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EEOC ADAAA Regulations Significantly Expand ADA Coverage, Impacting All Employers

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The Equal Employment Opportunity Commission (EEOC) has issued final regulations for the Americans with Disabilities Act Amendment Act of 2008 (ADA Amendments Act, or ADAAA), which become effective today, May 24, 2011.

The Americans with Disabilities Act of 1990 (ADA) makes it unlawful for an employer to discriminate against an individual with a disability who is qualified, provided he or she can perform the essential functions of the job, with or without reasonable accommodation. "Disabilities" include (1) physical or mental impairments that substantially limit one or more major life activity; (2) a record of such impairment; or (3) being regarded as having such impairment.

In enacting the ADAAA in 2008 (effective January 1, 2009), Congress made it easier for an individual to seek protection under the ADA. The ADAAA states that the definition of "disability" should be interpreted to cover a broad range of individuals, thereby overturning several Supreme Court decisions that Congress believed had defined "disability" too narrowly. At its core, the ADAAA promotes broader coverage by shifting its focus from the employee (and his/her burden to prove a disability) to the employer (and its burden to make a good faith effort to reasonably accommodate the employee).

The regulations, like the ADAAA, are designed to simplify the determination of who has a "disability" and make it easier for individuals to establish that they are protected by the ADA. The regulations provide guidance under the ADAAA generally, and specifically with respect to important topics, such as (1) whether a condition constitutes a "physical or mental impairment," (2) whether a physical or mental impairment "substantially limits" a life activity, and (3) whether such activity constitutes a "major life activity."

"Physical or Mental Impairment"

The regulations define "physical or mental impairment" as any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin and endocrine. The regulations' definition also covers any mental or psychological disorder, such as intellectual disability (formerly termed mental retardation), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Notably, under the regulations, mitigating measures (other than corrective eyewear) will not be considered in the assessment of whether a condition constitutes a physical or mental impairment under the ADA. Accordingly, the underlying impairment—even if well-controlled, episodic, in remission, or improved via an enabling device—still constitutes a disability if it would substantially limit

a major life activity, regardless of mitigating measures. The regulations also clarify that the non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, also may be considered when determining whether an individual's impairment substantially limits a major life activity.

"Substantially Limits"

The regulations include nine rules of construction to help guide the determination of whether a physical or mental impairment "substantially limits a major life activity," when determining if an individual has a disability. In keeping with ADAAA's purpose of extending the application of the ADA, the regulations state that the limitation need not "significantly" nor "severely" restrict a major life activity in order to be considered "substantially limiting." Rather, it is sufficient that an individual's ability to perform a single major life activity or bodily function is limited when compared to that of "most people in the general population." Specifically, the nine rules of construction are as follows:

1. The phrase "substantially limits" is to be construed broadly in favor of the most expansive coverage permissible under the ADA.
2. Although not every impairment will constitute a disability, an impairment need not prevent or severely or significantly limit a major life activity to be considered "substantially limiting."
3. The determination of whether an impairment substantially limits a major life activity requires an individualized assessment and should not require an extensive analysis, as the "primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity."
4. The determination of whether an impairment substantially limits a major life activity requires an individualized assessment, although the standard is lower than that applied prior to the ADAAA.
5. Although determination of whether an impairment substantially limits a major life activity as compared to most people will not usually require scientific, medical, or statistical evidence, such evidence may be used if appropriate.
6. Mitigating measures other than "ordinary eyeglasses or contact lenses" shall not be considered in assessing whether an individual has a disability.
7. Impairments that are episodic or in remission can be considered disabilities if they substantially limit a major life activity when active.
8. An individual need only be substantially limited, or have a record of a substantial limitation, in one major life activity to be covered under the first or second prong of the definition of "disability" (i.e., not "regarded as").
9. The six-month "transitory" part of the "transitory and minor" exception to "regarded as" coverage does not apply to the definition of "actual disability" or "record of disability." The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting.

The new regulations further explain that the "regarded as" prong of determining an individual's coverage under the law is triggered if an adverse employment action is taken against an individual because of an actual or perceived impairment even if the employer does not perceive the impairment to be substantially limiting—as long as the condition objectively is not minor or transitory (typically less than six months in duration). The regulations make it clear that an individual can sue under the "regarded as" prong as long as he/she is not challenging an employer's failure to provide a

reasonable accommodation.

The definition of "regarded as" does not require showing that an employer perceived the individual to be substantially limited in a major life activity. Rather, the focus is on how the employee was treated, not on what the employer believes about the nature of the individual's impairment. An individual seeking a reasonable accommodation from the employer, however, would have to still establish either an actual "disability" or a record of a "disability."

"Major Life Activity"

The regulations state that "[w]hether an activity is a 'major life activity' is not determined by reference to whether it is of 'central importance to daily life,'" effectively reversing case law that had evolved to focus on the relative importance of certain life activities when analyzing whether an impairment substantially impacted a "major life activity." That focus no longer applies under the new regulations, which promote a less intensive analysis of whether an individual is covered under the ADA.

The current non-exhaustive examples of major life activities are 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. This expansive definition, among the changes reflected in the ADAAA and its regulations, effectuates Congress's desire to curb extensive investigation into the existence of a disability, and focus more on whether an employer unlawfully discriminated against an individual.

Notably, the EEOC moved its discussion of the controversial major life activity of "working" to its interpretative guidance, stating that it should be given no greater weight than other major life activities, and should only be considered in "rare" circumstances. Pursuant to the regulations, "working" is impacted when an impairment restricts an employee from performing a "class or broad range" of jobs. The regulatory language is designed to limit a court's ability to focus on a narrow band of work-related activity when determining coverage under the ADA, and to highlight the fact that another major life activity likely is implicated when an individual's ability to work is impacted.

Finally, the regulations further elaborate on the ADAAA's affirmation that performing major bodily functions constitutes a major life activity—a significant amendment to the ADA. The listed examples of these new major life activities include 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. The regulations specifically include the operation of an individual organ within a body system (e.g., the operation of the kidney, liver, or pancreas) as constituting a major life activity. The inclusion of such functions as "major life activities" not only signals Congress's intent to include a wider class of individuals under the ADA, but also increases the number of situations where a disability under the ADA may have no immediately obvious effect on an individual's ability to perform day-to-day activities.

In a further effort to expand ADA coverage (and minimize legal disputes) for certain health conditions, the regulations note that while employers must engage in individualized assessments of disability status, certain enumerated conditions will "virtually always" meet the broadened definition of "disability." The regulations' non-exhaustive list includes deafness; blindness; an intellectual disability; partially or completely missing limbs, or mobility impairments requiring the use of a wheelchair; autism; cancer; cerebral palsy; diabetes; epilepsy; HIV; multiple sclerosis; muscular dystrophy; major depressive disorder; bipolar disorder; post-traumatic stress disorder; obsessive compulsive disorder; and schizophrenia. The regulations advise that in cases involving such impairments the individualized assessment called for by the ADAAA should be "particularly simple and straightforward."

Prohibited Discrimination

Employers need to be careful at every stage of the employment relationship to avoid any claims of unlawful discrimination. As was the case before, the regulations list the following employment contexts where employers need to be vigilant in their awareness of potentially discriminatory policies and

practices:

- Recruitment, advertising, and job application procedures
- Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring
- Rates of pay or any other form of compensation and changes in compensation
- Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists
- Leaves of absence, sick leave, or any other leave
- Fringe benefits available by virtue of employment, whether or not administered by the employer
- Selection and financial support for training, including apprenticeships, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training
- Activities sponsored by an employer, including social and recreational programs
- Any other term, condition, or privilege of employment

Action Items for Employers

The ADAAA regulations represent significant changes in the way the ADA should be interpreted. Armed with the new regulations and interpretive guidance, employers can better evaluate how they handle disability issues in the workplace, and ensure that they do so in a manner that aligns with the EEOC's position and expectations. In particular:

- Employers should examine their policies regarding accommodations and leaves of absence to ensure that they are drafted and enforced in a manner that complies with ADA regulations.
- Employers and their managers should renew their focus on the interactive process of reasonably accommodating employees with qualified disabilities. As the regulations point out, the "primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity."
- To help ensure compliance with the ADA—and to highlight the employer's good faith attempt to comply with the ADA—employers should train all managers (even beyond human resource managers) in the current legal and practical implications of the ADA.

Mintz Levin can provide training, draft or review policies, and otherwise help to advise your company on how best to proceed in this complicated area of employment law.

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