

EEOC Issues Final Regulations for the ADAAA

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On March 24, 2011, the Equal Employment Opportunity Commission (EEOC) issued final regulations governing the Americans with Disabilities Act Amendments Act of 2008 (ADAAA). The final regulations take effect May 24, 2011. This advisory briefly summarizes key aspects of the final regulations.

Highlights

Disability claims are up 17 percent since the Americans with Disabilities Act Amendments Act took effect in January 2009. The new regulations will likely continue this trend.

The concept of a “major life activity” has been broadened to include reproductive and other bodily functions.

The definition for “substantial limitation” has been relaxed. Except for eyeglasses and contact lenses, the use of mitigating measures may no longer be used to determine whether an individual is disabled. More important, a physical or mental impairment does not need to severely or significantly restrict a major life activity to be considered “substantially limiting.”

A new test has been established for “regarded as” claims. Individuals will no longer have to show that an employer regarded them as having an impairment that substantially limited a major life activity. Instead, a claim will exist if the employer made an adverse employment decision based on an actual or perceived impairment, unless the impairment is transitory or minor.

Focus on whether discrimination occurred and not whether individual is disabled

The ADAAA and the final regulations are intended to shift the focus from whether or not an individual is disabled to whether or not an employer discriminated against an individual. Congress and the EEOC intend that key concepts be broadly construed to afford individuals with greater protection. Congress also intended to legislatively overrule cases that made it difficult for individuals to establish that they were entitled to relief. The final regulations and interpretive guidance provide that the determination of whether someone is “substantially limited” in a “major life activity” should “not demand extensive analysis” and “usually will not require scientific, medical or statistical analysis.”

How is “disability” defined?

The final regulations keep the ADA’s three-part definition of “disability”: A disability is (1) a physical or mental impairment that substantially limits one or more major life activities; (2) a record (or past history) of such an impairment; or (3) being regarded as having a disability. What’s changed is how these terms should be interpreted.

How is “physical or mental impairment” defined?

The regulations define “physical or mental impairment” as any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine.

The regulations include any mental or psychological disorder, such as intellectual disability (formerly termed mental retardation), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

The definition of “impairment” in the new regulations has been expanded to include immune and circulatory

systems because these systems are specifically mentioned in the ADAAA's examples of major bodily functions.

How is “substantial limitation” defined?

The final regulations reflect EEOC's intent that the term “substantially limits” should be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADAAA.

Mitigating measures are not to be analyzed in determining whether or not an impairment substantially limits a major life activity. There is only one exception—ordinary eyeglasses and contact lenses.

A key change under the final regulations is that an impairment does not need to prevent or severely or significantly restrict a major life activity to be considered “substantially limiting.”

Moreover, an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

The EEOC instructs that the determination of disability and substantial limitation should not require extensive analysis.

Nine rules of construction for evaluating “substantial limitation”

The final regulations include nine rules of construction for evaluating “substantial limitation”:

1. The term substantially limits should be broadly construed and is not a demanding standard.
2. A physical or mental impairment need not significantly restrict an individual from performing a major life activity.
3. The focus should be on whether an employer has complied with its obligations and not whether an individual's impairment substantially limits a major life activity.
4. Although an individualized assessment is required, the standard for determining whether an impairment substantially limits a major life activity should be interpreted to reflect functional limitation (a standard that is lower than the standard previously applied).
5. Scientific, medical, or statistical analysis should not be required when evaluating an individual's performance of a major life activity.
6. The use of mitigating measures should not be used when evaluating substantial limitation.
7. Impairments that are episodic or in remission qualify for classification as a disability if the impairment would substantially limit a major life activity when active.
8. A substantial limitation may be found even if only one major life activity is affected.
9. The six-month period used to determine the “transitory and minor” defense to “regarded as” coverage does not apply to the other definitions of disability. An impairment that lasts or is expected to last less than six months may constitute a substantial limitation.

What is a “major life activity”?

The final regulations also state that major life activities include the operation of major bodily functions, including functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The EEOC has also advised that, although the final

regulations do not cover the subject, major bodily functions include the operation of an individual organ within a body system (for example, the operation of the kidney, liver, or pancreas). Somewhat controversially, the final regulations include “interacting with others” as a major life activity.

The final regulations abandon the old definition providing that a major life activity is one that most people can perform with little or no difficulty. Instead, the final regulation simply provides examples of activities (a nonexhaustive list). A major life activity need not be of “central importance to daily life,” and is not supposed to be interpreted in a way that creates a “demanding standard for disability.”

What are some examples of mitigating measures?

Mitigating measures eliminate or reduce the symptoms or impact of an impairment. The ADAAA and the final regulations provide a nonexhaustive list of examples of mitigating measures. They include medication, medical equipment and devices, prosthetic limbs, low vision devices (that is, devices that magnify a visual image), hearing aids, mobility devices, oxygen therapy equipment, use of assistive technology, reasonable accommodations, and learned behavioral or adaptive neurological modifications. In addition, the final regulations add psychotherapy, behavioral therapy, and physical therapy to the ADAAA’s list of examples.

May an employer require an employee to use a mitigating measure?

No. An employer cannot require an individual to use a mitigating measure. However, failure to use a mitigating measure may affect whether an individual is qualified for a particular job (whether an individual can perform the essential functions of the job) or poses a direct threat.

Are there any “per se” disabilities?

Technically there are no “per se” disabilities. However, the final regulations identify examples of specific impairments that, in the view of the EEOC, should probably be classified as disabilities, including: deafness, blindness, intellectual disability (formerly known as mental retardation), partially or completely missing limbs, mobility impairments requiring use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder, and schizophrenia.

How is “record of” disability claims evaluated?

An individual may fit within this theory if he or she had a record of a substantially limiting physical or mental impairment. An individual who does not currently have a substantially limiting impairment but who had one in the past meets this definition of “disability.”

An individual can also meet the “record of” definition of disability if she was once misclassified as having a substantially limiting impairment (for example, someone erroneously deemed to have had a learning disability but who did not).

The EEOC has emphasized that all of the other changes to operational terms and concepts will apply to evaluating whether an individual meets the “record of” definition of disability. Thus, the expanded list of major life activities, the lower threshold for finding a substantial limitation, the clarification that episodic impairments or those in remission may be disabilities, and the requirement to disregard the positive effects of mitigating measures, may all be used to analyze whether or not an individual had a record of a disability.

The final regulations clarify that a person with a record of a disability is entitled to a reasonable accommodation. It is only “regarded as” disability theories that are not entitled to a reasonable accommodation.

How are “regarded as” disability theories evaluated?

An employer “regards” an individual as having a disability if it makes an adverse employment decision 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 is a new test. It is no longer necessary for an individual to show that the employer believed the individual's impairment (or perceived impairment) substantially limited performance of a major life activity. Instead, an employer will regard an individual as having a disability if it makes an adverse employment decision based on an actual or perceived impairment.

The employer may defend against a "regarded as" claim by showing that the impairment in question, whether actual or perceived, is both transitory and minor. However, this defense is not available if it is not objectively true. The example that the EEOC uses is that an employer that refuses to employ an individual because he has bipolar disorder cannot assert that it believed the impairment was transitory and minor because bipolar disorder is not objectively transitory and minor. This defense is only available for "regarded as" claims.

An individual relying on a "regarded as" theory is not entitled to a reasonable accommodation.

What else has changed?

The EEOC did not include the concepts of "condition, manner, or duration" in the final regulations as conditional elements for analyzing substantial limitation. However, the EEOC has explained that these concepts of condition, manner, or duration are facts that may still be considered, if relevant.

The phrase "qualified individual with a disability" is no longer used. Instead, the final regulations adopt the phrase "individual with a disability."

Job criteria should be linked to a business necessity.

Practical considerations

As a practical matter, the ADAAA and the final regulations are designed to shift the focus away from whether an individual is disabled and toward concepts of reasonable accommodation and discrimination.

Employers should beef up training to ensure that key personnel understand how to conduct an interactive dialogue for purposes of evaluating requests for reasonable accommodation.

Employers should evaluate their job descriptions, job duties, and testing procedures to ensure that policies are legitimate, nondiscriminatory, and can satisfy the "business necessity" standard.

Employers should ensure that decisions are properly documented, and supported by objectively verifiable evidence.

Employers should check recordkeeping and file maintenance procedures to minimize the risk of "regarded as" claims from being filed.

Conclusion

Where can one go for more information? Please see the EEOC's [fact sheet](#) and its [Q&A Web page](#).

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