EXPANSION OF ADA EXPOSURE: DANGER AHEAD!

On September 25, 2008, President Bush signed the ADA Amendments Act (the "ADAAA") which took effect on January 1, 2009 and substantially enlarged the number and scope of individuals who are "qualified individuals with a disability." The Act emphasizes that the definition of disability shall be construed in favor of broad coverage to the maximum extent permitted by the terms of the Act.

The amendments significantly expand the definition of "major life activities" to include not only functions such as seeing, hearing, breathing, walking, thinking, sleeping and working, but also reading, writing, concentrating, lifting and bending. Major life activity now also includes major bodily functions, such as proper functioning of the digestive, nervous, respiratory, endocrine, and reproductive systems, as well as impairments affecting the brain, bladder, bowel and normal cell growth. An impairment that substantially limits one major life activity need not limit another major life activity in order to be considered a disability. Impairments that are episodic or in remission (such as cancer) are disabilities under the Act if the impairment substantially limits a major life activity when active. The effect of mitigating measures must not be considered in determining whether an individual has an impairment which substantially limits a major life activity. Such mitigating measures 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.

Finally, the amendments clearly provide that an employer violates the ADA merely by regarding an employee as having a physical or mental impairment, regardless whether that impairment is perceived by the employer to substantially limit one or more of the employee's major life activities as provided under the original ADA. As a result, the "regarded as" provision of the ADA is now very broad. However, impairments that will not fall within the scope of the "regarded as" prong of the ADA are those impairments that last for six months or less.

With the substantial expansion of potential liability under the ADA, employers should take immediate action to assure that they are in compliance. These changes will result in more employees and job applicants being covered by the ADA with more types of conditions being covered and law's protections significantly expanded. To limit liability, Management should immediately review and revise company policies and practices, especially as they relate to the interactive process between Management officials and an employee with a disability. Procedures should be developed to assist in finding and implementing reasonable accommodations when they become necessary. Also, if an employer receives a request for a reasonable accommodation from an employee, the employer should engage in the interactive process with the employee regardless whether medication, aides or other mitigating measures may be available to the employee. Of course, as in the past, of most importance is to document – document – document.

Michael L. Brungo, a partner with MB&M recently presented to SMC Business Councils on the impact of the ADA Amendments on September 17, 2009. If you have concerns whether your Company is compliant with the new ADA Amendments, Mr. Brungo is available for ADA training of Management and HR staff.