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ADA Amendments Act: Final EEOC Regulations – What Employers Need to Know

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More than two years after the January 1, 2009, effective date of the ADA Amendments Act of 2008 ("ADAAA"), the Equal Employment Opportunity Commission ("EEOC") published final regulations ("Regulations") on March 25, 2011. The Regulations are effective May 24, 2011 – 60 days after publication. Employers, however, should immediately take the Regulations into account in employment decision making, as they will certainly guide EEOC enforcement activities and employee expectations even before May 24.

The ADAAA and the Regulations are designed to change the focus of inquiries under the American with Disabilities Act of 1990 ("ADA") from whether an individual's impairment meets the definition of a "substantial impairment" that constitutes a disability, to issues of discrimination, qualifications, and reasonable accommodation.

The ADAAA did not change the ADA's three-pronged definition of "disability":

1) A physical or mental impairment that substantially limits one or more major life activities;
2) A record (or previous history) of such an impairment; or
3) Being "regarded as" having a disability (and, under the ADAAA, being subject to an adverse action because of an actual or perceived impairment that is not transitory and minor).

What the ADAAA and the Regulations do change is how the first and third prongs are evaluated. Both the ADAAA and the Regulations provide that the definition of "disability" is to be interpreted in favor of broad coverage and that, in most cases, the issue of "disability" should be easily resolved to find coverage. The Regulations provide nine rules of construction for determining whether an individual has a covered disability. At the same time, it is important to note that the ADAAA and the Regulations have not changed many key ADA issues. Neither the ADAAA nor the Regulations change the ADA definitions and existing case law on the meaning of "qualified," "essential functions," "reasonable accommodation," "undue hardship," or "direct threat," or the burden of proof in demonstrating any of these requirements. (See the EEOC's

Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008 ("Q&A") #29.)

Among the key points for employers under the Regulations are the following:

1) The Regulations define "physical or mental impairment" as any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more bodily systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitor urinary, immune, circulatory, hemic, lymphatic, skin, and endocrine. In addition, "physical or mental impairment" also covers any mental or psychological disorder, such as intellectual disability (formerly termed mental retardation), organic brain syndrome, emotional or mental illness, and specific learning disabilities. The definition of "impairment" in the Regulations closely tracks the original regulations, except for the addition of the immune and circulatory systems. (Q&A #7.)

2) The Regulations require a "broad scope of protection" by requiring an expansive interpretation of the term "substantially limits."

3) The Regulations drop the bar for finding a "substantial limitation," as an impairment no longer must prevent or severely or significantly restrict a "major life activity" ("MLA") to qualify as "substantially limiting." (Q&A #9.) The Regulations also take the position that an impairment need not last a particular length of time to qualify under the ADAAA and that the effects of an impairment lasting less than six months *can* still be "substantially limiting." (Q&A #10, Section 1630.2(j)(1)(ix).) The EEOC premises this position on the fact that the ADAAA has an exception to the "regarded as" coverage for transitory impairments, that is, ones that last less than six months and are minor, and on some parts of the legislative history. It is worth considering whether that is a sufficient basis to overrule prior case law, which usually found actual impairments lasting six months or less not to be disabilities. Taken to its extreme, the question becomes whether Congress made the ADA and the Family and Medical Leave Act ("FMLA") essentially coextensive as to coverage, without ever saying so, directly or indirectly. Put differently, must an employer consider accommodations beyond giving FMLA leave for substantially limiting, but short duration, conditions?

4) The Regulations address the scope of MLAs by providing a non-exhaustive list of examples, starting with previously recognized ones, such as performing manual tasks, seeing, hearing, standing, speaking, learning, concentrating, communicating, interacting with others, and working. There is a second and new category of MLAs under the Regulations, which contains major bodily functions (*e.g.,* immune system, normal cell growth, digestive, bladder, neurological, brain, cardiovascular, endocrine, and others), including the operation of an individual organ within a body system (*e.g.,* the operation of a kidney, liver, or pancreas). (Q&A #8.)

5) The Regulations require that the determination of substantial limitation on a MLA be made without regard to the ameliorative or positive effects of mitigating measures (*e.g.,* prosthetic devices, medications, etc.), except that ordinary eye glasses or contact lenses may be considered. Expanding on the proposed regulations that were published on September 23, 2009, the Regulations add psychotherapy, behavioral, and physical therapy as examples of mitigating measures. (Q&A #12, 13.) The Regulations do not establish a specific level of visual acuity for determining whether eye glasses or contact lenses should be considered "ordinary." They state that such determinations should be made on a case-by-case basis "in light of current and objective medical evidence." (Q&A #14, Section 1630.2(j)(1)(vi) and (j)(6).) Mitigating affects may be considered, however, for purposes other than determining whether the impairment is substantially limiting (*e.g.,* in addressing qualifications, reasonable accommodation or direct threat issues). (Q&A #15, 16.)

6) The Regulations track the ADAAA and expressly state that impairments that are episodic or in remission are covered disabilities if the impairment would be substantially limiting when present or active. (Q&A #11.)

7) The Regulations depart from the approach of the proposed regulations which had listed what essentially amounted to a per se or categorical list of impairments that would qualify as disabilities. The new approach is to give examples of specific impairments that generally "should easily be concluded to be disabilities" (*e.g.,* deafness, blindness, intellectual disability, partially or completely missing limbs, mobility impairments requiring use of a wheel chair, cancer, bipolar disorder, post traumatic stress disorder, etc.). This change may not alter the likely EEOC position where the impairment was on the proposed categorical list. (Q&A #19.)

8) The Regulations again depart from the proposed regulations in providing that the "condition, manner, or duration" under which a MLA can be performed may be considered in determining whether an impairment is a disability. The EEOC opines, however, that it should not be necessary to use these concepts as to many impairments that "should easily be concluded to be disabilities." (Q&A #20.)

9) The Regulations and the Appendix to the Regulations, unlike the proposed regulations, provide that the assessment of substantial limitation in the MLA of working will be made with reference to difficulty performing either a "class or broad range of jobs in various classes" rather than merely "a type of work." In an important reference, the EEOC states that "demonstrating a substantial limitation in performing the unique aspects of a single, specific job is not sufficient to establish that a person is substantially limited in a major life activity of working." (Q&A #21.) This is a positive change for employers.

10) The Regulations reaffirm that the ADA continues to exclude individuals who are currently using drugs. They note, however, that the ADA continues to provide

potential coverage for individuals who have successfully completed, or are participating in, a rehab program.

11) The Regulations track the ADAAA with regard to the third prong of coverage for individuals who assert "regarded as" claims. Under the ADAAA and the Regulations, an individual would show an employer acted on its belief that the individual's impairment, or perceived impairment, substantially limited performance of a MLA. The Regulations now place the focus in a "regarded as" case on how the individual is treated due to an actual or perceived impairment rather than the employer's belief regarding the impairment, as under prior case law. The Regulations also track the ADAAA in providing that an individual whose only claim is a "regarded as" claim is *not* entitled to a reasonable accommodation. (Q&A #25-27.)

12) Following the language of the ADAAA, the Regulations no longer refer to a "qualified individual with a disability," rather, they refer to an "individual with a disability" and a "qualified individual" as separate terms. The focus of the inquiry on whether discrimination occurred is now whether the employer acted "on the basis of disability" rather than "against a qualified individual with a disability because of the disability of such individual." The Regulations seek to make the primary focus on whether discrimination occurred, not whether the individual meets the definition of "disability." Employers should note, however, that an individual still must establish that he or she is qualified for the job in question. (Q&A #30.)

The rapidly escalating number of disability discrimination claims made since the enactment of the ADAAA, and the further attention that promulgation of the Regulations will draw, means that employers should promptly address key aspects of the Regulations. The Regulations, the Q&A about the Regulations, and the Appendix to the Regulations provide a virtual GPS guide as to how the EEOC will enforce the ADAAA. Thus, employers should promptly take steps to assure compliance with the ADAAA and the Regulations.

What Employers Should Do Now

1) Understand that most ADA claims will now focus on whether the applicant or employee is qualified for the job, whether a reasonable accommodation was offered, whether the employer engaged in the interactive process to discuss possible accommodations in good faith, and whether any employer action was caused by an individual's disability, record of disability, or being regarded as disabled. In most cases, a focus on whether the person is disabled would be misplaced.

2) Review all job descriptions to assure that they accurately and fully capture all "essential functions" of the job. Properly prepared job descriptions should be afforded considerable weight by the EEOC and the courts. Having a properly prepared job description will be much more important when cases are being

decided on the merits instead of on whether the individual had a disability that substantially limits a MLA.

3) Train supervisors on the new broad coverage of the ADA and require them to enlist the assistance of Human Resources in the "interactive process" to determine whether a reasonable accommodation can be made. The training should also sensitize supervisors to recognize accommodation requests if the applicant or employee is not extremely literate or crystal clear in making a request.

4) Always engage in the interactive process when there is an accommodation request and fully document your organization's efforts in the interactive process. Try to secure the employee's signature on a document memorializing any agreements reached in the process. If the employee should refuse to sign, make sure the employer's participants in the process do sign and note, if true, that the employee did not dispute the content of the memo, but simply refused to sign it.

5) Review language in any policies and employee handbook to make sure it is consistent with the ADAAA.

6) Review your applications and any inquiries that might elicit information about an applicant's disability, and determine if they are appropriate.

7) Contemporaneously document all employment actions, decisions, and corrective action involving an employee who is an individual with a disability or has a record of a disability.

If you have any questions about this Advisory or other ADA employment or public accommodation issues, please contact:

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