

# 2012 RESOLUTIONS

## ENSURE COMPLIANCE WITH THE ADA AND ADA AAA

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**T**he number of disability discrimination claims has increased in recent years. According to a report by the Equal Employment Opportunity Commission (EEOC), more people filed such charges in 2009 and 2010 than at any other time in the 20-year history of the Americans with Disabilities Act (ADA) (see *ADA Charges FY 1997–FY 2010*, available at [eoc.gov](http://eoc.gov)). Whether it is attributable to a growing awareness by employees of their ADA rights, or the expansive effect of the ADA Amendments Act of 2008 (ADAAA), the trend in increased filings will likely continue.

Additionally burdensome for employers, the EEOC has initiated disability discrimination suits charging employers with failing to accommodate medical conditions that may not have been covered under the ADA's definition of disability before it was amended by the ADAAA.

In light of the ADAAA's broad definition of disability, it is imperative for employers to understand the new standards being applied in determining whether an individual has a covered disability, and focus their efforts on the interactive process and providing reasonable accommodation rather than lingering on the initial question of coverage.

### BACKGROUND

In enacting the ADAAA, which took effect on January 1, 2009, Congress overturned a series of US Supreme Court decisions perceived as taking an unduly narrow view of what constitutes a disability. Specifically, Congress noted that persons with many types of impairments, including epilepsy, diabetes, multiple sclerosis, intellectual disabilities (formerly called mental retardation), major depression and bipolar disorder, had been unable to bring claims under the ADA because they

were found not to meet the statutory definition of disability. The ADAAA was passed to make it easier for people with disabilities to obtain protection under the ADA.

Consistent with the ADAAA's mandate, the EEOC issued final regulations, effective May 24, 2011, providing guidance as to what constitutes a disability under the ADAAA. These regulations make it clear that the ADA's scope of coverage is much broader than it was in the past.

### NEW MEANING OF DISABILITY

The ADAAA retains the ADA's basic three-part definition of disability as:

- A physical or mental impairment that substantially limits a major life activity ("actual disability").
- A "record of" having such an impairment.
- Being "regarded as" having such an impairment.

However, the ADAAA and its final regulations significantly alter the way these terms are interpreted.

### LESS DEMANDING STANDARD FOR "SUBSTANTIALLY LIMITS"

Before the ADAAA, an individual claiming an actual disability had to establish a substantial limitation by showing that the impairment "prevents or severely restricts" the individual from performing a major life activity (see *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002)). The impairment also needed to be permanent or long term (see *Toyota Motor*, at 198).

The ADAAA rejects that standard in favor of a lower threshold, which is not defined in the statute or the regulations. The

EEOC explains in the preamble to the ADAAA's final regulations that it did not provide a new definition of "substantially limits" because it "would inexorably lead to greater focus and intensity of attention on the threshold issue of coverage" than was intended by the ADA. Rather, the EEOC has set forth nine rules that it will apply in determining whether an impairment substantially limits a major life activity:

1. Interpret the term "substantially limits" broadly in favor of coverage.
2. Compare the individual's limitations against most people in the general population.
3. Focus primarily on the employer's compliance obligations and whether discrimination occurred, not whether an individual is substantially limited in a major life activity.
4. Apply a lower standard during the individualized assessment than existed before the enactment of the ADAAA.
5. Scientific, medical or statistical analysis is not necessary when assessing an individual's performance of a major life activity.
6. Do not consider the helpful 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. Only one major life activity needs to be substantially limited to establish the existence of a substantially limiting impairment.
9. Conditions of short duration, which last or are expected to last for less than six months can be substantially limiting.

#### BROADER MEANING OF MAJOR LIFE ACTIVITY

To be considered a major life activity, the impaired function at issue no longer needs to be one that is "of central importance to daily life," as previously articulated by the US Supreme Court. Under the ADAAA, the term "major" is not a demanding standard. Major life activities include a broad array of activities, such as:

- Caring for oneself.
- Performing manual tasks.
- Seeing.
- Hearing.
- Eating.
- Sleeping.
- Walking.
- Standing.
- Lifting.
- Sitting.
- Bending.
- Speaking.
- Breathing.
- Learning.
- Reading.
- Concentrating.
- Thinking.
- Communicating.
- Working.
- Reaching.
- Interacting with others.

Most notably, the ADAAA adds the "operation of a major bodily function" as a major life activity. An individual with a condition that substantially limits (under the new meaning) any of the following bodily functions can have a covered disability:

- Immune system.
- Special sense organs and skin.
- Normal cell growth.
- Digestive.
- Genitourinary.
- Bowel.
- Bladder.
- Neurological.
- Brain.
- Respiratory.
- Circulatory.
- Cardiovascular.
- Endocrine.
- Hemic.
- Lymphatic.
- Musculoskeletal.
- Reproductive.
- Operation of individual organ within the body system.

These lists are not exhaustive. Given these changes, many more life activities that previously had not been considered major under the pre-ADAAA amendments to the ADA would likely be covered by the statute.

#### "VIRTUALLY ALWAYS" DISABILITIES

While an individualized assessment of disability is still required under the ADAAA, the EEOC identifies certain conditions that it deems will "virtually always" meet the definition of disability, including:

- Deafness.
- Blindness.
- Intellectual disability.
- Missing limbs.
- Mobility impairments (requiring use of wheelchair).
- Autism.
- Cancer.
- Cerebral palsy.
- Diabetes.
- Epilepsy.
- HIV infection.
- Multiple sclerosis.
- Muscular dystrophy.
- Major depressive disorder.
- Bipolar disorder.
- Post-traumatic stress disorder.
- Obsessive compulsive disorder.
- Schizophrenia.

The individual analysis of disability in these situations should be simple and straightforward, according to the EEOC.

#### "RECORD OF" AND "REGARDED AS" CASES

Individuals who are "regarded as" having a disability will have an easier time bringing disability discrimination claims than they did prior to the ADAAA. These individuals do not need to show that the mental or physical impairment they are or were perceived as having substantially limits a major life

activity. However, an employer can use the defense that the impairment is both minor and transitory, defined as lasting less than six months.

There is no duty to accommodate an individual who is covered under only the ADA's "regarded as" prong of the disability definition. But the ADA's final regulations make clear that an individual with a "record of" a disability is entitled to a reasonable accommodation, absent undue hardship.

## RECOMMENDATIONS FOR EMPLOYERS

In light of the ADA's final regulations, employers should:

- Re-evaluate their procedures for requesting medical information in response to an accommodation request to avoid imposing an unduly burdensome process on an employee to establish a covered disability.
- Request supporting documentation where the disability or need for accommodation is not obvious or known to the employer, but avoid extensive analysis of an employee's entitlement to a reasonable accommodation.
- Ensure robust procedures meet the employers' obligations to engage in an interactive process with the individual to explore potential reasonable accommodations.

Employers should:

- consider implementing policies that notify employees with disabilities of the availability of the reasonable accommodation process and to whom such requests should be directed;
  - ensure job descriptions accurately and completely capture the essential functions of positions;
  - engage in and document the interactive process;
  - evaluate thoughtfully whether an accommodation is reasonable or why it would cause undue hardship;
  - carefully consider, on an individual basis, all accommodation requests;
  - be creative in exploring alternative, less burdensome accommodations; and
  - take advantage of free consulting services and federal resources such as the Job Accommodation Network (JAN) (available at [jan.svu.edu](http://jan.svu.edu)), ABLEDATA (available at [abledata.com](http://abledata.com)) and Disability and Business Technical Assistance Centers (DBTACs) (available at [adata.org/dbtac.html](http://adata.org/dbtac.html)).
- Regularly train managers and supervisors to ensure they understand their obligations to base employment decisions on objective business facts without regard to an individual's impairment in the workplace.
  - Document the legitimate, non-disability-related reasons for employment actions.

- >> For detailed information about disability discrimination, the interactive process and reasonable accommodations, search [ADA](#) on our website.
- >> For a side-by-side comparison of the old and new disability terms under the ADA, as amended, search [Disability Definition under the ADA's Final Regulations](#) on our website.

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