A Closer Look at

THE LAW

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ATTORNEYS AT LAW

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Cunningham Dalman, P.C. is a full service law firm located in Holland, Michigan. Our attorneys possess skill and experience in a broad spectrum of areas of practice, and have proudly served the lakeshore community for over 100 years.

More Alphabet "Soup" for the Employer: The ADAAA

By: James A. Bidol
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For the unprepared employer, this "alphabet legal soup" may be hard to digest when it becomes an official offering on the mandatory "legal menu" served to employers on January 1, 2009, the effective date of the ADA Amendments Act of 2008. President George W. Bush signed the ADAAA into law on September 25, 2008 after a compromise was reached by employer and business groups and the disability rights community. This salutary (on the whole) legislation, as originally drafted and called the "ADA Restoration Act," would have placed the burden of legal proof on employers in ADA "reasonable accommodation" claim cases; treated an "impairment" as a "disability" under the ADA; and included a list of medical conditions that were *per se* considered disabilities. The compromise reached left the burden of proof with the employee; did not treat all "impairments" as "disabilities"; and dispensed with the "*per se* list"; but it did restore vitality to the original legislative purposes expressed when the ADA was first enacted. Nevertheless, the ADAAA significantly broadens the coverage of the ADA by overturning recent U.S. Supreme Court decisions that had made it extremely difficult for individuals to establish that they were "disabled" under and entitled to the protection of the ADA. The bottom line of this amendatory legislation is that many more people will be covered by the expanded definition of "disability," and consequently employers will need to focus more of their efforts and attention on the employer's obligation to provide reasonable accommodations.

You may recall that the Americans with Disabilities Act (ADA) applies to those employers with 15 or more employees, but nearly every state, including Michigan, has its own parallel law for employers with fewer than 15 employees. Michigan's own Persons With Disabilities Civil Rights Act (PDCRA), for instance, has a broader definition of coverage/applicability than the ADA's definition in that an employer who has one or more employees, including the agent of an employer, falls within the coverage of the PDCRA. Although the ADA and PDCRA have overlapping technical definitions, it remains to be seen whether a Michigan legislature will incorporate any of the definitions and concepts which the ADAAA does to expand the availability of the protections found in the federal act to make it more "user friendly" from the perspective of the disabled employee. Given Michigan's dire economic climate, I don't believe we'll see any successful similar legislative push for expanding the protection under PDCRA any time soon; but even when applying the employer's duty to reasonably accommodate an applicant or employee under PDCRA, the new concepts under ADAAA may still have some effect because Michigan appellate courts have held that they will look to case law established under the ADA in construing the PDCRA (the *Lown* case) although differences in the wording of the two statutes preclude any automatic application of the ADA (the *Peden* case).

Summarizing the major impact of the ADAAA, this Act repudiates the 1999 decision of the U.S. Supreme Court in *Sutton v. United Airlines*, which found that mitigating measures, such as the taking of medications or the use of medical equipment to alleviate a medical condition, had to be

considered in determining whether an individual is "substantially limited" in a major life activity. The ADAAA now provides that the determination of whether an impairment substantially limits a major life activity is to be made without regard to the effects of such mitigating measures. (There is, however, an exception to this new rule for the use of ordinary eyeglasses and contact lenses.) Under this new rule, for example, an employee or applicant with high blood pressure whose condition is effectively controlled by medication may nonetheless be considered to be "disabled" for purposes of the ADA, as the alleviating effect of the medication must be disregarded. The ADAAA also repudiated the Court's 2002 decision in *Toyota Manufacturing Company of Kentucky, Inc. v. Williams* which had taken a restrictive view of what constitutes the substantial limitation in the major life activity of working, as had the U.S. Equal Employment Opportunity Commission (EEOC) in its promulgated regulations. Both the EEOC and the Court had interpreted "substantially limits" to mean "significantly restricted," but in Congress's view, both had set the bar too high with the effect of emasculating the ADA. Overruling the *Williams'* decision, which required that a person substantially limited in the major life activity of "working" must also be limited in at least one additional life activity to qualify his or her impairment as a disability under the ADA, the ADAAA now makes it clear that an impairment that substantially limits one major life activity need not also limit other major life activities in order to be considered a disability.

The ADAAA now lengthens the list of "Major Life Activities" beyond the list currently in the EEOC regulations, and now adds an entirely new list of "Major Bodily Functions" into the medico-legal analysis equation. The amendatory Act adds "eating, sleeping . . . standing, lifting, bending . . . reading, concentrating, thinking, and communicating" to the current list of "caring for oneself, performing manual tasks, seeing, hearing, walking, speaking, breathing, learning, and working." The new list of "Major Bodily Functions" includes "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." As of January 1, 2009 and going forward, if an individual applicant or employee has a "physical or mental impairment" that "substantially limits" any of the list of "major life activities" or "major bodily functions," then that individual is to be considered disabled and must be accorded the right to reasonable accommodation under the Act. The Act brings still other important changes to the medico-legal analysis equation, further traps for the unwary employer.

The ADAAA will surely make it much more difficult for employers to take the position that any given individual is not "disabled" within the meaning of the Act with the result that more reasonable accommodation requests and decisions, as well as more administrative discrimination charges and actual lawsuits, are likely forthcoming. A few words to the wise are in order so that employers can reasonably protect themselves in the face of this potential avalanche of disability claims and possible lawsuits. Employers will do well to ensure that their human resources and functional management are up to date on the expanded legal obligations under the ADAAA and competent to handle accommodation requests both knowledgeably and appropriately. In reliance on the very pro-employer *Sutton* decision, many employers have offered little or no ADA training in many years, but now updated, comprehensive training of personnel to meet the "restored" protections for disabled persons brought in by the ADAAA (especially on how to effectively handle requests for reasonable

accommodations going forward) will be the key to success for all employers covered by the ADA. In the short run, I would advise management to access the U.S. Equal Employment Opportunity Commission website (www.eeoc.gov); click on Disability under the heading "Discrimination By Type: Facts and Guidance"; and read the "Notice Concerning the Americans With Disabilities Act Amendments Act of 2008" to start to gain a working understanding of the specific changes made to the ADA. Become even more proactive and prepared by scheduling your HR directors or managers for a session with the author to review the ADAAA in practical depth and to receive "how to" instructions when administering the employer's ADA/ADAAA compliance policies under the new medico-legal regime. With the right amount of preparation and ingredients, we can make the ADAAA a "palatable legal soup," however unsavory for employers it still may be, or, at least, stop you from "choking" on it! Alka-Seltzer® anyone!

Jim Bidol, shareholder and senior litigator, has over thirty (30) years experience as a practitioner of preventive employment law and litigation, for both employers and employees, and invites you to consult with him on these and other legal concerns and issues you may have.

Michigan's New Gift Card Law

By: Vincent L. Duckworth
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Effective November 1, 2008, Michigan enacted several Public Acts which together provide Michigan consumers with greater protection when purchasing or receiving gift certificates and gift cards. These acts, known as Public Acts 208, 209, 210 and 211 of 2008, were passed to ensure that gift certificates, which are defined to include gift cards, retain their value after purchased and give consumers a reasonable time to use them.

It has been estimated by retailers that more than 2/3 of gift cards are not used within the first 30 days of purchase. Moreover, in a 2004 Michigan retailer publication, it was reported that 15% of gift cards are never fully redeemed and 5% of gift cards are never redeemed at all. http://www.retailers.com/news/retailers/04oct/MR1004retailer.html Under the new law, consumers should have a greater opportunity to use those sometimes forgotten gift cards.

For gift cards purchased after November 1, 2008:

- No retailer of goods or services shall sell a gift card or gift certificate to a consumer that expires within a period of less than (5) five years;
- No retailer shall refuse to accept a gift card or gift certificate in payment for consumer goods or services, including those goods or services advertised as being sold "on sale" or through "liquidation or closeout."
- No retailer shall restrict the holder of a gift certificate from using the certificate in the manner consistent with its terms and conditions when purchased;

- No retailer shall alter the terms or conditions of a gift certificate after issued;
- No retailer shall fail to disclose terms and conditions of a gift certificate when purchased;
- No retailer shall refuse to accept the gift certificate and apply it to a purchase even if its value is less than the purchase price of goods or services then being purchased.

How is the new law enforced?

The new gift law is part of the Michigan Consumer Protection Act. The Michigan Attorney General and private parties, through a civil lawsuit, can enforce this new law in court and seek actual damages or a minimum of $250 in damages, plus attorney's fees.

What is not a gift card or gift certificate?

The new law does exempt certain general use, prepaid cards or other electronic payment devices that are sponsored or issued by a financial institution in a predetermined amount and usable at multiple and unaffiliated retailers. Also exempt from the law's protections are electronic payment devices linked to a deposit account, prepaid telephone calling cards or other prepaid discount cards or gift certificates below face value or bought on volume discount.

Does the new law go far enough?

Some commentators have observed that the new law prohibits retailers from charging inactivity fees on gift cards. However, the new law does not expressly prohibit inactivity fees. Rather, the new law makes clear that if there are to be terms and conditions imposed on the card's use, that those terms and conditions be either stated expressly on the card itself or be stated on other materials delivered to the purchaser of the card with the card, so long as a toll-free telephone number is printed on the gift card itself which can used to learn about such terms. Accordingly, consumers are cautioned to still read the fine print if concerned about inactivity fees.

Another issue of concern is the lack of a clear definition as to what constitutes "a person engaged in the retail sale of goods or services." The new law applies only to such persons, yet the Michigan Consumer Protection Act (MCPA), the overriding law through which these new provisions are enforced, does not define the "retail sale of goods or services." Accordingly, while it may be safe to assume that retail sales of gift cards for consumer goods and services are within the transactions regulated, it would be a mistake to assume that *all* gift card transactions, even if consumer related and within "trade or commerce" as defined by the MCPA, are covered by the new law.

Finally, while the new law prohibits the selling of gift cards with an expiration date of less than 5 years, there is no requirement that the expiration date for any given card be printed on the gift card itself. So, unless the giver of a gift card presents a receipt with the gift card, the card user may still be left guessing as to how soon the card must be used before forfeiting the gift – which the new law does make clear will happen if not used after 5 years.

Notwithstanding some of the above questions, the new gift card law is a welcome protection for most Michigan consumers.