

HIRE PERSPECTIVES

Winter 2009/2010

A periodic newsletter from the Labor & Employment Law Group at Dickinson, Mackaman, Tyler & Hagen, P.C.

EEOC's Proposed Regulations for the Amended ADA

by [JILL R. JENSEN-WELCH](#)

Did the Equal Employment Opportunity Commission (EEOC) overstep its authority with the proposed regulations for the 2008 Americans with Disabilities Act Amendment Act (ADAAA)?

The EEOC issued its proposed regulations on September 23, 2009, almost a year to the date after Congress amended the ADA to expand the law's reach and overturn several U.S. Supreme Court decisions. Comments on the proposed regulations were due on November 23, 2009. Submissions by some business groups, such as the Society for Human Resource Management, contend the EEOC went further than the amended statute allows it to go.

The ADA and ADAAA both define a "disability" as "a physical or mental impairment that substantially limits one or more major life activities" of an individual. The ADA did not specify what Congress meant by "major life activities" or "substantially limits." It left these terms open to interpretation by EEOC regulation and by case law. Partially in response to such case law, which required a narrow meaning for these terms, Congress seized control by amending the ADA. The ADAAA adds more specificity regarding these terms. Business commentators argue that, by being specific, Congress may have limited the power of the EEOC and the courts to go beyond the ADAAA in regulations and when interpreting and applying the law.

Major Life Activities

The ADAAA's statutory definition of "major life activities" (MLAs) includes an expansive list of examples, and a new subcategory of MLAs called major bodily functions (MBFs). The ADAAA's list of MLAs includes those that had been listed in the EEOC's regulations for the ADA, and adds more. The ADAAA explicitly states it is "not limited to" what is listed. The EEOC took that language to heart by adding even more MLAs and MBFs in its proposed regulations than were in the ADAAA itself.

The chart below demonstrates how wide-ranging the definition of MLA has become under the ADAAA, and how much wider it will become if the proposed EEOC regulations become final.

<i>Major Life Activities</i>	<i>EEOC's ADA Regulations</i>	<i>ADAAA Statute</i>	<i>Proposed EEOC Regulations for the ADAAA</i>
Caring for oneself	X	X	X
Performing manual tasks	X	X	X
Walking	X	X	X
Seeing	X	X	X
Hearing	X	X	X
Speaking	X	X	X
Breathing	X	X	X
Learning	X	X	X
Working	X	X	X

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<i>Major Life Activities</i>	<i>EEOC's ADA Regulations</i>	<i>ADAAA Statute</i>	<i>Proposed EEOC Regulations for the ADAAA</i>
Eating		X	X
Sleeping		X	X
Standing		X	X
Lifting		X	X
Bending		X	X
Reading		X	X
Concentrating		X	X
Thinking		X	X
Communicating		X	X
Sitting			X
Reaching			X
Interacting with Others			X
Immune system (MBF)		X	X
Cell growth (MBF)		X	X
Digestive system (MBF)		X	X
Bowel (MBF)		X	X
Bladder (MBF)		X	X
Neurological system (MBF)		X	X
Brain (MBF)		X	X
Respiratory system (MBF)		X	X
Circulatory system (MBF)		X	X
Endocrine system (MBF)		X	X
Reproductive system (MBF)		X	X
Special sense organs & skin (MBF)			X
Genitourinary system (MBF)			X
Cardiovascular system (MBF)			X
Hemic system (MBF)			X
Lymphatic system (MBF)			X
Musculoskeletal system (MBF)			X

The second column of the chart shows the nine MLAs listed in the EEOC's regulations under the ADA. Case law led to more MLAs being protected under the ADA, but that varied by jurisdiction and is not reflected in the above chart. The third column shows that the ADAAA incorporated the EEOC's original list of nine MLAs, then added nine more, along with eleven new MBFs. The last column shows that the EEOC's proposed ADAAA regulations would go further yet, to add three more MLAs and six more MBFs to the ADAAA's coverage. In addition, the proposed regulations state that even these lengthy lists are not exhaustive, and are merely examples.

With lists like this, there seems to be no end to what could be an MLA. Virtually any activity and bodily function/system could qualify. So it is understandable that commentators for business interests are raising the concern that the definition is too broad and that it may exceed the EEOC's authority under the ADAAA. But Congress may have intended this result and sufficiently allowed for it based on the ADAAA's statement that the statute's list is not limited or exhaustive. We do not expect changes to this section when the EEOC issues its final regulations.

Substantially Limits

Perhaps the biggest task before the EEOC in the proposed regulations for the ADAAA was to fashion a new, broader definition for "substantially limits." Remember, this term is another part of the definition of "disability," which determines who is protected by the ADAAA.

In the ADAAA, Congress eliminated consideration of mitigating measures when determining whether an individual has a "disability" — with the lone exception of ordinary eyeglasses and contact lenses. Mitigating measures include medication, hearing aids, prosthetics, mobility devices, oxygen therapy equipment, learned or adaptive behavior, and reasonable accommodations. In addition, Congress directed the EEOC to issue regulations that lowered this standard even further. The EEOC certainly answered that call in the proposed regulations.

Under the ADA regulations, "substantially limits" meant being completely unable to perform an MLA that the average person in the general population could perform, or being significantly restricted as to the condition, manner or duration under which the MLA was performed as compared with the average person in the general population. Additional factors to consider for "substantially limits" included the impairment's nature, severity, and permanence or long-term impact. The regulations provided additional guidance when the MLA under consideration was "working," which was a somewhat disfavored MLA. ADA case law further narrowed the application of "substantially limits" to require that the MLA be of central importance to the individual's daily life.

Under the ADAAA, "substantially limits" means substantially less than it did under the ADA. If adopted, the EEOC's proposed regulations regarding what "substantially limits" means will:

- Reduce the comparison of the limitation in performing an MLA to that of most people in the general population, rather than the average person in the general population.
- Eliminate the need for a significant or severe restriction in performing the MLA.
- Eliminate the need to consider the condition, manner, and duration of the ability to perform the MLA.
- Eliminate the need to consider the nature, severity, permanence, or long-term impact of the ability to perform the MLA. In fact, the regulations specifically state that even an impairment that lasts, or is expected to last, less than six months can substantially limit an MLA under the ADAAA.
- Eliminate the need for the MLA under consideration to be of central importance to the individual's daily life.
- Require broad coverage of the term "substantially limits," and similar broad coverage for the MLA of "working."
- Adopt a new "common sense" standard for what "substantially limits" means.
- Eliminate the need for scientific or medical evidence of substantial limitations and will not require extensive analysis of the substantial limitation.
- Focus on what the individual cannot do, rather than what the individual can do with regard to an MLA. This sets traditional notions of how to view persons with disabilities on its head.
- In accord with the ADAAA, require that the substantial limitation determination for episodic impairments and impairments in remission be made as if the impairment was active, even when it is not active. Episodic impairments include relatively common conditions such as hypertension, asthma, and depression.

The proposed regulations include examples that provide further guidance as to what is meant by the new definition of "substantially limits." One example is that a person with a 20-pound lifting restriction, not of short duration, is substantially limited in the MLA of

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lifting, and therefore, disabled under the ADAAA. Such a person need not show what daily activities are impacted by the restriction, but merely that such a restriction exists. Another example indicates that a person with diabetes has a substantial limit on the endocrine system (MBF) and does not need to show a substantial limit on eating or any other MLA to qualify as “disabled.”

The proposed regulations don’t stop there. They go on to categorize impairments that will “consistently meet the definition of disability,” that “*may* be disabling for some individuals but not for others,” and that are “not usually disabilities.” In so doing, the EEOC was careful to say that no negative implication should be taken from the omission of any particular impairment. Below are the example impairments, considerations for each (if applicable), and the EEOC’s proposed category for each listed impairment.

<i>Consistently A Disability</i>	<i>May Be A Disability</i>	<i>Usually Not A Disability</i>
Deaf	Asthma	Common cold
Blind	High blood pressure	Common flu
Intellectual disability (f/k/a mental retardation)	Learning disability (consider speed, ease, time, effort, difficulty, and academic success at reading, learning, thinking, or concentrating)	Sprained joint
Partial or complete missing limbs	Back or leg impairments (consider standing duration, walking distance, weight lifting)	Minor gastrointestinal disorders
Mobility impairments requiring a wheelchair	Psychiatric disorders (consider time/effort to concentrate, capacity to interact with others, and appetite)	Broken bones expected to heal normally
Autism (consider ability to communicate, interact with others, or learning)	Carpal Tunnel Syndrome (consider amount of pain when writing, use of keyboard, and duration of manual tasks)	Other temporary, non-chronic impairments of short duration with little to no residual effects
Cancer that limits an MLA, such as normal cell growth		
Cerebral Palsy (consider ability to walk, perform manual tasks, speak, or brain functions)		
Diabetes (consider endocrine system functioning, such as production of insulin)		
Epilepsy (consider impact on brain functions or ability to see, hear, speak, walk, or think during a seizure)		
HIV/AIDS (consider impact on immune system)		
Muscular Dystrophy or Multiple Sclerosis (consider impact on neurological functions, walking, performing manual tasks, seeing, speaking, or thinking)		
Major depression (consider impact on brain functions or thinking, concentrating, interacting with others, sleeping, or caring for oneself)		

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Consistently A Disability

Bipolar disorder (consider impact on brain functions or thinking, concentrating, interacting with others, sleeping, or caring for oneself)

Post Traumatic Stress Disorder (consider impact on brain functions or thinking, concentrating, interacting with others, sleeping, or caring for oneself)

Obsessive Compulsive Disorder (consider impact on brain functions or thinking, concentrating, interacting with others, sleeping, or caring for oneself)

Schizophrenia (consider impact on brain functions or thinking, concentrating, interacting with others, sleeping, or caring for oneself)

May Be A Disability

Usually Not A Disability

As indicated in the chart above, the individualized analysis of a person's impairment and the degree of limitation it has on him or her — which was paramount under the ADA — is less important under the ADAAA. If the EEOC's proposed regulations become final, it may be sufficient in some situations to simply obtain the person's diagnosis to know whether he or she is protected by the ADAAA.

No matter what happens with the regulations, the ADAAA provides much more protection to employees and applicants than the ADA. Employers should be prepared to receive, and lose, more complaints of disability discrimination than ever before. Employers with the best defenses against these claims will have taken the following steps:

- Have accurate and detailed job descriptions that include the mental and physical abilities required to be qualified and to perform successfully in each job, and have distributed such a job description to each employee and his/her manager(s).
- Have an anti-discrimination policy that is up-to-date and includes discussion of reasonable accommodations for persons with disabilities. A separate policy on reasonable accommodations is also acceptable.
- Have well-trained managers who know how to respond to applicants and employees with disabilities, including how to spot and handle reasonable accommodations needs and requests.

If you have questions about the EEOC's proposed regulations for the amended ADA, please contact a member of the Firm's [Employment & Labor Law Group](#) or the Dickinson attorney with whom you normally work.

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