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## Legislative Bulletin……June 25, 2008

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# H.R. 3195— Americans with Disabilities Act (ADA) Restoration Act (*Hoyer, D-MD*)

**Please note the conservative concerns below.**

**Order of Business**: H.R. 3195 is scheduled to be considered on Wednesday, June 25, subject to a closed rule, H. Res. 1299. The rule waives all points of order against consideration of the bill (except those for PAYGO and earmarks) and provides for one hour of general debate. The rule provides for one motion to recommit on the bill, with or without instructions, and allows the Chair to postpone consideration at any time.

**Background on ADA**:

The Americans with Disabilities Act (ADA) has been described by many as the most comprehensive nondiscrimination legislation since the Civil Rights Act of 1964. ADA provides broad nondiscrimination protection in employment, public services, public accommodation, and services operated by private entities, transportation, and telecommunications for individuals with disabilities. As to the language in ADA, the purpose of the legislation is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." As it is currently written, the ADA defines the term 'disability' with respect to an individual as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment."

According to the House Committee on Education and Labor Republican staff, "over the years, various legal interpretations of the ADA have limited its scope, in some cases preventing the law from offering the protections that were originally intended. For instance, the courts have ruled that someone able to treat the effects of his or her disability, through medication or technology, does not qualify for the law's protections because he or she is not 'disabled' enough."

As such, H.R. 3195 intends to address some of the recent court cases that have called into question the protections provided under the original ADA. This legislation is a result of numerous

stakeholders coming together to find a balanced method of reform of the ADA without imposing new mandates which would negatively affect the original intent of the ADA.

**Background on ADA Supreme Court Cases**

According to CRS:

> The Supreme Court in *Sutton v. United Air Lines* examined the definition of disability used in the ADA and found that the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment. The mitigating measures the plaintiffs used in Sutton were eyeglasses to correct their vision. Similarly, in *Murphy v. United Parcel Service, Inc.* the Court held that the fact that an individual with high blood pressure was unable to meet the Department of Transportation (DOT) safety standards was not sufficient to create an issue of fact regarding whether an individual is regarded as unable to utilize a class of jobs. The Court in Murphy found that an employee is regarded as having a disability if the covered entity mistakenly believes that the employee's actual, nonlimiting impairment substantially limits one or more major life activities. In *Toyota Motor Manufacturing v. Williams*, the meaning of "substantially limits" was examined, and Justice O'Connor, writing for the unanimous Court, determined that the word substantial "clearly precluded impairments that interfere in only a minor way with the performance of manual tasks." The Court also found that the term "major life activity" "refers to those activities that are of central importance to daily life." Finding that these terms are to be "interpreted strictly," the Court held that "to be substantially limited in performing manual tasks, 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."
>
> Since these Supreme Court decisions, lower courts have applied these holdings in various factual situations. For example, in *Orr v. Wal-Mart Stores, Inc.* the eighth circuit found that a pharmacist with diabetes who takes insulin and eats a special diet was not an individual with a disability because, with the medication and diet, the diabetes did not substantially affect a major life activity. Similarly, the eleventh circuit examined what are major life activities in *Littleton v. Wal-Mart.* The plaintiff, a 29-year-old man who was diagnosed with mental retardation as a child, was not hired for a position as a cart-push associate with Wal-Mart. The court found that "[i]t was unclear whether thinking, communicating and social interaction are 'major life activities' under the ADA" and noted that even if thinking, communicating, and social interaction were found to be major life activities, the plaintiff did not show that he was substantially limited in these activities.

**Summary**:

The ADA currently defines the term disability as:

> "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."

Section 3 of H.R. 3195 defines the term disability as:

> "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment **(as described in paragraph (4))**."

Paragraph four reads:

> "An individual meets the requirements of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this Act 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." [emphasis added]

Paragraph four of the bill elaborates on the requirements of the "regarded as" provision and provides that an individual meets the requirements of "being regarded as having such an impairment if the individual establishes that he or she has been subjected to an action prohibited under this Act 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." The bill states that an individual does not meet the "regarded as" requirement if the impairment is transitory and minor. The bill defines a transitory impairment as an impairment with an actual or expected duration of six months or less. It may be important to note that the exemption for transitory and minor impairments is applicable only to the "regarded as" part of the definition of disability.

H.R. 3195 also includes a definition of "substantially limits" meaning "materially restricts a major life activity"—although the bill does not define "materially restricts". This new language would allow for broader coverage than the current statutory language.

H.R. 3195 includes a section outlining major life activities, including major bodily functions, and provides examples of major life activities and major bodily functions (i.e. caring for oneself, seeing, hearing, learning, reading, thinking, communicating, working).

The bill includes rule of construction stating that the definition of disability shall be construed more broadly to "achieve the remedial purposes of the Act" and that:

- "an impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability;
- "an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active; and
- "a determination of whether an impairment is substantially limiting shall be made without regard to ameliorative effects of mitigating measures (such as medication, assistive technology, learned behavioral or adaptive neurological modifications)."

This bill eliminates the use of mitigating measures in determining whether a disability substantially limits a major life activity, with an exception regarding "ordinary eyeglasses or contact lenses."

H.R. 3195 makes several changes to Title I of the ADA including a provision stating that covered entities may not use qualification standards based on an individual's uncorrected vision unless the standard is shown to be job related and consistent with business necessity.

Section 6 of H.R. 3195 also amends Title V of the ADA (miscellaneous provisions). The bill would provide that the act does not "alter the standards for determining eligibility for benefits under state worker's compensation laws or under state or federal disability benefit programs." Furthermore, the bill says that "nothing in the act shall provide the basis for a claim by a person without a disability that he or she was subject to discrimination because of a lack of a disability." The bill also includes a provision which protects covered entities from being required to "provide a reasonable accommodation or a reasonable modification to policies, practices or procedures to an individual who meets the definition of disability" under the 'regarded as' piece of the definition.

Though it was never addressed in the Supreme Court cases which this bill is designed to address, H.R. 3195 grants the Equal Employment Opportunity Commission, the Attorney General, and the Secretary of Transportation the authority to issue regulations implementing the definitions of disability.

**Committee Action**:

The bill was introduced on July 27, 2007, and referred to the House Committee on Education and Labor, the Committees on the Judiciary, the Transportation and Infrastructure, and Energy and Commerce. The House Committee on Education and Labor held a mark-up of the bill on June 18, 2008, and ordered the bill reported, as amended, to the full House by a vote of 43-1. The House Committee on the Judiciary held a mark-up of the bill on June 18, 2008 and ordered the bill reported, as amended, to the full House by a vote of 27-0.

**Conservative Concerns**:

Some conservatives may be concerned that the broad expansion of the term "disability" under the bill—as well as the new authority by the Equal Employment Opportunity Commission, the Attorney General, and the Secretary of Transportation to determine any future definitions—may lead to an increased number of lawsuits and abuse of the ADA. With the broader definition of "disability," the courts may end up being the normal arbiter of who is—and who is not—actually disabled. According to the Heritage Foundation, "Courts have found a variety of minor conditions to be impairments, including back and knee strains, high cholesterol, erectile dysfunction, headaches, and tennis elbow." Such an elastic definition of disability may make the underlying ADA law far less effective in protecting the truly disabled. Furthermore, some conservatives may be concerned that this legislation will ultimately make it harder for employers to dismiss employees who are not genuinely disabled, thereby increasing their costs and incentivizing employers not to hire new employees, since it would be much harder to replace those that are unproductive "at will."

According to a WebMemo released by the Heritage Foundation:

> The ADA Restoration Act would water down the definition of disability, making disability status and protections available to any worker. In this way, it would fundamentally undermine the basic employer–employee relationship, to the detriment of businesses, responsible and diligent workers, and the public at large. Worst of all, the ADARA could

> actually backfire and harm the employment prospects of the truly disabled by making employers even more wary of hiring such workers and accommodating their special needs. Making the protections of the ADA available to all workers is a radical step that threatens to have huge impacts on the economy and the social fabric, by diluting the significance of disability and compassion for it among the public at large. Before making such a radical change, with far reaching effects but few benefits for those truly disabled, Congress should consider its risks and detriments.

**Outside Groups in Support**:

U.S. Chamber of Commerce
National Association of Manufacturers
Human Resource Policy Association
International Franchise Association
National Restaurant Association
Society for Human Resource Management
American Association of People with Disabilities
American Diabetes Association
Bazelon Center for Mental Health Law
Epilepsy Foundation
Leadership Conference on Civil Rights
National Disability Rights Network
National Council on Independent Living

**Cost to Taxpayers**:

CBO estimates that assuming appropriation of the necessary amounts, H.R. 3195 would cost about $25 million over the 2009-2013 period for the Equal Employment Opportunity Commission (EEOC) to handle additional discrimination cases. Enacting H.R. 3195 would not affect direct spending or revenues.

**Does the Bill Expand the Size and Scope of the Federal Government?**: No.

**Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?**: No. According to CBO, "Section 4 of the Unfunded Mandates Reform Act (UMRA) excludes from the application of that act any legislative provision that establishes or enforces statutory rights that prohibit discrimination on the basis of disability." Therefore, as sections three through six fall within that exclusion, they have not been reviewed for intergovernmental or private-sector mandates. According to CBO, "The remaining provisions of H.R. 3195 contain no intergovernmental or private-sector mandates as defined in UMRA and would impose no costs on state, local, or tribal governments, or the private sector."

**Does the Bill Comply with House Rules Regarding Earmarks/Limited Tax Benefits/Limited Tariff Benefits?**: The Education and Labor Committee, in House Report 110-730, asserts that, "H.R. 3195 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e) or 9(f) of rule XXI."

**Constitutional Authority**: The Education and Labor Committee, in House Report 110-730, cites constitutional authority in Article I, section 8, clauses 3 and 18 of the U.S. Constitution (commerce clause).

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