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EEOC Releases Final Regulations Significantly Expanding Coverage under the Americans with Disabilities Act

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Last week, the Equal Employment Opportunity Commission (the "EEOC") released its final *Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended* (the "Final Regulations"), and accompanying Interpretive Guidance. The Final Regulations confirm and amplify the expanded Americans with Disabilities Act ("ADA") coverage contemplated by the Americans with Disabilities Act Amendments Act of 2008 (the "ADAAA").

The ADAAA, which became effective on January 1, 2009, amended the language of the original ADA, substantially expanding the statute's coverage. Among its many new provisions, the ADAAA granted the EEOC broad rulemaking authority to interpret the meaning of the term "disability" and to issue updated regulations interpreting the ADA.

Over a year ago, the EEOC proposed new regulations that included significant changes from the former ADA regulations. The far reaching proposals provoked over 600 written comments from members of the public, civil rights groups, employers, and professional organizations. After more than a year, the EEOC has now released the Final Regulations, which will take effect on May 24, 2011.

Together with the text of the ADAAA, the Final Regulations make sweeping changes to disability law as applied to the American workplace. They dramatically expand the proportion of the population that will qualify for ADA coverage, and thereby effectively impose additional obligations on employers.

The Final Regulations Reinforce the ADAAA's Expansive Definition of "Disability"

The Final Regulations emphasize that the definition of the term "disability" is to be construed broadly. To that end, they direct that the primary focus in applying the ADA should be on whether *discrimination* has occurred, and *not* on whether the employee or applicant meets the definition of an individual with a "disability." 29 C.F.R. § 1630.1(c)(4).

Like the EEOC's initial proposed regulations, the Final Regulations provide that a "disability" means: (1) having a physical or mental impairment that "substantially limits" one or more of the "major life activities" of the individual; (2) having a record of such an impairment; or (3) being "regarded as" having such an impairment. The Final Regulations, however, broaden the definition of a "disability" in three key ways. First, they significantly expand the "substantially limits" standard. Second, they extend the concept of what constitutes a "major life activity." Finally, they broaden the reach of the "regarded as" prong of the definition of "disability."

A Reinvention of "Substantially Limits"

The Final Regulations provide that the "substantially limits" standard is not a demanding standard and should be given the broadest construction possible. 29 C.F.R. § 1630.2(j)(1)(i). Representing a departure from extensive case law under the original ADA, the Final Regulations state that an impairment no longer need be a significant or severe restriction on a major life activity to trigger the ADA's coverage. 29 C.F.R. § 1630.2(j)(1)(ii). Thus, even impairments that are episodic (*e.g.,* epilepsy) or in remission (*e.g.,* cancer) may constitute a "disability" if they *would* substantially impair a major life activity when active. 29 C.F.R. § 1630.2(j)(1)(vii). Similarly, the Final Regulations reject the notion that short-term impairments are categorically excluded from the ambit of the ADA. 29 C.F.R. § 1630.2(j)(1)(ix).

Furthermore, the Final Regulations provide that the analysis of whether an individual is "substantially limited" in a major life activity is to be made by comparison to *most people* in the general population, as opposed to the *average person*, which was the language in the prior regulations. 29 C.F.R. § 1630.2(j)(1)(ii). This revision is meant to conform the language to the terminology that was used in the legislative history of the ADAAA. In making that determination, the Final Regulations clarify that reference to "scientific, medical, or statistical" information generally will not be required to establish the abilities of "most people." 29 C.F.R. § 1630.2(j)(1)(v). The Final Regulations do not further define the term "most people."

In addition, although in theory the "substantial limitation" analysis remains individualized, the Final Regulations identify a category of "predictable assessments" – conditions that will "*virtually always*" impose a substantial limitation on a major life activity and, thus, qualify as a disability. This lengthy list includes: deafness; blindness; intellectual disability; partially or completely missing limbs and mobility impairments requiring the use of a wheelchair; autism; cancer; cerebral palsy; diabetes; epilepsy; HIV infection; multiple sclerosis; muscular dystrophy; major depression; bipolar disorder; post-traumatic stress disorder; obsessive compulsive disorder; and schizophrenia. 29 C.F.R. § 1630.2(j)(3).

Under the Final Regulations, the positive effects of "mitigating" measures (*i.e.*, measures that eliminate or reduce the symptoms of an impairment, such as medication), other than ordinary eyeglasses or contact lenses, are *not* to be considered in evaluating whether an individual is "substantially limited" in a major life activity. 29 C.F.R. § 1630.2(j)(1)(vi). In other words, even when a medication or other measure effectively eliminates or reduces the symptoms or the impact of an impairment, the "substantial limitation" inquiry is to be performed assuming the medication or mitigating measure was not being used. By contrast, however, when analyzing whether an employee is "substantially limited," any negative effect of mitigating measures (*e.g.*, medication) on one's ability to perform major life activities *can* be considered. 29 C.F.R. § 1630.2(j)(4)(ii).

Expansion of "Major Life Activity"

Consistent with the prevailing theme of broadening statutory coverage, the Final Regulations significantly expand the definition of a "major life activity" in three ways. First, they add the following to the existing non-exhaustive list of major life activities: eating, sleeping, standing, sitting, reaching, lifting, bending, learning, reading, concentrating, thinking, communicating, and interacting with others. 29 C.F.R. § 1630.2(i)(1)(i).

Second, the Final Regulations add to the list the operation of a *major bodily function* (which includes the operation of an individual organ within a body system). 29 C.F.R. § 630.2(i)(1)(ii). The Interpretative Guidance indicates that the EEOC added this concept to make it easier for individuals with certain impairments to qualify as having a disability. Finally, the Final Regulations caution that

interpretation of the term "major" should not "create a demanding standard for the term disability," and that a "major life activity" need not be of "central importance to daily life." 29 C.F.R. § 1630.2(i)(2).

"Regarded As" Being Disabled Now Easier to Prove

The Final Regulations alter the "regarded as" prong of the definition of "disability" in three ways. First, it is no longer relevant whether an employer believes that an employee's actual or perceived impairment substantially limits performance of a major life activity. In short, an employer is deemed to "regard" an employee as having a disability any time it takes a prohibited action against an employee (*e.g.*, termination, refusal to hire, demotion, or harassment) based on an actual or perceived impairment. 29 C.F.R. § 1630.2(l)(1). Second, an employee is "regarded as" having a disability when the employer takes the prohibited action against the employee because of an actual or perceived impairment, even if the employer has a defense for its action (*e.g.*, establishing that the employee is not qualified for the job). 29 C.F.R. §§ 1630.2(l)(2),(m). Finally, whether an actual or perceived impairment is transitory (*i.e.*, lasting or expected to last for six months or less) and minor now is an affirmative defense. 29 C.F.R. § 1630.15(f). An employer may not assert this defense, however, if the impairment is not *objectively* transitory and minor (*e.g.*, bipolar disorder). *Id.*

Because of this very low threshold for the "regarded as" prong, the Final Regulations advise that employees who are not challenging a failure to provide a reasonable accommodation may wish to proceed under the "regarded as" prong in lieu of showing an actual impairment (or a record of an impairment). 29 C.F.R. § 1630.2(g)(3). The Final Regulations also clarify that employers are not required to provide a reasonable accommodation to employees who meet only the "regarded as" prong. 29 C.F.R. § 1630.9(e).

Other Aspects of the Former Regulations Remain Intact

Most of the changes in the Final Regulations address only the definition of "disability." The Final Regulations do not significantly alter the definitions of "qualified," "direct threat," "reasonable accommodation," and "undue hardship."

Steps Employers Should Take Now

Proceed With Caution When Making Employment Decisions

The ADAAA and its implementing regulations were intended to shift the focus in ADA matters from the question of whether a disability exists to whether the employer acted in a non-discriminatory fashion. It does so by vastly lowering the threshold for establishing the existence of a disability.

When considering an adverse employment action or a request for accommodation, the employer should simply assume that an individual claiming an impairment is protected by the ADA and proceed carefully to analyze the situation as it would have before the ADAAA was passed.

Train Your Employees

Now that the Final Regulations have been published, employers should ensure that supervisory, human resources, and medical personnel are carefully trained on the effects of these changes, as well as applicable state laws that may provide even broader protection to applicants and employees.

Revise Handbooks

Employers should review and revise employee handbooks and supervisor manuals to ensure that statements regarding disability and accommodation are consistent with the ADAAA, the Final Regulations, and applicable state laws.

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