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## MEMORANDUM TO MUNICIPAL CLIENTS

**RECEIVED**

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TO: BOARD OF SELECTMEN/MAYOR/TOWN AND CITY COUNCIL/TOWN  
MANAGER/TOWN ADMINISTRATOR/EXECUTIVE SECRETARY

RE: Amendments to the Americans with Disabilities Act ("ADA")

**BOARD OF SELECTMEN**

As you may be aware, last year Congress amended the Americans with Disabilities Act ("ADA") to expand anti-discrimination coverage available to individuals under the ADA. The ADA Amendments Act of 2008 ("the ADAAA"), which went into effect this year, overturns two U.S. Supreme Court decisions that essentially made it more difficult for individuals to establish that they were "disabled" under the ADA. Through the enactment of the ADAAA, Congress' intent was to increase the coverage of individuals under the ADA by broadening the definition of "disability." As a result, employers will need to be increasingly aware of this change in fulfilling their legal obligation to provide individuals with reasonable accommodations at work and reduce the risk of disability discrimination litigation. The Equal Employment Opportunity Commission ("EEOC") is currently in the process of revising its regulations in light of the ADAAA. We expect that these regulations will expand employee protections under the ADA. In the meantime, there are key changes that you should be aware of in the employment context.

First, under this new law, the definition of an individual who may be considered disabled under the ADA is now broadly construed. Section 3(4)(A) of the ADAAA. This is a significant departure from previous federal case law that required a strict interpretation of the definition of disability as contained in the ADA. Moreover, whether an employee is "disabled" under the ADA is now evaluated without any regard to the effects of mitigating measures, such as medication, medical equipment, use of aids such as prosthetics or hearing aids, or course of medical treatment (with the exception of eyeglasses and contact lenses). This, too, is a rejection of previous federal case law.<sup>1</sup> In addition, under the ADAAA, an employee that suffers from so-called "episodic impairments," conditions which are sporadic or in remission, may be considered disabled under the ADA if that person would be substantially impaired in a major life activity when their medical condition is active. For example, an employee who is diagnosed with cancer, but is currently in remission, would now likely be considered disabled under the ADA.

The ADA has always required that the employer and employee engage in an "interactive dialogue" to determine what reasonable accommodations, if any, can be made so that a disabled employee may perform the essential functions of his or her job. Given the broadening of coverage that has resulted from the ADAAA, it is more important than ever that employers do not simply

<sup>1</sup> Under the Massachusetts anti-discrimination law, G.L. c. 151B, mitigating measures are not to be considered when analyzing whether an employee is disabled under Chapter 151B. Thus, this change to the ADA is consistent with current practice under the state analogue to the ADA.