Is Every Employee Now Disabled?

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The Americans with Disabilities Amendments Act (ADAA) was created to expand coverage of the Americans with Disabilities Act (ADA) and overturn several U.S. Supreme Court decisions that Congress believed interpreted the concept of "disability" too narrowly. The question now is whether the Equal Employment Opportunity Commission (EEOC) has gone too far in the other direction, making nearly every employee in America "disabled" under the statute.

On May 24, 2011, the EEOC's final regulations implementing the ADAA will go into effect. Significant changes found in the new regulations include the following:

- The EEOC has listed various conditions that "in virtually all cases" meet the definition of disability. These conditions include autism, cancer, cerebral palsy, diabetes, HIV, muscular dystrophy, epilepsy, multiple sclerosis, missing limbs, major depression, bipolar disorder, obsessive compulsive disorder, post-traumatic stress disorder and schizophrenia. While all of these conditions certainly seem like disabilities, some of them can have dormant or mild symptoms when treated with medication. In the past, an employer could do an individualized analysis. Now, it would be wise to accept almost any employee with these conditions as "disabled."

- The EEOC has rejected the formerly well-accepted position that temporary impairments are not disabilities. Previously, many employers would not consider conditions to be disabilities if they lasted less than six months. Now, the EEOC has expressly stated that impairments expected to last fewer than six months can be disabilities, provided they are sufficiently severe.

- In order to have a disability, an employee must have an impairment that substantially limits a major life activity. Previously, employers would engage in significant analysis of what constitutes a "substantial limitation." The Supreme Court said an impairment needs to "prevent" or "severely restrict" a major life activity to be considered a disability. Now, the EEOC gives no standard as to what "substantial limitation" means and instead states that employers should not extensively analyze this requirement.

- The EEOC regulations make clear that employers cannot consider mitigating factors such as medicine, treatment, hearing aids, prosthetic devices, etc. when deciding whether an employee is disabled. So, even if a person has a disabling condition that is completely controlled by medication and there are no outward symptoms, that person is still disabled. Further, the EEOC makes clear that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active, even if the active episode(s) are "brief" and "occur[s] infrequently."

- The EEOC regulations make it easier for individuals to establish that they are "regarded as" having a disability by putting the focus on how the employee has been treated because of an impairment, regardless of whether the employer actually believed the impairment was a disability. So, an employee who has a minor lifting restriction following hernia surgery could be "regarded as" and thus protected as "disabled" even though the condition is clearly not a disability under the statute. It is important to note, however, that the regulations do state that employers do not have to provide accommodations to employees who are simply "regarded as" disabled.

So what should employers do in the face of these new rules? Here are a few suggestions. First, and most simply, if an employee has a condition and requests an accommodation that is easy and cheap to provide, employers should simply grant the request. Do not investigate if the employee has a disability. Avoid mentioning the ADA or the legal buzzword "reasonable accommodation." Just call it a job modification and make a record of it. By doing so, the employer has met its obligations under the ADA and could still argue the person does not have a disability if the situation breaks down in the future.

Second, if the necessary accommodation is not easy or cheap and the employer needs to do an analysis of whether or not it has to provide the accommodation, the employer should not rely on an argument that the person does not have a disability – unless the condition is very minor and/or short term (i.e. , 3-month duration or less).

Third, since the key analysis now is whether or not a disabled employee is otherwise qualified to perform the essential job functions with or without a reasonable accommodation, employers should review their job descriptions and make sure they are accurate and list all key components of the job.

The ADAA and the EEOC regulations will assuredly be the subject of much litigation, which will help define employer's obligations. We will keep you apprised of any major developments. In the meantime, if you have questions about the new regulations or would like assistance in your disability accommodation process, you may contact Jon Kok (jkok@wnj.com or 616.752.2487) or any member of Warner's Labor and Employment Practice Group.