

[Alerts and Updates]

EEOC One Step Closer to Issuing Proposed Regulations Under the ADAAA

June 29, 2009

The Americans with Disabilities Act Amendments Act of 2008 (ADAAA) went into effect on January 1, 2009, imposing sweeping changes to the Americans with Disabilities Act (ADA). Since then, employers and individuals have anticipated Equal Employment Opportunity Commission (EEOC) regulations to further delineate the expanded definition of a "disabled" individual as well as the "rules of construction" set forth in the ADAAA.

On June 17, 2009, the EEOC voted to approve a proposed Notice of Proposed Rulemaking (NPRM) under the ADAAA. The proposed NPRM has been sent for comment by other federal agencies and for approval by the Office of Management and Budget. When this process is completed, the NPRM will be published in the *Federal Register* for public comment.

While the proposed NPRM has not yet been published (and is therefore not publicly available), the remarks of the EEOC assistant legal counsel at the June 17, 2009, public meeting provide insight into the proposed NPRM and, thus, the mindset of the EEOC. The proposed NPRM may reflect a more aggressive enforcement position by the EEOC.

We will provide an extensive analysis once the full text of the NPRM is available. Below are highlights of remarks by EEOC Assistant Legal Counsel Christopher Kuczynski to explain the proposed NPRM.

What Is a "Major Life Activity"?

The ADAAA and the proposed NPRM retain the three-part definition of "disability" that was originally established under the ADA: (1) a physical or mental impairment that substantially limits a major life activity, (2) a record of having such an impairment or (3) being regarded as having such an impairment.

The ADAAA added a nonexhaustive list of "major life activities" (caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working) to the statutory text. The ADAAA also identified a nonexhaustive list of "major bodily functions" that also qualify as major life activities (functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions).

It is important to note that the proposed NPRM (as described by the EEOC's assistant legal counsel) broadens the text of the ADAAA by adding three major life activities (reaching, sitting and interacting with others) and three major bodily functions (functions of the hemic, lymphatic and musculoskeletal systems). The proposed NPRM also lists impairments that impact major life activities (e.g., kidney disease affects bladder function, cancer affects normal cell growth, epilepsy affects neurological functions), which may identify categories of impairments that will constitute disabilities.

How Is "Substantially Limited" Defined?

In enacting the ADAAA, Congress rejected the U.S. Supreme Court's position in *Toyota Motor Mfg. v. Williams*¹ that the term "substantially limits" means "severely restricts" an individual from doing activities that are of "central importance to daily life."

In response to Congress' mandate to promulgate regulations addressing the definition of "substantially limits," the proposed NPRM is reported to include five rules of construction:

1. The focus of ADA cases should be on whether discrimination occurred, not on the definition of "disabled"; whether an impairment substantially limits a major life activity should be "construed broadly," and the determination of whether someone is disabled should "not demand extensive analysis."
2. In order to demonstrate that an individual is substantially limited in a major life activity, the individual does not need to demonstrate that he or she is limited in "activities of central importance to daily life."
3. An individual may be able to demonstrate that he or she is disabled based upon an impairment that substantially limits *only* one major life activity.
4. The determination of an individual's limitation "may be made using a common-sense analysis without resorting to scientific or medical evidence" when comparing the individual's limitation to that of most people in the general population.
5. Impairments that last for fewer than six months may still be substantially limiting.

Against this background, the proposed NPRM is reported to provide that temporary, nonchronic impairments of short duration, with no residual effects (*e.g.*, the common flu, a sprained ankle), do not substantially limit a major life activity and, therefore, are not disabilities.

In addition, the proposed NPRM sets forth two categories of conditions (with corresponding examples): (1) those impairments that will obviously be substantially limiting and which will consistently meet the definition of "disability" and (2) those impairments that may be substantially limiting, depending upon further analysis. Although the EEOC's assistant legal counsel stated in his public comments that the identification of these specific impairments does not eliminate the "individualized assessment" to be undertaken in an ADA analysis, the inclusion of these categories suggests that the EEOC may believe that certain conditions should be deemed disabilities.

The proposed NPRM also eliminates the requirement that to be substantially limited in the major life activity of "working," an individual must be prevented from working in a "class" or "broad range" of positions. In its place, the proposed NPRM maintains that an impairment substantially limits the major life activity of working if it "substantially limits an individual's ability to perform, or to meet the qualifications for, the type of work at issue as compared to most people having comparable training, skills, and abilities."

Mitigating Measures

In contrast to prior case law, the ADAAA provides that a determination of whether an impairment substantially limits a major life activity shall be made without reference to mitigating measures (except for ordinary eyeglasses and contact lenses).

The proposed NPRM reiterates this position and, as stated by the EEOC's assistant legal counsel, reinforces the principle that an impairment may be a disability if it would substantially limit a major life activity without a mitigating measure "even where an individual has never experienced limitations or has experienced only minor limitations resulting from the impairment." In addition to listing the mitigating measures specifically referenced in the ADAAA, the NPRM adds surgical interventions as a mitigating measure.

Episodic Conditions or Conditions in Remission

The proposed NPRM is reported to adopt the language of the ADA by contending that impairments that are episodic or in remission are disabilities if they would be substantially limiting when active (*e.g.*, epilepsy, asthma, cancer and psychiatric disabilities such as major depression).

Regarded as Disabled

Following the language set forth in the ADA, the proposed NPRM provides that when an employer takes an adverse action against an individual (*e.g.*, failure to hire, failure to promote) because of an impairment, that individual will be able to demonstrate that he or she has been regarded as disabled, unless the impairment is transitory (lasting or expected to last for six months or less). As an example, the proposed NPRM provides that if a manufacturing employer does not hire an individual, believing that she has carpal tunnel syndrome, that employer will be deemed to have regarded the individual as disabled.

Opposition to the NPRM

The proposed NPRM is not without its challengers, some of whom are within the EEOC.

EEOC Commissioner Constance S. Barker, in her public comments on June 17, 2009, commented on the proposed NPRM, finding that "these proposed changes depart in a fundamental way from the basic concept of the ADA—that disability is determined on the basis of an individualized assessment and not categorically." She further discussed the proposed NPRM's removal of the concept, "condition, manner or duration," which had previously been identified by the EEOC (and relied upon by courts) as relevant to the determination of whether an impairment substantially limits a major life activity as well as the removal of the language "class of jobs or broad range of jobs," which had previously been utilized in determining whether an individual is substantially limited in the major life activity of working.

While discontent within the EEOC and future public comment may result in subsequent revisions to the proposed NPRM, the significance of the statutory changes resulting from the ADA indicates that employers should be aware that the final version of the EEOC's regulations is likely to support a more expansive definition of "disability" and rules of construction than existed prior to the ADA.

What This Means for Employers

While at this point we do not know how expansive the EEOC regulations ultimately will be, the statutory framework of the ADA significantly expands the number of individuals who will be deemed disabled. Therefore, employers may want to focus on the aspects of the ADA analysis that have not been altered. These areas include considering whether the individual is otherwise qualified to perform his or her job, whether a requested accommodation is reasonable or poses an "undue hardship" and whether an individual poses a "direct threat." Employers may also want to review and update job descriptions to ensure that they accurately reflect the key requirements of positions. In addition, it may be appropriate to train managers to focus only on the objective performance issues, and not on any suspected underlying medical condition, when addressing performance deficiencies.

For Further Information

If you have any questions regarding the NPRM issued by the EEOC, about policies or about the ADAAA, please contact any of the [attorneys](#) in our [Employment, Labor, Benefits and Immigration Practice Group](#) or the attorney in the firm with whom you are regularly in contact.

Note

1. *Toyota Motor Mfg. v. Williams*, 534 U.S. 184 (2002).