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Recent Developments
under the ADA

(Arial Narrow)



Course Evaluation

Recent Developments under the Americans with Disabilities Act
 David Comeaux - *Ogletree Deakins*

For each question circle the answer that comes closest to your opinion

1-strongly disagree 2-disagree 3-neutral 4-agree 5-strongly agree

⤴ This program was presented in a lively, stimulating way	1	2	3	4	5
⤴ The content was interesting and informative	1	2	3	4	5
⤴ The information presented will be useful to me	1	2	3	4	5

⤴ **What other topics in this area should we consider for next year?**

⤴ **Other Comments?**

Your comments will ensure a successful program next year. Thank you.
 Please place this form in the designated box located in each session.

2009 HOSPITALITY LAW CONFERENCE

THE ADA AMENDMENTS ACT



ADA MENDMENT ACT OF 2008
AND
TITLE III – ADA ACCESS

Presenters




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ADA Title I in a Nutshell



- ADA prohibits **discrimination** against **qualified** individuals with a **disability**
- Requires employers to make **reasonable accommodations** for disabled individuals where no **undue hardship** to the employer or direct threat of harm to employee or others results



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Most Litigation: Is Employee Disabled?

- Under the ADA, an employee has a "disability" if he or she:
 - Has any impairment that **substantially limits a major** life activity;
 - Has a record of an impairment that **substantially limits a major** life activity; or
 - Is **regarded as** having an impairment that **substantially limits a major** life activity




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ADAAA Overrides Supreme Court Decisions

Sutton v. United Airlines (1999)

- Issue:** Two severely myopic sisters applied for jobs as airline pilots and sued after being rejected for not meeting uncorrected vision requirements.
- Court:** Sisters not disabled under ADA because their impairment could be mitigated by corrective lenses.
- Rule:** Medicines or other devices that allow individuals to function despite their impairments may be considered by courts when determining whether an individual is "disabled" under the ADA.




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ADAAA Overrides Supreme Court Decisions


Toyota Motor Manufacturing v. Williams (2002)


- Issue:** Employee was diagnosed with carpal tunnel syndrome and employer allegedly failed to accommodate her "disability."
- Court:** An individual must meet a "demanding standard" for showing she is "substantially limited" in a "major life activity." Employee could not meet this standard and was not covered under ADA because she could still perform some manual tasks despite her condition.
- Rule:** Individuals must show their impairments prevent or severely restrict their ability to perform activities of central importance to most people's daily lives.


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 Congress' Response to Supreme Court Decisions


- Expand definition of major life activities
- Broaden the meaning of substantial limitation
- Eliminate consideration of mitigating measures
- Expand the scope of "regarded as" claims



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 ADA "Broad Construction"

- Amendment states: "The 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."




 New "Major Life Activities"

- Caring for oneself
- Performing manual tasks
- Seeing
- Hearing
- Eating
- Sleeping
- Walking
- Standing
- Lifting
- Bending
- Speaking
- Breathing
- Learning
- Reading
- Concentrating
- Thinking
- Communicating
- Working

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“Major Bodily Functions”




- Amendments state that “major bodily functions” include:
 - Functions of the immune system
 - Normal cell growth
 - Digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions

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Mitigating Measures No Longer Apply


- Mitigating measures may not be considered in determining whether an individual is disabled under ADA
- Exception for “ordinary eyeglasses and contact lenses”
- Episodic conditions are considered in their active state




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Result of ADA Amendments


- More employees are “disabled” within the meaning of the ADA
- Much greater emphasis on reasonable accommodation and need to engage in the “interactive process” required under ADA regulations with almost all impairments
- Analysis of essential job functions
- Expanded EEOC regulations





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 **Tips for Complying with the ADAAA**


- Assume coverage
- Engage in interactive dialogue
- Revisit job descriptions
 - Essential job functions
- Revisit policies and postings
 - Procedures for interactive dialogue
 - Procedures for accommodation
 - Document receipt of policies

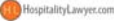





 **Tips for Complying with the ADAAA**


- Provide training for supervisors and HR personnel
 - Remind of anti-retaliation provisions
 - Avoid stereotypes and assumptions
 - Document training
- Begin compliance with ADAAA right away
 - Uncertain interpretation of effective date







 **ADA Title III – Guest Access**


Prohibits private businesses that serve the public from discriminating against persons with disabilities in the full and equal enjoyment of their goods, services, facilities, privileges, advantages and accommodations.



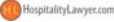
 **What we WILL Discuss**


- Discrimination under Title III of ADA
- Effect of New Construction and Renovations
- General Standards
- Enforcement of Title III




 **What we WILL NOT Discuss**

- State Laws
- Detailed Standards
 - ADAAG is > 300 pages
 - Every Property is different
- Specific Lawsuits



 **Discrimination under the ADA**


- Direct Discrimination
- Unintended Discrimination
 - Requiring Drivers' License for ID
 - No Pets
- Safety Considerations
 - Direct Threat to safety of others
 - Cannot be mitigated (e.g., auxiliary aids)



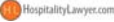
 **New Construction Renovations**


- New Construction must be "accessible to and usable by" persons with disabilities
- Alterations (after 1/26/92) must
 - Satisfy accessibility standards (ADAAG)
 - To the maximum extent feasible, make altered portions of the facility accessible and usable




 **Facilities Unaltered Since 1992**


- Barrier removal must be accomplished only when it is "readily achievable" to do so.
- **Readily achievable:** "easily accomplishable and able to be carried out without much difficulty or expense."




 **Readily Achievable - Examples**


- Simple ramping of a few steps
- Installation of grab bars where only routine reinforcement of the wall is required
- Lowering telephones
- Rearranging restaurant tables
- Placing writing table in lobby



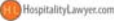
 **New Construction**


- Full compliance with Accessibility Standards
- ADA Accessibility Guidelines (ADAAG)




 **Renovations (ADA: Alterations)**

- Accessible manner to maximum extent feasible
 - e.g. new doorway must be wide enough
- Alterations to Primary Function Areas (Lobbies, restaurants, etc.)
 - Accessible Path of Travel
 - Bathrooms / Phones / Drinking Fountains
 - 20% of renovation costs



 **Enforcement – U. S. DOJ**

- Injunctive Relief
- Money Damages for affected persons
- Civil Penalties
 - First offense – up to \$55,000
 - Further offenses – up to \$100,000



 **Enforcement – Private Lawsuits**


- Injunctive Relief
 - Stop Discrimination
 - Make changes to facilities
- Money Damages
- Attorney’s Fees and Costs
 - If **any** violation found



 **Cottage Industry of Litigation**

- “Advocacy” Groups – Professional Plaintiffs
- Specialty Law Firms
- Professional Experts



 **Further Information**

- www.ada.gov
- www.access-board.gov
- Experts – Architects with hospitality experience
- Attorneys – not unless you get sued

