate claim fails because she failed to complete participation in the necessary interactive process (and the breakdown in the process is not attributed to the defendant), citing *Humphrey v. Memorial Hospitals Ass'n*, 239 F.3d 1128, 1137 (9th Cir. 2003) (reiterating that both an employer and an employee have a duty to engage in an interactive process to consider requested accommodations that requires communication and good-faith exploration of possible accommodations); *Zivkovic v. So. Cal. Edison Co.*, 302 F.3d 1080, 1089 (9th Cir. 2002) (liability for failure to provide reasonable accommodations ensues only where the employer bears responsibility for the breakdown in the interactive process).

#### **D. What do the Changes Imposed under the ADAAA Mean for Employers on a Day-to-Day Basis?**

A primary purpose of the ADAAA is the de-emphasis of complicated analyses regarding whether or not an individual meets the statutory definition of disabled. An employer's focus, then, should be directed towards these legal elements of the disability claim analysis: the meaning of a qualified individual and the interactive reasonable accommodation process.

Once an accommodation is requested, the appropriate reasonable accommodation typically is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability requesting the accommodation. The purpose of the process is to identify the limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations. See 29 C.F.R. § 1630.2(o)(3). The law does not require that an employer grant every accommodation

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<sup>9</sup> To establish that the defendant failed to reasonably accommodate the plaintiff's disability, the plaintiff must show that he attempted to engage in an interactive process with defendant to determine a reasonable accommodation and the defendant was responsible for any breakdown that occurred in that process. See, e.g., *EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 797 (7<sup>th</sup> Cir. 2005) (addressing ADA).

requested; rather, the employer need only provide accommodations that are effective and reasonable.<sup>10</sup>

The ADAAA offers as illustrations of what may constitute a reasonable accommodation: job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities; and making existing facilities used by employees readily accessible to and usable by individuals with disabilities. 42 U.S.C. § 12111(9). Accommodations that impose an undue hardship on the operation of the employer's business are not required.<sup>11</sup>

Under the ADAAA, the term "qualified individual" is defined as an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. 42 U.S.C. § 12111(8).

When addressing the "qualified individual" element, the ADAAA makes clear that consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job. 42 U.S.C. § 12112(b). Herein lies one of the employer's most effective tools for compliance. That is, the employer retains the control over determining what qualifications are required for the job and what duties are essential for the job. This determination cannot be made after the fact. It is imperative that employers maintain current and meaningful documentation that addresses the essential qualifications and duties of the job. Such documentation is found in job postings, job descriptions, statements of annual goals and expectations, and performance evaluations. Often employers turn to these documents to support their position as to what is (or is not) an essential qualification or duty of the job, only to come to regret the document is outdated, incomplete, or simply inaccurate. Therefore, employers must be vigilant to avoid the situation where they have no documentation (or even worse, incorrect documentation) about the essential job qualifications and duties. (*See* Section V for additional action items for employers to undertake for compliance initiatives.)

The "qualified individual" element also bears directly on the challenge employers face when addressing conduct of an employee which presents a direct threat to the safety or health of other individuals in the workplace (and that conduct is related to a disability). As discussed above, the ADAAA does not eliminate the "direct threat" defense. It continues to recognize it. It is essential, however, that employers conduct an individualized assessment of the risks posed by the individual in accordance with the direct threat analysis, as established under the applicable regulations and case law. (The specific aspects of such direct threat analysis are discussed in

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<sup>10</sup> See also the discussion in Section II, paragraph C, above, regarding the parameters of claims brought for failure to provide a reasonable accommodation. For further discussion of the interactive process, see the current EEOC regulations at 29 C.F.R. § 1630.

<sup>11</sup> Undue hardships often is a difficult standard to employers to meet in regard to fairly routine requests for accommodations. That term is defined at 42 U.S.C. § 12111(10).

Section II, paragraph C, above, in connection with the *Wurzel* case. *See also* 42 U.S.C. §§ 12111(3) and 12113(a)(b) and 29 C.F.R. § 1630.2(r). Generally speaking, an employer cannot expect to rely on a subjective good faith determination of its human resources or management personnel to meet the direct threat requirements.

### III. TITLE II OF THE GENETIC INFORMATION NONDISCRIMINATION ACT

In May of 2008, the Genetic Information Nondiscrimination Act of 2008 (“GINA”) was enacted.<sup>12</sup> Title II of GINA, which addresses employment discrimination, became effective in November of 2009. The requirements of Title II are administered by the EEOC. The EEOC issued proposed regulations for GINA in March of 2009. On November 9, 2010, the EEOC issued final regulations under GINA. (the “GINA Regulations”).

Employers are recommended to review the GINA Regulations, as they offer specific examples and illustrations, as well as the question and answer summary document prepared by the EEOC posted at [http://www.eeoc.gov/laws/regulations/gina\\_qanda\\_smallbus.cfm](http://www.eeoc.gov/laws/regulations/gina_qanda_smallbus.cfm). For further detailed information, a comprehensive analysis of the GINA Regulations appears at <http://www.federalregister.gov/articles/2010/11/09/2010-28011/regulations-under-the-genetic-information-nondiscrimination-act-of-2008>.

Under GINA, genetic information is defined broadly. It includes information about genetic tests of the individual or his/her family members, the manifestation of a disease or disorder in family members of an individual (family medical history), an individual’s request for, or receipt of, genetic services, or the participation in clinical research that includes genetic services by the individual or his/her family member, and the genetic information of a fetus carried (or an embryo held by or for) the individual or his/her family member. Genetic information excludes information about the sex or age of the individual or his/her family members. A genetic test is defined as an analysis of human DNA, RNA, chromosomes, proteins, or metabolites that detects genotypes, mutations or chromosomal changes. 29 C.F.R. § 1635.8(b)(1)(i)(B). *See* 29 C.F.R. § 1635.3(a) for the meaning of family member, which is defined broadly.

Title II of GINA<sup>13</sup> applies to employers (with fifteen or more employees), labor unions and employment agencies. In summary, GINA prohibits the use of genetic information in employment, restricts covered entities from requesting, requiring, or purchasing genetic

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<sup>12</sup> The Genetic Information Nondiscrimination Act of 2008 (“GINA”) (Pub. L. 110-233, 122 Stat. 881) is codified at 42 U.S.C. §2000ff *et seq.* Title I of GINA addresses health insurance discrimination and Title II addresses employment discrimination. The current regulations appear at 29 C.F.R. § 1635 *et seq.* (The proposed GINA regulations appeared at 74 Fed. Reg. 9056.)

<sup>13</sup> Title I of GINA prevents all health insurers, including employer-sponsored group health plans and individual health insurance issuers, from basing eligibility or premium determinations on genetic information. The requirements of Title I are administered by the Departments of Health and Human Services, Labor and the Treasury. This paper focuses on Title II of GINA. The reader is advised to review the statute directly for specific information regarding Title I of GINA and its enforcement and penalty structure.

information about an employee or applicant, and strictly limits the disclosure of such genetic information. *See* 29 C.F.R. § 1635 *et seq.*

GINA prohibits covered entities from discriminating against or harassing an individual on the basis of genetic information (as defined under GINA) in regard to hiring, firing, compensation, or other terms, conditions or privileges of employment. 29 C.F.R. § 1635.4. GINA also prohibits covered entities from retaliating against an individual for having complained about genetic discrimination. 29 C.F.R. § 1635.7

GINA requires covered entities to maintain genetic information as a confidential medical record and places strict limits on disclosure of genetic information. Under GINA, employers must maintain genetic information on separate forms and in separate medical files. The information must be treated confidentially. Employers may not disclose genetic information regarding an employee except to that employee, health researchers, or in compliance with federal or state law. 29 C.F.R. § 1635.9

In addition, GINA prohibits covered entities from requesting, requiring, or purchasing, genetic information of an employee or applicant, with limited exceptions. These exceptions occur in situations where the information is acquired: inadvertently; as part of health or genetic services, including voluntary wellness programs; in the form of family medical history to comply with the certification requirements of the Family and Medical Leave Act, state or local leave laws, or certain employer leave policies (but see discussion below and the “safe harbor” provision); from sources that are commercially and publicly available, such as newspapers, books, magazines, and even electronic sources (but excludes the active search or seeking of such information); as part of genetic monitoring that is either required by law or provided on a voluntary basis; and by employers who conduct DNA testing for law enforcement purposes as a forensic lab, or for human remains identification. 29 C.F.R. § 1635.8; *see also* [http://www.eeoc.gov/laws/regulations/gina\\_qanda\\_smallbus.cfm](http://www.eeoc.gov/laws/regulations/gina_qanda_smallbus.cfm).

The GINA Regulations provide specific guidance to employers that impact many common practices. For example, if an employer requires an employee to undergo a medical examination related to employment, the employer must affirmatively advise the health care provider not to collect genetic information, including family medical history. *See* [http://www.eeoc.gov/laws/regulations/gina\\_qanda\\_smallbus.cfm](http://www.eeoc.gov/laws/regulations/gina_qanda_smallbus.cfm) and 29C.F.R. § 1635.8(b)(1). Also, it should be noted that although not necessarily anticipated under the previously proposed GINA regulations, the GINA Regulations state that when an employer makes a request for health-related information (*e.g.*, to support an employee’s request for reasonable accommodation under the disability laws or a request for sick leave), it should caution the employee and/or his or her health care provider from whom it requests the medical information not to provide genetic information. *Id.* The GINA Regulations state that such caution may be in writing (or verbally, if the covered entity typically does not make such requests in writing). 29 C.F.R. § 1635.8(b)(1)(i)(A). The GINA Regulations contain the following sample “safe harbor” language for an employer to include in such requests to health care providers:

The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically

allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. “Genetic information” as defined by GINA, includes an individual’s family medical history, the results of an individual’s or family member’s genetic tests, the fact that an individual or an individual’s family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual’s family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services. 29 C.F.R. § 1635.8(b)(1)(i)(B).

The enforcement provisions of Title II of GINA are borrowed from Title VII of the Civil Rights Act of 1964, as amended. The EEOC has jurisdiction over enforcement of GINA. For the most part, the same remedies available under Title VII (such as, reinstatement, back pay, injunctive relief, equitable relief, and attorneys’ fees and costs) are available under Title II of GINA.

#### **IV. VIRTUAL ACCESSIBILITY**

Over the recent years, colleges and universities have seen developments in disability law in the context of student-related matters in the area of the accessibility to certain technologies and web-based programs and activities.<sup>14</sup> For example, the National Federation for the Blind (“NFB”) and the American Council of the Blind (“ACB”) filed complaints against several colleges and universities with the Office of Civil Rights, Department of Education, challenging the use of e-readers as part of course curriculum. See, e.g., <http://www.ada.gov/princeton.htm> and [http://www.ada.gov/arizona\\_state\\_university.htm](http://www.ada.gov/arizona_state_university.htm). In September of 2010, McNesse State University entered into an agreement with the Department of Justice to make new and modified web pages accessible. See <http://www.ada.gov/mcnesse.htm>. In November 2010, the NFB, on behalf of students and faculty with limited vision, filed a complaint against The Pennsylvania State University (“Penn State”) with the Office of Civil Rights, Department of Education, alleging violations under Title II of the ADAAA and the Rehabilitation Act, due to inaccessible web design features, including inaccessible web pages from the University’s Office of Disability, on-line library catalogue, course descriptions, course management software, and lack of guidelines to instruct faculty on how to make web pages accessible. See [http://www.nfb.org/images/nfb/documents/word/OCR\\_Complaint\\_Final.doc](http://www.nfb.org/images/nfb/documents/word/OCR_Complaint_Final.doc). For general commentary, see <http://chronicle.com/article/Blind-Students-Demand-Access/125695> and <http://chronicle.com/blogs/wiredcampus/ada-compliance-a-major-vulnerability-for-online-programs/28136>.

Also with a focus on web accessibility, the Department of Justice issued an Advance Notice of Proposed Rulemaking (“ANPRM”) on accessibility of websites under Titles II and III of the ADAAA in July of 2010. See <http://www.ada.gov/anprm2010/anprm2010.htm>. With that ANPRM, the Department of Justice states that it is considering revising the regulations implementing Title III in order to establish requirements for making the goods, services,

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<sup>14</sup> This information is offered in this section for the purpose of illustrating emerging trends likely to impact the employment context. The reader is directed to the session of this Stetson conference that addresses developments in disability laws in student-related matters.

facilities, privileges, accommodations, or advantages offered by public accommodations via the internet, specifically at sites on the web, accessible to individuals with disabilities. That Department is also considering similar revisions to the Title II regulations. It issued the ANPRM in order to solicit public comment on these potential new requirements.

Similarly, the Department of Labor issued an ANPRM in July of 2010 to determine how the Office of Federal Contract Compliance Programs can strengthen the affirmative action requirements of the regulations implementing Section 503 of the Rehabilitation Act. Included in that ANPRM is the inquiry of what impact would result from requiring federal contractors to make information and communication technology used by job applicants in the job application process, and by employees in connection with their employment, fully accessible and usable by individual with disabilities. The ANPRM offers, by way of example, the possibility of requiring that federal contractors ensure that application and testing kiosks are fully accessible and usable by individuals with disabilities, and that federal contractors strive to ensure that their internet and intranet web sites satisfy the United States Access Board's accessibility standards for technology used by the Federal Government and subject to Section 508 of the Rehabilitation Act. *See <http://edocket.access.gpo.gov/2010/pdf/2010-18104.pdf>*. It issued the ANPRM in order to solicit public comment on these potential new requirements.

Similar developments within the employment context likely are to occur in the next year. Thus, these web-accessibility issues provide predictions of emerging trends and guidance by analogy for employers seeking to comply with their obligations under Title I of the ADAAA. Consequently, employers should identify the same type of issues that are present in the workplace, and address them proactively.<sup>15</sup>

## **V. EFFECTIVE TOOLS FOR EMPLOYERS FOR COMPLIANCE WITH THE DISABILITY LAWS**

As described above, the primary impact of the ADAAA is to reduce substantially (and some would say eliminate entirely) an employer's challenge that the employee (or job applicant) has a disability as that term is now defined and interpreted. The de-emphasis on whether or not an individual meets the statutory definition of disabled will result in an emphasis on the availability of reasonable accommodations and the attendant interactive process. The emphasis on the reasonable accommodation process will, in turn, place further focus on whether the disabled individual is otherwise qualified to perform the essential functions of a job. As a result of the changes to the ADAAA, employers are wise to refocus and update their approaches to compliance with the disability laws by doing the following:

- Update disability and reasonable accommodation policies to make certain these policies include prohibitions against disability discrimination and an explanation of the reasonable accommodation process, including how an individual can make a request for a reasonable accommodation. (Make certain that it is clear that these policies apply to all employees, including faculty.)

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<sup>15</sup> As a threshold matter, employers who use on-line employment applications should check them for accessibility to individuals with disabilities under Title I of the ADAAA.

- Centralize the reasonable accommodation review, determination and approval process to the extent practicable to maximize expertise and consistency of response. (A disability coordinator who addresses only student disability issues may not necessarily be the most effective person to address the reasonable accommodation process for employees and faculty.)
- Comply with Section 504 regulations of the Rehabilitation Act<sup>16</sup> requiring compliance coordinators and a grievance process, if the institution is covered under Section 504. (An employer should consider the benefit of having an identified coordinator and grievance process even if it is not covered by Section 504.)
- Identify the essential qualifications for and the essential duties of the job at issue. (This is important for faculty, as well as non-faculty.)
- Update job descriptions (and other related documentation) to include a clear, accurate and reasonable articulation of both the essential duties and the essential qualifications of the job. (This is important for faculty also, even if there are no formal job descriptions. Documentation of expectations for faculty, in terms of course loads, obligations to students outside of the classroom, attendance at department meetings, participation in department or other campus activities, and the like, are useful when addressing a faculty member's request for accommodation.)
- Think about the array of documents that exist which reflect the essential duties of (and qualifications for) the job, beyond the typical job description. Those other documents (such as, job postings, department protocols, procedures for operation of certain equipment) must be consistent with the job duties and job qualifications.
- Train management personnel (including deans and faculty chairs) on the definition of disability, the employer's obligation for the interactive process, and the employer's disability policy and specific procedures for addressing requests for accommodations.
- Direct management personnel (including deans and faculty chairs) who are likely to receive reasonable accommodation requests to refer individuals to the employer's established processes and/or include appropriate human resources personnel in the discussion.
- Obtain medical verification from individual's health care provider based on criteria directly related to the essential job duties.

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<sup>16</sup> An entity which is covered under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, is required to designate at least one person to coordinate its efforts to comply with its obligations under that statute and is to adopt grievance procedures that incorporate appropriate due process standards that provide for prompt and equitable resolution of complaints alleging any action prohibited under the statute. However, such procedures need not be established with respect to complaints from applicants for employment (or from applicants for admission to post-secondary educational institutions). 34 C.F.R. §104.7

- Document the employer's acceptance and reliance on information and certification provided by the individual's health provider as to the individual's ability to perform the essential duties of the job, with the agreed accommodations (or without the need for accommodations).

Employers should not interpret the changes in the ADAAA as a prohibition to take employment actions based upon legitimate, non-discriminatory business reasons. However, as any employer faced with a discrimination lawsuit knows, justifying the legitimate basis of an employment action requires adherence to established policies and accurate documentation. Employers are prudent to view the challenges presented by the broadening of the definition of disability under the ADAAA as an opportunity to refocus on, and reestablish, effective employment management practices, such as the following:

- Train management personnel (including deans, faculty chairs, and faculty who evaluate other faculty) on the importance of conducting (and how to conduct) meaningful performance reviews, including evaluating job performance in the context of the essential duties of the job and qualifications for the job.
- Establish and articulate (and update as necessary) the job requirements and performance expectations to the employee.
- Have employees review and acknowledge the job position description.
- Adhere to any policies regarding job training and mentoring.

For those employers who understand that an underlying goal of the disability laws is to prohibit stereotyping about persons with disabilities or perceived disabilities, and who also appreciate the confidentiality of medical information they receive in connection with an individual's employment, benefits, and medical leaves, the purpose of Title II of GINA should be clear. Compliance with GINA, however, does require an employer to have a specific understanding of the statute and the recently issued GINA Regulations. At a minimum, employers should consider the following immediate action items:

- Update employment policies prohibiting discrimination to include prohibitions against genetic information discrimination.
- Post updated EEOC poster that includes information about GINA. See <http://www.dol.gov/ofccp/regs/compliance/posters/pdf/eeopost.pdf>.
- Train management personnel on GINA's requirements, the meaning of genetic information and the scope of family members and medical history under GINA, and impermissible requests for genetic information.
- Make certain that health care providers who conduct fitness for duty examinations or pre-hire physicals on behalf of the employer understand and comply with the requirements (and restrictions) under GINA, and do not inappropriately collect



family medical history or genetic information. Also, make use of the “safe harbor” language, as discussed in Section III and at 29 C.F.R. § 1635.8(b)(1)(i)(B).

- Develop procedures to comply with GINA requirements regarding maintaining documentation with genetic information confidentially and separately.

## **VI. CONCLUSION**

The disability laws and their impact in the employment context will continue to evolve, especially as cases governed by the ADAAA reach the circuit courts of appeal for analysis over the next several years. Employers can achieve compliance with the disability laws by being vigilant in updating their policies, procedures and postings; being proactive in identifying and rectifying possible areas of concern, in particular technology and web-accessibility issues; conducting supervisory training programs; reinforcing effective management practices and implementation of employee performance evaluation programs; and maintaining meaningful documentation of the reasonable accommodation process.