Healthcare Employment Law IN Brief ™

EEOC Issues Final Rule: ADA Greatly Expanded

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The EEOC's Final Rule concerning the January 2009 amendments to the Americans with Disabilities Act (ADA) is now published (Federal Register, Vol. 76, No. 58, pp. 16978-17017) (Final Rule). The Final Rule will result in many more employees being covered by the ADA. This means more employees will be entitled to reasonable accommodations, and the EEOC and courts will focus on prohibited activity and reasonable accommodations, not on whether the individual is disabled. This will significantly impact your day-to-day operations, your EEOC position statements, and your defense of court cases. If you have not recently done so, it is time to train your managers and supervisors to immediately notify human resources when an employee with a known medical condition is having difficulty performing job duties and when an employee requests time off, an adjusted schedule or modified duties, or other form of assistance.

ADA Basics

The ADA prohibits covered employers from discriminating against qualified individuals on the basis of a disability. A disability can be an *actual* impairment, a *record of* an impairment, or a *perceived* impairment. Discrimination can take many forms, including, but not limited to, refusing to hire or promote, requiring involuntary leave, terminating or demoting, harassing, or failing to provide a reasonable accommodation that would enable an otherwise qualified employee to safely perform the essential functions of his or her job.

Don't Focus on "Disability"

The Final Rule confirms that "disability" will be construed very broadly in favor of coverage. A "disability" still must involve a physical or mental impairment that substantially limits a major life activity, but the Final Rule makes clear that the terms "substantially limits" and "major life activity" now will be generously construed in favor of the employee.

Highlights from Final Rule

The following highlights from the Final Rule will impact decisions concerning the evaluation and defense of ADA cases moving forward:

- The following rules will apply in determining whether an impairment substantially limits a major life activity:

- "The term 'substantially limits' shall be construed broadly in favor of expansive coverage" and "is not meant to be a demanding standard." "An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting."

- An impairment is a disability if it substantially limits an individual's ability "to perform a major life activity as compared to most people in the general population." Major life activities are broadly defined to include major bodily functions. Comparing an individual's performance of a major life activity to the performance of the same activity by most people in the general population "usually will not require scientific, medical, or statistical analysis."

- Whether an impairment substantially limits a major life activity "should not demand extensive analysis."

- The determination of whether an impairment substantially limits a major life activity must be made "without regard to the ameliorative effects of mitigating measures" (except for ordinary glasses and contact lenses). Moreover, an employee's refusal to accept mitigating measures, like taking medication, are not to be considered when determining whether an impairment is substantially limiting.

- "An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."

- An impairment is a disability if it substantially limits just one major life activity.

- With regard to *actual* and *record of* situations, impairments lasting or expected to last fewer than six months may be substantially limiting. Duration and severity both are considered. Impairments that last only a short period of time may be covered if very severe.

- The following will "virtually always" be covered disabilities:

  - Deafness
  - Blindness
  - Intellectual disability (formerly called mental retardation)
  - Missing limbs or mobility impairments requiring 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
- Schizophrenia

- The following are factors to consider when determining whether a person is substantially limited in performing a major life activity:

  - How the person performs the activity
  - How long it takes the person to perform the activity
  - How long the person is able to perform the activity
  - Pain caused by the activity
  - Impact of the activity on a major bodily function
  - Negative side effects of medication
  - Burdens of following a particular treatment regimen

- With regard to an *actual* or *record of* situation, the focus is on how the major life activity is substantially limited, not on what outcomes the individual can achieve. For example, a person with a learning disability may still have a covered disability even though he or she succeeds academically through hard work.

- Just as with *actual* disabilities, a person with a *record of* a disability may be entitled to a reasonable accommodation (for example, leave or a modified schedule to permit the employee to attend follow-up medical appointments).

- An individual has a *perceived* disability if he or she is subjected to a prohibited action because of an actual or perceived physical or mental impairment that is not transitory (which means lasting or expected to last six months or less) and is not minor, even if that impairment does not substantially limit and is not perceived to substantially limit a major life activity.

- ADA cases that do not involve reasonable accommodation will focus on whether there was discrimination on the basis of a *perceived* impairment, therefore, the issue of a substantial limitation on a major life activity might not even come into play.

Practical Tips

A few practical tips follow:

- Do not require an employee to be "100% healed" or have "no restrictions." Such requirements fail to consider reasonable accommodations.

- Do not refuse to consider providing time off solely because your policies don't provide for the time requested. One form of reasonable accommodation is modifying policies, including leave of absence policies. You might be able to offer an alternative accommodation that would require the employee to return to work, but you should understand that modification of leave policies may have to be considered in the absence of an alternative, effective accommodation.

- The morale of co-workers generally is not a factor that employers may rely on in refusing to provide a reasonable accommodation.

- Impairments resulting in lifting restrictions that are expected to last several months may be covered disabilities.

- Impairments resulting from complications from pregnancy may be covered disabilities.

- Remember that the ADA prohibits discrimination against a "qualified individual" on the basis of disability. "Qualified individual" means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. Even under the Final Rule, you may require the employee to safely perform the essential functions of the job, even if you must provide some type of accommodation. In other words, you may have to help the employee meet the bar, but you do not have to lower the bar. Job descriptions should be updated and kept current.

In sum, the "new" ADA will cover more employees and, in more cases, will require employers to focus on the interactive process and reasonable accommodations rather than on whether an employee is entitled to an accommodation. It is critical for managers and supervisors to understand the importance of promptly informing human resources when an employee with a known medical condition is having difficulty performing his/her job and when an employee requests some form of assistance or workplace (including policy) modification. Training is essential. If our labor and employment attorneys can be of assistance, please let us know.

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