Legal Update Article

What Manufacturers Should Know About the ADA's Exception for 'Transitory and Minor' Impairments

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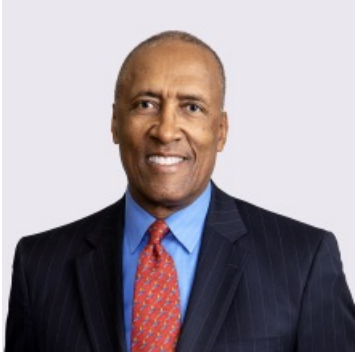
Meet the Authors



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Under the Americans With Disabilities Act Amendments Act (ADAAA), employers have a viable defense to an Americans With Disabilities Act (ADA) "regarded as" claim if the impairment in question was "transitory and minor," although transitory and minor impairments are ill-defined.

Manufacturing and Disability

The ADA defines "disability" in three ways: (1) a physical or mental impairment that substantially limits one or more major life activities; (2) a record of such an impairment; or (3) being "regarded as" having such an impairment.

These provisions of the ADA are particularly problematic in the manufacturing setting, where minor injuries such as strains, scrapes, and sore muscles are more common than in many other industries. By their nature, manufacturing plants are demanding environments that require physical exertion and repetitive motions by workers. Despite regular safety trainings and the use of ergonomic tools and personal protective equipment, minor injuries can occur in these settings. Worrying about disability discrimination claims can make managing and disciplining employees more difficult in such a setting. Furthermore, it would be unsustainable for manufacturers whose business models depend on the uninterrupted operation of their plants if the ADA required them to engage in a time-consuming interactive process and search for reasonable accommodations whenever a foreman believed a worker might have a minor impairment.

To potentially limit the application of the "regarded as" basis for discrimination, under the ADAAA exception, an employer cannot be held liable for discrimination under the ADA for "regarding" an employee as having a disability if the actual or perceived condition is transitory and minor. This exception permits employers to make employment decisions affecting such employees, including discipline and termination if warranted, with less risk of an employee prevailing on a claim under the ADA's "regarded as" prong if the employer can show the actual or perceived condition was transitory and minor.

The statutory amendments also clarified that an employer "need not provide a reasonable accommodation" to an employee who meets the ADA's definition of disability based *solely* on being "regarded as" having an impairment.

Based on the current state of the case law, the "transitory and minor" impairment exception remains a highly relevant and viable defense against disability discrimination claims resulting from an employer's alleged adverse actions. The exception may also be relevant, indirectly, to claims of alleged failure to accommodate, as long as the employee in such a case does not meet the ADA's definition of disability based *solely* on the "regarded as" prong of the definition.

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Transitory and Minor

Importantly, for the exception to apply, the impairment or perceived impairment must be both transitory *and* minor — the terms are not interchangeable.

The ADAAA defines "transitory" as an impairment with an actual or expected duration of up to six months. However, "minor" is not defined within the ADAAA. Instead, what qualifies as a minor impairment must be evaluated on a case-by-case basis. Courts consider various factors to determine whether an injury is minor, including the severity of the impairment, symptoms, required treatment, associated risks and complications, need for surgical intervention, and post-operative care, among other factors.

The application of these factors is not straightforward. Manufacturers should seek legal guidance when assessing whether the exception applies, especially considering that courts have taken different approaches to reviewing similar alleged impairments. For example, in the past few years, two federal courts in Pennsylvania took different paths to conclude COVID-19 was not a transitory and minor impairment. One court found that an employee's diagnosis with COVID-19 could not be considered "transitory" at the pleading stage, because it was reasonable to infer that his impairment, including the treatment and recovery, could have lasted longer than six months. The other court found that an employee's diagnosis with COVID-19 satisfied the "transitory" prong, but it was not considered "minor" because hospitalization and mortality rates for COVID-19 were high when compared to such other illnesses as swine flu and seasonal flu.

Checklist

While courts can significantly differ in their application of the "transitory and minor" exception, manufacturers can take the following steps to help protect themselves and reduce their legal and financial exposure:

- Exercise caution before taking adverse employment action against an employee who has recently disclosed a health condition, even if the condition seems minor or temporary on its face, unless the employer has a well-established, legitimate reason for the action.
- Maintain policies with respect to disabilities and reasonable accommodations that are compatible with the ADA, the ADAAA, and applicable case law.
- Train supervisors, managers, and HR professionals on best practices to handle employees' disabilities, perceived disabilities, and accommodations where the impairment does not initially appear to be serious.
- Train management and HR personnel regarding when and how to engage in the interactive process with respect to employees' medical conditions that do not seem to be serious.

Above all, manufacturers must remember that there is no one-size-fits-all solution. The "transitory and minor" exception is analyzed on a case-by-case basis. Therefore, when in doubt about a particular scenario, manufacturers should review the matter with employment counsel.

Please contact the authors or your Jackson Lewis attorney contact with any questions.

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