

WSGR ALERT

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PUSHING THE ENVELOPE: NEW DISABILITY REGULATIONS INCREASE EMPLOYERS' EXPOSURE RISK

After nearly two years, the Equal Employment Opportunity Commission (EEOC) has released its final regulations implementing the ADA Amendments Act (ADAAA), which will become effective on May 24, 2011. The ADAAA and the new regulations broaden the class of individuals who qualify for protection under the Americans with Disabilities Act of 1990 (ADA), including those who must be provided with reasonable accommodations. As a result, employers are likely to see an increase in federal disability-related claims, including requests for reasonable accommodations.

The ADA prohibits employment discrimination against a qualified individual with a disability. Under the statute, an individual is "qualified" if he or she is able to perform the essential functions of his or her position with or without a reasonable accommodation. The ADA defines the term "disability" as a physical or mental impairment that "substantially limits" one or more of the individual's "major life activities." In addition to an actual disability, the ADA also protects employees who are "regarded as" disabled and those who have a "record of" a disability. While the specific definitions of these ADA groups essentially remain unchanged, the new regulations construe the application of the ADA much more liberally.

Liberally Construed Definition of "Disability"

The final regulations are intended to support the ADAAA's objective of restoring Congress'

original intent to provide broad protections to individuals with disabilities under the ADA and to reverse a number of recent rulings limiting the meaning of a "disability" under the statute. In the past, employers found refuge in the U.S. Supreme Court's decision in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), which applied a strict interpretation to the terms "substantially limits" and "major" in defining the term "disability." In effect, this ruling established a demanding standard for qualifying as disabled under the ADA. The final regulations and the ADAAA reject this standard and broaden the ADA's definition of "disability" to redirect the focus of cases away from whether an individual's impairment qualifies as a disability toward whether the employer has complied with its statutory obligations.

"Substantially Limits" Construed

While the final regulations do not define the term "substantially limits," they do provide "rules of construction" for determining whether an impairment falls into that category. Those rules include: (1) that the term "substantially limits" be construed broadly to give maximum coverage under the ADA; (2) that an impairment does not have to prevent or significantly restrict the individual from performing a major life activity; (3) that extensive analysis is not necessary; (4) that an impairment lasting less than six months can be substantially limiting under the "actual" or "record of" disability prongs; (5) that the determination should involve an

individualized analysis; and (6) that the impairment need only affect one major life activity and not necessarily others. Because the rules of construction offer limited guidance, the true scope of what it means to be "substantially limited" is currently unclear. Consequently, this issue likely will evolve through the courts' interpretation of these new rules.

Major Life Activities Listed

With respect to the major life activities involved in the definition of "disability," the final regulations also set forth a non-exclusive list that includes the following:

- Caring for oneself
- Speaking
- Performing manual tasks
- Breathing
- Seeing
- Learning
- Hearing
- Reading
- Eating
- Concentrating
- Sleeping
- Thinking
- Walking
- Communicating
- Standing
- Working
- Lifting
- Interacting with others
- Bending

Continued on page 2...

Pushing the Envelope: New Disability Regulations Increase Employers' Exposure Risk

Continued from page 1...

Many of these already have been recognized as major life activities by courts interpreting the ADA. The addition of "interacting with others," however, is particularly troubling since it can pose a significant challenge to employers dealing with interpersonal problems among supervisors and their employees.

The final regulations also expand the scope of major life activities under the ADA to include the operation of "major bodily functions," such as:

- Cell growth
- Respiratory functions
- Endocrine functions
- Immune system functions
- Neurological functions
- Reproductive functions
- Digestive functions

This is a significant expansion of the "major life activity" definition, since an employee now can have an internal impairment that alone satisfies the standard.

Enumerated Disabilities

The final regulations further clarify that when applying the rules of construction, there will be some conditions that "virtually always" constitute a disability. These conditions include the following:

- Deafness
- Diabetes
- Blindness
- Cancer
- Missing limbs
- HIV infection
- Epilepsy
- Bipolar disorder

This significant change is meant to limit litigation regarding whether or not some of these conditions constitute a disability under the ADA. This clarification is intended to redirect the focus away from whether an individual qualifies for the protection of the ADA toward an evaluation of compliance with the statute.

Mitigating Measures

The final regulations also support the ADAAA's reversal of prior decisions by the U.S. Supreme Court requiring the consideration of "mitigating measures." Mitigating measures are steps taken to correct an impairment, such as medication, equipment, and other auxiliary aids or devices (including hearing aids). The final regulations provide that mitigating measures should not be used in determining whether the impairment qualifies as a disability under the ADA, except in the case of normal eyeglasses or contact lenses. Consequently, the ADAAA and the final regulations provide that the employee must be considered in his or her "unmitigated" state in most cases.

"Regarded as" Disabled

As mentioned above, the ADA also prohibits an employer from "regarding" an employee as disabled. The U.S. Supreme Court previously has interpreted this provision to require proof that the employer believed that the employee has a substantially limiting impairment. The final regulations follow the ADAAA in eliminating this standard. Rather, individuals are now "regarded as" disabled under the ADA if they show that they were subjected to discriminatory actions because of an actual or perceived impairment, regardless of whether the impairment actually limits a major life activity or whether the perceived limitation of that activity is substantial.

The final regulations do clarify, however, that employers need not accommodate those who are regarded as disabled and specify that this prong does not extend to transitory or minor impairments with an actual or expected duration of six months or less. The final regulations also clarify that an episodic impairment or one that is in remission is still a disability under the ADA if it substantially limits a major life activity when it is active. Employers may therefore be liable for failure to accommodate or discrimination even in instances where the employee does not have an active impairment.

Recent Trends

The ADAAA and the final regulations represent a trend of loosening the definition of "disability" that also can be seen in recent state and local disability discrimination law revisions. For example, employers in California will recognize that some of the final regulations' provisions are similar to the Fair Employment and Housing Act (FEHA) disability discrimination provisions, as well as the new proposed California regulations that further expand coverage under FEHA.

For instance, FEHA provides coverage to individuals whose disability simply "limits" one major life activity as opposed to "substantially limiting" the major life activity. Like the ADA, FEHA does not consider mitigating measures in determining whether an impairment limits a major life activity, but it is silent on whether ordinary eyeglasses or contacts are included in such mitigating measures (although the proposed regulations include them as mitigating measures). The proposed regulations also include "interacting with others" as a major life activity. FEHA specifically provides that where the ADA's protections are broader than FEHA's protections, the ADA controls. For this reason, California employers should familiarize themselves with each act's requirements to ensure compliance.

Keep GINA in Mind

It is also important to recognize that the final regulations follow the Genetic Information Nondiscrimination Act of 2008 (GINA), which prohibits employers from discriminating on the basis of genetic information. GINA impacts employer inquiries into employee health information and can pose potential liabilities with regard to employer interactions while handling ADA issues. All employers are strongly advised to immediately update their leave-of-absence forms for disability leaves, as well as forms for family and medical leaves under both state and federal law, to include the safe harbor provided by GINA.

Continued on page 3...

Pushing the Envelope: New Disability Regulations Increase Employers' Exposure Risk

Continued from page 2...

What to Consider Going Forward

The ADAAA and the final regulations, as well as state amendments (such as FEHA and the pending revisions to its regulations), significantly broaden the scope of who will qualify as "disabled" under the ADA or state law. In response, courts are likely to apply the ADA or relevant state law much more broadly, interpreting employees' claims to protection under the statute with deference, as directed by the new regulatory guidelines.

In light of these changes, employers should proceed cautiously and seek counsel with regard to how these new regulations will impact their obligations, including the requirement to provide reasonable accommodations, to employees who now may qualify for coverage under the ADA or state law, especially since any disability claims now will require even more individualized inquiries. Employers also should seek counsel regarding how GINA may impact their ability

to request medical information from employees, including information regarding family members.

For more information on the ADAAA, the final regulations, or other related matters, please contact Fred Alvarez, Kristen Dumont, Laura Merritt, Rico Rosales, Marina Tsatalis, Alicia Farquhar, or any other member of Wilson Sonsini Goodrich & Rosati's employment law practice.



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