

LABOR & EMPLOYMENT ALERT

HIGHLIGHTS OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S FINAL ADA REGULATIONS

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Signed into law by President George W. Bush on September 25, 2008, the Americans with Disabilities Amendments Act ("ADAAA") broadened the scope of the Americans with Disabilities Act ("ADA"), making it easier for an individual to establish that he or she has a disability. While the ADAAA retains the ADA's basic definition of "disability" as: (1) an impairment that substantially limits one or more major life activities; (2) a record of having such an impairment; or (3) being regarded as having such an impairment, the ADAAA explicitly rejects court interpretations of the definition of disability, which Congress believed inappropriately limited the ADA's scope.

Over one year after the ADAAA's January 1, 2009 effective date, the Equal Employment Opportunity Commission issued its final revised ADA regulations and accompanying interpretive guidance ("final regulations"), interpreting the changes made by the ADAAA. <http://www.gpo.gov/fdsys/pkg/FR-2011-03-25/pdf/2011-6056.pdf> The final regulations provide guidance on what constitutes a "disability" under the ADAAA, which will assist employers in determining whether and how to provide a reasonable accommodation to employees. Employers should review the updated regulations to ensure compliance with the revised rules.

Highlights of how the ADAAA affected the ADA, the interpretation or clarification provided by the EEOC regulations on these changes, and what they mean for employers, are outlined below:

CLARIFYING THE DEFINITION OF "SUBSTANTIALLY LIMITS"

- **Effect of ADAAA:** Under the ADA, a disability includes a physical or mental impairment that "substantially limits" one or more major life activity. The ADAAA does away with the U.S. Supreme Court's interpretation of "substantially limits" as "severely restricts", and also rejects the EEOC's interpretation of "substantially limits" as "significantly restricts". Congress found that the EEOC's interpretation of "substantially limits" was "inconsistent with congressional intent, by expressing too high a standard" and directed the EEOC revise its regulations.
- **EEOC final regulations clarification:** The final regulations provide guidance in the form of the following nine "rules of construction" to determine whether a "substantial limitation" exists:
 - The term "substantially limits" should be broadly construed in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA.
 - An impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, significantly restrict, or severely restrict the individual from performing a major life activity in order to be considered substantially limiting.

- In ADA actions, the primary focus should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity.
 - The determination of whether an impairment substantially limits a major life activity requires an individualized assessment.
 - Comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical or statistical analysis.
 - The determination of whether an impairment substantially limits a major life activity shall be made *without* regard to ameliorative effects of mitigating measures. However, the ameliorative effects of ordinary eyeglasses or contact lenses will be considered in determining whether an impairment substantially limits a major life activity.
 - An impairment that is episodic or in remission is still considered a disability if it would substantially limit a major life activity when active.
 - An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.
 - The effects of an impairment lasting or expecting to last fewer than six months can be substantially limiting.
- **What this means for employers:** Employers should use the EEOC's nine guidelines to determine whether an employee's impairment is "substantially limiting", while keeping in mind that Congress has significantly reduced the threshold for coverage under the ADA. Employers should be prepared to respond to an increased number of accommodation requests and to make accommodations when necessary. As a result of the likely increase in reasonable accommodation requests, it is more important than ever to review all job descriptions to ensure that they accurately describe the essential functions (both physical and mental) of each job.

MITIGATING MEASURES

- **Effect of ADAAA:** Prior to the ADAAA, a determination of whether an impairment "substantially limited" a major life activity was made in light of the effects of positive or ameliorating mitigating measures, such as medication. Now, a determination of whether an individual is substantially limited in a major life activity must be made *without* regard to the ameliorative mitigating measures (except for ordinary eyeglasses and contact lenses).

The ADAAA does not change the law that allows for consideration of the negative effects of a mitigating measure in determining if a disability exists. For example, the side effects that an individual experiences from use of medicine for high blood pressure may be considered in determining whether the individual is substantially limited in a major life activity. Furthermore, employers may take into account both positive and negative effects of mitigating measures when determining both the need for a reasonable accommodation and whether an individual poses a direct threat to the health or safety of that individual or others in the workplace in order to lawfully exclude that individual from employment for safety reasons.

- **EEOC final regulations clarification and additions:** The final regulations set forth a non-exhaustive list of mitigating measures that are not to be considered in determining whether an individual meets the definition of having a "disability": hearing aids, mobility devices, surgical interventions, psychotherapy, behavioral therapy and physical therapy.
- **What this means for employers:** If a mitigating measure eliminates or reduces the symptoms of an impairment, that fact cannot be used in determining whether a person meets the definition of disability. Instead, the determination must focus on whether the individual is substantially limited in performing a major life activity *without* the mitigating measure. However, both positive and negative effects of mitigating measures can be taken into account for reasonable accommodation determinations.

"PREDICTABLE ASSESSMENTS" LIST OF DISABILITIES

- **Effect of ADA AAA:** The ADA AAA retains the ADA's requirement that the determination of whether someone is disabled be based upon an individualized assessment.
- **EEOC final regulations clarification:** Employer commentators on the proposed regulations wanted the EEOC to provide three lists of impairments that would "consistently meet," "might meet," and "not likely meet" the definition of a disability. The EEOC declined to include multiple lists and, instead, the final regulations set forth the following list of impairments that would "easily be concluded" as disabilities in "virtually all cases":
 - Deafness
 - Blindness
 - Intellectual disability
 - Partially or completely missing limbs
 - Autism
 - Cancer
 - Cerebral palsy
 - Diabetes
 - Epilepsy
 - HIV infection
 - Multiple sclerosis
 - Muscular Dystrophy
 - Major Depressive Disorder
 - Bipolar disorder
 - Obsessive compulsive disorder
 - Post-traumatic stress disorder
 - Schizophrenia
- **What this means for employers:** Although employers are still required to conduct an individualized assessment, if an employee suffers from an impairment on the predictable assessment list, the employer's determination of whether the employee is "disabled" should be particularly straightforward and simple.

EXPANDING THE LIST OF "MAJOR LIFE ACTIVITIES"

- **Effect of ADA AAA:** To be covered under the ADA, a physical or mental impairment must substantially limit a "major life activity." The ADA AAA includes a specific, non-exhaustive list of the following "major life activities":
 - Caring for oneself
 - Performing manual tasks
 - Seeing
 - Hearing
 - Eating
 - Sleeping
 - Bending
 - Speaking
 - Breathing
 - Learning
 - Reading
 - Concentrating

- Walking
- Standing
- Lifting

- Thinking
- Communicating
- Working

"Major life activities" under the ADAAA also includes the following major bodily functions:

- Immune system
- Normal cell growth
- Digestive
- Bowel
- Bladder
- Neurological

- Brain
- Respiratory
- Circulatory
- Endocrine
- Reproductive

- **EEOC final regulations clarification and addition:** In addition to the non-exhaustive list of major life activities listed in the ADAAA, the final regulations also adds the major life activities of sitting, reaching, and interacting with others, as well as major bodily functions of special sense organs, skin, genitourinary, cardiovascular, hemic, lymphatic, and musculoskeletal functions.
- **What this means for employers:** The expanded list of major life activities, which now explicitly includes major bodily functions, further increases the likelihood that an individual with an impairment will be "disabled" under the ADA. Employers should review the list of major life activities when determining whether an employee is disabled, but keep in mind that the activities and functions included in the ADAAA and the final regulations are "non-exhaustive".

"REGARDED AS" REDEFINED

- **Effect of ADAAA:** Under the ADA, an individual previously was "regarded as" having a disability only when the employer perceived that individual to have an impairment that "substantially limited" him or her in a major life activity. After the enactment of the ADAAA, an individual may be "regarded as" disabled if an employer believes that the individual has an impairment, regardless of whether the employer believes that the impairment substantially limits a major life activity.
- **EEOC final regulations clarification:** The final regulations clarify that employers are not required to grant reasonable accommodations to employees who meet only the "regarded as" definition of disabled. The employee must be actually disabled or have a record of being disabled in order to qualify for a reasonable accommodation. Employers can defend against "regarded as" claims if the employee's impairment is "transitory" (*i.e.* will last fewer than six months) and "minor".
- **What this means for employers:** Under the ADAAA, an employee meets the "regarded as" definition of disabled if the employer believes the employee has a non-transitory impairment, even if the impairment does not actually restrict a major life activity. Any decision by the employer that relies on a perceived or actual physical impairment may subject the employer to liability.

This Labor & Employment Alert provides a general summary of regulation updates and is not intended to be, and should not be relied upon as, legal advice.