

EEOC ISSUES FINAL ADAAM REGULATIONS

The wait is over. Following its consideration of over 600 written comments and four “town hall listening sessions,” the Equal Employment Opportunity Commission (EEOC) issued its final regulations March 25, 2011, implementing the Americans with Disabilities Act Amendments Act of 2008 (ADAAA). The regulations took effect May 24, 2011, and provide further insight into how claims under the Americans with Disabilities Act (ADA) will be addressed by the EEOC and the courts.

What is the ADAAA?

The ADAAA, which took effect January 1, 2009, was passed by Congress in response to several U.S. Supreme Court decisions that had limited the application and scope of the ADA. The ADAAA broadens the interpretation of operative terms such as “disability” and “major life activity” while simultaneously lowering the standards for inclusion in a protected category and restricting the consideration of most mitigating factors.

In the new regulations, the EEOC has further codified the ADAAA’s mandates of increased coverage and decreased standards. This Nexsen Pruet Employment Law Update highlights important aspects of these regulations. For a more detailed explanation of the ADAAA itself, consult the [October 2008 edition of the Employment Law Update](#).

Nine New Rules of Construction

In determining whether an individual has a qualifying disability under the ADA, the claimed disability must “substantially limit” a “major life activity.” “Substantially limit” is a term that the EEOC had defined in its previous regulation implementing the ADA. In the ADAAA, Congress expressed an expectation that the EEOC would revise its definition of “substantially limit” to conform to the new lower standard in the ADAAA.

However, the EEOC did not create a new definition *per se* for “substantially limit.” The EEOC explained that such a new definition would lead to greater “focus and intensity of retention on the threshold issue of coverage intended.” As an alternative, the EEOC implemented nine new “Rules of Construction” to determine whether a claimed disability “substantially limits” a “major life activity.” These rules expressly lower the perceived threshold for inclusion under the ADA and are as follows:

1. The term “substantially limits” is to be construed broadly in favor of coverage. To that end, the EEOC notes that “substantially limits” is not to be a demanding standard.
2. In determining whether an individual is substantially limited in a major life activity, that individual’s ability is considered vis a vis the general population. Contrary to what the term might otherwise suggest, the EEOC directs that an impairment does not need to prevent, significantly restrict or severely restrict a major life activity in order to “substantially limit” that activity.
3. The primary object of focus under the ADA should be whether an employer or other public entity has complied with the requirements of the ADA and whether any discrimination has occurred. Conversely, the acknowledged threshold issue of whether an alleged impairment substantially limits a major life activity “should not demand extensive analysis.”

4. Whether an impairment substantially limits a major life activity should be determined through an individualized assessment. However, the EEOC expressly notes that the functional standard is lower than it was before the ADAAA was enacted.
5. Determining whether a claimed impairment substantially limits a major life activity does not require any scientific, medical or statistical analysis.
6. As noted in the ADAAA, except for eyeglasses and contact lenses, mitigating measures are not considered. The focus is on how an individual is limited, not on what can be achieved despite the alleged limitation.
7. An impairment that is episodic or in remission constitutes a disability if it substantially limits a major life activity when active. Therefore, conditions such as cancer or rheumatoid arthritis likely qualify as disabilities even if they are not currently active.
8. Regardless of how many potential “major life activities” are affected, only one needs to be substantially limited for protection of the ADA to attach.
9. Individuals with perceived impairments that are both “transitory” (i.e., six months or less in actual or expected duration) and “minor” are excluded from coverage for individuals who are regarded as “disabled.” However, this limitation does not apply to the determination of whether an actual disability exists. Therefore, individuals with minor impairments with expected durations of less than six months may still be considered disabled and entitled to protection and reasonable accommodations under the ADA.

Broad Inclusion Under “Major Life Activity” Umbrella

Under the ADA, individuals must demonstrate that a claimed impairment substantially limits a “major life activity” to be considered disabled. But under the new regulations, the EEOC notes that the term “major life activity” is not to be interpreted strictly to create a demanding standard. Likewise, whether something constitutes a “major life activity” should not be determined by a reference to whether it is of central importance to daily life.

Coupled with the ADAAA’s inclusion of “major bodily functions” with other “major life activities,” this lower standard also *substantially increases* the number of individuals potentially covered under the ADA. In addition to the non-exhaustive list of examples of major life activities and major bodily functions identified in the ADAAA, the EEOC identified a list of impairments that it indicated easily could be concluded as substantially limiting a major life activity. This non-exhaustive list includes deafness, blindness, intellectual disabilities, mobility impairments and missing limbs, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV, multiple sclerosis and muscular dystrophy.

Expansive Protection for Individuals “Regarded As” Disabled or With a “Record of” Impairment

The new regulations also include provisions that increase the potential for claims under the ADA’s prohibition of discrimination against individuals who are “regarded as” disabled and those who have a “record of” impairment.

As noted above, one defense potentially available to a claim of “regarded as” discrimination is that the perceived impairment was both “transitory” and “minor.” However, the new regulations limit the potential availability of this defense. It is not enough for an employer to show a subjective belief that the perceived impairment was both transitory and minor. The focus is now on whether the perceived impairment was *objectively* transitory and minor, which allows for potential second-guessing of employer decisions.

Likewise, the new regulations expand the applicability of the ADA to individuals with a “record of” impairment. Now, an individual with a record of an *incorrect* classification or diagnosis – such as an individual who is misdiagnosed with a mental disability – is expressly identified as one who could have standing to pursue a claim arising from alleged discrimination on that basis. Impairments that are episodic or in remission may also be included in this category under the new regulations.

How do the New Regulations Affect Employers?

Following the implementation of the new regulations, employers should expect the already expanded ADA to be given broad interpretation. Based on the guidance disseminated by the EEOC, it is likely that a high percentage of individuals who request a reasonable accommodation will have some basis to argue that they have a disability under the ADA. With that in mind, employers should consider training managers and supervisors who are likely to receive requests for reasonable accommodations and shift their focus from whether an individual is “disabled” to individualized functional job limitations.

This Employment Law Update is published as a service to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation.

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