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LEGAL ALERT

New ADA Rules Provide Much Needed Clarification

After a lengthy wait, the Equal Employment Opportunity Commission (EEOC) has issued final regulations and interpretive guidance for the Americans With Disabilities Amendments Act (ADAAA), the new disability law which was passed in 2008. Many employers were prepared for the worst after the agency first proposed dramatic and game-changing regulations in 2009 which would have tilted the playing field even further in favor of employees. Although the final regulations published on March 24, 2011 strongly emphasize that the law's coverage is to be quite broad, the EEOC pulled back from its original position and published regulations that are fairly consistent with the statute.

The best news for employers is that the final regulations answer most of the questions that arose when the proposed regulations were issued. For example, the EEOC answers whether some impairments will be "automatic disabilities," how the EEOC will analyze "working" as a major life activity, how condition, manner, and duration may be relevant in determining whether an impairment is a disability, and the length of time a condition must last to be a protected disability. Here is a summary of the major highlights of the regulations.

Guidance On "Actual" Disabilities

The ADAAA's main goal was to ensure that the determination of whether an individual had a disability should not be the primary focus of a lawsuit; instead, it should be whether the employer complied with its obligations under the law. The regulations maintain this focus by retaining the broad definition of "disability," but provide helpful guidance that will aid employers in confirming whether disability status is present.

Length Of Time

The EEOC declined to define "substantial limitation" other than to state that it is less than the previous "prevents or significantly restricts" standard. Moreover, an impairment does not have to last at least six months to be an actual disability. The EEOC opines that an impairment that lasts at least a few months can be a disability, but that those that last a short time will not be – unless "sufficiently severe."

"Substantial Limitation"

The regulations reinstate the "condition, manner and duration" concepts for evaluating the disability determination which had existed in the old regulations but were in line to be shelved with the 2009 proposals. Under the new ADAAA, in determining whether an employee is

substantially limited in a major life activity, employers should now 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 the major life activity;
- the pain experienced when performing the major life activity; and
- the adverse effects of mitigating measures (such as prosthetics, medications, etc.).

Individualized Assessments

The new regulations confirm one of the principal hallmarks of the ADA – that all impairments require an individualized assessment to determine whether they rise to the level of "disability." The 2009 proposals were often criticized for creating a series of "categorical" disabilities that would automatically qualify under the ADA; the refined regulations eliminate these while acknowledging that certain obvious impairments "consistently" qualify – deafness, blindness, missing limbs, cancer, diabetes, HIV, multiple sclerosis, and a number of other impairments.

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"Working" As A Major Life Activity

The EEOC moved its discussion of this controversial major life activity to its Interpretative Guidance, noting that it should get no greater treatment than other major life activities, especially since it should only be considered in "rare" circumstances. In the Guidance, the agency reinstated the test which clarifies that an individual would need to be restricted from a "class or broad range" of jobs in order to trigger protection, an uncommon scenario.

"Regarded As" Disabilities Remain Challenging

It wouldn't be the EEOC if there weren't some disappointing news for employers. As most employers have come to realize, the new ADA makes it far easier for employees to pursue and prevail in claims alleging that the employer perceived them as being disabled. The final regulations offer no relief, and in fact seemingly make it easier for workers to establish coverage under the "regarded as" prong of the disability definition. The new rules make clear that the focus in such cases will be on how the worker was *treated* by the employer, rather than on what an employer *believed* about the worker's condition.

The ADAAA states that the only kind of impairment that cannot form the basis of a "regarded as" claim is one that is "transitory and minor." The final regulations offer few bright line rules about defining this standard, but do provide some guidelines. First, a condition is considered transitory if the impairment lasts or is expected to last less than six months. Second, the analysis of whether an impairment is "minor" must be an objective inquiry. Third, the defense is not available if the employer simply believes the impairment is transitory and minor. Rather, the impairment must actually be one that is transitory and minor. Finally, the employer bears the burden of proving this defense at all times in litigation.

If there is some good news, it is that the EEOC removed language from the proposed rules which would have rendered an employer liable under the "regarded as" prong for taking adverse action against an employee based on a "symptom" of the disability, even if the employer did not know the employee had an impairment.

What Does This Mean For You?

If your company adapted to the changes ushered in by the ADA Amendments Act two years ago, the issuance of these regulations will primarily be a non-event. These regulations mostly clarify and offer guidance rather than offering any substantive changes to the law that would require changes in practice and procedure.

You should continue to assume that most employees with physical or mental impairments are covered under the ADA, and should always err on the side of caution by engaging in a good faith and well-documented interactive process with impacted employees.

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