

EEOC Releases New Regulations for the Americans with Disabilities Act

On March 25, 2011, the EEOC issued its long-awaited regulations under the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA"). Like the ADAAA, the regulations focus on making it significantly easier for an individual to qualify for the protections of the Americans with Disabilities Act ("ADA"). The content of the regulations, and of the revamped Interpretative Guidance published at the same time, largely track that of the ADAAA. The regulations will become effective on May 24, 2011.

Background

The ADAAA broadened the class of individuals protected by the ADA without changing the statutory definition of "disability." An individual with a protected disability remains one who (1) has an actual disability, (2) has a record of having a disability, or (3) is regarded as having a disability. Also as before, for purposes of the first two prongs of this definition, disability is defined as a physical or mental impairment that "substantially limits" a "major life activity." The principal changes effected by the ADAAA are to the concepts of "substantially limits" and "major life activity" and to the requirements for the "regarded as" prong of the definition, all of which were made considerably easier to satisfy.

In the ADAAA, Congress repudiated the Supreme Court's and the EEOC's definitions of "substantially limits" as too restrictive.¹ It directed that a court's primary focus in an ADA case should be on whether an employer has complied with its obligations, and that whether an individual satisfies the definition of disability should not demand extensive analysis. Congress also expressed its expectation that the EEOC would revise its regulations so that their meaning for the term "substantially limits" would be consistent with the ADAAA.

Relaxed Standard for "Substantially Limits"

In its new regulations the EEOC has declined to provide a new definition of the term "substantially limits," explaining that "a new definition would . . . lead to greater focus and intensity of attention on the threshold issue of coverage than intended by Congress." Instead, the regulations provide nine rules of construction to be applied in determining whether an impairment "substantially limits" a major life activity. Most of the rules come directly from the language of the ADAAA, but several have been added by the EEOC. The rules are the following:

1. "The term 'substantially limits' shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. 'Substantially limits' is not meant to be a demanding standard."
2. The determination of whether an impairment is "substantially limiting" should be made by comparing the ability of an individual to the general population. The impairment does not need to "prevent, or significantly or severely restrict" the performance of a major life activity.
3. The "threshold issue" of substantially limits should not require extensive analysis, and the focus should be on whether the employer has complied with its statutory obligations.
4. The determination requires an "individualized assessment," but the assessment should be done by requiring "a degree of functional limitation that is lower than the standard for 'substantially limits' applied prior to the ADAAA."
5. Comparing an individual to the general population should not generally require scientific, medical, or statistical analysis.

6. The determination should be made without regard to the ameliorative effect of mitigating measures other than ordinary contact lenses and eyeglasses.
7. "An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."
8. An impairment need not limit more than one major life activity.
9. "The effects of an impairment lasting or expecting to last fewer than six months can be substantially limiting."

The statement that the determination of whether an impairment causes an individual to be "substantially limited" requires an "individualized assessment" is of interest because in its earlier proposed regulations the EEOC appeared to be saying that certain conditions *per se* met the definition of disability. This position seemed inconsistent with the underlying premise of the ADA that individuals with disabilities should not be stereotyped. Although the EEOC has retreated somewhat from the position of the proposed regulations, the final regulations state that the individualized assessment of some types of impairments will, in virtually all cases, result in a determination of coverage under either the first prong (actual disability) or the second prong (record of disability) of the definition of disability. The regulations provide a list of examples of such impairments, including: deafness substantially limits hearing; blindness substantially limits seeing; mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function; cancer substantially limits normal cell growth; diabetes substantially limits endocrine function; epilepsy and multiple sclerosis both substantially limit neurological function; HIV infection substantially limits immune function; epilepsy, multiple sclerosis and muscular dystrophy all substantially limit neurological function; and an intellectual disability, autism, cerebral palsy, major depressive disorder, bipolar disorder, post-traumatic stress disorder and schizophrenia all substantially limit brain function.

Also noteworthy is the rule that the effects of an impairment lasting or expected to last for six months or less can be substantially limiting. Prior to the ADAAA, most courts had taken the position that a temporary condition lasting just a few months did not qualify as an actual disability under the ADA. The regulations do state that not every impairment will constitute a disability within the meaning of the ADA. However, the Interpretative Guidance also states that while typically not covered, impairments that last only for a short period of time may be covered if sufficiently severe. The Interpretative Guidance also states by way of example that someone with an impairment resulting in a 20-pound lifting restriction that lasts or is expected to last for "several months" is substantially limited in the major life activity of lifting.

Relevance of Condition, Manner and Duration

The regulations state that to determine whether an individual is "substantially limited" in a "major life activity," it may be useful in appropriate cases to consider the condition under or the manner in which an individual performs a major life activity and/or the duration of time it takes the individual to perform (or for which the individual can perform) the activity, as compared to most people in the general population. The EEOC instructs that in determining whether an individual has a disability under the actual disability or record of disability prong of the definition of disability, the focus should be on how a major life activity is substantially limited and not on what outcomes an individual can achieve. The regulations give the example of someone with a learning disability who may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort required to read, write or learn compared to most people in the general population.

Examples of facts that may be relevant to a condition, manner or duration analysis are the effort or time required or the pain experienced when performing a major life activity and the way an impairment affects the operation of a major bodily function. In addition, the "non-ameliorative" effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an individual's impairment substantially limits a major life activity.

The EEOC draws a clear distinction between facts that bear on condition, manner or duration, which it says may be considered in appropriate cases, and the nine rules of construction, which it says it is always necessary to consider in assessing whether an individual is "substantially limited" in a "major life activity."

Non-Exclusive List of Major Life Activities

The Purposes section of the ADAAA and the regulations both specifically reject the Supreme Court's interpretation of the term "major life activity" as limited to activities of central importance to a person's daily life and stress that the term "major" should not be interpreted as creating a demanding standard for disability. The ADAAA provides a non-exclusive list of activities that are encompassed by the term "major life activity."² The regulations reiterate the list provided by Congress and add sitting, reaching and interacting with others as further examples of major life activities. The ADAAA also provides that the operation of a major bodily function qualifies as a major life activity and lists examples.³ The regulations add, as further examples, the functions of special sense organs and skin and functions of the genitourinary, cardiovascular, hemic, lymphatic, and musculoskeletal systems.

The regulations do not include any discussion of when an impairment will substantially limit the major life activity of working, an issue that had been the subject of considerable case law before the ADAAA. The Interpretative Guidance does discuss this issue, but notes that there will now be much less need to rely on working as a major life activity because under the new, broadened standard, an impairment that substantially limits the major life activity of working will in most cases also substantially limit some other major life activity.

Enhanced Importance of the "Regarded As" Prong

Another major change in the ADAAA that is a focus of the regulations is the reduced requirements for the "regarded as" prong of the definition of disability. The ADAAA reversed the majority of cases by providing that the requirement that an impairment "substantially limit" a "major life activity" does not apply to the "regarded as" prong of the definition of disability. Thus, that prong is satisfied whenever an employer regards an individual as having an impairment, even if the employer does not view the impairment as substantially limiting (and, when an actual impairment is at issue, even if the impairment in fact is not substantially limiting). While it is now easier for an individual to meet the "substantially limits" and the "major life activity" requirements of the first two prongs of the definition, in most cases it will be even easier to establish protection under the "regarded as" prong.

The ease of establishing that an individual is "regarded as" having a disability is very important for adverse treatment cases. While an employer has no obligation to provide reasonable accommodation to an individual who meets only the "regarded as" prong of the definition of disability – a point the regulations confirm – the ADA's proscription against disparate treatment applies fully to "regarded as" cases. Indeed, the new regulations expressly state that "where an individual is not challenging an employer's failure to make reasonable accommodation . . . , it is generally unnecessary to proceed under the actual disability or record of prongs, which require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. In these cases, the evaluation of coverage can be made solely under the regarded as prong of the definition of disability, which does not require a showing of an impairment that substantially limits a major life activity or a record of such an impairment."

The ADAAA states that a person will not qualify as an individual "regarded as" having a disability if the impairment is "transitory [defined as having a duration of six months or less] and minor." (As noted above, an individual with an actual impairment may qualify for protection under the actual disability or record of disability prongs even if the duration of the condition is six months or less.) Although the language of the statute does not suggest this, the regulations state that the fact that an impairment is transitory and minor is a "defense," to be demonstrated by the employer. The defense applies only when an impairment is objectively transitory and minor. The fact that an employer incorrectly believed that an impairment was transitory and minor is irrelevant.

Lesson for Employers: The Interactive Process

In passing the ADAAA, Congress made clear that it wanted broader workplace protection for individuals with disabilities, with the focus on reasonable accommodation, not on whether an individual has a covered disability. While the regulations and Interpretative Guidance contain no big surprises, the focus on reasonable accommodation makes it particularly

important that employers properly communicate with individuals seeking an accommodation to identify the individual's limitations and to identify and implement appropriate accommodations.

In this regard, the EEOC's earlier guidance describes "an informal, interactive process . . . [to] identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." In its previous guidance, the EEOC outlined four steps involved in the interactive process:

1. Analyze the particular job involved and determine its purpose and essential functions;
2. Consult with the individual . . . to ascertain the precise job-related limitations imposed by the . . . disability and how those limitations could be overcome with a reasonable accommodation;
3. In consultation with the individual . . . identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and
4. Consider the preference of the individual . . . and select and implement the accommodation that is most appropriate for both the employee and the employer. (The EEOC has acknowledged that when more than one accommodation would be effective, the employer may ultimately choose the one it prefers.)

Employers should ensure that they have identified which of their personnel have responsibility for addressing requests for an accommodation and that those persons are familiar with, and actually engage in, an interactive process when an individual makes such a request. In addition, H.R. professionals and supervisory personnel should be reminded of the importance of reasonable accommodation and of the procedures to be followed when an employee discloses an impairment and requests a reasonable accommodation.

Employers should also consider including in their equal employment policy the availability of reasonable accommodations for a protected disability and the identity of the contact for requesting an accommodation. In addition, H.R. personnel and supervisors should be educated about the liberalized definition of disability and the resulting need to be able to demonstrate a persuasive business reason for adverse employment decisions made as to individuals with physical or mental impairments that are not transitory and minor.

The full text of the new regulations, and the new Interpretative Guidance, is available from the EEOC's website, located at http://www.eeoc.gov/laws/statutes/adaaa_info.cfm. ♦

Endnotes

- ¹ The Supreme Court had held that an impairment "substantially limits" as major life activity only if an individual is "present or severely restricted in an activity" The EEOC regulations had defined "substantially limited" to mean "significantly restricted."
- ² The statute lists: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, breathing, learning, reading, concentrating, blinking, communicating, and working as examples of major life activities.
- ³ The statute lists: functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions.

If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.

Ellen Martin	212.336.2860	emmartin@pbwt.com
Lisa Cleary	212.336.2159	lecleary@pbwt.com
Krista D. Caner	212.336.2922	kcaner@pbwt.com

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