The ADAAA Final Regulations Have Arrived; Were They Worth the Two-Year Wait?

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Just as the first weekend of Spring arrives, the Equal Employment Opportunity Commission issues its long-awaited final regulations interpreting the ADA Amendments Act. Almost poetic, isn't it? We're still wading through the fine print, but it looks like some of the EEOC's guidance will be very useful, albeit not always favorable, to employers. As for other parts of the guidance, the jury is still out. At the very least, however, the new regs are a major improvement over the proposed version that the agency issued in 2009.

Here are some of the highlights (or lowlights, depending on your aspect):

The Definition of "Disability"

The ADAAA and the final regulations define a disability using a three-pronged approach:

- a physical or mental impairment that substantially limits one or more major life activities (sometimes referred to in the regulations as an "actual disability"), or
- a record of a physical or mental impairment that substantially limited a major life activity ("record of"), or
- when a action prohibited by the ADA is taken because of an actual or perceived impairment that is not both transitory and minor ("regarded as").

No Reasonable Accommodation In "Regarded As" Cases

The final rules clarify that an individual must meet the either the "actual" or "record of" definitions of disability in order to be eligible for a reasonable accommodation. Individuals who only meet the "regarded as" definition are not entitled to a reasonable accommodation. It is also unnecessary to proceed under one of the first two prongs of the definition if an individual is not asserting a failure to accommodate claim.

No More "Automatic" Disabilities

One of the biggest complaints about the proposed regulations was they listed certain impairments that would "consistently" qualify as disabilities under the Americans with Disabilities Act. Critics charged that there should be no such thing as a "per se" disability. Instead, they argued, the determination of whether someone is disabled should be based on an assessment of the impairment's effect on the individual. To categorize an impairment as a disability based solely on the fact that someone is diagnosed with it overlooks the reality that some allegedly impairing conditions have virtually no disabling effects on some individuals.

It appears that the EEOC was listening, at least a little bit. The final regulations eliminated the language stating that certain impairments will consistently be considered disabilities. They still include, however, a strong presumption about certain impairments. The EEOC acknowledges

that it will go back to using an individualized assessment approach to determining disability status, but it goes on to provide a list of impairments that it believes "should easily be concluded" to be disabilities. Those include deafness, blindness, intellectual disabilities (formerly known as mental retardation), autism, partially or completely missing limbs, mobility impairments requiring the use of a wheelchair, cancer, diabetes, HIV, multiple sclerosis, muscular dystrophy, cerebral palsy, epilepsy, and a variety of serious mental disorders.

The regulations explain that given their inherent nature, these impairments will (1) virtually always impose a substantial limitation on a major life activity and (2) require an individualized assessment that is "particularly simple and straightforward."

Expanded Definition of "Major Life Activities"

The final regulations provide a non-exhaustive list of examples of major life activities, all of which came from longstanding ADA regulations and court decisions: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working.

One of the complaints from plaintiffs, however, has been that it is too difficult to find individuals with certain types of impairments to have a disability because those impairments do not substantially limit one of the traditionally-recognized major life activities. In an effort to help bridge the gap for those people, the final regulations broaden the definition of major life activities to include the operation of *major bodily functions*, including functions of the immune system, special sense organs and skin, normal cell growth, digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. As a result of this significant expansion, a much broader universe of potential plaintiffs will be entitled to protection under the statute.

Better Guidance on "Substantial Limitation"

The final regulations provide some useful rules for determining what constitutes a "substantial limitation." In determining whether an individual is substantially limited in a major life activity, employers should compare them to "most people in the general population" in the following respects:

- the condition under which they perform the major life activity;
- the manner in which they perform the major life activity;
- how long it takes them to perform the major life activity (and how long they are able to perform it);
- the difficulty, effort, or time required to perform a major life activity;
- any pain experienced when performing a major life activity; and
- any adverse effects of mitigating measures (such as side effects of medication).

Employers are cautioned, however, to focus on the extent to which an impairment substantially limits a major life activity, not on how much an individual can achieve despite the impairment. For example, the new regs point out that just because someone achieves a high level of academic success doesn't necessarily negate a determination that he is substantially limited in the major life activity of learning because he may have to work harder than most people in order to achieve that level of success.

Transitory and Minor Impairments

The ADAAA dramatically expanded the circumstances in which employers may be liable under the "regarded as disabled" prong of the ADA's definition of disability. No longer must a plaintiff show that her employer perceived her as suffering from an impairment that substantially limits a major life activity. Now, she must only show that the employer perceived her as having some mental or physical impairment that is not *both* transitory and minor, regardless of whether that impairment does or would substantially limit a major life activity.

The regulations provide no guidance on what is to be considered a "minor" condition, other than to state that it is an objective inquiry. They do, however, provide a few guidelines:

- The transitory and minor standard is a defense that must be proved by the employer.
- The defense applies only if the impairment actually was transitory and minor, regardless of whether the employer believed it was transitory and minor.
- A condition is considered transitory if it lasts or is expected to last less than six months.
- The transitory nature of an impairment is not relevant to whether someone suffers from an actual disability. A person may be considered actually disabled even if the impairment lasts less than six months.

Impairments That Are Episodic or In Remission

The final regulations specifically state that an impairment that is episodic or in remission can be a disability if it would substantially limit a major life activity when active. This means that chronic impairments with symptoms or effects that may not be present all the time can be a disability even if the symptoms or effects would only substantially limit a major life activity when the impairment is active. Examples include epilepsy, hypertension, asthma, diabetes, major depressive disorder, bipolar disorder, and schizophrenia. Likewise, an impairment such as cancer that is in remission but may possibly return can also be considered a disability.

What It All Means

The final regulations go into effect on May 24, 2011. While much of the guidance should help employers, the early assessment is that some of it still appears to miss the mark.

For example, as noted above, the final regulations suggest on the one hand that an impairment is transitory – i.e., it may be unsuitable to support a disability claim – unless it lasts more than six

months. On the other hand, they go on to say that a person may nonetheless be considered disabled even if the impairment lasts less than six months. That kind of guidance is unsettling, at best.

Another glaring problem is the EEOC's position that in determining whether someone is substantially limited in a major life activity, it is irrelevant to look at what the person is able to achieve despite their impairment. That is completely at odds with the rulings of most courts that have addressed the issue. Whether those courts will now be willing to reverse a decade or more of precedent just because the EEOC has suddenly taken a contrary position is far from certain.

The one certainty is that the field of disability law will continue to be a hotbed of controversy. As courts and commentators weigh in on the ADAAA and the final regulations, expect more questions to rise to the surface.