

**27<sup>th</sup> Annual Labor and Employment Law Conference****May 7-8, 2020  
Austin, Texas****Developments in  
Disability Discrimination Law****2019 - 2020****JAMES H. KIZZIAR, JR.****AMBER K. DODDS****CAROLINE M. MELO****Bracewell LLP**

James H. Kizziar, Jr.  
Amber K. Dodds  
Caroline M. Melo  
Bracewell LLP  
San Antonio, Texas

[Jim.Kizziar@bracewell.com](mailto:Jim.Kizziar@bracewell.com)  
[Amber.Dodds@bracewell.com](mailto:Amber.Dodds@bracewell.com)  
210-299-3526/210-299-3569

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**THIS OUTLINE IS INTENDED TO ASSIST PARTICIPANTS WITH A  
GENERAL UNDERSTANDING OF CURRENT DEVELOPMENTS IN THE LAW.  
IT IS NOT TO BE CONSIDERED LEGAL ADVICE.**

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**James H. Kizziar, Jr.**  
Bracewell LLP

300 Convent Street, Suite 2700  
San Antonio, TX 78205

2001 M Street NW, Suite 900  
Washington, DC 20036

210-299-3526

[jim.kizziar@bracewell.com](mailto:jim.kizziar@bracewell.com)

**Practices**

Labor and Employment • Health Care

**Admitted**

State Bar of Texas • District of Columbia Bar

**Education**

J.D., Duke University School of Law, 1976

B.A., magna cum laude, Ohio Wesleyan University, 1973

**Court Admissions**

U.S. Court of Appeals, Fifth, and Eleventh, District of Columbia Circuits • U.S. District Court Texas, Southern and Western Districts • U.S. District Court, District of Columbia • U.S. Supreme Court

**Board Certifications**

Board certified in labor and employment law by the Texas Board of Legal Specialization

**Experience**

For 44 years, Jim Kizziar has represented management in all aspects of labor and employment law before federal and state agencies and courts. His practice includes litigation and preventative counseling of management on issues such as discrimination, harassment, union organizing and wage-hour issues.

Mr. Kizziar is also a lecturer and prolific writer on labor law issues. He served on the editorial board of the Texas Labor Letter and co-authored a chapter entitled "Risk Management Issues in Employment" for the American Hospital Association's Risk Management Handbook for Health Care Facilities. He has also co-authored a resource guide entitled Human Resources Management: A Comprehensive Guide for Apartment Professionals for the National Apartment Association.

Mr. Kizziar has served as chairman of The University of Texas Law School Conferences on the Americans with Disabilities Act and chairman of The University of Texas Law School Conferences on Developments in Labor and Employment Law.

**Professional recognition**

- The Best Lawyers in America, labor and employment law 2003-2020
- Selected as the Best Management Labor and Employment Attorney in San Antonio, Texas for 2013 and 2019 by The Best Lawyers in America
- Texas Super Lawyer, labor and employment law, 2003-2020
- Scene in SA: San Antonio's Best Lawyers, labor and employment law, 2005-2009, 2013-2018
- Listed in Chambers USA: America's Leading Lawyers for Business, Labor & Employment, 2011-2013

**Community Involvement**

Mr. Kizziar served as chairman of the American Heart Association, San Antonio Division, 2003-2004, and 2013-16; he served on the organization's board of directors from 1991 to 2005 and from 2012 to 2017. In 2004, he received the Paul D. Apgar Award of Excellence from the American Heart Association. Mr. Kizziar served from 1982 to 1988 on the Board of Directors of the San Antonio YMCA. He also serves on the board of directors of the Canyon Lake Sailing Foundation.

**Affiliations**

Texas Bar Foundation, life fellow • Federal Bar Association, National Council, past member • Federal Bar Association, San Antonio Chapter, Past President • San Antonio Human Resources Management Association, past officer and board member



**Amber K. Dodds**  
Bracewell LLP  
300 Convent Street, Suite 2700  
San Antonio, TX 78205  
210-299-3569  
[amber.dodds@bracewell.com](mailto:amber.dodds@bracewell.com)

**Practices**

Labor and Employment

**Admitted**

State Bar of Texas

**Education**

The University of Texas School of Law, J.D., 2012 – *with honors*  
Boston University, Master of Theological Studies, 2008 – *summa cum laude*  
Trinity University, B.A., 2006 – *summa cum laude, Phi Beta Kappa*

**Court Admissions**

U.S. District Court Texas, Southern and Western Districts

**Board Certifications**

Board certified in Labor and Employment Law by the Texas Board of Legal Specialization

**Experience**

Amber Dodds counsels employers in all areas of employment law. Her advice includes analysis and direction on employment and benefits issues, such as leave administration, employee investigations, use of background checks and consumer reports, employee discipline and preventing harassment and retaliation claims. She drafts employment policies and employee handbooks specific to client industry and management needs. Amber also routinely advises on employee pay practices, such as compliance with overtime, per diem, pay deduction, and exemption classification requirements. She has experience advising clients on compliance with Occupational Safety and Health Act (OSHA) regulations, including the General Duty Clause, Process Safety Management, and a variety of industry or hazard-specific regulations.

In addition to regulatory and employment-law compliance, Amber represents employers in pre-litigation administrative investigation and hearings, settlement negotiations, and federal and state court litigation. Her litigation matters have included a variety of employment-law claims, such as retaliation, wrongful termination, discrimination, harassment, and wage and hour issues, as well as general civil litigation matters in the public, private and religious organization employer context. Amber is also experienced in Fair Labor Standards Act (FLSA) collective action litigation, including class certification and notice issues.

Amber served as an intern in the United States District Court for the Western District of Texas with the Honorable Lee Yeakel and the Texas First Court of Appeals with Justice Evelyn V. Keyes.

**Noteworthy**

U.S. District Court for the Western District of Texas, Intern  
Texas First Court of Appeals, Intern  
The University of Texas School of Law, *Texas International Law Journal*, Article and Notes Editor  
The University of Texas School of Law, Dean's Achievement Award, Outstanding Performance in Business Associations

**Community Involvement**

YWCA San Antonio, Board of Directors; 2014-2019  
Concordia University, Nebraska, Personnel Committee

**Caroline M. Melo**  
Bracewell LLP  
711 Louisiana St. Suite 2300  
Houston, TX 77002  
713.221.1391  
[caroline.melo@bracewell.com](mailto:caroline.melo@bracewell.com)

**Practices**

Labor and Employment

**Admitted**

State Bar of Texas

**Education**

J.D., cum laude, SMU Dedman School of Law, 2019

B.S., honors, The University of Texas at Austin, 2013

**Court Admissions**

U.S. District Court of Texas, Southern and Eastern Districts

**Experience**

Caroline Melo represents employers in litigation, administrative investigations, and other actions related to employment including the defense of claims of alleged discrimination, retaliation, harassment, wrongful discharge, and occupational safety and health violations. She also provides advice and counsel to employers regarding a variety of workplace matters.

Prior to joining Bracewell, Caroline served as a Judicial Extern for Judge Kimberly Priest Johnson at the US District Court for the Eastern District of Texas and as a summer clerk at the US Senate Judiciary Committee with the Office of Senator John Cornyn. She also worked as a staffer in the Senate offices of the Majority Whip (Senator Cornyn) and completed a fellowship in the office of Senator James Inhofe.

**Publications**

- "Pandemic Telework May Undermine Employer ADA Defense" *Law360*
- "When Must Employee Illnesses Be Recorded by OSHA?" *IndustryWeek*
- "Should I Let My Employees Wear Earbuds?" *IndustryWeek*

**Noteworthy**

- U.S. District Court for the Eastern District of Texas, Judicial Extern for Judge Kimberly Priest Johnson
- U.S. Senate Judiciary Committee, Office of U.S. Senator John Cornyn, Summer Clerk
- Innocence Clinic, Buried Alive Project
- U.S. Senate, Office of the Majority Whip, Staff Assistant/Media Tracker
- U.S. Senate, Office of U.S. Senator James Inhofe, Congressional Fellow

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## I. INTRODUCTION

The Americans with Disabilities Act of 1990 (the “Act” or the “ADA”) protects individuals with disabilities from discrimination in employment, access to facilities, and access to services. Title I of the ADA prohibits covered employers from discriminating against qualified individuals with disabilities (“QID’s”) in job application procedures, hiring, advancement, discharge, compensation, training, and other terms, conditions, and privileges of employment.

On September 25, 2008, President Bush signed the ADA Amendments Act (“ADAAA”). The ADAAA reversed various Supreme Court decisions interpreting Title I of the ADA and required a broader application of the ADA. Among other things, the ADAAA bans lawsuits by non-disabled individuals for reverse disability discrimination, clarifies the Equal Employment Opportunity Commission’s authority under the ADA to develop and implement binding regulations, and amends the definition of disability for claims under the Rehabilitation Act. The amendments, which significantly change the ADA, became effective on January 1, 2009.

In September 2009, the EEOC issued proposed regulations implementing the ADAAA. On March 25, 2011, the EEOC published final regulations in the Federal Register. The regulations became effective on May 24, 2011.

The ADAAA’s broad coverage mandate, the expanded definition of “major life activity,” the virtual elimination of mitigating measures and the easing of the burden of plaintiffs to meet the “regarded as disabled” standard, have contributed to a surge in disability discrimination claims filed with the EEOC and the courts. See Appendix A, which shows that since the passage of the ADAAA, disability-based charges have reached their highest levels since the EEOC began enforcing Title I in 1992. Between 2010 and 2019, the average number of disability-based claims brought per year was 25,933, whereas in the preceding nine years (2001-2009) the annual average was 16,921. The number of claims filed with the EEOC peaked at an all-time high of 28,073 in 2016 and has since declined approximately 14 percent to 24,238 in EEOC fiscal year 2019.

Because of the extensive changes wrought by the amendments and the subsequently issued regulations, this outline includes only post-amendment decisions in sections where the ADAAA has resulted in significant changes. For ADA issues that were not affected by the ADA Amendments, this outline summarizes both pre-and post-amendment decisions.

## II. THE EEOC REGULATIONS IMPLEMENTING THE ADAAA

The EEOC issued final rules implementing the ADAAA on March 25, 2011. The EEOC also concurrently issued a fact sheet, questions and answers regarding the final rule, and guidance for small businesses. The following is a summary of the significant provisions of the rule:

### A. Construction (29 C.F.R. § 1630.1(c)(4))

Under this section, the EEOC emphasizes that the ADA now has “broad application”:

a. The purpose of the amendments was to make it easier for people with disabilities to obtain protection under the ADA.

b. Consistent with the purpose of reinstating a broad scope of protection, the definition of “disability” is to be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA.

c. The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability.

d. The question of whether an individual meets the definition of disability should not demand extensive analysis.

### **B. Definition of Disability (29 C.F.R. § 1630.2(g))**

This section explains that the definition of the term “disability” was preserved, but “redefined”, by the ADA. For clarity, the EEOC refers to the first prong as “actual disability” to distinguish it from the other two prongs—a record of a disability and “regarded as” disabled. This section clarifies that:

a. Being “regarded as” having an impairment means that the individual “has been subjected to an action prohibited by the ADA as amended because of an actual or perceived impairment that is not both ‘transitory and minor.’”

b. An individual may establish coverage under any one or more of the three prongs.

c. Where claims do not involve a failure to accommodate or the need for a reasonable accommodation, it is generally unnecessary to proceed under the “actual disability” or “record of” prongs, which require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. Claims not involving reasonable accommodation can be made solely under the “regarded as” prong, which requires no showing of an impairment that substantially limits a major life activity or a record of such an impairment.

### **C. Definition of Physical or Mental Impairment (29 C.F.R. § 1630.2(h))**

In this section, the EEOC emphasized that the enumeration of bodily systems provided is not exhaustive, just as the list of mental impairments is not exhaustive. The EEOC has also supplemented these definitions by:

a. Adding the immune and circulatory systems to the list of major bodily functions.

b. Changing the term mental retardation to “intellectual disability.”

### **D. Definition of Major Life Activities (29 C.F.R. § 1630.2(i))**

In this section, the EEOC emphasized that the list of major life activities enumerated is not exhaustive. Changes in this section include:

a. The inclusion of the following additional enumerated major life activities: eating, sleeping, standing, sitting, reaching, lifting, bending, reading, concentrating, thinking, communicating, and interacting with others. Some of these activities were rejected by the courts as not constituting a major life activity (see *Smith v. Flying J*, No. 09-433, 2010 U.S. Dist. LEXIS 131393 (D.N.M. 2010) (“As an initial matter, ‘concentration’ is not considered a major life activity by the Tenth Circuit.”); *Battle v. Mineta*, 387 F. Supp. 2d 4 (D.D.C. 2005) (holding that the ability to interact positively with others is not a major life activity, being generally “too undefined, indistinct, and unlike the sort of activities that have been held by other courts to be major life activities”)).

b. The inclusion of “major bodily functions” (including the operation of an individual organ within a body system) as a major life activity, including functions of the immune system, special

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