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NO MORE "BUSINESS AS USUAL": ADAAA Regulations Will Be a Bear for Employers

By Kristen Allman and Robin Shea
Tampa and Winston-Salem Offices

The **Americans with Disabilities Act Amendments Act of 2008** and the **Final Rule** interpreting the ADAAA, which was issued last month by the U.S. Equal Employment Opportunity Commission, will mean significant changes for employers who are dealing with employees' medical conditions.

Simply put, the ADAAA and the EEOC's new regulations mean that virtually anyone with a medical condition will arguably have a "disability" within the meaning of the ADA. The express purpose of the ADAAA was to significantly ease, if not eliminate, the plaintiff's burden of showing as a threshold matter that he or she had a "disability" and thus was entitled to the non-discrimination and reasonable accommodation protections of the Act.

> On the surface, the Amendments Act and the regulations do not change an employer's other ADA obligations. However, the breadth of the new definition of "disability" means that many more employees and applicants will be "protected," which in turn means that employers are vulnerable to claims from a larger class of individuals and will have to consider reasonable accommodations in many more cases than before.

The original ADA defined "disability" as a physical or mental impairment that "substantially limited" a "major life activity," or a record (history) of such an impairment. It also protected individuals who were "regarded as" (or perceived as) having such impairments. As interpreted by the courts, "substantial limitation" meant a significant limitation when compared with the general population, and generally required that the condition be both long-term and severe. The original list of "major life activities" was relatively short, and included walking, speaking, caring for oneself, performing manual tasks, seeing, hearing, breathing, learning, and working. To be substantially limited in the major life activity of working, the individual had to be substantially limited in working, *plus* one additional major life activity.

The New "Substantially Limits": Not Very "Substantial"

By its terms, the ADAAA still requires a "substantial limitation," but "substantial" no longer means what it says. The ADAAA legislatively overruled several decisions

from the U.S. Supreme Court that had taken a restrictive view as to who qualified as "disabled." Among other things, the Supreme Court had held that "mitigating measures" had to be considered in determining whether an individual was "substantially limited" – in other words, if the condition could be controlled through medication, surgery, or other means, then the individual was not "disabled" even though he or she might have had a medical condition that in its untreated state would be substantially limiting.

> **EXAMPLE:** Linda has epilepsy, but because of her medication, she has not had a seizure in 20 years. She is able to drive a car and operate other heavy machinery. Under the "old" ADA standards, Linda would not have been "disabled" because her medications allowed her to function normally – therefore, she was not "substantially limited." Under the ADAAA, however, Linda has a "disability" simply because she has the underlying condition of epilepsy. The fact that her medicine has eliminated the effects of her condition cannot be taken into account.

(NOTE: *Vision impairments that are corrected by normal eyeglasses and contact lenses are not considered "substantially limiting," even under the ADAAA. Also, although the ADAAA prohibits an employer from considering the positive effects of mitigating measures in determining whether an individual is disabled, the employer can consider both positive and negative effects of mitigating measures when determining whether an individual requires reasonable accommodation or poses a direct threat.*)

The ADAAA and the regulations also provide that episodic conditions, or conditions that are in remission, are "disabilities." In short, the EEOC says, the determination of whether an individual has a "substantial limitation" "should not demand extensive analysis." According to the EEOC, the employer's attention should focus on whether it has met its ADA obligations and not whether an individual's impairment substantially limits a major life activity.

- "Substantial limitation" is determined by a *common sense assessment* of the individual's ability to perform a specific major life activity or bodily function compared with that of most people in the general population.

- A lesser degree of "limitation" is required than was required under the original ADA.

- An impairment that substantially limits one major life activity, such as working, need not limit other major life activities in order to be a disability.

- An impairment substantially limits "working" when it limits an individual's ability to perform or meet the qualification for a "type of work," including (1) the nature of the work in which the individual is limited when compared with most people having similar training, skills and abilities (*for example*, DOT-regulated commercial motor vehicle driving jobs, assembly line positions, food service jobs, clerical jobs and law enforcement positions); or (2) job-related requirements that an individual is limited in meeting due to an impairment as compared to most people performing those jobs (*for example*, repetitive bending, reaching or manual tasks; repetitive or heavy lifting; prolonged sitting or standing; extensive walking; working in high temperatures, high noise levels or high stress; or ability to work rotating, irregular or excessively long shifts).

- An individual who claims to be substantially limited in the "performance of manual tasks" no longer has to show that he or she is unable to perform a variety of tasks central to daily living.

- Although *positive* effects from mitigating measures are not to be considered in determining wheth-

er an individual has a disability, *negative* effects (such as side effects of medication) are to be considered.

- An actual impairment or record of impairment can be "substantially limiting" *even if it lasts or is expected to last less than six months.*

- A "substantial limitation" may exist even if the individual has overcome obstacles and achieved success.

> **EXAMPLE:** Harold has dyslexia, but through hard work and determination has managed to get a Ph.D. in nuclear physics from MIT. Under the "old" ADA, he would not be considered to have a "disability" because he achieved and outperformed most people in the general population. However, under the ADAAA and the new regulations, Harold would still be considered to have a "disability" because of the additional time or effort required for him to read, write, and learn when compared with the non-dyslexic population.

- Certain conditions are "substantially limiting" *per se*: deafness, blindness, intellectual disabilities, missing limbs, mobility impairments, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, major depression, bipolar disorder, obsessive-compulsive disorder, and schizophrenia.

- A person who has been misclassified in educational, medical or employment records as having a substantially limiting physical or mental impairment has a "record of impairment."

Expanded List of "Major Life Activities"

The Amendments Act keeps the original ADA's conservative list of "major life activities," but adds eating, standing, lifting, bending, concentrating, thinking, communicating, reading, and sleeping. The EEOC regulations issued last month add three more major life activities – sitting, reaching, and interacting with others – and provide that even this long list is not "exhaustive." The Amendments Act explicitly overruled the Supreme Court's 2002 decision in ***Toyota Manufacturing Co. of Kentucky v. White***, meaning that, now, only one major life activity need be limited for the person to be considered "disabled."

"Major Bodily Functions"

Additionally, under the ADAAA, an individual will be disabled if he or she is "substantially limited" in a "major bodily function," a completely new category. The statute lists the following "major bodily functions": immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive. The EEOC regulations add the hemic, lymphatic, musculoskeletal, special sense organs and skin, genito-urinary, and cardiovascular systems.

"Regarded As"

Because the proof is so much simpler, the EEOC is aggressively encouraging charges to be filed under the "regarded as" prong, even if the charging parties have "actual" or "record" disabilities. (Although employers do not have to make reasonable accommodations for individuals whose disabilities are only perceived, they must not discriminate against such individuals.)

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In order to meet the ADAAA's "regarded as" prong, the individual must show (1) that the employer engaged in a "prohibited action" (and *note* that this does not mean an "illegal action" but only an adverse employment action, such as a failure to hire or promote, or a termination) and (2) that the *adverse* action was based on the employer's perception that the individual was *impaired*. This is enough to establish that the employer "regarded" the individual as having a disability.

> The employer still theoretically has the opportunity to show that it did not unlawfully discriminate against the individual, even if the individual wins on the "regarded as" prong. However, it is difficult to see how an employer can prevail if the individual has already established that he or she had only a "perceived" impairment – in other words, not an *actual* impairment that might hinder the individual's ability to perform the job – and that the adverse action was based on that perceived impairment.

The only perceived impairments that are excluded from "regarded as" are those that are *both* "transitory" (short in duration, generally less than six months) *and* "minor" (not serious).

The EEOC regulations provide that the following will not result in a "regarded as" finding: (1) asking an employee who seems to be having trouble performing the job because of an impairment whether he or she needs a reasonable accommodation; (2) requesting medical information during the reasonable accommodation "interactive process"; or (3) requesting medical information based on an objectively reasonable belief that the individual presents a "direct threat."

> "Regarded as" claims are likely to escalate, not only because of the EEOC's aggressive promotion of the claims, but also as older workers try to cope with the recent economic downturn. These employees will be in a position to claim that non-transitory conditions attendant with aging, such as arthritis, diabetes, hearing loss, vision loss and mobility issues, have resulted in adverse action.

As stated above, the ADAAA does not change the employer's non-discrimination and reasonable accommodation obligations, apart from making them applicable to a much larger population. But because these issues will arise more often now, employers should re-familiarize themselves with the reasonable accommodation process and their obligations, as well as reasonable accommodations that they do not have to make. In addition, employers should

- Realize that the changes to the ADA will also have an effect on other laws, such as the Family and Medical Leave Act, the Genetic Information Non-Discrimination Act, the HIPAA privacy rule, the Occupational Safety and Health Act, and state workers' compensation laws.

- Realize that ADA case law based on actions or omissions that occurred before January 1, 2009 (the effective date of the ADAAA) are of limited or no precedential value if they were based on a finding of "no disability." (Older cases dealing with non-discrimination and reasonable accommodation may still be valid.)

- Realize that it will be difficult, if not impossible, to defend an ADA case on the ground that the plaintiff or charging party is not "disabled."

- Review (and, if necessary, amend) post-offer medical screening to ensure that offers are withdrawn only after an individualized assessment and attempt at reasonable accommodation.

- Review (and, if necessary, amend) policies governing "automatic" termination at the conclusion of medical leaves of absence to ensure that any such terminations are based on a "final" individualized assessment and attempt at reasonable accommodation.

- Ensure that operations management and front-line supervisors are trained in the "original" ADA and are aware of the ADAAA's expansion of coverage. Under the Supreme Court's recent decision in ***Staub v. Proctor Hospital***, an employment decision that was "tainted" by a supervisor with a discriminatory motive could result in liability for the employer, even if the decisionmaker had a pure heart.

If you need assistance with any aspect of ADA compliance or training, please contact any member of Constangy's **Litigation Practice Group**, or the Constangy attorney of your choice.

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