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of the term "disability" to cover more physical and mental conditions. The second was a set of new guidelines from the Equal Employment Opportunity Commission (EEOC) which are scheduled to go into effect in 2010.

The ADA amendment has meant that more people than ever are protected against disability discrimination—intentional or otherwise. "One of the most common errors made by employers is assuming that only major disabling conditions such as blindness

or deafness are covered under the law," says James McDonald, managing partner of the Irvine, CA, office of the employment law firm of Fisher & Phillips. "But the definition of disability has expanded substantially."

In passing the amendment "congress mandated a shift in focus in ADA cases from whether or not a given employee is truly disabled to whether or not the employer discriminated," adds McDonald. "As a result, you can no longer count on your lawyer to get you out of an ADA lawsuit on a technicality that

the plaintiff was not really disabled under the law."

Added to this are the proposed regulations from the EEOC which "represent a significant expansion of what the ADA will require from employers," says Robert J. Nobile, a partner with the New York office of Seyfarth Shaw LLP, an employment law firm. "The agency is really trying to bypass the whole issue of whether a given individual is disabled and move directly to the assumption that the person with an impairment is disabled regardless of his or her condition—and regardless of whether the impairment is temporary or permanent or substantially limits a life activity."

Note too that a growing number of courts consider behavior growing out of disability as protected under the law. It may be considered discriminatory to fire an employee for emotional outbursts toward a supervisor, for example, if you have prior knowledge that the employee has a protected condition.

Employees have many avenues to pursue legal action. At the federal level they can file claims with EEOC which enforces the ADA. If the EEOC determines the employer violated the law some attempt will be made to settle through an amicable resolution. However, at the same time the EEOC renders its determination regarding whether there is reasonable cause to believe a violation of the ADA has occurred, the EEOC will hand the employee a "right to sue" notice.

The employee always has a right to sue in federal district court alleging the same workplace violation. Employees can also file claims with the relevant agencies at the state or local level. In many states the employee can bypass the administrative process and go straight to state court.

Avoid lawsuits

The bottom line for all this is that the burden of proof has shifted to the employer to demonstrate that making an accommodation would create an undue hardship. "My advice to the employer is to always be liberal in the assumption that a condition is covered by the ADA, then move right on to engage in an interactive assessment to determine if the company can come up with an accommodation for the employee's condition," says Nobile. If you believe an accommodation is impossible or would result in an "undue hardship" to your business, you should be prepared to prove your position to the EEOC or ultimately in court.

Making a sensible accommodation

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