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EEOC Publishes Final New ADA Regulations: What Employers Need to Know About The New Class Of Disabled Employees

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On March 25, 2011, the EEOC published its long-anticipated final regulations under the Americans with Disabilities Act Amendments Act ("ADAAA"), enacted September 25, 2008, and effective January 1, 2009. The new regulations will become effective on May 24, 2011, and can be accessed here.

The Americans with Disabilities Act ("ADA") prohibits employment discrimination against a qualified individual on the basis of disability. The ADA defines "disability" as a physical or mental impairment that "substantially limits" an individual's ability to perform a "major life activity." The ADA also prohibits discrimination against individuals who have a "record of" or are "regarded as" having such an impairment. Discrimination under the ADA includes an employer's failure to provide reasonable workplace accommodations to qualified individuals with a known disabilities, unless the employer can demonstrate the accommodation would impose an undue hardship on its business operations.

Prior to the ADAAA's enactment, federal courts had narrowly defined "disability" to the point that most plaintiffs (even those with conditions like cancer or HIV infection) could not prove their condition substantially limited a major life activity. Thus, the issue of whether the employer discriminated on the basis of disability – e.g., by failing to provide a reasonable accommodation – was never reached in most cases because the plaintiff failed to make the threshold showing that he or she was disabled within the meaning of the Act. By amending the ADA, Congress rejected case law narrowly defining "disability" under the Act.

For example, the ADAAA overruled Sutton v. United Airlines, 527 U.S. 471 (1999), which held that mitigating measures must be taken into account when determining whether a physical or mental impairment substantially limits a major life activity. As amended, the ADA provides that the determination of whether an impairment is substantially limiting "shall be made without regard to ameliorative effects of mitigating measures," including, for example, medication, medical supplies and equipment, hearing

aids, and prosthetic limbs or devices (but not including ordinary eyeglasses or contact lenses). 42 U.S.C. § 12102(4)(E).

For the most part, the new regulations are what practitioners expected and track the ADAAA. However, employers should take note of key provisions which greatly expand the class of employees who are disabled under the ADA.

Summary Of The Regulations' Key Provisions
Below is a summary of the regulations' key provisions, focusing on those which have the greatest potential to expand the Act's definition of disability:

- **Certain Impairments Will Be Disabilities in "Virtually All Cases."** Whether an individual's impairment is substantially limiting requires an individualized assessment. 29 C.F.R. § 1630.2(j)(1)(iv). Nonetheless, "to provide for more generous coverage," and to apply the ADA in a "predictable, consistent, and workable" manner, the regulations identify certain impairments which, "in virtually all cases," are substantially limiting. *Id.* § 1630.2(j)(3). The regulations identify: deafness, blindness, intellectual disability, partially or completely missing limbs, mobility impairments requiring use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia.
- **Expanded Definition of "Major Life Activity."** The ADAAA defined "major life activity" to include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, breathing, learning, reading, concentrating, thinking, communicating, and working. 42 U.S.C. § 12102(2). It also defined "major life activity" to include the "operation of a major bodily function," like the "immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." *Id.* The regulations add to the list of major life activities: sitting, reaching, bending, lifting, and interacting with others. 29 C.F.R. § 1630.2(i)(1)(i). They also add special sense organs and skin, genitourinary, cardiovascular, hemic, lymphatic, and musculoskeletal to the list of "major bodily functions." *Id.* § 1630.2(i)(1)(ii). Expressly rejecting the Supreme Court's holding in *Toyota Motor Manufacturing v. Williams*, 534 U.S. 184 (2002), the regulations provide that a "major life activity" need not be of "central importance to daily life." *Id.* § 1630.2(i)(2).
- **"Substantially Limits" Construed Broadly.** The regulations provide that the term "substantially limits" should be "construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA." 29 C.F.R. § 1630.2(j)(1)(i). The regulations make clear that "substantially limits" is not intended to be a "demanding standard." An employee must be substantially limited compared to the general population, but the impairment need not "prevent, or significantly or severely restrict" the individual's ability to perform a major life activity. *Id.* § 1630.2(j)(1)(ii). Also, in most cases, an individual's performance of

a major life activity compared to the general population will be measured without "scientific, medical, or statistical analysis." *Id.* § 1630.2(j)(v).

- **Disabilities Include Temporary and Episodic Conditions, and Conditions in Remission.** Disabilities include episodic conditions or conditions in remission, provided the impairment would substantially limit a major life activity in an active state. 29 C.F.R. § 1630.2(j)(1)(vii). The Appendix to the regulations provides non-exhaustive examples of conditions which generally will constitute a disability despite their episodic nature, or the fact the individual's condition is in remission, including cancer, epilepsy, multiple sclerosis, hypertension, diabetes, asthma, major depressive disorder, bipolar disorder, schizophrenia, and post-traumatic stress order. Temporary impairments, lasting or expected to last fewer than six months, also can be substantially limiting within the meaning of the ADA. 29 C.F.R. § 1630.2(j)(1)(ix).
- **Expanded Definition of "Regarded as Disabled."** To succeed in a "regarded as disabled" case, the plaintiff need not prove he or she is actually disabled under the Act, as courts had required. 29 C.F.R. § 1630.2(l). Rather, it is enough that the employer believed the plaintiff had a mental or physical impairment and discriminated against the plaintiff on that basis. However, employers need not accommodate employees they regard as disabled. *Id.* § 1630.9(e). Employees with a record of a disability must be accommodated if an accommodation is needed and related to the past disability – for example, time away from work to attend follow-up or monitoring appointments. *Id.* § 1630.2(k)(3).

What Employers Should Do In Response To The New Regulations

1. **Focus on the Reasonable Accommodation Process**
   Under the ADAAA and new regulations, the definition of disability is broader than ever, and the focus of future litigation will be on whether discrimination occurred, not whether the plaintiff's condition meets the Act's definition of disability. While the ADA still defines a disability as an impairment substantially limiting a major life activity, the ADAAA and regulations make clear that a wide range of impairments will qualify as disabilities under the ADA, regardless of whether the conditions are short in duration, periodic or episodic, temporary, or even currently in remission.

   We recommend employers shift their focus to the interactive process of providing a reasonable accommodation. If an employee comes forward seeking a workplace change based on a medical condition – remember the employee need not use magic words like "disability" or "accommodation" – the employer should participate in good faith in the accommodation process.

   Common reasonable accommodations include making facilities more accessible; allowing job restructuring such as telecommuting or part time or modified work schedules; leaves of absence; reassigning an employee to another open position that better accommodates the impairment; providing devices that allow employees to do their jobs; and providing readers, interpreters, and the like. Employers

should actively engage in the interactive process and make sure to explore multiple options, including options proposed by the employee.

Since many more employees will meet the initial hurdle of proving they are disabled under the ADAAA, litigation, especially costly class action litigation, may be more appealing to employees and plaintiffs' attorneys. In most cases, employers defending ADA cases in court or before administrative agencies, will no longer be able to argue the individual was not disabled and will have to defend, instead, based on the lack of discrimination, including their good faith participation in the accommodation process – e.g., they made or offered an accommodation; the plaintiff failed to request or accept an accommodation; and/or the plaintiff's preferred accommodation was not reasonable.

2. **Document the Process and (Re)train Your Employees**
   Document everything. Remember that in the worst case scenario, the accommodation process will end up in a courtroom. Employers must be able to defend their decisions regarding accommodations. Thus, when engaged in the back-and-forth process of accommodating an employee, document all attempts at finding a reasonable accommodation, even if certain accommodations ultimately are not used. If a reasonable accommodation is decided upon, clearly state the length or any limits of accommodation. Consider how you will prove in court that an employee's requested or preferred accommodation was not reasonable or posed an undue hardship.

   With the new regulations coming into effect, now is the time to train (or retrain) managers to handle requests for accommodation appropriately. Your company may be liable if a manager fails to recognize, or alert Human Resources to, an employee's request for accommodation. Ensure any training provided to employees regarding your discrimination or harassment policies discusses the ADA, affirms the company's commitment to providing reasonable accommodations, and explains how employees can request accommodations.
3. **Update Job Descriptions**
   Update job descriptions to ensure all essential functions of a job are stated. Remember an employer only has a duty to accommodate an employee who can accomplish his or her essential job functions with the help of a reasonable accommodation.