

**NEW YORK STATE DEPARTMENT OF CIVIL SERVICE
STATE PERSONNEL MANAGEMENT MANUAL**

Advisory Memorandum #08-03

0400 Affirmative Action

October 2008

T0: Department and Agency Counsels; Personnel, Human Resources, and Affirmative Action Officers; and ADA Coordinators

FROM: Judith Ratner, General Counsel

SUBJECT: Recent Amendments to the Americans with Disabilities Act

As you may be aware, on September 25, 2008 the President signed into law amendments to the Americans with Disabilities Act ("ADA"). Public Law 110-325. The amendments take effect on January 1, 2009.

The ADA amendments focus primarily on the definition of "disability," and are intended to shift the Court's analysis away from an extensive review of whether a claimant is disabled. The amendments set forth explicit guidelines regarding "disability" under the ADA, reflecting the intention to reject recent Supreme Court holdings in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) and their companion cases, which narrowed the scope of the ADA.

For State agencies, the ADA amendments provide insight on two particular issues with respect to the definition of "disability." First, the amendments provide that an impairment that is episodic or in remission is a disability if it substantially limits a major life activity **when active**. Second, the amendments provide that whether the impairment substantially limits a major life activity shall be determined without consideration of the ameliorative effects of mitigating measures other than ordinary eyeglasses or contact lenses. Examples of mitigating measures set forth in the amendments include medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies, use of assistive technology, reasonable accommodations or auxiliary aids or services, or learned behavioral or adaptive neurological modifications.

While these amendments may be significant with respect to the ADA, New York State's own Human Rights Law (HRL) contains a broader definition of "disability." Contrary to the ADA, the State's definition of disability found in Section 292 of the HRL does not require the impairment to "substantially limit" a major life activity, but rather that the impairment either prevent the exercise of a normal (not major) bodily function or be demonstrated by medical diagnostic techniques. HRL § 292(21). State agencies should thus consider the ADA amendments to provide guidance with respect to impairments that are episodic in nature or in remission, or are ameliorated by mitigating measures.

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In addition, agencies are reminded that SPMM Advisory Memorandum #02-04 is still in effect, and that information received during the review of a reasonable accommodation request may **only** be used to evaluate the request. Such information cannot be used as a basis for referring an employee for a medical examination to determine fitness for duty pursuant to section 72(1) of the Civil Service Law, or placing the employee on an involuntary leave of absence pursuant to Civil Service Law section 72(5), or for other personnel actions.

A more thorough review of the ADA amendments can be found at the Proskauer website, http://www.proskauer.com/news_publications/client_alerts/index, by selecting the September 2008 Client Alert entitled "Congress Amends the Americans with Disabilities Act; President Bush Expected to Sign New Law."