

Labor and Employment Law Update Lawyers for Employers®

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Reminder: New ADAAA Regulations Go Into Effect Today, May 24

How Will the Changes Affect Our Business? The Equal Employment Opportunity Commission (“EEOC”) estimates that the new Americans with Disabilities Act Amendments Act of 2008 (“ADAAA”) regulations that go into effect today will result in between 400,000 and 1.2 million new accommodations for employees across the U.S. over the next year at a mean annual cost of \$150 per accommodation. The new regulations can be found at: <http://federalregister.gov/a/2011-6056>.

The EEOC’s regulations are expressly intended to broaden coverage to the maximum extent permitted by the ADAAA. For employers operating in Washington who are already subject to the broader definition of disability under the Washington Law Against Discrimination (“WLAD”), the impact may likely be minimal. For employers operating in states that interpret their state disability protection laws similarly to the ADA, such as Oregon and Alaska, the new regulations will undoubtedly mean that more employees qualify for coverage under the ADAAA’s broader definition of disability and, in turn, will be entitled to request and receive reasonable accommodations.

Do We Have to Read the Whole Thing? The new regulations are lengthy and contain a host of changes – some big and some small. It remains to be seen how courts will interpret the new regulations. In the meantime, the regulations provide employers with a few general themes for guidance:

- *Don’t get too hung up on whether an employee is “disabled” under the ADAAA.* The regulations repeatedly advise that whether an individual has a disability “should not demand extensive analysis.”
 - Many impairments will virtually always be a covered “disability,” including deafness, blindness, intellectual disabilities, mobility impairments, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder and schizophrenia.
 - Mitigating measures (other than ordinary eyeglasses or contact lenses) must not be considered. For example, an employee with diabetes has a “disability” even if the condition is completely controlled by medications or insulin.

- Although the definition of “disability” is broader under the new regulations, certain physical “characteristics” are still not covered impairments, such as eye color, hair color, left-handedness, or height, weight or muscle tone that are within “normal” range and are not the result of a physiological disorder. This leaves the door open, however, for characteristics outside of the “normal” range – e.g., obesity.
- Common personality traits such as poor judgment or a quick temper are not covered impairments unless they are symptomatic of a mental or psychological disorder.
- Environmental, cultural or economic disadvantages such as poverty, lack of education or a prison record are not covered impairments.
- Advanced age, in and of itself, is not a covered impairment. However, various medical conditions commonly associated with age, such as hearing loss, osteoporosis or arthritis may be impairments.
- *Be careful not to discriminate against any employee because of an impairment – even when that impairment does not substantially limit any major life activities.* The regulations repeatedly caution that an employee may bring suit against an employer who “regarded” the employee as having a disability.
 - Under the “regarded as” analysis, the employee must still prove either an actual impairment or that the employer perceived him or her to have an actual impairment. However, the employee will not have to prove that the actual or perceived impairment substantially limits a major life activity. Thus, a broader class of employees with impairments may be able to claim that they have been victims of discrimination.
 - Still, not every impairment will be a disability. Employers can defend a “regarded as” claim by showing that the impairment is transitory and minor – e.g., that it has an actual or expected duration of six months or less. However, the regulations suggest that a condition that is expected to last six months or less may nonetheless qualify as a disability if it is not “minor.”
 - Whether an impairment is transitory and minor is measured by an objective test. The employer’s subjective belief that an impairment is transitory and minor is irrelevant. For example, an employer may mistakenly believe that an employee’s depressive disorder will “go away” on its own after a few weeks, but the employer’s belief is not controlling.
 - On the flip side, an employer may still face liability if it takes a discriminatory action against an employee with a transitory and minor impairment (e.g., a hand wound) because the employer mistakenly believes the impairment to be symptomatic of an impairment that is not transitory and minor (e.g., HIV infection).
- *Be prepared for a possible expansion of reasonable accommodation obligations.* In many respects, the regulations broaden the class of employees who are entitled to reasonable accommodations under the ADAAA.

- An employee who requests a reasonable accommodation must still prove that his or her impairment substantially limits a major life activity. The regulations include a broad and non-exhaustive list of activities that will be considered “major life activities.” The list includes activities previously rejected by courts, such as “interacting with others” and “working.”
- The “transitory and minor” defense will not apply outside the “regarded as” context. Instead, impairments that last only a short period of time may be covered if sufficiently severe. For example, an employee who injures her back and has a 20-pound lifting restriction that is expected to last for several months is substantially limited in the major life activity of lifting and may seek reasonable accommodation.
- The employee’s abilities should be compared to those of “most people in the general population” and not just to those who are similarly-situated to the employee. For example, the abilities of an individual with an amputated limb should be compared to other people generally and not to other amputees.
- Impairments must be considered in the aggregate. Multiple impairments that combine to substantially limit one or more of an individual’s major life activities constitute a disability.
- Impairments that are episodic or in remission are disabilities if they would substantially limit a major life activity when active. For example, an employee with post-traumatic stress disorder, whose only symptom is debilitating but brief and infrequent flashbacks, is disabled.
- Employees with a “record of” a substantially limiting impairment may be entitled to a reasonable accommodation if related to the past disability. For example, an employee with a history of cancer that is in remission may need leave or a schedule change to attend follow-up or “monitoring” appointments with a health care provider.
- Employers are not required to provide a reasonable accommodation to an individual who meets the definition of disability solely under the “regarded as” prong. In other words, an employer does not have to provide extra breaks as an accommodation to an employee whom the employer believes to have diabetes and needs to eat frequently when the employee, in fact, has no such impairment.

What Do We Do Now? Employers should immediately review their disability and reasonable accommodation policies and practices, whether in their handbooks or otherwise, to make sure they comply with the new regulations. Because the disability accommodation process is complex and often requires consultation with health care providers, managers should generally refer such situations to knowledgeable and trained Human Resource professionals. Legal counsel should be consulted about how the new regulations will apply in specific situations, particularly when an employer is considering denying a requested accommodation on the grounds that it is unreasonable or will impose an undue hardship on business operations.

**For more information, please contact the Labor and Employment Practice Group at
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