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# MASUD, PATTERSON, SCHUTTER, PETERS & VARY, P.C.

ATTORNEYS AND COUNSELORS  
SPECIALIZING IN LABOR AND EMPLOYMENT LAW

## NEWSLETTER

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### ADA Amendments Act of 2008 Signed Into Law

On September 25, 2008, President George W. Bush signed into law the ADA Amendments Act of 2008 (“the Act”). The Amendments’ provisions become effective on January 1, 2009, and significantly expand the scope of the ADA. The ADA prohibits discrimination against disabled employees or job applicants and requires covered employers to make reasonable accommodations to allow a disabled individual to perform the essential functions of his or her job. The ADA covers all private employers, state and local governments, and educational institutions that employ 15 or more people.

Under the new provisions, millions of Americans may now claim to be disabled who previously were not considered to have a disability. The new provisions expressly overturn the United States Supreme Court’s decisions in *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999) and *Toyota Motor Mfg. Ky. Inc. v. Williams*, 534 U.S. 184 (2002). In *Sutton*, the Supreme Court limited the ADA’s protections for individuals whose disabilities could be mitigated by measures such as medication, medical supplies, prosthetics and assistive devices. In *Toyota Motor Mfg.*, the Supreme Court adopted standards making it harder for plaintiffs to prove they are “substantially limited” in “major life activities.” The rejection of these decisions now calls into question numerous state and federal court decisions that hinged upon

the reasoning of these decisions and have denied protections for various conditions, including epilepsy, heart disease, diabetes, and cancer.

Although the definition of a disability remains the same under the new law, “a physical or mental impairment that substantially limits one or more major life activities,” the application of the language is changed under the Act in favor of broad coverage for individuals. For example, the Act provides that the use of mitigating measures such as hearing aids or medication is no longer permitted when determining whether a person is disabled. The only exception to this prohibition allows consideration of normal eyeglasses and contacts in determining whether a person has a disability. The Act also directs the Equal Employment Opportunity Commission to define the term “substantially limits” as materially restricts, as opposed to severely restricts or prevents.

Under the Act, the definition of “major life activities” includes many activities that the EEOC has previously recognized, such as caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, speaking and breathing, as well as activities that the EEOC has not previously recognized, such as reading, bending and communicating. The new provisions further provide that “major life activities” include the operation of a major bodily function, such as immune system, normal cell growth, digestive,

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bladder, neurological, brain, respiratory, circulatory, endocrine and reproduction.

The Act also clarifies that an impairment that substantially limits one major life activity need not limit other major life activities in order to be a disability. This statement addresses the court decisions that have required limits on not just a major life activity, but also on the individual's ability to work. Further, the Act states that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

The Act also incorporates the definition of "regarded as having" an impairment found in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987). Thus, the Act states that an individual has been discriminated against unlawfully on the basis of a disability if the individual is "regarded as having such an impairment," regardless of whether "the impairment limits or is perceived to limit a major life activity." The Act does note, however, that the "regarded as" definition does not apply to impairments that are transitory and minor, with an actual or expected duration of 6 months or less. The theory behind this change is to try to prevent employers from making decisions based upon fears and stereotypes. Despite this expansion in the law, the Act does not require employers to provide reasonable accommodations for employees who are "regarded as" disabled, but not actually "disabled." The employer must merely abstain from discriminating against the employee on the basis of the perceived disability. This clarifies a previous split in the courts on this issue.

Although the Act is clearly more employee friendly, the Act does make one concession to employers. The amendments make clear that there is no such thing as reverse disability discrimination claims. Reverse discrimination claims have arisen where non-disabled employees have claimed that they should receive the same reasonable accommodations that a disabled employee has received. The Act makes clear that disabled employees may obtain certain changes to their jobs to which other employees are just not entitled.

As a result of this new law and the broader definition of "disability," it will most certainly mean more employees and job applicants will be eligible for the protections of the ADA. As a result, employers will be expected to make more workplace accommodations or face the possibility of increased litigation. Should you have any questions regarding this new law either in general, or as to how it may impact your particular situation, please do not hesitate to contact us.

### **"Hire Michigan First" Legislation Proposed**

A package of 12 bills, known as the "Hire Michigan First," has been passed by the Michigan House of Representatives and is currently pending in the State Senate Committee on Commerce and Tourism. It focuses on employers with State contracts and those that seek or receive State tax breaks. Specifically, these bills would (1) give companies hiring all Michigan workers priority in the awarding of tax breaks and other economic development tools; (2) require companies receiving economic development incentives from the State to report their new hires to the State; (3) require State contractors to hire 100% of their workers from Michigan, replacing the current 50% requirement; and (4) cancel the State contracts and tax incentives of companies hiring undocumented workers, and bar them from consideration for future State contracts.

### **Federal Contractors Now Required to Use E-Verify**

In June of this year, President Bush issued an Executive Order dated June 9, 2008, mandating federal contractors to use the E-Verify system to check immigration status when they hire new workers or start work under government contracts. E-Verify, the Employment Eligibility Verification Program, is a Web-based system that electronically verifies the employment eligibility of newly hired employees or for every new contract with the government. On November 13, 2008, the federal government issued the Final Rules implementing this E-Verify requirement.

The regulations apply to federal contracts awarded and solicitations issued after January 15, 2009, worth at least \$100,000 with a period of performance longer than 120 days. Subcontracts worth \$3,000 or more flowing from such prime contracts are also covered. Under the new rule, companies with covered contracts will need to use E-Verify not only for all new hires, but also to verify the employment eligibility of their employees who work directly on federal contracts. The latter are defined as employees hired after November 6, 1986, who are directly performing work in the United States under a contract that includes the clause committing the contractor to use E-Verify.

Companies awarded covered contracts will be required to enroll in E-Verify within 30 days of the contract award date. Companies will then have 90 days to begin using E-Verify for employees already on staff who are assigned to work on the federal contracts.

Should you have any questions regarding this new rule, either in general, or as to how it may impact your particular situation, please do not hesitate to contact us.

**LAW FIRM UPDATES  
AND  
CLIENT SUCCESSES**

**ABC and Masud, Patterson, Schutter, Peters & Vary, P.C. Seeking an Appeal to the United States Supreme Court.**

In 1992, Associated Builders & Contractors (“ABC”) and Masud, Patterson, Schutter, Peters & Vary, P.C. (“MPSPV”) were successful in thwarting the State of Michigan’s attempts to impose an apprentice-teacher ratio in the Michigan Electrical Administrative Act (“MEA”). ABC and MPSPV argued that the state statute, which was backed and lobbied for by labor unions that have included ratios in their collective bargaining agreements, was preempted by ERISA, a federal statute which governs pensions and benefits. At that time, the federal court

imposed an injunctive order which prohibited the state of Michigan from enforcing the one-to-one ratio requirements of the MEA.

Fourteen years later, the State of Michigan chose to mount a new effort, once again backed by big labor, to enforce the apprenticeship ratio provisions contained in the MEA and to dissolve the injunctive order. The basis of the State’s argument was that the law concerning ERISA preemption had changed in the years since 1992 and, therefore, the State should be able to mandate a one-to-one apprentice-instructor ratio. In response to this challenge by the State, ABC and MPSPV mounted a vigorous defense, attacking both the State’s legal analysis and its delay in seeking judicial review of the issue. In a result which sent the Union reeling, ABC was successful in its efforts before the district court to ensure that the apprentice ratio provisions of the MEA remain unenforceable and preserve the status of the injunctive order. The Sixth Circuit Court of Appeals, however, reversed the decision of the district court.

As a result of the Sixth’s Circuit Opinion, ABC and MPSPV filed a Petition for Writ of Certiorari to the United States Supreme Court. We will keep you informed as to whether the Supreme Court agrees to hear this case.

**Thank You to Our Clients**

In keeping with the spirit of giving that accompanies the end-of-year holidays, Masud, Patterson, Schutter, Peters & Vary, P.C., made a contribution to the Eastside Soup Kitchen as an expression of appreciation on behalf of you, *our clients*. Thank you for choosing our firm as your labor and employment counsel and we hope you have a happy, healthy and prosperous 2009.

**MERRY CHRISTMAS AND HAPPY NEW YEAR  
FROM ALL OF US AT MASUD, PATTERSON,  
SCHUTTER, PETERS & VARY, P.C.**