

EEOC Releases Its Final Regulations Implementing the ADA Amendments Act

March 25, 2011

On March 24, 2011, more than two years after the effective date of the Americans With Disabilities Amendments Act of 2008 (ADAAA) signed by President George W. Bush, the Equal Employment Opportunity Commission (EEOC) released its final rule implementing the statute. As we previously reported, the ADAAA made significant changes to the meaning of "disability." While the actual definition of "disability" - a mental or physical impairment that substantially limits one or more major life activities - did not change, the ADAAA greatly expanded the definition of "mental or physical impairment" and "major life activities," thereby encompassing more conditions and, thus, protecting more individuals under the statute. The ADAAA also lowered the threshold for establishing that an impairment "substantially limits" a major life activity.

On September 23, 2009, the EEOC released its proposed regulations, inviting public comments. The EEOC received more than 600 comments. Its 2011 final rule, which accounts for many of those comments, differs from the 2009 proposed regulations in a number of ways:

- **Impairments.** The ADAAA expanded the definition of "physical or mental impairment" to include mental or psychological disorders, and any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body system. The final rule adds "immune" and "circulatory" systems to an already lengthy, non-exhaustive list of body systems that may be affected by an "impairment" found in the 2009 proposed regulations.
- **Major Life Activity.** The ADAAA expanded the definition of "major life activity" to include, among other things, "major bodily functions." In the final regulations, "major bodily functions" include the operation of an individual organ within a body system (e.g., the operation of one kidney, the liver, or pancreas). The final rule also expressly states that the determination of whether an activity is a "major" life activity is not determined by reference to whether it is of "central importance to daily life."
- **Mitigating Measures.** The ADAAA explained that mitigating measures that eliminate or reduce the symptoms or impact of an impairment are not to be considered in determining whether an individual has a "disability." While the 2009 proposed regulations included a non-exhaustive list of examples of mitigating measures, such as prosthetic limbs, medication, and hearing aids, the final regulations add psychotherapy, behavioral therapy, and physical therapy to the list.
- **"Regarded As" Disabled.** The ADAAA explained that an employer regards an individual as disabled if it takes a prohibited action against her because of an actual or perceived impairment that was not "transitory or minor," irrespective of whether it was perceived to have substantially limited a major life activity. The final rule deletes language that appeared in the 2009 proposed regulations suggesting that an employer would "regard" an individual as disabled if it took a prohibited action based on the individual's symptoms, without knowledge of the connection between the impairment and the symptoms. According to the EEOC, however, the final rule's deletion of that language should not lead to a "negative inference concerning the merits of this issue."

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- **"Condition, Manner, or Duration."** The final rule reinstates language from the pre-ADAAA regulations, deliberately left out of the 2009 proposed regulations, that permits the consideration of concepts known as "condition, manner, or duration" when determining whether an impairment substantially limits one or more major life activities. According to the final rule, assessing the "condition, manner, or duration" under which a major life activity can be performed may include consideration of the difficulty, effort, or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; and/or the way an impairment affects the operation of a major bodily function.
- **"Working" as a Major Life Activity.** The ADAAA expressly identified "working" as a "major life activity." Unlike the 2009 proposed regulations, which provided that a substantial limitation in working may be shown by difficulty performing a "type of work," the final rule reverts to the pre-ADAAA standard that an individual must show that she is substantially limited in performing either a "class or broad range of jobs in various classes" to be substantially limited in the major life activity of "working" and that a substantial limitation in performing the unique aspects of a single specific job is not sufficient to establish a substantial limitation in working.
- **"Substantially Limits."** Despite receiving numerous requests and proposals to more affirmatively define "substantially limits," such as "ample," "considerable," or "more than moderately restricts," the final rule does not add terms to quantify the phrase. Rather, the final rule provides nine "rules of construction" in determining whether an impairment "substantially limits a major life activity":
 1. The term "substantially limits" shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADAAA. "Substantially limits" is not meant to be a demanding standard.
 2. An impairment is a disability within the meaning of the ADAAA 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, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability.
 3. The primary object of attention in cases brought under the ADA 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. Accordingly, the threshold issue of whether an impairment "substantially limits" a major life activity should not demand extensive analysis.
 4. The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term "substantially limits" shall be

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interpreted and applied to require a degree of functional limitation that is lower than the standard for "substantially limits" applied prior to the ADAAA.

5. The 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 presentation of scientific, medical, or statistical evidence to make such a comparison, however, may be made where appropriate.
6. The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. However, the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.
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 that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.
9. The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of the ADAAA.

With the final rule in place, employers subject to the ADA will need to be ever more cautious about denying accommodation requests, as more and more individuals will fall under the statute as having a "disability." Employers must, therefore, give heightened attention to the interactive process during which they analyze whether an individual is entitled to an accommodation and might select an appropriate accommodation. In addition, "regarded as" cases are likely to be more prevalent, since they can be triggered by any perceived impairment, with or without any perceived substantial limitation, so employers must be careful not to inject disability issues into personnel matters unnecessarily.

The final ADAAA regulations are available to the public and are scheduled to be printed in the Federal Register on March 25, 2011.

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