

## **EEOC Approves Proposed ADAAA Regulations**

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On June 17, 2009, the U.S. Equal Employment Opportunity Commission ("EEOC") voted in a 2 -1 vote to adopt proposed rule changes to the ADA regulations to conform with the ADA Amendments Act ("ADAAA") which went into effect in January 2009. The EEOC was mandated by the ADAAA to pass regulations to clarify and expand upon the Amendments Act. This vote is the first step in that process. However, the proposed regulations will still need to be reviewed by the Office of Management and Budget and federal agencies before becoming law, likely before the end of 2009. In comments made by the Assistant Legal Counsel for the EEOC, it was suggested that these regulations will be applied to all matters reviewed by the EEOC dating back to the first date of the ADA Amendments Act, January 1, 2009. In light of this, employers may now need to review policies and procedures to take initial steps for compliance with the anticipated rule changes.

The ADAAA made clear that the purpose for its passage was to expand coverage of the Americans With Disabilities Act and to require employers, courts, and the EEOC, to focus not on whether the individual has a qualifying disability but instead on how the employer responded and whether a reasonable accommodation was required. The proposed regulations fall in line with this intent and further detail the far reaching breadth of the Amendments Act and coverage.

Specifically, with regard to major life activities, the proposed regulations not only references the two non-exhaustive lists included in the Amendments Act as major life activities that may be impaired to qualify as a disability, but also adds to that list reaching, sitting, and interacting with others. Additionally, while the ADAAA included a list of major bodily functions which could be impaired to qualify as a disability, the proposed regulations also expand the list to include hemic, lymphatic, and musculoskeletal systems.

The proposed regulations provide that an impairment is a disability if it "substantially limits a major life activity." This language is in line with the ADA Amendments Act. The Amendments Act also clearly stated that the Supreme Court's interpretation of the term "substantially limits" as meaning "severely restricts" was too high of a standard and the ADAAA intended to lower that standard. While the Act itself did not offer guidance as to where that standard should be, the proposed regulation specifically states that in order to be "substantially limiting" an impairment need not severely restrict or significantly restrict performance of a major life activity. Certainly, this is a far lower standard than that previously held by the Supreme Court and the EEOC. The proposed regulations do identify that temporary, non-chronic impairment of short duration with little or no residual effects such as a cold or common flu, a sprained joint or a broken bone that is expected to heal completely will usually not substantially limit a major life activity. These conditions could be viewed as both minor and transitory but under the language of the regulations, few other ongoing conditions will likely be excluded if they are found to limit a major life activity or bodily function.

The proposed regulations also detail five rules of construction for determining whether an impairment does limit a major life activity. The first of these rules states that in ADA cases the focus should be on whether or not discrimination occurred and not on whether the individual meets the definition of a disability. Moreover, the definition of "substantially limited" should be construed broadly to the maximum extent allowable under

the ADA and determination of whether an individual has a disability should not demand extensive analysis. The second rule of construction addresses the ADAAA's rejection of the Toyota v. Williams decision and provides that an individual whose impairment substantially limits a major life activity need not also demonstrate a limitation in the inability to perform "activities of central importance to daily life." This is a significant change from the earlier position and holdings of the courts and EEOC. The third rule detailed in the proposed regulations further expands on this and provides that an impairment that substantially limits one major life activity need not limit any other major life activities or impact work to be considered substantially limiting. It is clear in the proposed regulations that limitation of one of the major life activities is sufficient.

The regulations go on to the fourth rule of construction which provides that when comparing an individual's limitation to determine whether or not it is substantially limited, it should be compared to the general population and a common sense analysis without resorting to scientific or medical evidence may be followed. The fifth rule of construction addresses the issue raised by reference to "transitory and minor" conditions referenced by the Amendments Act as being excluded for regarded as claims. The regulation clarifies that impairments that last for fewer than six months may still be substantially limiting. Therefore, it is clear that at this point in time, the EEOC is not adopting a bright line rule that conditions lasting six months are transitory in nature and therefore not covered. In comments regarding the EEOC's thoughts on this, it has been suggested that a three month standard is likely to be adopted.

As is demonstrated by these highlights from the proposed regulations, the EEOC has heeded the words of Congress in the ADAAA. It is clear that the EEOC intends to interpret the ADAAA to allow for broad construction and will not place great weight or scrutiny on whether or not the individual has a covered disability. Deference will be given to the probability of coverage and the focus will be on the employer's actions. Therefore, employers must look at their application and selection process as well as their internal evaluation, promotion, and accommodation procedures to ensure that proper assessment is given to these changes. Employers need to ensure that they have a process in place for evaluating reasonable accommodation needs and that documentation of the interactive process and ultimate decision regarding granting or denying accommodations is maintained. Although these regulations are not yet final, it appears that the EEOC will treat these as retroactive and apply them to any claims brought before it regarding actions after January 1, 2009. Therefore, I do not recommend delaying changes until the regulations are final. I suggest that a close review be taken of your disability, discrimination and accommodation policies and any necessary changes implemented at the earliest time.