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Hall, Render, Killian, Heath & Lyman is a full service health law firm with offices in Wisconsin, Indiana, Kentucky, and Michigan. Since the firm was founded by William S. Hall in 1967, Hall Render has focused its practice primarily in the area of health law and is now recognized as one of the nation's preeminent health law firms serving clients in multiple states. For more information please visit us at [www.hallrender.com](http://www.hallrender.com).

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## AMENDING THE AMERICANS WITH DISABILITIES ACT OF 1990 AND ITS IMPACT ON WISCONSIN EMPLOYERS

As we all know, the Americans with Disabilities Act of 1990 ("ADA") is a federal law that prohibits employers from discriminating against employees or employment applicants who have a physical or mental impairment that substantially limits one or more major life activities. Individuals who have a record of such impairment, such as an individual who is in cancer remission, or who are regarded as having such impairment, are also covered under the ADA. However, temporary, non-chronic conditions such as broken bones or sinus infections, and individuals able to sufficiently mitigate the impact of the disability, have generally not been covered.

Once it is established that an individual's condition meets the definition of the term "disability," an employer has a duty to explore whether a reasonable accommodation can be provided so as to allow the individual to perform the essential functions of his or her job.

Although it has taken most of us about 10 years to become comfortable that we understood our obligations under the ADA (and numerous District, Circuit and Supreme Court decisions fleshing out the details), on June 25, 2008, the U.S. House of Representatives overwhelmingly approved legislation that would change the rules. Bill H.R. 3195, known as the "ADA Amendment Act" ("Act"), if passed, would broaden the meaning and application of the term "disability" so dramatically that a significant number of additional employees and applicants would arguably have coverage under the ADA. Much of the extended protections will come under the Act's non-exhaustive list of what constitutes a "major life activity" (which would include eating, sleeping, standing, thinking and concentrating). In addition, the determination of whether an impairment substantially limits a major life activity would be made without regard to the effects of mitigating measures, such as medication, hearing aids or mobility devices.

## THE ADA AMENDMENT ACT'S IMPACT

While the Act will effect many U.S. employers, it may not have as much of an impact in Wisconsin. Wisconsin's own disability discrimination law, the Wisconsin Fair Employment Act ("WFEA"), already has a broader definition of "disability" than the federal ADA. Under the WFEA, an employee or applicant is considered disabled if he or she has a physical or mental impairment which makes achievement unusually difficult or limits the

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## The ADA Amendment Act's Impact (continued)

capacity to work. In other words, Wisconsin's definition already provides protections to individuals whose disability limits their capacity to work whereas, in many cases, the ADA as currently written does not. The proposed legislation would provide such an individual protection under both state and federal laws. So, while a Wisconsin employer's policies and procedures may not need to change dramatically, your risk of damages is likely to increase with the passage of the Act. Under Wisconsin disability law, a claimant is only entitled to back pay, front pay or reinstatement and attorney fees for violations. The ADA, on the other hand, allows a plaintiff to pursue greater damages in the form of compensatory and punitives. Therefore, suits which in the past may have been raised under the broader WFEA, will more likely be brought under the ADA.

Once it is determined that an individual is disabled under either federal or state law, the employer has the duty to explore whether a reasonable accommodation exists that would not present an undue hardship on the employer. To fulfill its duty, employers should initiate an interactive process with the employee to determine whether a reasonable accommodation exists. To be effective, an employer should engage the disabled employee in a dialogue to explore possible accommodations. If reasonable accommodation is found, then both parties benefit by getting the job done without job loss. If a reasonable accommodation cannot be identified, then the employer can point to these efforts to defend against a discrimination charge.

Employers will no doubt face an increased number of accommodation requests following passage of the Act. Have you struggled with the accommodation exercise? If so, perhaps the Hall Render Reasonable Accommodation Work Sheet on the following pages can help you through these challenges.

The legislation was introduced in the U.S. Senate on August 1, where it will likely undergo further revisions. Hall, Render, Killian, Heath & Lyman, P.C. will continue to monitor the progress of this proposed legislation and provide updates regarding the Act's movement through Congress and passage into law. If you have questions about these or other employment law issues, please do not hesitate to contact Robin Sheridan or Carrie Turner at 414-721-0442.

Resolution of legal issues depends upon many factors, including variations of facts and interpretations of law. This information is not intended to provide legal advice in a specific situation. The reader is urged to consult legal counsel before taking action with respect to particular circumstances.



**Carrie Turner**

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## Reasonable Accommodation Work Sheet

**Employee Name:** \_\_\_\_\_ **Date:** \_\_\_\_\_

**Good Faith Interactive Process.** You have requested an accommodation in connection with your work. We believe the best way to determine if a reasonable accommodation exists is to engage in a good faith interactive process in the hope that an effective accommodation can be identified. This process cannot guarantee that an effective reasonable accommodation will be identified. However, by your participation in this process we can all be assured that the alternatives, if any, have been fairly considered.

**The process involves three steps:**

**Step 1** – Analyze Job Functions

**Step 2** – Determine Precise Job Limitations

**Step 3** – Identify Potential Reasonable Accommodations

Below is a Work Sheet that will focus on each of these Steps. The information collected will assist us in identifying if there is a reasonable accommodation that we can offer you. We thank you for your cooperation.

### Step 1 - Analyze Job Functions

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Attach Job/Position Description

List additional job functions that should be included or excluded.

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_
4. \_\_\_\_\_
5. \_\_\_\_\_
6. \_\_\_\_\_
7. \_\_\_\_\_
8. \_\_\_\_\_
9. \_\_\_\_\_

Does this accurately describe the functions of your job? \_\_\_ Yes \_\_\_ No

### Step 2 - Determine Precise Job Limitations

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Identify what job functions you are currently not able to perform.

Identify any barriers to job performance.

Attach Health Care Provider certification, if requested.

### Step 3 - Identify Potential Accommodations

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What suggestions do you have that will accommodate your limitations.

Additional ideas and suggestions to be considered.

Outside resources to be considered:

*\*Job Accommodation Network [www.jan.wvu.edu](http://www.jan.wvu.edu)*

*\*Employer Open Positions Report*

*\*Employer Leave of Absence Policies*

**Based upon all of the above, the company will determine if there is an available effective reasonable accommodation.**

\_\_\_\_\_  
Manager

\_\_\_\_\_  
Date

\_\_\_\_\_  
Employee

\_\_\_\_\_  
Date