

# The Impact of the Americans with Disability Amendments Act of 2008 on the Rehabilitation Act and Management of Department of the Army Civilian Employees

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## Introduction

The Americans with Disabilities Act Amendments Act of 2008 (ADAAA),<sup>1</sup> which was passed in September 2008, dramatically amended Section 504 of the Rehabilitation Act (Rehab Act), originally enacted in 1973.<sup>2</sup> Both the Rehab Act and Americans with Disability Act (ADA) of 1990 prohibit discrimination in federal employment against “qualified individuals with disabilities” on the basis of their disability.<sup>3</sup> The category of individuals covered by the two acts differs, however. The Rehab Act, the predecessor of the ADA, applies to the Department of the Army (DA) and all other federal agencies, while the ADA is applicable to private employers.<sup>4</sup> The Rehab Act covers all federal employees, applicants for employment, and former employees. For purposes of determining employment discrimination, the standards of the ADA apply in cases alleging violations of the Rehab Act.<sup>5</sup> Meanwhile, as discussed in detail below, the ADAAA reversed a number of Supreme Court decisions that narrowed the definition of a qualified individual with a disability under the ADA. The most obvious impact of the ADAAA is the increase in the population of employees who will meet the definition of disabled.

In enacting the ADA,<sup>6</sup> Congress intended to provide a comprehensive national mandate to eliminate discrimination against individuals with disabilities and to provide broad coverage. Congress recognized that disabilities in no way diminish a person’s right to participate fully in all aspects of society, but prejudice, antiquated attitudes, or failure to remove societal and institutional barriers precluded disabled individuals from doing so.<sup>7</sup> Congress’s expectation that courts would interpret the ADA definition of disability in a manner consistent with the definition of “handicap” under the Rehab Act was not fulfilled.<sup>8</sup>

Over the years the Supreme Court and lower courts narrowed the broad scope of protections intended under the ADA, eliminating protections for many individuals Congress originally intended to protect.<sup>9</sup> Equally discouraging was the realization that the courts had regularly excluded individuals with a range of substantially limiting impairments from the definition of people with disabilities.<sup>10</sup> The ADAAA clarified and reiterated who is covered by the civil rights protections of the ADA and Rehab Act.

This article first summarizes the ADAAA and provides a basic framework for judge advocates confronted with questions involving the Act. Second, the article addresses the conditions of which DA may provide or deny reasonable accommodation requests from a qualified individual with a disability in light of the newly expanded definition of disability. Third, the article

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<sup>1</sup> Americans with Disability Act Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended at 42 U.S.C. § 12101, and 29 U.S.C. § 705 (2006)) [hereinafter ADAAA] (House Resolution 3195 allows for the following short title for this act “ADA Amendments Act of 2008.”).

<sup>2</sup> Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as 29 U.S.C. § 701 (1973)) [hereinafter Rehab Act].

<sup>3</sup> See, e.g., 42 U.S.C. § 12101(b) (2006).

<sup>4</sup> Calero-Cerezo v. U.S. Dep’t of Justice, 355 F.3d 6, 19 (1st Cir. 2004).

<sup>5</sup> 29 U.S.C. §§ 790–794a (2006).

<sup>6</sup> Americans with Disability Act, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (1994 & Supp. V 1999), and 29 U.S.C. § 705 (1999)).

<sup>7</sup> ADAAA, *supra* note 1, § 2(a)(2).

<sup>8</sup> *Id.* § 2(a)(3).

<sup>9</sup> *Id.* § 2(a)(4).

<sup>10</sup> *Id.* § 2(a)(5).

discusses the implications of the ADAAA for the DA. Finally, the article offers practical guidance on how judge advocates should advise commanders and supervisors on employee issues arising from requests for reasonable accommodations.

### Overview of the ADA Amendments Act of 2008

On 25 September 2008, President George W. Bush signed the ADAAA into law, and it became effective on 1 January 2009. The provisions of the ADAAA are not retroactive; therefore, the previous ADA standard will continue to apply to Rehab Act cases involving disability discrimination that occurred before 1 January 2009. Although the ADAAA would not apply to a situation in which discrimination or failure to reasonably accommodate occurred in December 2008 and the employee initiated a complaint after 1 January 2009, it would apply to denials of reasonable accommodation requests where a request was made, or an earlier request was renewed, on or after 1 January 2009.

Congress amended the ADA with the specific intent of overturning several Supreme Court decisions that significantly limited the ADA's coverage. Unfortunately, the changes to the ADAAA (which also applies to Section 504 of the Rehab Act) may have unanticipated consequences for DA and its practices. To comply with the legislation, judge advocates and commanders must fully understand the standards under both the ADA and the ADAAA, adhere to the statute, and provide civilian employees reasonable accommodations in the workplace when appropriate.

In enacting the ADAAA, Congress both clarified and reiterated its comprehensive national mandate for the elimination of discrimination and the need for enforceable standards by reinstating broad civil rights protections under the ADA.<sup>11</sup> To that end, Congress legislatively overturned a number of Supreme Court cases it deemed narrowed ADA protections in a manner that improperly excluded individuals who should have been covered by the Act. For example, Congress rejected the requirement to consider the effects of mitigating measures when determining whether an impairment substantially limits a major life activity.<sup>12</sup> In doing so, Congress rejected the Supreme Court's finding in *Sutton v. United Air Lines, Inc.*<sup>13</sup> with regard to coverage under the third prong of the definition of disability. In *Sutton*, the Court had held that corrective and mitigating measures should be considered in determining whether an individual is disabled under the ADA.<sup>14</sup> In its place, Congress reinstated the standard followed in *School Board of Nassau County v. Airline*,<sup>15</sup> which set forth a broad view of the third prong of the definition of handicap under the Rehab Act.<sup>16</sup> The amended language states that the ameliorative effects of mitigating measures, such as assistive devices, medical therapies, and medical supplies (other than eyeglasses and contact lenses), have no bearing in determining whether a disability qualifies under the law.<sup>17</sup>

Congress further rejected the standards enunciated in *Toyota Motor Manufacturing v. Williams*,<sup>18</sup> which declared that the terms "substantially" and "major" in the definition of "disability" under the ADA should be interpreted strictly to create a demanding standard for conditions qualifying as impairments and also to narrow the definition of those who are substantially limited in performing a major life activity to individuals with a disability that prevents or severely restricts the performance of activities of central importance to the daily lives of most individuals.<sup>19</sup> The ADAAA revised the definitions of "substantially limits" and "disability" to more broadly encompass impairments that affect a major life activity.<sup>20</sup>

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<sup>11</sup> *Id.* § 2(b)(1).

<sup>12</sup> *Id.* § 2(b)(2).

<sup>13</sup> 527 U.S. 471 (1999).

<sup>14</sup> *Id.* at 482.

<sup>15</sup> 480 U.S. 273 (1987).

<sup>16</sup> § 2(b)(3).

<sup>17</sup> *Id.* § 4(a)(3)(E)(i).

<sup>18</sup> 534 U.S. 184 (2002).

<sup>19</sup> § 2(b)(4).

<sup>20</sup> § 2(b)(2).

## Accommodating DA Civilian Employees with Disabilities

The DA must reasonably accommodate the known physical or mental limitations of an otherwise qualified applicant or DA civilian employee with a disability unless the accommodation would impose an undue hardship on its operations.<sup>21</sup> That said, DA civilian employees with a disability are not always entitled to reasonable accommodation. Although DA may elect to advance employee relations by granting requests for various accommodations for claimed disabilities, the Rehab Act only requires that DA reasonably accommodate qualified individuals with disabilities.<sup>22</sup> Additionally, although federal employees are protected by the Rehab Act, the standards applied under the Rehab Act are the same as those applied under the ADA.<sup>23</sup>

When providing advice to commanders, managers, or supervisors of DA civilian employees on whether to provide an individual with a reasonable accommodation, judge advocates should apply a five-step method to the analysis. First, determine if the person is an individual with a disability. Second, determine if the person is a qualified individual with a disability. Third, ensure that management consults with the individual about specific needs and considers accommodation possibilities. Fourth, determine if the preferred accommodation will result in undue hardship to DA. Answering these questions will be an interactive process, which may require consideration of medical documentation, job restructuring, work schedule adjustments, new equipment and furniture, or reassignment as an accommodation of last resort. Lastly, if the accommodation does not present an undue hardship, implement the accommodation.

Additionally, refer to the ADA's definition of "disability" to determine if the individual qualifies as a person with a disability. The ADA's definition of disability remains the same as the ADAAA's. A disability is defined as (1) a physical or mental impairment that substantially limits (i.e., prevents or significantly restricts the manner, condition, or duration of) an individual's performance of one or more of the major life activities<sup>24</sup> (e.g., walking, hearing, or breathing); (2) a record (e.g., a medical record) documenting such an impairment; or (3) being regarded as having such an impairment.<sup>25</sup>

To be entitled to a reasonable accommodation, a DA civilian employee must be a "qualified individual with a disability" as defined in the ADA and, by incorporation, in the Rehab Act.<sup>26</sup> Prior to 1 January 2009, the vast majority of disability discrimination litigation focused on whether a complainant met the definition of "qualified individual with a disability." Although the ADAAA will not completely eliminate litigation of this issue, it should significantly reduce litigation.

Under the ADAAA, a qualified individual with a disability is an individual with an impairment who possesses the necessary skill, experience, education, and other job-related requirements for a position and who is capable of performing the essential functions of the job with or without reasonable accommodation.<sup>27</sup> Meanwhile, the DA can require that the individual not pose a significant risk (i.e., direct threat) of substantial harm to the health and safety of the individual or others in the workplace.<sup>28</sup> If the direct threat cannot be eliminated or reduced by reasonable accommodation, the individual cannot be qualified for the position because his physical limitations would preclude him from performing the essential functions of the job. Commanders must assess each individual's existing ability (with or without a reasonable accommodation) to safely perform the essential functions of the job;<sup>29</sup> if an individual meets the definition of a qualified individual with a disability, judge advocates should ensure management consults the individual about specific needs and considers accommodation possibilities.

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<sup>21</sup> Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.9 (2009).

<sup>22</sup> Rehabilitation Act, *supra* note 2.

<sup>23</sup> § 1614.203(b).

<sup>24</sup> Major life activities are those basic activities that the average person in general population can perform with little or no difficulty. Major life activities are such functions as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. *Id.* § 1630.2(i). The EEOC has noted the lists provided in the ADA Amendments Act of 2008 and 74 Fed. Reg. 48431, are not exhaustive.

<sup>25</sup> 42 U.S.C. § 12102(2)(B) (2006) (defining "Regarded as"). For example, whenever an employer takes an adverse employment action (e.g. removal, suspension or demotion) against an employee based on an actual or perceived impairment, such as a heart condition, this amounts to regarding the employee as having a disability.

<sup>26</sup> 29 U.S.C. § 791(g) (2006).

<sup>27</sup> § 1630.2(m).

<sup>28</sup> *Id.* § 1630.2(r).

<sup>29</sup> *Id.*

The DA cannot be found liable for failing to provide a reasonable accommodation if an employee does not request one and DA is otherwise unaware of the need for one.<sup>30</sup> However, if a request for accommodation is made to a supervisor or manager, DA must reasonably accommodate the known physical or mental impairments of an otherwise qualified applicant or DA civilian employee.<sup>31</sup> For example, if a worker sustains an eye injury, requests more time to adjust to his monocular vision because of loss of depth perception, and details in specific terms the nature of the tasks he cannot perform, the worker's request should trigger DA's obligation to investigate accommodation.

Identifying an individual's precise physical limitations and determining what accommodation would be reasonable and appropriate to overcome those limitations is an interactive process.<sup>32</sup> Management representatives who fail to engage in the process may subject DA to liability for disability discrimination based on a failure to accommodate.<sup>33</sup> Likewise, a complainant's failure to respond to DA inquiries made in furtherance of the process may result in a dismissal of a potential disability discrimination claim.<sup>34</sup> Management options for reasonable accommodation include job restructuring by reallocating or redistributing nonessential functions, modification of shifts (e.g., the use of straight shifts rather than split shifts), new equipment and furniture, telework in which an employee performs officially assigned duties at an alternative worksite on a regular, recurring or ad hoc basis, and reassignment. Judge advocates should ensure individuals are consulted about their specific needs and that the appropriate accommodation is considered.

On the other hand, an undue burden may excuse DA from providing a reasonable accommodation. Once an employee shows that an accommodation is reasonable, the burden shifts to DA to provide specific evidence establishing that the accommodation would cause an undue hardship.<sup>35</sup> Undue hardship includes situations which would result in extreme financial expense, substantial or disruptive change, or a fundamental alteration to the nature of the work.<sup>36</sup> If undue hardship cannot be established, the reasonable accommodation should be implemented.

### **ADAAA Retains the Intent and Protections of the Original ADA**

The ADAAA retains the basic three-part ADA definition of disability: a physical or mental impairment that substantially limits one or more major life activities; a record of such an impairment; or being regarded as having such an impairment. It is the meaning of the terms "substantially limits" and "major life activities" that have changed. These changes to the terms emphasize that the definition of disability is to be construed to the maximum extent permitted by the terms of the ADA in favor of a broad coverage of individuals. Moreover, the expanded definition of disabled is intended to alleviate, as much as possible, the requirement for the once extensive analysis that was often burdensome for both the employee and the employer.

In determining whether an employee has a disability, employers are reminded that an impairment need not prevent, or significantly or severely restrict performance of a "major life activity" to be "substantially limiting," and an impairment need not substantially limit more than one major life activity.<sup>37</sup> An individual with a disability will usually be limited in more than one major life activity, so considering whether the individual is substantially limited in working is generally unnecessary. Employers are advised to take a common sense approach to the analysis of whether an employee has an impairment that "substantially limits" one or more "major life activities" and not an extensive analysis requiring scientific or medical evidence. An individual's ability to perform a major life activity is compared to "most people in the general population." Therefore, to have a disability an individual must be substantially limited in performing a major life activity as compared to most people in the general population.

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<sup>30</sup> Sutton v. U.S. Postal Serv., EEOC No. 0120055392, 107 FEOR 157 (Dec. 28, 2006).

<sup>31</sup> § 1630.9.

<sup>32</sup> *Id.* § 1630.2(o)(3).

<sup>33</sup> Black v. U.S. Postal Serv., EEOC No. 01A42589, 106 FEOR 447 (June 9, 2006).

<sup>34</sup> Billman v. Dep't of Veterans Affairs, EEOC No. 01A21619, 104 FEOR 12 (Aug. 15, 2003).

<sup>35</sup> U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002).

<sup>36</sup> Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.9 (2009).

<sup>37</sup> ADAAA of 2008, *supra* note 1, § 3(4)(C).

“Major life activities” are basic activities that most people in the general population can perform with little or no difficulty. The ADAAA includes a non-exhaustive list of examples of “major life activities.”<sup>38</sup> This list is drawn from the ADA, published Equal Employment Opportunity Commission (EEOC) guidance and ADA and Rehabilitation Act court cases. The ADAAA list specifically includes the operation of major bodily functions as major life activities.<sup>39</sup> The inclusion of major bodily functions on the list reflects the ADAAA’s intent to make it easier for individuals seeking protection under the ADA to establish the existence of their disability within the meaning of the ADA.

Mitigating measures eliminate or reduce the symptoms or impact of an impairment. The EEOC has included a non-exhaustive list of examples of mitigating measures in the proposed rules. Consideration of mitigating measures is limited. For instance, the positive effects of an individual’s use of mitigating measures will not be considered when determining if an impairment substantially limits a major life activity. The determination of whether an individual’s condition meets the definition of a disability focuses on whether the individual would be substantially limited in performing a major life activity without the mitigating measure. However, the ADAAA does allow for consideration of the negative effects from use of a mitigating measure in determining if a disability exists.<sup>40</sup>

Additionally, the definition of “regarded as” no longer requires a showing that the employer perceives the individual to be substantially limited in the performance of a major life activity. Now the individual, either applicant or employee, is “regarded as” disabled if subjected to an action prohibited by the ADA based on an impairment, or on an impairment the employer believes the individual has, unless the impairment is transitory and minor. “A transitory impairment is an impairment with an actual or expected duration of 6 months or less.”<sup>41</sup>

### **Implications of the ADA Amendments Act of 2008 for the Department of the Army**

The provisions of the ADAAA and the EEOC’s proposed rules will result in a lower threshold for finding a substantial limitation of a major life activity. Considering that the definition of disability is to be construed in favor of broad coverage of individuals and that determining whether an employee is disabled should not require an extensive analysis, the changes to the meaning of the terms “substantially limiting” and “major life activities” will necessarily include a larger percentage of the workplace population.<sup>42</sup>

Although the population of covered employees may increase significantly, it remains to be seen whether it will make a practical difference in day-to-day employment decisions on issues of disability and reasonable accommodation.<sup>43</sup> Most employers are unlikely to question an individual’s impairment as a disability when presented with a request for a reasonable accommodation based on a diagnosed medical condition. In fact, most often the focus in the analysis is on the reasonableness of the requested accommodation and not on whether the impairment “substantially limits a major life activity.” In analyzing the reasonableness of the requested accommodation the question remains whether the requested accommodation allows the employee to perform the essential functions of his job.

### **Practice Tips for Judge Advocates**

The impact of the significant shift in the definition of disability and the changes brought about by the ADAAA will not reach the courts for some time. However, judge advocates who serve as labor and employment law practitioners would be wise to become familiar with the ADA Amendments Act of 2008 and the EEOC’s proposed rules now. The most immediate consideration is the timing of complaints alleging discrimination based on a disability or allegations that the employer has failed to reasonably accommodate a request for accommodation. The timing of the complaint and when the alleged

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<sup>38</sup> *Id.* § 4a (amending Section 3(A) of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12102)).

<sup>39</sup> *Id.* (amending Section 3(B) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102)).

<sup>40</sup> *Id.*

<sup>41</sup> ADA Amendments Act of 2008, *supra* note 1, § 3(3)(B).

<sup>42</sup> See Notice of Proposed Rulemaking, 74 Fed. Reg. 485431, 48,436 tbl.3 (2009) (providing information on the Population With Disabilities Using Current Population Survey Data, 1999–2007). A copy of the table is at Appendix A.

<sup>43</sup> *Id.* at 48,436 tbl.4 (providing statistics on the Estimated Reasonable Accommodation Cost With 16 Percent Request Rate). A copy of the table is at Appendix B.

discrimination or failure to accommodate occurred will determine the definition of disability used in analyzing the employer's position and possible defenses to the alleged discrimination.<sup>44</sup>

Reviewing current organization or installation Equal Employment Opportunity (EEO) policies on disability discrimination and reasonable accommodation policies and procedures is a first step. Equally important is working with human resources personnel and the servicing EEO Officer to ensure that the organization or installation policies and procedures address language in the ADAAA. The U.S. Army Procedures for Providing Reasonable Accommodation for Individuals with Disabilities, issued on 17 March 2009, provides guidance on the procedures for processing reasonable accommodation requests throughout the Army.<sup>45</sup> These procedures are designed to assist the Army in meeting its obligations in addressing requests for reasonable accommodation submitted by individuals with disabilities.

Some impairments will consistently meet the definition of disability when analyzed in light of the ADAAA changes. Broadly construing the term "disability"—by considering that an impairment's substantial limitation on a major bodily function is sufficient to constitute a disability, by disregarding the ameliorative effects of mitigating measures, and by recognizing that impairments that are episodic or in remission are disabilities if they would be substantially limiting when active—results in a more broad coverage of impairments. The proposed regulations provide a non-exhaustive list of such impairments. For such impairments an individualized assessment can be conducted quickly and easily.<sup>46</sup>

Impairments that may be substantially limiting for some individuals, but not for others, may require somewhat more analysis, although the level of analysis should not require extensive medical or scientific information. The proposed regulations also include examples of such impairments.<sup>47</sup>

The ADAAA, and the proposed regulation, also contained several significant items, which are noted below:

- An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. Such impairments should not be confused with temporary, non-chronic impairments of short duration with little or no residual effects that usually will not substantially limit a major life activity and will not be considered disabilities.<sup>48</sup>
- Asking an employee who appears to be having difficulty performing his job because of an impairment whether he needs a reasonable accommodation will not violate the ADA or the ADAAA. The same is true for situations in which an employer asks an employee for medical information as part of the reasonable accommodation interactive process when the employee's disability or the accommodation are not obvious.
- The ADAAA does not change the definitions of "qualified," "direct threat," "reasonable accommodation," or "undue hardship," and the burdens applicable to each one have not changed. It does, however, provide that individuals covered only under the "regarded as" prong are not entitled to reasonable accommodation.<sup>49</sup>
- The ADAAA and the proposed regulations do not change the standards for determining eligibility for benefits under worker's compensation laws or disability benefit programs.<sup>50</sup>
- The ADAAA specifically declares that nothing in the Act provides a basis for a claim of discrimination based on the lack of a disability by an employee who claims to have a disability but who does not actually have the claimed disability.<sup>51</sup> Additionally, the ADAAA language precludes a claim of reverse discrimination.

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<sup>44</sup> Landgraf v. USI Film Prods., Inc., 511 U.S. 244 (1994) (finding remedial amendments of 1991 Civil Rights Act not retroactive).

<sup>45</sup> Memorandum from Dep't of the Army, Office of the Assistant Sec'y, Manpower & Reserve Affairs, for See Distribution, subject: U.S. Army Procedures for Providing Reasonable Accommodation for Individuals with Disabilities (17 Mar. 2009).

<sup>46</sup> Notice of Proposed Rulemaking, 74 Fed. Reg. at 48447.

<sup>47</sup> *Id.*

<sup>48</sup> ADA Amendments Act of 2008, *supra* note 1, § 4(4)(D).

<sup>49</sup> *Id.* § 6(h).

<sup>50</sup> *Id.* § 6.

<sup>51</sup> *Id.* § 6(g) (amending Title V of the Americans with Disabilities Act of 1990, 42 U.S.C. 12201 by adding language at section 501(f)).

- The proposed regulation clarifies that coverage of the “record of” prong of the definition of “disability” is not dependent on whether the employer relied on a record in making an employment decision. The employer’s knowledge of an individual’s past substantially limiting impairment is relative to whether the employer engaged in discrimination. It does not relate to whether the individual is covered.<sup>52</sup>
- The ADAAA does not require that the employer accept the individual’s requested accommodation; a reasonable accommodation does not mean the individual’s accommodation of choice. Additionally, the ADAAA does not change the employer’s right to deny a request for accommodation in situations where a disabled employee presents a direct threat to the workplace. Such a determination to deny a request for reasonable accommodation based on an individual’s impairment that presents a direct threat to the workplace should not be made by managers and supervisors without consulting with human resources, EEO, and legal advisors.

Upon reviewing requests for reasonable accommodation, judge advocates should consider carefully whether to focus efforts on demonstrating that an individual’s impairment is not a disability. Instead, focus should be directed at whether the individual was actually qualified for the job, whether the employer’s decision was made on the basis of the disability or for some other legitimate unrelated reason, whether the individual was engaged in the interactive process, and whether specific accommodations were reasonable or available.

### **Conclusion**

This article provides judge advocates with a comprehensive analysis of the ADAA by examining its origin, purpose, and current applicability. The ADAAA narrows DA’s determination that a particular employee does not have a disability. The amended language puts a greater emphasis on the question of what is necessary in order to provide an employee with a nondiscriminatory workplace. While it may be true that DA may not need to significantly modify its regulations, it is not clear what impact the ADAAA will have on the Army. The effect of the ADAAA will depend in major part on how the courts will interpret current and new regulations based on the ADAAA’s expanded definition of disability and the related practices required of DA managers and supervisors.

As evident by this article, the ADAA is a complicated statute. Judge advocates and DA labor attorneys must thoroughly review the statute and follow pending court decisions on the ADAA to provide competent advice to commanders and other supervisory officials to ensure their compliance with the ADAA.

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<sup>52</sup> *Id.*

## Appendix A

### Population With Disabilities Using Current Population Survey Data, 1999–2007<sup>53</sup>

Year	Workers with disabilities	Labor force participants with disabilities
1999	3,207,218	3,588,806
2000	3,545,209	3,889,789
2001	3,187,276	3,533,647
2002	3,081,585	3,574,294
2003	2,835,976	3,414,687
2004	3,146,749	3,727,859
2005	3,067,059	3,579,808
2006	3,200,808	3,698,593
2007	3,042,300	3,497,321

**Table 3**

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<sup>53</sup> Notice of Proposed Rulemaking, 74 Fed. Reg. 48436 (2009).

**Appendix B**

**Estimated Reasonable Accommodation Costs With 16 Percent Request Rate<sup>54</sup>**

<b>Average accommodation cost</b>	<b>Total cost (million)</b>	<b>Accommodations over five years (million)</b>
<b>\$462</b>	<b>\$74</b>	<b>\$15</b>
<b>\$865</b>	<b>\$138</b>	<b>\$28</b>
<b>\$1,434</b>	<b>\$229</b>	<b>\$46</b>

**Table 4**

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<sup>54</sup> *Id.* at 48437.