

FORD & HARRISON^{LLP}
THE RIGHT RESPONSE AT THE RIGHT TIME

LEGAL ALERT



Legal Alert: EEOC Releases Proposed Regulations Implementing the ADAAA

9/25/2009

The Equal Employment Opportunity Commission (EEOC) has published a Notice of Proposed Rulemaking (NPR) containing proposed amendments to its Americans with Disabilities Act (ADA) Regulations and Interpretive Guidance that reflect changes made by the Americans with Disabilities Act Amendments Act of 2008 (ADAAA). The NPR was published in the Federal Register on September 23, 2009. The EEOC will accept comments on the proposed regulations until November 23, 2009. The EEOC has also published a Question and Answer (Q/A) document on its web site, http://www.eeoc.gov/policy/docs/qanda_adaaa_nprm.html, which addresses some of the changes of the proposed regulations.

The most significant changes in the proposed regulations include:

Broad interpretation of the term "disability": In accordance with the ADAAA, the proposed regulations provide that the definition of "disability" should be interpreted broadly and the focus of an ADA case should be on whether discrimination occurred, not whether an individual meets the definition of "disability." In keeping with this requirement, the proposed regulations list examples of impairments that consistently meet the definition of disability. The proposed regulations note that "because of certain characteristics associated with these impairments, the individualized assessment of the limitations on a person can be conducted quickly and easily, and will consistently result in a determination that the person is substantially limited in a major life activity." The proposed regulations also state that other types of impairments not specifically identified in this list may also consistently be substantially limiting.

Additionally, the proposed regulations explain that other types of impairments may be substantially limiting for some individuals but not others and list examples of these types of impairments. The proposed regulations acknowledge that these types of impairments may require more analysis to determine whether they are substantially limiting for a particular individual, but note that this determination "should not demand an extensive analysis."

Broad interpretation of the term "substantially limits": In accordance with the provisions of the ADAAA, the proposed regulations state that a limitation need not "significantly" or "severely" restrict a major life activity in order to be considered substantially limiting. The proposed regulations also delete reference to the terms "condition, manner, or duration" under which a major life activity is performed. According to the proposed regulations, an impairment is a disability if it "substantially limits" the ability of an individual to perform a major life activity "as compared to most people in the general

population."

Major life activities: The ADAAA includes a non-exhaustive list of major life activities, to which the proposed regulations add sitting, reaching, and interacting with others. The ADAAA also states that major life activities include the operation of major bodily functions and lists some bodily functions considered to be major life activities. The proposed regulations add several examples to the ADAAA's list of bodily functions. Additionally, the proposed regulations state that an individual whose impairment substantially limits a major life activity is not also required to show that he or she is limited in the ability to perform activities of central importance to daily life to be considered an individual with a disability.

Mitigating measures: In accordance with the ADAAA, the proposed regulations state that the ameliorative effects of mitigating measures are not to be considered in determining whether an individual is substantially limited in a major life activity. However, the both the ADAAA and proposed regulations provide that the use of ordinary glasses or contact lenses can be considered in determining whether an individual has a disability.

Episodic illness: The proposed regulations provide that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

Reasonable accommodation: The proposed regulations clarify that both the positive and negative effects of mitigating measures can be considered when determining whether a reasonable accommodation is needed and whether an individual poses a direct threat. The EEOC's Q/A states "For example, if an individual with a disability uses a mitigating measure which eliminates the need for a reasonable accommodation, then an employer will have no obligation to provide one."

Substantially limited in working: The proposed regulations provide that the determination of whether an individual is substantially limited in working should be made by addressing whether an individual is limited in the ability to perform a "type of work" (such as commercial truck driver). This definition replaces the concepts of a "class" or "broad range" of jobs from the 1991 ADA regulation. The proposed Interpretative Guidance further notes that using the "type of work" standard, "evidence from the individual regarding his educational and vocational background and the limitations resulting from his impairment may be sufficient for the court to conclude" that he is substantially limited in performing a type of work. Thus, according to the Interpretive Guidance, the statistical analysis previously required by some courts will not be needed in order to establish that an individual is substantially limited in working. Additionally, the factors set forth in the prior regulation that guided the determination of whether an individual was substantially limited in work, such as the geographic area to which the individual has access, have been eliminated. "Expert testimony concerning the types of jobs in which the individual is substantially limited will generally not be needed."

Regarded as disabled: Under the ADAAA, an employer "regards" an individual as having a disability if it takes an action prohibited by the ADA (e.g., discriminatory failure to hire, termination, or demotion) based on an individual's impairment or on an impairment the employer believes the individual has, unless the impairment is transitory (lasting or expected to last for six months or less) and minor. This new definition of "regarded as" having

a disability eliminates the requirement that the employer believed the impairment (or perceived impairment) substantially limited performance of a major life activity. The proposed regulations also reiterate the ADAAA's provision that employers have no obligation to provide reasonable accommodation to an individual who only meets the definition of regarded as disabled.

Action taken based on symptoms of an impairment or based on the use of mitigating measures: The proposed regulations provide that a prohibited action based on an actual or perceived impairment includes an action based on a symptom of such an impairment, or based on medication or any other mitigating measure used for such an impairment. The EEOC specifically seeks public comment on this provision.

Record of a disability: The proposed Interpretive Guidance eliminates the requirement in the prior Guidance that an employer must have "relied on" a record of disability to establish coverage under this definition of disability. Although the question of whether the employer relied on a record of disability when making an employment decision is relevant to the issue of whether the employer discriminated against the individual, it is not relevant to the question of whether the person is disabled because of a record of disability.

Employers' Bottom Line:

Like the ADAAA, the proposed regulations emphasize that the determination of whether an individual is disabled should not be the primary focus of ADA cases. Instead, the focus should be on whether prohibited discrimination has occurred. Thus, from a practical standpoint, employers in most situations will be better able to defend an ADA lawsuit by showing that they made a good faith effort to accommodate the employee, rather than by challenging the employee's disability.

If you have any questions regarding the proposed regulations or other labor or employment related issues, please contact the Ford & Harrison attorney with whom you usually work.