

## **New Proposed EEOC Regulations Under the Americans with Disabilities Amendments Act**

**September 24, 2009**

Yesterday, the Equal Employment Opportunity Commission (EEOC) published in the *Federal Register* its proposed regulations and interpretive guidance under the Americans with Disabilities Amendments Act of 2008 (ADAAA). The ADAAA, which went into effect in January 2009, significantly changed how employers handle disability issues both in the workplace and in litigation. The EEOC's proposal is designed to provide employers with additional guidance on how to interpret and apply the ADAAA. The EEOC is soliciting written comments on the proposal through November 23, 2009.

Highlights of the EEOC's proposed regulations include the following:

### **Definition of Disability**

The ADAAA itself defines a disability as:

- A physical or mental impairment that substantially limits a major life activity; or
- A record of a physical or mental impairment that substantially limited a major life activity; or
- When an entity (e.g., an employer) takes an action prohibited by the ADA based on an actual or perceived impairment.

The EEOC's proposal offers guidance with respect to each prong of the definition with the consistent message that "disability" should be interpreted broadly. For example, the proposal adds three examples—sitting, reaching, and interacting with others—to the ADAAA's nonexhaustive list of major life activities. The proposal also adds several examples of "major bodily functions" to those included within the text of the ADAAA as encompassed within "major life activities," including hemic, lymphatic, musculoskeletal, special sense organs and skin, genitourinary, and cardiovascular functions. Consistent with the ADAAA's inclusion of impairments that are episodic or in remission, the EEOC provides the following examples of episodic impairments: epilepsy, hypertension, multiple sclerosis, asthma, diabetes, major depression, bipolar disorder, and schizophrenia.

The proposed regulations reiterate that an impairment does not need to prevent, or significantly or severely restrict, the individual from performing a major life activity to be considered "substantially limiting." Rather, the determination of whether an individual is substantially limited in performing a major life activity should be a common-sense assessment comparing an individual's ability to perform a

specific major life activity (which could be a major bodily function) with that of most people in the general population. According to the EEOC, the proposed change in terminology from the “average person” to “most people” emphasizes the common sense approach and does not require an exacting or statistical analysis.

Consistent with current regulations, temporary nonchronic impairments of short duration that result in little or no residual effects will usually not meet the definition of disability. The EEOC’s proposed regulations contain several examples of temporary nonchronic impairments of short duration that are usually not disabilities, including (but not limited to) the common cold, seasonal or common influenza, a sprained joint, minor and nonchronic gastrointestinal disorders, or a broken bone that is expected to heal completely. The proposed regulations state that an impairment may substantially limit a major life activity even if it lasts, or is expected to last, for fewer than six months. The six-month durational minimum on transitory impairments applies only to the “regarded as” prong of the definition of disability.

### **Impairments that Consistently Meet the Definition of Disability**

The proposed regulations include a nonexhaustive list of impairments that will consistently meet the definition of disability, including: deafness, blindness, intellectual disability (of the type referred to in former regulations as “mental retardation”), partially or completely missing limbs, mobility impairments requiring use of a wheelchair (a mitigating measure), autism, cancer, cerebral palsy, diabetes, epilepsy, HIV/AIDS, multiple sclerosis, muscular dystrophy, major depression, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder, and schizophrenia. According to the EEOC, the individualized assessment of whether a substantial limitation exists can be done “quickly and easily” with respect to these impairments, and will consistently result in a finding of disability.

The proposal also lists other impairments, like asthma, high blood pressure, and learning disabilities that may be substantially limiting for some individuals but not for others. According to the EEOC, these impairments require more analysis than the impairments identified as consistently meeting the definition of disability, but do not require an extensive analysis and should be construed in favor of broad coverage.

### **“Type of Work” Analysis**

The proposed regulations replace the concepts of a “class” or “broad range” of jobs from the previous regulations in situations where an impairment substantially limits a person’s ability to meet certain job-related requirements, even though it does not impose substantial limitations outside the workplace. The proposed regulations provide that an impairment substantially limits the major life activity of working when it substantially limits an individual’s ability to perform, or to meet the qualifications for, the “type of work at issue.” The type of work at issue includes the job the individual has been performing, or for which the individual is applying, and jobs with similar qualifications or requirements that the individual would be substantially limited in performing because of the impairment. Examples of “types of work” include commercial truck driving, assembly line jobs, food service jobs, clerical jobs, or law enforcement jobs. Types of work may also be determined by job-related requirements including characteristics like jobs requiring repetitive bending, reaching, or manual tasks; repetitive or heavy lifting; prolonged sitting or standing; extensive walking; or driving.

In addition to proposing a new “type of work” standard, the specific factors included in the current regulations as guiding the determination of whether the limitation on working is “substantial” have been

eliminated from the proposed regulations. Those specific factors proposed to be eliminated include the geographic area to which the individual has reasonable access, the job from which the individual has been disqualified, and the number and types of jobs using (and the number and type not using) similar training, knowledge, skills, or abilities within the geographical area from which the individual is also disqualified because of the impairment.

In the proposed interpretive guidance, the EEOC comments that in using the “type of work” standard, evidence from the individual regarding his or her educational and vocational background and the limitation resulting from his or her impairment may be sufficient for the court to conclude from the nature of the jobs implicated that he or she is substantially limited in performing a type of work. The EEOC believes that expert testimony concerning the types of jobs in which the individual is limited will no longer be necessary to establish that the limitation is substantial given this more lenient standard.

### **Clarification as to the “Regarded As” Definition of Disability**

The EEOC’s proposed regulations make clear that the definition of “regarded as” disabled no longer requires a showing that the employer perceived the individual to be substantially limited in a major life activity. Rather, an applicant or employee who is subjected to an action prohibited by the ADA because of an actual or perceived impairment will meet the “regarded as” definition of disability, unless the impairment is both transitory and minor. The EEOC’s proposed regulations further state that prohibited actions based on an impairment will include actions based on symptoms of the impairment or mitigating measures relating to the impairment.

To explain these provisions, the EEOC provides as an example that an employer that refuses to hire someone because he or she takes anti-seizure medication has regarded the individual as having a disability, even if the employer does not know the impairment for which the medication is being used. As a second example, the EEOC states that an employer who does not hire someone because of a facial tic has regarded the individual as having a disability even if the employer does not know that the tic is caused by Tourette’s syndrome. The EEOC specifically invites public comment on this particular point.

Finally, the EEOC clarifies that individuals only covered under the “regarded as” prong are not entitled to reasonable accommodation.

### **Clarification of Mitigating Measures**

The EEOC’s proposal confirms that, while employers are no longer permitted to take into account “mitigating measures” in determining whether an individual is “disabled,” employers can take into account the positive and negative effects of a mitigating measure for all other determinations—including the need for a reasonable accommodation.

### **Conclusion**

Morgan Lewis is well positioned to help employers respond to the EEOC’s proposed new regulations. In response to these regulations, Morgan Lewis will hold a one-hour webcast on October 14 at 1:00 pm ET. To register for the webcast, please go to <https://morganlewisevents1.webex.com>.

In addition, these proposed regulations are open for public comment. The Morgan Lewis Labor and Employment Practice is prepared to assist employers in their analysis of the proposed changes and their impact on employment policies, and to work with employers in submitting comments to the EEOC. We

are also considering forming a coalition of client companies for the purpose of pooling resources to provide comments on these proposed regulations.

If you are interested in a more detailed analysis of the proposed regulations, submitting comments, or possibly joining a coalition, please contact one of the team members:

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