

Alerts and Updates

EEOC ISSUES PROPOSED REVISIONS TO ADA REGULATIONS AND INTERPRETIVE GUIDANCE

September 24, 2009

On September 23, 2009, the Equal Employment Opportunity Commission's ("EEOC") proposed revisions to the existing Americans with Disabilities Act ("ADA") regulations and accompanying interpretative guidance were published in the *Federal Register*. The EEOC's Notice of Proposed Rulemaking ("NPRM") was prepared to bring the ADA regulations and interpretive guidance into compliance with the ADA Amendments Act of 2008, as directed by Congress. Interested parties may provide public comments on the NPRM on or before November 23, 2009.

Effective January 1, 2009, the ADA Amendments Act of 2008 implements Congress' desire to widely expand the definition of "disability" and, therefore, the number of individuals entitled to protection under the ADA.

While the NPRM retains the current definition of disability—(1) a physical or mental impairment that substantially limits one or more major life activities, (2) a record of such impairment or (3) being regarded as having an impairment—it follows Congress' directive and would amend the ADA regulations to provide for the definition of "disability" to be construed broadly.

What Is a Major Life Activity?

The NPRM provides that major life activities are basic activities, including major bodily functions, that most people in the general population can perform with little or no difficulty.

The NPRM sets forth a specific, nonexhaustive list of major life activities, including caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others and working. Three of the major life activities—reaching, interacting with others and sitting—are new in the NPRM and were not listed in the text of the ADA Amendments Act.

In addition, the NPRM issues a specific, nonexhaustive list of major bodily functions that constitute major life activities. They include 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. A number of the major bodily functions—special sense organs and skin, genitourinary,

cardiovascular, hemic, lymphatic and musculoskeletal—are new in the NPRM and were not listed in the ADA Amendments Act.

How Is Substantially Limited Defined?

The NPRM provides that an impairment is a disability if it substantially limits an individual's ability to perform a major life activity as compared to "most people in the general population." This is a slight variation from the current ADA regulations, which focus on whether an individual can perform a major life activity as compared to how an "average person in the general population can perform" a major life activity.

The NPRM also removes the prior factors that are currently considered in determining whether an impairment is "substantially limiting"—specifically, the nature, severity and duration of the impairment and the permanent or long-term impact of the condition.

Instead, the NPRM proposes several rules of construction, including:

- The focus should be on whether discrimination occurred, not on whether the individual meets the definition of "disability."
- To be disabled, an individual does not have to demonstrate that he or she is limited in the ability to perform activities of "central importance to daily life." This rule of construction reflects Congress' legislative rejection of the U.S. Supreme Court's analysis in *Toyota Motor Manufacturing, Kentucky, v. Williams*.¹ To illustrate this point, the NPRM proposes that an employee with a 20-pound lifting restriction that is not of short-term duration is substantially limited in lifting, and he or she does not need to demonstrate the inability to perform activities of daily life that require lifting in order to demonstrate that he or she is substantially limited in lifting.
- The term "substantially limits" should not require extensive analysis.

Mitigating Measures

Consistent with the text of the ADA Amendments Act, the NPRM provides that the ameliorative effects of mitigating measures (e.g., medication or hearing aids, use of assistive technology, auxiliary aids or services) would not be taken into account in determining whether an impairment substantially limits a major life activity.

In addition, the NPRM provides that an individual who has only minor or no limitations related to an impairment because of the use of mitigating measures will still be considered disabled if the impairment would be substantially limiting without the individual's use of those mitigating measures. It is important to note that the NPRM does not propose a method for making this determination.

Episodic Impairments or Impairments in Remission

The NPRM reiterates the text of the ADA Amendments Act by providing that impairments that are episodic (*e.g.*, epilepsy) or in remission (*e.g.*, cancer) would constitute disabilities if they would be substantially limiting "when active." The NPRM does not propose a specific method for how to make this determination.

Categories of Impairments

The text of the ADA Amendments Act indicates that the expansive definition of "disability" will be a categorical, and less individualized, assessment of whether someone has a disability. While the NPRM proposes that an individualized assessment would continue to be part of the analysis, it provides that certain impairments (*e.g.*, autism, cancer, cerebral palsy, diabetes, epilepsy, and AIDS or HIV) would consistently meet the definition of "disability," and the individualized assessment could be conducted "quickly and easily" to reach that determination.

The NPRM adds a list of impairments that may be disabling for some individuals (*e.g.*, asthma, high blood pressure, learning disabilities). With respect to these types of conditions, the NPRM proposes that the individualized analysis should be slightly more comprehensive.

Major Life Activity of Working

The NPRM proposes that to be substantially limited in the major life activity of working, an individual must be unable to perform a "type of work," taking into account the nature of the individual's work and job-related requirements. This new standard replaces the current standard of needing to determine whether an individual is substantially limited from working a "class" or "broad range" of jobs.

Regarded as Disabled

The NPRM reiterates the significant change to the definition of "regarded as" disabled established by the ADA Amendments Act. The NPRM provides that an individual would be "regarded as" disabled if the individual is subjected to an action prohibited by the ADA (e.g., termination, demotion) based on an actual or perceived impairment, regardless of whether the impairment limits or is perceived to limit a major life activity.

Conclusion

The NPRM sets forth the EEOC's expansive interpretation of the definition of disability, and there is likely to be an increase in the number of individuals considered to be disabled. However, the EEOC suggests that many individuals determined to be disabled are unlikely to seek any accommodations, and the accommodations that are requested can be adequately addressed through existing employer policies or other applicable laws, such as the Family and Medical Leave Act.

It is important to note that the NPRM proposes revisions only to the definition of "disability" and, consistent with the ADA Amendments Act, does not alter the ADA's analysis of what constitutes a reasonable accommodation or whether the accommodation requested would present an undue hardship or pose a direct threat. Employers will still have available to them the possibility of challenging accommodation requests based on those factors.

For Further Information

If you have any questions about the NPRM or the ADA Amendments Act, please contact any of the [attorneys](#) in our [Employment, Labor, Benefits and Immigration Practice Group](#) or the attorney in the firm with whom you are regularly in contact.

Note

1. *Toyota Motor Mfg., Ky. v. Williams*, 534 U.S. 134 (2002).