

## **EEOC Issues Final ADAAA Regulations**

**March 29, 2011**

On March 25, the Equal Employment Opportunity Commission (EEOC) published in the *Federal Register* its long-awaited final regulations and accompanying Interpretive Guidance under the Americans with Disabilities Act Amendments Act (ADAAA) of 2008. With the publication of these final regulations, which go into effect on May 24, 2011, employers now should have more definitive guidance as to what constitutes a “disability” under the ADAAA, the determination of which in turn triggers an employer’s obligations to make reasonable accommodations. Indeed, given the statutory mandate to expand ADAAA coverage for employees, employers should be prepared to take steps to accommodate more employees than in the past. Employers also need to be cognizant that the final regulations confirm the limited burden that employees have to demonstrate that they are disabled. Thus, employers need to be aware of their compliance obligations under the ADAAA, and take proactive steps to minimize risk.

### **Background**

On September 25, 2008, President George W. Bush signed into law the ADAAA, which went into effect on January 1, 2009. The ADAAA amended the Americans with Disabilities Act (ADA) in response to a perception that the federal courts were taking an unduly narrow view of what constituted a disability. Indeed, a 2006 study found that plaintiffs had lost more than 97% of all ADA employment discrimination claims. The ADAAA specifically overturned several Supreme Court decisions that had limited the ability of an individual to establish a “disability” under the ADA, and made clear that the intent of the amendment was to “reinstate a broad scope of protection” for individuals with disabilities.

As the governing enforcement agency, the EEOC proposed regulations on September 23, 2009 to provide employers and employees with guidance on how to interpret and apply the ADAAA. The EEOC received more than 600 comments during the 60-day public comment period. As a result of the comments, the final regulations reflect some changes to the EEOC’s original proposal, but, consistent with the ADAAA’s mandate, the final regulations make clear that the ADA’s scope of coverage is much broader than it was in the past.

### **Highlights of the Final Rule**

#### ***Expanding the Meaning of “Substantially Limits”***

The ADAAA defines a “disability” as follows:

- A physical or mental impairment that substantially limits a major life activity
- A record of such an impairment

- Being regarded as having such an impairment

42 U.S.C. § 12102.

Prior to the passage of the ADAAA, whether an individual had an actual disability turned on establishing a substantial limitation in a major life activity. Under this standard, an impairment had to significantly restrict or prevent an individual from performing a major life activity to constitute a disability. The impairment also needed to be permanent or long term. In keeping with the statutory requirements, the final regulations make clear that the term “substantially limits” does not have the same meaning as it did before the ADAAA went into effect. The final regulations provide that the following nine “rules of construction” apply in determining whether a substantial limitation exists:

1. The term should be construed “broadly in favor of expansive coverage.” It is “not meant to be a demanding standard.”
2. An impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. 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. Nonetheless, not every impairment will constitute a disability.
3. The primary focus should be whether the employer complied with its obligations and whether discrimination occurred, not whether an individual is substantially limited in a major life activity. Therefore, this determination should not require extensive analysis.
4. The individualized assessment to determine if someone is substantially limited should require a degree of functional limitation that is “lower” than the standard prior to the enactment of the ADAAA.
5. The analysis of whether an individual’s performance of a major life activity as compared to most people in the general population usually will not require scientific, medical, or statistical analysis.
6. The determination of whether a substantial limitation exists shall be made without regard to the ameliorative effects of mitigating measures (except for ordinary eyeglasses or contact lenses).
7. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
8. An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered substantially limiting.
9. The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting. Therefore, even conditions of short duration (e.g., a few months) can meet this definition.

In the past, many employers looked at the “permanent or long-term” nature of a condition to conclude whether it constituted a disability. It is especially important to note that the EEOC’s rules of construction make clear that short-term and/or episodic conditions may be substantially limiting. For example, the Interpretative Guidance provides that an individual with a back impairment that results in a 20-pound lifting restriction that lasts for several months is substantially limited in the major life activity of lifting and would have an actual disability.

The final regulations also caution an employer against conducting a substantial analysis when making a determination as to whether an employee has a condition that substantially limits a major life activity by demanding extensive medical documentation from the employee to support a substantial limitation claim.

While ameliorative or mitigating measures<sup>1</sup> are not to be considered to determine whether an individual is substantially limited, the regulations do make clear that the nonameliorative side effects of a mitigating measure may be taken into account to determine if a substantial limitation exists, such as the negative side effects of medication.

The final regulations also reinstate the use of the “condition, manner, or duration” standard to evaluate a substantial limitation. This concept had been eliminated from the proposed rule. However, the Interpretative Guidance makes clear that when referring to “duration,” the analysis involves the time it may take an employee to perform a major life activity or the length of time an individual can perform a major life activity, as compared to most people in the general population. It is not referring to whether the impairment is permanent or long term.

### ***What Constitutes a Major Life Activity***

The ADAAA expanded the list of “major life activities” covered by the ADA to include major bodily functions such as hemic, lymphatic, musculoskeletal, special sense organs and skin, genitourinary, and cardiovascular functions. The final regulations make clear that a “major life activity” need *not* be one that is “of central importance to daily life.” Moreover, the final regulations clarify that the list of major life activities and major bodily functions is meant to be nonexhaustive. Given these changes, many more “activities” may be covered by the ADAAA in the future.

The EEOC noted that language related to the major life activity of “working” was intentionally moved from the regulations to its Interpretative Guidance since no other major life activity had been singled out in the regulatory text. Given the addition of major bodily functions to the definition of what constitutes a “major life activity,” the EEOC noted that this category should be rarely used. If it is necessary, however, the final regulations reinstate the “class or broad range of jobs in various classes as compared to most people having comparable training, skills and abilities” standard for purposes of conducting the “major life activity of working” analysis (it had been removed from the proposed regulations), but provide examples of individuals who could be considered substantially limited in working under the “lower standard” for establishing a disability under the revised definition.

### ***“Predictable Assessments” of Impairments***

The EEOC was heavily criticized for creating in its proposed regulations a “per se” list of disabilities to be covered by the ADA since an “individualized” analysis has always been the hallmark of the ADA disability analysis. The EEOC makes clear in the final regulations that an “individualized analysis” still is required with regard to all disabilities. However, section 1630.2(j)(3)(i) through (iii) of the final regulations lists conditions that “in virtually all cases” will satisfy the definition of “disability” due to

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1. The final regulations broadly define “mitigating measures” as including, but not limited to, medication; medical supplies, equipment, or appliances; low-vision devices (devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses); prosthetics including limbs and devices; hearing aids and cochlear implants or other implantable hearing devices; mobility devices; and oxygen therapy equipment and supplies; use of assistive technology; reasonable accommodations or “auxiliary aids or services”; learned behavioral or adaptive neurological modifications; or psychotherapy, behavioral therapy, or physical therapy.

certain characteristics associated with the impairments. Included in this list are autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia. The regulations provide that “with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward.” 29 C.F.R. § 1630.2(j)(3). The proposed regulations had contained a list of conditions that typically would not qualify as disabilities under the ADA; this list was removed from the final regulations.

### ***“Regarded As” vs. “Record of” or “Actual” Disability***

The ADAAA expressly broadened the “regarded as” prong of the definition of a “disability” by prohibiting discrimination based on the employer’s alleged perception of a mental or physical impairment, even if that impairment is not perceived as one that substantially limits a major life activity. The final regulations and Interpretative Guidance make clear that there is no duty to accommodate based on an individual being “regarded as” an individual with a disability. The final regulations emphasize, however, that if an accommodation request is not at issue, the “regarded as” prong of the test should be the “primary” means for bringing a disability discrimination claim, as it will be easier for an employee to establish a “disability” under this prong of the test. *See id.* §1630.2(g), (j). The regulations provide that to demonstrate an ADA violation, the employee would have to prove that (1) he or she has an impairment or was perceived by a covered entity to have an impairment and (2) the covered entity discriminated against him or her because of the impairment in violation of the statute. *See* Preamble to Final Rule at 32.

The final regulations confirm that an individual with a “record of” a disability is entitled to an accommodation. For example, an employee may need an accommodation to attend follow-up medical appointments related to a past condition.

### ***Defense to “Regarded As” Claims***

The final regulations provide that in the case of a “regarded as” disability claim, an employer can use the defense that the impairment is “transitory and minor.” “Transitory” is defined as a condition that lasts less than six months. Consistent with the statutory language, both prongs of the test (transitory *and* minor) must be satisfied.

### **Practical Implications**

The definition of a “disability” implicates several important aspects of the reasonable accommodation process. As a result of the final regulations, an employer should do the following:

1. Reevaluate its procedures for requesting medical information when a request for an accommodation is made to avoid making the process unduly burdensome for an employee to establish that he or she has a disability. While an employer still may request documentation to support the existence of a disability and/or need for an accommodation if it is not obvious or known by the employer, extensive analysis should not occur as to whether the employee is entitled to an accommodation.
2. Ensure it has a robust accommodation process in place that meets its obligations to engage in the “interactive process” when an individual with a disability requests an accommodation. This includes having policies and procedures in place to notify employees with disabilities of accommodation processes. In the past, many employers did not have their accommodation practices challenged since claims were dismissed on the basis of whether a “disability” existed,

but in the future the focus is expected to be on whether an employer meets its obligation to accommodate.

3. Through regular training, ensure that managers and supervisors understand their obligation to make employment decisions on objective business facts without regard to an individual's impairment in the workplace.

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