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Employment Law Commentary

EEOC Issues New ADAAA Regulations: What Employers Should Watch For

By Lloyd W. Aubry, Jr.

In June 2009, the U.S. Equal Employment Opportunity Commission (EEOC) voted to revise its rules to conform to changes made by the ADA Amendments Act of 2008 (ADAAA), which was signed into law by President Bush in September 2008 and broadened the scope of disability protected under the law. On March 24, 2011, the EEOC released the much-anticipated final regulations pertaining to the ADAAA. The new regulations become effective on June 24, 2011, 60 days from publication.[1]

The ADAAA, which went into effect on January 1, 2009, clarifies the terminology used to define disability, and directs the EEOC to overhaul its regulations to expand protection for disabled individuals seeking protection under the Americans with Disabilities Act (ADA).

Among other things, the ADAAA overturned several U.S. Supreme Court rulings that narrowed the class of people considered disabled under the ADA. The text of the law specifically stated that the act was aimed to "restore protection for the broad range of individuals with disabilities as originally envisioned by Congress."

The new regulations significantly impact the existing legal framework relating to disability law, and employers are well served to know how these changes will affect their current practices.

At its most general level, the ADAAA and the EEOC's implementing regulations require employers and courts to interpret definitions in the original ADA more broadly. The interpretive guidance makes clear that a central objective of the ADA, the ADAAA, and the final regulations, is to focus

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attention on "whether entities covered under the ADA/ ADAAA have complied with their obligations under the act" (i.e., nondiscrimination), rather than focusing on whether an individual meets the definition of "disability." The final regulations, therefore, seek to refocus on the issues of nondiscrimination and reasonable accommodation.

The highlights of these new regulations are examined below.

Major Life Activities

The final regulations provide an expanded list of what constitutes a "major life activity" under the ADA. The regulations, however, make it clear that these are not exhaustive lists, but merely examples that should be considered in determining whether an employee is disabled.

According to the new rules of construction, major life activities now include the operation of major bodily functions, as well as the more traditional list of activities commonly understood as being major life activities. Acts constituting major life activities include 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.

The operation of major bodily functions include the functions of the immune system, special sense organs, and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions.

Based on changes Congress made in the ADAAA, the new regulations also expressly reject the standard adopted by the U.S. Supreme Court in T*oyota Motor Mfg. Ky. Inc.* v. *Williams*[2] that a major life activity is determined by reference to its "central importance to most people's daily lives." The regulations now emphasize that the term "major" is not to be interpreted strictly to create a demanding standard for a disability, and whether an activity is of "central importance to daily life" is not indicative of whether it constitutes a major life activity.

Substantially Limits

The new rules of construction lower the threshold for finding a "substantial limitation," as the impairment no longer has to prevent, or severely or significantly restrict, a major life activity to be considered "substantially limiting."

To be sure, neither the ADAAA nor the final regulations define "substantially limits." In the interpretive guidance, the EEOC intentionally avoided providing such a definition, stating that to do so would "inexorably lead to greater focus and intensity of attention on the threshold issue of coverage than intended by Congress."

Instead, relying on the ADAAA's detailed findings, purposes, and rules of construction, the final regulations provide a set of guidelines for consideration in determining whether an impairment "substantially limits" a major life activity. According to the regulations, the following nine rules of construction should be used in evaluating whether an impairment substantially limits an individual in a major life activity:

1. The term "substantially limits" shall be construed broadly in favor of expansive coverage.
2. Significant or severe restriction is not required for an impairment to "substantially limit" an individual in performing a major life activity. The level of limitation must be "substantial" as compared to most people in the general population. The impairment must nevertheless be "important," and not every impairment will constitute a "disability."
3. "Substantial limitation" should not be the primary focus in disability cases. The primary object of attention should be on compliance with the reasonable accommodation and antidiscrimination obligations. Whether an impairment "substantially limits" a major life activity should not demand "extensive analysis."
4. A determination of whether an impairment substantially limits a major life activity requires an individualized assessment, but the degree of limitation is lower than that required prior to the ADAAA.
5. A determination of whether an impairment is substantial will not typically require the use of scientific, medical, or statistical evidence.
6. Whether an impairment is substantial shall be evaluated without regard to the ameliorative effects of mitigating measures.
7. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity in its active state.
8. An impairment that limits one major life activity need not limit any others.
9. The "transitory and minor" exception to the "regarded as" disability standard does not apply to the "actual disability" and "record of" disability standards. Impairments lasting fewer than six months may be disabilities under the latter two standards, though impairments lasting for short periods would typically not be covered unless sufficiently severe.

"Regarded As"

Another major change to the regulations affects those covered under the "regarded as" prong of the definition of disability. The regulations clarify that the concepts of "major life activities" and "substantially limits" are irrelevant in evaluating a claim under the "regarded as" prong. Thus, an employee suing under this prong need only show that his or her employer regarded him/her as having a disability, and that the employer discriminated against the employee because of that perception. The employer need not have considered whether a major life activity

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was substantially limited based on that perception.

While the new regulations may make it easier for employees to state "regarded as" discrimination claims, the new regulations also provide a defense to such claims and also to claims based on actual impairments, namely that the impairment was transitory and minor.

To establish this defense, an employer must demonstrate that the impairment is objectively both transitory, defined as lasting or expected to last six months or less, and minor. An employer may not argue that it subjectively believed the impairment was transitory and minor. The regulations also clarify that individuals covered only under the "regarded as" prong are not entitled to reasonable accommodations.

Mitigating Measures and Episodic Conditions

Through the ADAAA, Congress rejected the Supreme Court's decision in *Sutton* v. *United Air Lines Inc.*,[3] and the new regulations now explain that mitigating measures other than "ordinary eyeglasses or contact lenses" shall not be considered in assessing whether an impairment substantially limits a major life activity. The regulations also provide that qualification standards, employment tests, or other selection criteria, based on an individual's uncorrected vision, may not be used unless shown to be job-related for the position in question and consistent with business necessity.

The regulations note that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

Regulations that Have Not Changed

The EEOC did not revise regulations relating to the exceptions to the definition of disability; the direct threat defense; association with an individual with a disability; the obligations of employers and individuals during the interactive process following a request for a reasonable accommodation; health insurance, disability, and other benefit programs; and the interaction of the ADA, the Family and Medical Leave Act, and workers' compensation laws.

The ADAAA's Impact on State Disability Laws

While the regulations bring the ADA closer to many state laws that broadly define the term disability, employers should remain mindful of their obligation to consider the definition of disability that is most favorable to the employee.

In California, for example, the impact of the ADAAA will be limited given that the California Fair Employment and Housing Act (FEHA) already provides greater protection than the ADA. Among other things, under the FEHA, disabilities need only "limit" rather than "substantially limit" the individual. The FEHA also prohibits discrimination based on medical conditions or an individual's genetic characteristics, and the employer has the burden of showing that the individual was not qualified, or could not perform essential functions. California law, moreover, already looks at the individual's unmitigated state to determine whether disability protections apply.[4]

Employees in California, and those in states such as New York and New Jersey, will likely continue to bring their disability discrimination claims under the broad protection of the FEHA, or their respective state and city laws, which already provide broader definitions of disability than the new definitions under the ADAAA. Employers in these jurisdictions, however, should recognize that state courts often look to ADA definitions for guidance and interpretation of specific terms. Thus, until the ADAAA is interpreted in the courts, employers should consider the definition of disability that is most favorable to the employee.

Significance for Employers

The new regulations will certainly provide fodder for disability discrimination litigation. The EEOC has already seen an increase in disability discrimination claims, having received 25,165 claims in 2010, the largest number of disability claims since the ADA went into effect in 1992.

In light of the regulations, employers need to be more mindful of their duty to reasonably accommodate individuals with physical or mental impairments. When employees request extended leave, additional excused absences, or any other form of accommodation, the employer must consider those requests in light of Congress's intent to expand the protections of the ADA to a substantially broader group of individuals than were previously covered.

Additionally, employers should review their disability discrimination policies and practices, paying careful attention to the use of the phrases "major life activities," "substantially limits," "regarded as," and "mitigating measures." In particular, employers should make sure that medical certification forms for employees' health care practitioners do not provide outdated standards for consideration in determining whether their patients are disabled. Employers should also train managers to understand management's obligations to "reasonably accommodate" disabled employees and to recognize instances when such accommodations may be appropriate.

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1. The ADAAA is not retroactive; it applies only to discriminatory acts that occurred on or after January 1, 2009.
2. *Toyota Motor Mfg. Ky. Inc.* v. *Williams*, 534 U.S. 184 (2002)
3. *Sutton* v. *United Air Lines Inc.*, 527 U.S. 471 (1991)
4. The California Fair Employment and Housing Commission issued a useful chart comparing the original Americans with Disabilities Act, the ADAAA, and the FEHA's coverage of individuals with disabilities. The chart can be accessed at http://www.fehc.ca.gov/pdf/ADA-ADAAA-FEHA_Table-2.pdf.