



Client Alert

March 31, 2011

EEOC Final Regulations Highlight Expanded Coverage of ADA

On March 25, 2011, the EEOC issued long-awaited final regulations to interpret and implement the ADA Amendments Act of 2008 (ADAAA) in a move that greatly expands the number of applicants and employees who will be considered "disabled." These regulations also fundamentally alter the type of analysis that every employer must make in order to determine whether an individual is considered disabled under the ADA.

Under the new regulations, it will often be much easier for employees and applicants to prove that they are disabled. Indeed, the new regulations give examples of specific impairments that "should easily be concluded to be disabilities" and examples of major life activities (including major bodily functions) that the impairments substantially limit. These impairments include: deafness, blindness, intellectual disability (formerly termed mental retardation), partially or completely missing limbs, mobility impairments that require the use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder and schizophrenia.

The new regulations, consistent with prior law, require an individualized assessment of whether an impairment substantially limits a major life activity. Now, however, there is an additional and expanded list of "major life activities" that is much broader than the courts' prior interpretations of the ADA. It includes major bodily functions, including functions of the immune system, special sense organs and skin, normal cell growth, digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive systems. In addition, the regulations state the major bodily functions include the operation of an individual organ within a body system (e.g., the operation of the kidney, liver, or pancreas).

Under the new regulations, an impairment can rise to the level of a disability even if it does not prevent, or even significantly or severely restrict, the individual from performing a major life activity or bodily function. It is enough if the individual's ability to perform a single major life activity or bodily function is limited when compared to that of most people in the general population. Thus, most employees and applicants will not need to prove they are substantially limited in the major life activity of working in order to establish that they are disabled.

Other expansions seem nuanced, but have real practical effects. They will serve to expand the number of persons considered "disabled" even if they are not truly limited by their medical condition. For example:

Here are a few important points to keep in mind:

- Mitigating measures (other than ordinary eyeglasses or contact lenses) can no longer be considered in determining whether an impairment is substantially limiting. Thus, for example, the diabetic whose condition is completely controlled by insulin or the epileptic whose condition is completely controlled by seizure medication will be considered disabled if their condition, if untreated, would substantially limit a major life activity. Similarly, an individual who can hear normally with a hearing aid would also be considered disabled.
- An impairment that is episodic or in remission, such as cancer or epilepsy or bipolar disorder, is considered a disability if it would substantially limit a major life activity if active.
- Because the definition of disability is now much broader, the number of individuals who will be deemed to have a "record of a disability" is similarly expanded.

The regulations also make a major change in those covered by the statute because they are "regarded as disabled." It is no longer required that the employer actually perceive the individual to be substantially limited in a major life activity. Rather, it is enough if he or she is subject to an adverse employment action (e.g., failure to hire, demotion or termination) based on an individual's impairment (but not actual disability) or the employer's belief that the employee suffers from an impairment.

An exception to this sweeping change is if the regarded as disabled impairment is really transitory (lasting less than six months) and minor. The new regulations provide two stark examples: refusing to hire someone because the person has scars that don't actually interfere with any major life functions, and refusing to promote an individual because of a minor back injury as long as the back impairment lasted or was expected to last more than six months. Thankfully, the regulations did not change the law that individuals who are covered only because they are "regarded as disabled" are not entitled to reasonable accommodations. Instead they are only protected from discrimination.

You might ask yourself, is anyone not disabled under these regulations? There was some hope of guidance in this regard as the *proposed* regulations had listed several examples of temporary, non-chronic impairments of short duration with little or no residual effects that are usually not disabilities. Those included the common cold, seasonal or common influenza, a sprained joint, minor and non-chronic gastrointestinal disorders, or a broken bone that is expected to heal completely, appendicitis and seasonal allergies that do not substantially limit a person's major life activities even when active. However, the final regulations deleted these examples. Thus, employers are left to guess as to whether the condition qualifies as a disability under the expanded scope of the ADA.

These regulations can be found on the EEOC Web site, www.eeoc.gov, which also contains some Questions and Answers on implementing the ADA Amendments Act of 2008.

The EEOC's new regulations will almost certainly result in an increase in disability claims and lawsuits and potentially increased confusion as the courts sort out and interpret the ADAAA. In addition, the focus under the ADA will now be less on whether an individual is even disabled and more on the employer's conduct, with the underlying assumption that the employee is covered by the protections of the law. Courts will now be more apt to focus on whether an employer 1) has met its obligation to reasonably accommodate the person or 2) has discriminated against an individual because of his or her disability.

The regulations contain other important changes that are too numerous to describe in this Alert. Questions about these regulations and how to comply with the ADAAA can be directed to:

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