

New ADAAA regs: the untold story!!!

By **Robin E. Shea** on April 04, 2011



As most people in the Human Resources and employment-law worlds are aware, the U.S. Equal Employment Opportunity Commission recently issued its final rule interpreting the Americans with Disabilities Act Amendments Act.

The ADAAA, which took effect in January 2009, was enacted toward the end of the administration of George W. Bush, with the support of disability rights advocates as well as the U.S. Chamber of Commerce and the Society for Human Resources Management (both of whom were trying to head off a version that would have been worse for employers). The ADAAA dramatically expands the population that is considered "disabled" within the meaning of the ADA but does not change the ADA's provisions on, for example, reasonable accommodation, medical examinations, or confidentiality.

There has been a lot of commentary about the new regulations, but here are some points that I have not seen anywhere else:

1. The 40-or-so pages of dense preamble and regulations, and the EEOC's "Interpretive Guidance," can be summarized in one sentence, as follows: **It is now unlawful to discriminate, not just against individuals with "disabilities," but against *anyone* because of a medical condition, whether actual, past, or perceived.** (Please note that "medical condition" also includes mental/psychiatric conditions and learning disabilities.) The only exceptions might be, for example, a person suffering from the common cold or the flu, or someone who wears eyeglasses or contact lenses. *But not necessarily.* The new definition of "disabilities" in the ADAAA is as loosey-goosey as the definition of "serious health condition" in the Family and Medical Leave Act.

2. Individuals who are "regarded as" being only *impaired* are protected. The only perceived "impairments" that don't count are those that are *both* transitory (duration of less than six months) *and* minor. Because it's going to be so easy to qualify, the EEOC is actively encouraging individuals to always sue under the "regarded as" prong as long as they aren't challenging an employer's failure to provide a reasonable accommodation. (For obvious reasons, reasonable accommodations do not have to be provided to individuals who are only "regarded as" being impaired, so an individual seeking a reasonable accommodation would have to establish either an actual "disability" or a record of a "disability.")

3. Thanks (but no thanks) to this law, I expect to see some class action lawsuits alleging ADAAA violations in connection with post-offer medical examinations and terminations at the end of extended medical leaves of absence. Under the prior version of the ADA, these cases were normally unsuccessful as class actions because an individualized analysis was required to determine who could be a member of the class (that is, who was "disabled"). But now that the determination of who is "disabled" is virtually automatic, disability discrimination cases will be more susceptible of class treatment.

4. Most ADA case law on who is "disabled" is no good any longer. The ADAAA explicitly overruled some excellent Supreme Court decisions, including *Sutton v. United Air Lines* (1999) and *Williams v. Toyota Manufacturing of Kentucky* (2002). However, our court system is slow, and so we are still seeing ADA decisions that take a restrictive view of who is "disabled." This is nothing to be excited about, unfortunately. Be sure to read the fine print: If the facts alleged in the case occurred before January 1, 2009, then the court is applying the old ADA, which really was a pretty good and reasonable law. (On the other hand, if you see a pro-employer decision based on facts that occurred after January 1, 2009, then you may have reason to open a bottle of champagne.)

So, what should an employer do to comply with the ADAAA?

***Always assume that everyone has an ADAAA "disability."** You will be right 99.9 percent of the time, and the rest of the time you'll be erring on the right side.

***Brush up, if you need to, on your legal obligations concerning reasonable accommodations.** You will have to consider reasonable accommodations in many more cases than you did in the past.

***If you think a "medical condition" disqualifies a person from performing the job, go through the full-blown ADA/reasonable accommodation analysis.** If you think you will be unable to accommodate, consult with counsel before making any irreversible decisions.

***If you require post-offer medical screening, review what you are doing and make sure that your medical department (or outside physician) is not automatically rejecting everyone who has certain conditions.** All medical rejection decisions should be considered "preliminary" until they have been reviewed and approved by someone in Human Resources and/or a lawyer. (This may require the offeree to sign a HIPAA authorization that will allow the medical department to share relevant information with HR/Legal.)

***Review your medical leave/termination policies and practices, and be especially on the lookout for any provisions that seem to call for "automatic" termination without an individualized assessment or consideration of reasonable accommodation options.**

***Make sure your "paws" know the laws.** Now that we have the potential for cat's paw liability, be sure that your front-line supervisors and other managers know at least that the ADA has been amended and that it will cover significantly more people than before.

CONSTANGY

BROOKS & SMITH, LLP

The Employers' Law Firm, Since 1946

Constangy, Brooks & Smith, LLP has counseled employers on labor and employment law matters, exclusively, since 1946. A "Go To" Law Firm in Corporate Counsel and Fortune Magazine, it represents Fortune 500 corporations and small companies across the country. Its attorneys are consistently rated as top lawyers in their practice areas by sources such as Chambers USA, Martindale-Hubbell, and Top One Hundred Labor Attorneys in the United States, and the firm is top-ranked by the U.S. News & World Report/Best Lawyers Best Law Firms survey. More than 130 lawyers partner with clients to provide cost-effective legal services and sound preventive advice to enhance the employer-employee relationship. Offices are located in Alabama, California, Florida, Georgia, Illinois, Massachusetts, Missouri, New Jersey, North Carolina, South Carolina, Tennessee, Texas, Virginia and Wisconsin. For more information, visit www.constangy.com.