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Disappointing New ADAAA Regulations Issued by the EEOC

For those of us who have been "waiting with bated breath" for the "final" version of the EEOC's amendments to the Federal Register which relate to the Americans with Disabilities Act (ADA), the "wait" is over – but turned out not to be worth it – much like Duke fans watching the NCAA Tournament this year! Sorry!

Even worse, for those "over-achievers" who have been relying on the "proposed" version of the new regulations which were issued back in September of 2009, you now will need to throw that version in the trash and "unlearn" almost all the "new developments" the proposed version contained.

Before getting into the "meat" of this nearly empty coconut, a brief history lesson for those of you just joining the ADA festivities.

The ADA was amended by the Americans with Disabilities Act Amendments Act (ADAAA) back in September of 2008. The ADAAA went into effect on January 1, 2009. It contained some straightforward changes such as "an impairment which is episodic in nature or in remission is a disability if it would substantially limit a major life activity when active." However, aside from stating that "a substantial limitation of a major life activity should not be read to mean what courts have read it to mean in the past," the law itself left much to the imagination.

This is the reason many employers had deferred to using the "proposed" ADAAA regulations which were issued in September of 2009, assuming the final version would be at least somewhat like them. The proposed regulations also threw employers some "bones" such as providing three lists of conditions which the EEOC considered would almost "always" be "disabilities," those which "sometimes" would be and those which "usually would not be."

The "final" version contains few such "bones," which is a disservice not only to employers but to employees as well, as the final version contains the same mandate which the proposed version did. "The primary purpose of the ADAAA is to make it easier for people with disabilities to obtain protection under the ADA. . . .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 the individual meets the definition of disability. The question of whether an individual meets this definition under this part should not require extensive analysis."

What better way to have supported this blanket statement that determining whether an individual is disabled should be "easy"/not "require extensive analysis" than simply giving employers lists of the conditions the EEOC has assessed will "always," "sometimes," and "rarely" be disabilities?

Oh well, enough crying over spilt milk. . .

Here is what the EEOC is now telling us in the final ADA/ADAAA regulations:

- The following conditions will "virtually always" be found to be disabilities (so we did

get one list!):
- deafness
- blindness
- missing limbs or mobility impairments requiring the use of a wheelchair
- intellectual disability (formerly mental retardation)
- autism
- cancer
- cerebral palsy
- diabetes
- epilepsy
- Human Immunodeficiency Virus Infection (HIV)
- multiple sclerosis
- multiple dystrophy
- major depressive disorder
- post-traumatic stress disorder
- bipolar disorder
- obsessive compulsive disorder
- schizophrenia.

- In determining whether any other condition constitutes a disability, employers should consider the following factors regarding how the condition affects an individual's ability to perform one or more major life activities as compared with those in the general population:
  - the level of difficulty, effort and amount of time required to perform the activity
  - whether such activity can only be performed with pain
  - the length of time the activity can be performed (again, as compared with those in the general population) and/or
  - the actual impact of the condition on a major bodily function.

[While at first glance, this "list" of criteria appears somewhat comforting by providing employers with at least some groundwork for the "disability" analysis, consider that this analysis now must be conducted with no consideration of **how long** any of these effects will last per the EEOC.]

- Regarding the new class of disabilities which were created by the ADAAA, "major bodily functions," the EEOC states that "the operation of one organ within a bodily system" can constitute a "major bodily function."

- While the *positive* effects of mitigating measures (aside from ordinary eyeglasses or contact lenses) cannot be considered in determining whether an individual is disabled, the *negative* effects of such measures *can be*. For instance, if the medication or other treatment an individual is taking substantially limits a major life activity (again, including a major bodily function), even if the condition for which he/she is being treated would not otherwise have such an effect, the individual will be considered disabled under the new ADA.

- Much of the new regulations were devoted to changing the way the third category of disabled individuals under the ADA, those who are merely "regarded as" being disabled, (as opposed to actually having a disability [category one], or those having a record of a disability [category two]) are to be analyzed. Specifically,
  - an employer need not "perceive" or "incorrectly believe" that an individual actually has a "disability" in order to be liable for discriminating against that individual under the ADA. The employer need only "perceive" or "incorrectly believe" that the individual has/had a condition which is not both "transitory and minor" in order for that individual to be protected from discrimination on the basis of being "regarded as being disabled."
  - for purposes of this "regarded as" definition only, the word "transitory" is defined

as being "a condition which will last six months or less."

- Employers also are not permitted to test or otherwise use as a standard "unmitigated" vision (i.e., how well someone sees without their glasses or contacts) unless there is some business necessity for this test or standard.

The final version of the new regulations will go into effect on May 24, 2011.

In the coming days, you will no doubt be receiving multiple invitations to various "webinars, seminars, etc." offering an "ADAAA regulation update." For those of you interested in a more detailed discussion of not only these new regulations (and the 33 pages of commentary accompanying them) but also an overall "ADA refresher," you are welcome to join Miller & Martin's live "HR Breakfast Club" seminar on this topic which will be held at our Chattanooga office on April 12, 2011 from 8:30 a.m. – 10:00 a.m. To register for this free seminar, please click here.

As always, if you have any questions regarding these new regulations, the ADA, or any Labor & Employment law topic, please feel free to contact Stacie Caraway at scaraway@millermartin.com or (800-275-7303, ext. 399) or any other member of Miller & Martin PLLC's Labor & Employment Law Department.

The opinions expressed in this bulletin are intended for general guidance only. They are not intended as recommendations for specific situations. As always, readers should consult a qualified attorney for specific legal guidance. Should you need assistance from a Miller & Martin attorney, please call 1-800-275-7303.

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