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New ADAAA Regulations Require Employer Action

By Kristen G. Lingo

Game-changing new regulations that went into effect last month have extended the protection of the Americans with Disabilities Act to thousands more employees by lowering the bar for proving disability. More employees than ever will qualify for ADA protection, and employers may face increases in disability discrimination claims and requests for reasonable accommodation. Now is the time for employers with 15 or more employees to review their policies and procedures to ensure that they are prepared for this new ADA landscape.

HIGHLIGHTS OF CHANGES IN THE NEW REGULATIONS

The new regulations implement the ADA Amendments Act, a 2009 law that was specifically designed, as the EEOC put it, to "make it easier for people to establish that they are protected by the Americans With Disabilities Act." The new regulations don't change the basic definition of an ADA disability – (1) a physical or mental impairment that substantially limits a major life activity, (2) having a "record" of such an impairment, or (3) being "regarded as disabled." But they do significantly change the meaning of some of the components of that definition:

"Substantially limits" is construed as broadly as possible.

- An impairment no longer has to prevent or even significantly restrict someone from engaging in a major life activity to be a substantial limitation. If the impairment limits the person's ability to perform a major life activity as compared to the average person in the general population, it is substantially limiting.
- An impairment does not need to be permanent or long-term to qualify as an ADA disability. An impairment that substantially limits someone for fewer than six months can be a disability, as can impairments that are episodic or are in remission, if they substantially limit a major life activity when active.
- Determining whether an impairment substantially limits a major life activity should be done without considering the positive effects of things like medication, hearing aids, or mobility aids (ordinary eyeglasses or contact lenses are exceptions).

The list of "major life activities" has been expanded.

- In addition to things like eating, sleeping, standing, lifting, concentrating, and thinking, activities such as sitting, reaching and interacting with others are now considered major life activities.
- The list also includes "major bodily functions" such as normal cell growth and functions of the immune, digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, lymphatic, musculo-skeletal or reproductive systems, or the operation of an individual organ within these systems.
- Virtually any significant impairment can bring someone within the definition of "regarded as disabled."
- A person who is not actually disabled is considered to be "regarded as disabled" if the employer takes any employment action because of any actual or perceived impairment,

unless it is transitory and minor. This standard is far lower than the prior standard, under which someone was regarded as disabled only if the employer wrongly perceived him or her to have an impairment that substantially limited in a major life activity.
- The new regulations also make clear that while those who are "regarded as" disabled are protected from discrimination and retaliation, they are not entitled to reasonable accommodations.

WHAT SHOULD YOU DO?

These regulations make it more crucial than ever for employers to have good policies and procedures addressing disability discrimination and reasonable accommodations, and that they follow those policies and procedures. Under the prior regulations, the focus of most ADA claims was whether the employee was disabled within the meaning of the statute. Employers had a lot of success defeating many ADA claims on those grounds, and rarely had to defend the lawfulness of their conduct. The new regulations flip this dynamic to make the employer's conduct, not the employee's condition, the focus of the analysis. Now, the employee's disability is almost a foregone conclusion in many cases, and an employer's best bet for avoiding ADA liability is to show that it acted lawfully and in compliance with the ADA. That means that employers' preventative efforts should be focused on making sure managers and supervisors make employment decisions for non-discriminatory reasons and respond appropriately to requests for reasonable accommodation. The best way to make that happen is to have effective and legally sound policies and procedures in place.

Employers should therefore consider taking the following steps in light of the new regulations:

- Revising disability discrimination and reasonable accommodation policies to reflect the new disability definition.
- Revamping procedures for documenting performance problems, disciplinary action and reasons for employment terminations.
- Training managers and supervisors on the expanded disability definition, how to handle reasonable accommodation requests appropriately, and how to avoid disability discrimination in employment decisions.
- Revamping reasonable accommodation policies and procedures to make sure they fulfill your obligation to engage in the interactive process, and properly document communications and decisions. This should include reevaluating procedures for requesting supporting medical information from employees, in light of a statement in the regulations that extensive analysis and medical evidence should not typically be necessary.

About the Author

Kristen G. Lingo practices exclusively in the area of employment law, serving as outside general employment counsel to employers of all sizes throughout North Carolina.

For more information on the ADAAA regulations, please contact Kristen at (919) 510-9243 or lingo@manningfulton.com.