

Labor and Employment ADVISORY

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EEOC Expands ADA's Definition of "Disability"

On January 1, 2009, the Americans with Disabilities Act Amendments Act of 2008 (ADAAA)¹ went into effect, greatly expanding the definition of "disability" in the Americans with Disabilities Act (ADA).² The ADAAA overrides the holdings in several U.S. Supreme Court decisions and some EEOC regulations that Congress felt construed the definition of "disability" too narrowly.

On September 23, 2009, the EEOC published in the *Federal Register* a long-awaited Notice of Proposed Rulemaking (NPR)³ seeking to implement the ADAAA. The new proposed definition of "disability" incorporates many medical impairments. The changes apply to both the ADA and the Rehabilitation Act (covering Federal employees).

Outlined below is a guide to the more significant changes we can expect should the NPR become regulation.

A More Expansive Definition of Disability

The proposed regulations seek to expand the definition of "disability" as found under the ADAAA (and under the original ADA): A "disability" is (i) an impairment that substantially limits one or more major life activities, (ii) a record of such an impairment or (iii) being regarded as having such an impairment.⁴ However, the proposed regulations make clear that "disability" is to be interpreted broadly.

The threshold for establishing that an individual is "substantially limited" is considerably lower:

"An impairment is a disability within the meaning of this section if it 'substantially limits' the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly restrict, the individual from performing a major life activity in order to be considered a disability."⁵

¹ ADA Amendments Act of 2008, 29 U.S.C. § 705.

² Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 1201 (a)(1).

³ "Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act," 74 Fed. Reg. 48431, 48440 (Sept. 23, 2009) (to be codified at 29 C.F.R. pt. 1630).

⁴ ADA, 42 U.S.C § 12102(1).

⁵ "Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act," 74 Fed. Reg. 48431, 48440 (Sept. 23, 2009) (to be codified at 29 C.F.R. pt. 1630).

Temporary, non-chronic impairments of short duration (such as the common cold or flu, a sprained joint or broken bone that is expected to heal, or minor and non-chronic gastrointestinal disorders) usually will not substantially limit a major life activity. However, an impairment may substantially limit a major life activity even if it lasts, or is expected to last, for fewer than six months.⁶

The EEOC has stated that examples of impairments that will consistently meet the definition of a disability include deafness, blindness, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV/AIDS, multiple sclerosis and muscular dystrophy, major depression, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder or schizophrenia.

Expansion of the definition of “major life activities”:

The proposed regulations expand the definition of major life activities by providing two non-exhaustive lists of activities and bodily functions, many of which were included in the ADAAA. The list of activities includes caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working (all of which were included in the ADAA). The new regulations propose to add three additional major life activities that were not included in the ADAAA: sitting, reaching and interacting with others.

A “common sense” assessment of any particular impairment:

The proposed regulations also provide that the determination of whether an impairment substantially limits a major life activity will be based upon a “common-sense assessment,” comparing an individual’s ability to perform a specific major life activity with that of most people in the general population.

Working as a “major life activity”:

The proposed regulations also significantly change the interpretation of what it means to be substantially limited in the major life activity of working: “An impairment substantially limits the major life activity of working if it substantially limits an individual’s ability to perform, or meet the qualifications for, the type of work at issue.” This replaces the former requirement that an individual be limited from working in a “broad range” or “class” of jobs to be substantially limited in the “major life activities” of working.

Rejection of mitigating measures:

Under the proposed regulations, the ameliorative effects of mitigating measures are not to be considered in determining whether an impairment substantially limits a major life activity. Likewise, an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

⁶ *Id.*

The rejection of mitigating measures means that the use of such items as medication, medical supplies, equipment or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics (including limbs and devices), hearing aids and cochlear implants (or other implantable hearing devices), mobility devices, or oxygen therapy equipment and supplies will not preclude an individual from claiming they have an impairment that will limit a major life activity. Excepted from this list is the use of ordinary eye glasses.

Expansion of the “regarded as” prong:

The proposed regulations also follow the clear mandate of the ADAAA to make clear that individuals covered only under the “regarded as” prong are not entitled to reasonable accommodation. The “regarded as” prong has been expanded such that an employee need not show that an employer perceived him to be substantially limited in a major life activity. Instead, under the proposed regulations, an applicant or employee is regarded as disabled if he is subjected to an action prohibited by the ADA (such as denial of a promotion, failure to hire or termination) because of an actual or perceived impairment or because of symptoms of an impairment, unless the impairment is both transitory (lasting less than six months) and minor.

Practical Advice

1. **Be mindful that the definition of disability has expanded.** The ADAAA went into effect on January 1, 2009. Thus, if any of your employees have requested a reasonable accommodation due to a disability since that time, you should revisit any decision denying those requests. What may not have been a disability last February (e.g. diabetes), may well be a disability now.
2. **Review current position descriptions.** The ADA prohibits employers from using unnecessary qualification standards to screen out disabled applicants. A review of your current position descriptions will ensure that they are up-to-date and can be used to justify employment decisions that may give rise to liability under the ADA.
3. **Document.** As always, a strong paper trail is your best defense when an ADA claim is filed. With a more expansive pool of employees potentially claiming disability discrimination, the accurate documentation of employee performance and major employment decisions is essential.

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