

EEOC'S New ADAAA Regulations and Their Implications for the Workplace

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In September 2008, Congress enacted the Americans with Disabilities Act Amendments Act (ADAAA or Amendments Act) in response to a series of Supreme Court decisions that Congress believed too narrowly interpreted the Americans with Disabilities Act of 1990 (ADA). Following President Bush's signing of the law, on September 25, 2008, the ADAAA became effective January 1, 2009, and also amended Section 503 of the Rehabilitation Act of 1973. The Amendments Act "restored protections for the broad range of individuals with disabilities as originally envisioned by Congress." In so doing, the ADAAA shifted the focus in disability cases from resolving whether the employee has a disability to addressing whether there is an accommodation suitable for the employee and reasonable. While the basic definition of "disability" was retained, the Amendments Act expanded the calculus for interpreting "disability," rejecting a series of Supreme Court and appellate court interpretations which had restricted its meaning, clarified and expanded the scope of "major life activities," and called for broad coverage for those claiming a "disability" to the maximum extent consistent with the Act's underlying purposes.

To that end, more than two years later, the Equal Employment Opportunity Commission (EEOC) has finally issued revised regulations implementing the statute's mandates, and also revised the EEOC's Interpretive Guidance on Title I of the ADA to carry out the ADAAA's underlying policy. Most importantly, the Regulations adhere very closely to the Amendments Act, and should not trigger any additional substantive requirements from employers beyond those already found in the amended ADA. Rather, the Regulations simply confirm that the ADA is to be interpreted broadly and that employers should focus efforts on reasonably accommodating employees with disabilities so long as the worker can perform the essential functions of the job. In light of the complexity that inevitably surrounds some of the core concepts embodied in the ADAAA, employers are encouraged to refer to the Interpretative Guidance and to the learning found in its discussion in connection with selection, leave, and accommodation policies and practices to ensure compliance.

Overview

The key highlights of the new EEOC Regulations and revised Interpretive Guidance include:

- The ADA is to be interpreted broadly so as to afford its protections to those who satisfy its expansive definition of "disability";
- The EEOC has assigned a lower standard to be utilized for determining when a physical or mental impairment substantially limits a major life activity than that applied prior to the effective date of the ADAAA;
- An impairment need not prevent, nor severely or significantly restrict a major life activity to be considered "substantially limiting". Thus, the EEOC explained, "substantially limits" is not meant to be a demanding standard. The Regulations include nine rules of construction (most of which are derived from the statute or its legislative history) to help guide the "substantially limits" analysis, as modified by the ADAAA;
- The list of major life activities has been expanded to include major bodily functions;
- While employers must engage in individualized assessments of "disability" status, certain enumerated conditions, due to their inherent nature, "virtually always"

meet the broadened definition of “disability”;

- The term “disability” includes any impairment, even if it is episodic or in remission, so long as that impairment would substantially limit a major life activity when active;
- A temporary impairment (e.g., one lasting less than 6 months) can be “substantially limiting” in certain circumstances (for example, a back impairment that results in a lifting restriction of 20 pounds that lasts for a few months);
- With the exception of corrective eyeglass or contact lenses, employers may not consider the ameliorative effects of “mitigating measures” when assessing whether an impairment substantially limits one’s major life activities;
- Individuals who bring claims solely under the “regarded as” prong of “disability” are *not* entitled to reasonable accommodations from their employers; and
- Employers may not use qualification standards, tests, or other selection criteria that are based on uncorrected vision standards.

Broad Interpretation of “Substantially Limits”

Throughout the revised Regulations and Interpretive Guidance, the EEOC emphasizes Congress’ rejection of court decisions which had narrowly interpreted the ADA. In superseding such holdings, the Amendments Act and revised Regulations make clear that a limitation need *not* “significantly” nor “severely” restrict a major life activity in order to be considered “substantially limiting.” Rather, it is sufficient that an individual’s ability to perform a single major life activity is limited when compared to that of “most people in the general population.”

Employers are advised to consider the following factors when making the “substantially limiting” comparative analysis:

- The condition under which the individual performs the major life activity;
- The manner in which the individual performs the major life activity;

- The time it takes the individual to perform the major life activity;
- The duration of time the individual is able to perform the major life activity;
- The difficulty or effort required to perform the major life activity;
- Any pain experienced when performing the major life activity;
- The way an impairment affects the operation of a major bodily function;
- Any negative side effects of mitigating measures, such as medication.

Furthermore, the Regulations make clear that an individual need *not* demonstrate either a limitation in the ability to perform activities of central importance to daily life, or show that the impairment limits more than one major life activity.

Major Life Activities

The ADAAA extended the boundaries of “major life activities” to encompass “major bodily functions,” as Congress recognized that chronic impairments can be substantially limiting. The Regulations and Interpretive Guidance include a non-exhaustive list of major life activities and major bodily functions, to make clear that sitting, reaching, and interacting with others constitute major life activities, and that the functions of special sense organs and skin, and functions of the genitourinary, cardiovascular, hemic, lymphatic, and musculoskeletal systems qualify as major bodily functions.

The Major Life Activity of “Working”

Notably, the revised Regulations omit any discussion of when an impairment will substantially limit the major life activity of working. Instead, this discussion has been moved to the Interpretive Guidance, where the EEOC states that such analysis will rarely be necessary. More likely, an impairment that substantially limits the major life activity of working will also substantially limit some other major life activity. To illustrate, the Interpretive Guidance offers several examples, based on prior cases, in which an impairment was not found to substantially limit working, but would *now* qualify as substantially limiting a major bodily function. Included in these examples are:

- A seizure disorder which did not impair an employee's ability to work a range of jobs but did impair neurological function;
- Bone marrow cancer that did not impair an employee's ability to lift on the job but did impair normal cell growth;
- Major depression that did not impair a police officer's ability to carry a firearm but did impair normal brain function.

In the rare circumstance where the effect of an impairment on the major life activity of working is the only available method to establish a substantially limiting impairment, the EEOC submits that an individual may do so by showing that the impairment limits his or her ability to perform a class of jobs or broad range of jobs in various classes as compared to most people having comparable training, skills, and abilities. Thus, one who is substantially limited in performing the unique aspects of a single, specific job will *not* be deemed substantially limited in the major life activity of working. However, if a person whose job requires heavy lifting in excess of fifty pounds develops a disability that prevents him/her from lifting more than fifty pounds such that s/he cannot perform his or her current job, and other similar jobs with the same heavy lifting requirement, that person is likely substantially limited in working because s/he is substantially limited in performing the class of heavy lifting jobs.

In addition, the Interpretive Guidance submits that many cases previously analyzed in terms of whether the plaintiff was "substantially limited in working" will now be analyzed under the "regarded as" prong of the definition of disability. Illustrative examples of this modified approach include the following scenarios:

- A factory worker laid off due to her carpal tunnel syndrome was not regarded as substantially limited in working because her job as a sewing machine operator was not a "broad class of jobs." She would now be protected under the "regarded as" prong because she was fired because of her carpal tunnel syndrome, an indisputable impairment;
- An applicant who was not hired for a firefighting job because of his mild hemophilia was not regarded as substantially limited in working but would now be "regarded as" disabled because he was not hired because of hemophilia, an actual impairment.

Rules of Construction for Determining Whether an Impairment “Substantially Limits” a Major Life Activity

The Regulations include nine rules of construction to assist when making this determination:

- **“Substantially limiting” standard is a broad one, but not every impairment will qualify as a disability.** The first and second rules emphasize the expansive coverage of the ADAAA, reiterating that the “substantially limiting” standard is not meant to be demanding. However, while the reference to impairments that have only “minor, trivial” effects has been deleted, rule two offers a cautionary reminder that not all impairments will qualify as a disability under this new expansive definition;
- **Focus should be on discrimination, not whether one is disabled.** The focus in disability cases should be on whether employers have complied with their obligations and not whether the individual meets the definition of disability. Accordingly, absent good reasons, employers are best advised to engage employees claiming a disability in the interactive process in order to assess appropriate reasonable accommodations which will enable the employee to perform the essential job functions;
- **A lower functional limitation is now required.** While the “substantially limits” determination calls for an individualized assessment, the standard to be used requires a lower functional limitation than the pre-ADAAA standard for “substantially limits”. Thus, although scientific, medical or statistical evidence may be helpful when comparing an individual’s performance of a major life activity to that of most people in the general population, such evidence or reference will seldom be necessary. At its core, the revised regulations provide that an impairment is a disability if it substantially limits the individual’s ability to perform a major life activity as compared to most people in the general population;
- **Ameliorative effects of mitigating measures are not to be considered when determining disabled status.** The ameliorative effects of mitigating measures are *not* to be taken into account in determining whether an impairment substantially limits a major life activity. Nonetheless, the Regulations preserve the exception to this rule regarding ordinary eyeglass or contact lenses, which may be considered when making this determination. However, the negative effects of ameliorating measures may be considered when determining whether an individual

meets the definition of disability. Further, as per the ADAAA, both positive and negative effects of mitigating measures may be considered when assessing whether someone is entitled to reasonable accommodation;

- **Episodic illness is a disability if substantially limiting when active.** An impairment that is episodic or in remission is to be considered a disability, if that impairment would substantially limit a major life activity when active. Thus, an impairment such as epilepsy or cancer may constitute a disability if it would substantially limit a major life activity when active. On the other hand, episodic conditions that impose only minor limitations even when they are active will not meet the definition of disability;
- **One substantially limiting major life activity is enough to constitute a disability.** The Regulations provide that an impairment that substantially limits one major life activity suffices to be considered substantially limiting. Thus, if one is substantially limited in his or her keyboarding ability, for example, this is enough to rise to the level of disability. It is irrelevant whether or not the individual is similarly impaired in his or her ability to operate a touch-screen keypad;
- **Temporary impairments may nonetheless be substantially limiting.** While an impairment that is “transitory and minor” cannot form the basis of a “regarded as” claim, the Regulations confirm that the effects of an impairment lasting or expected to last *less* than six months *can* be substantially limiting in certain circumstances;
- **Activities central to daily life need not be impaired.** An employee is no longer required to demonstrate that an impairment that substantially limits a major life activity also results in a limitation in the ability to perform activities of central importance to daily life. Thus, as per the Interpretive Guidance, one who is substantially limited in his or her ability to lift need not demonstrate that lifting is an activity of central importance to daily life. This individual is disabled for purposes of the ADAAA.

Impairments that “Virtually Always” Meet the Definition of Disability

The Regulations preserve the individualized approach to determining whether one is substantially limited in a major life activity. However, they also recognize that some impairments, given their inherent nature, will *virtually always* impose a substantial limitation on a major life activity. Thus, in cases involving such impairments, the individualized assessment called for by the ADAAA should be “particularly simple and straightforward,” allowing employers to “easily” conclude that one is substantially limited in a major life activity:

- Deafness, as it substantially limits hearing;
- Blindness, as it substantially limits seeing;
- An intellectual disability as it substantially limits brain function;
- Partially or completely missing limbs or mobility impairments requiring the use of a wheelchair as they substantially limit musculoskeletal function;
- Autism, as it substantially limits brain function;
- Cancer, as it substantially limits normal cell growth;
- Cerebral palsy, as it substantially limits brain function;
- Diabetes, as it substantially limits endocrine function;
- Epilepsy, as it substantially limits neurological function;
- HIV, as it substantially limits immune function;
- Multiple sclerosis, as it substantially limits neurological function;
- Muscular dystrophy, as it substantially limits neurological function;
- Major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder and schizophrenia, as they substantially limit brain

function.

Modification of the “Regarded As” Prong of Disability

Under the ADAAA’s revised definition of “regarded as,” an employee no longer needs to establish that the employer perceived him or her to be substantially limited in a major life activity. The employee need only demonstrate that the employer took a prohibited adverse action based on the employer’s belief that the employee had an actual or perceived impairment, without regard to whether that condition was perceived to substantially limit a major life activity.

Under an exception to coverage, where an individual claims discrimination because s/he was “regarded as” disabled, the employer can plead as a defense that the impairment was both transitory (e.g., lasting or expected to last less than six months) *and* minor. This exception will only apply where the employer can demonstrate that the impairment would objectively be considered transitory and minor. It is simply not relevant that the employer, subjectively, may have believed the impairment was transitory and minor.

The Regulations also make clear that individuals who only satisfy the “regarded as” prong of the disability definition are *not* entitled to reasonable accommodation from their employers. However, if the employer takes an adverse employment action against an individual whom the employer regards as disabled, based on a perceived or actual disability, regardless of whether it was perceived to substantially limit a major life activity, the individual may file a charge of discrimination against his or her employer.

Next Steps for Employers:

Because EEOC’s Regulations track the many changes to the ADA effectuated by the Amendments Act, they should have only a marginal effect on the trends in disability litigation. However, employers should take advantage of the extra clarity they provide and take steps to ensure that their policies and practices are in compliance with the law. Critically important, Human Resources professionals should review handbooks, practices, and train all managers regarding the ADA as amended, and its revised Regulations. Human Resources professionals will have credibility when testifying in litigations or administrative proceedings if they can establish that they too underwent ADA training. Below are some additional action steps to consider:

- When reviewing existing policies and practices, employers should pay special attention to any requirements or deadlines, keeping in mind the ADAAA's emphasis on reasonable accommodation and interpretation of "substantially limits," "major life activities" and "regarded as," as highlighted in the new Regulations and Interpretive Guidance. For example, policies that automatically terminate employees who cannot yet work at the end of a 26-week short term disability leave need to be modified. In this regard, as well, communications between Human Resources professionals and third-party providers who are retained to administer FMLA and short-term disability leaves must be coordinated so as not to run afoul of the ADA and related state laws;
- Employers should not use qualification tests based on uncorrected vision unless such a standard is job related and consistent with business necessity;

The determination of whether an individual is disabled should not be the primary focus, although the condition obviously has to be considered and evaluated. The key inquiry in light of the Amendments Act is whether the employer can provide reasonable accommodations to an individual with a disability by engaging the worker in an interactive process. It follows that employers can best prepare themselves by making reasonable accommodation the cornerstone of their disability policies and practices. An employer's best strategy when defending an ADA lawsuit, in this new environment, is to demonstrate that it made good faith efforts to accommodate the employee, rather than by challenging the employee's disability.

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