

CLIENT ALERT

EEOC Issues Final Regulations on ADA Amendments Act of 2008

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The Equal Employment Opportunity Commission ("EEOC") recently issued its final revised Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended ("Regulations"), and accompanying interpretative guidance. These final Regulations, which interpret the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA"), will take effect on May 24, 2011.

The ADAAA, which became effective on January 1, 2009, significantly expanded the definition of "disability" under the Americans with Disabilities Act ("ADA") in order to "make it easier for people with disabilities to obtain protection under the ADA." The EEOC's newly issued Regulations implement this broader definition of "disability" and reflect the intent of Congress to construe the ADA in a more expansive manner after years of what it viewed as narrow interpretation by the courts.

The Regulations are extensive, and seek to minimize the emphasis previously placed on what was once the threshold question of whether an individual's impairment satisfied the definition of "disability." There, the EEOC observes that, instead, the "primary object" in ADA cases should be whether employers complied with their obligations thereunder.

Employers should take note of a number of significant provisions as they examine and implement their policies prohibiting disability discrimination. For example, the first prong of the three-prong definition of "disability," referred to in the Regulations as "actual disability," applies to a physical or mental impairment that "substantially limits" one or more of a person's major life activities. The Regulations adopt "rules of construction" that must be applied in order to determine whether an individual is substantially limited in performing a major life activity. In order for an impairment to be considered substantially limiting under the ADAAA, according to the Regulations, it is not necessary that the impairment prevent, or even severely or significantly restrict, a major life activity. Instead, the phrase "substantially limits" is construed broadly in favor of expansive coverage. In determining whether an individual is disabled, the availability of mitigating measures, such as hearing aids or medication, cannot be considered, with the exception of ordinary eyeglasses or contact lenses intended to fully correct visual acuity or to eliminate refractive error. Impairments that are episodic or in remission also constitute disabilities if they would substantially impair a major life activity when active.

The Regulations also expand the definition of the phrase "major life activities" to include "major bodily functions." In other words, an impairment that affects a major bodily function, such as the immune system or the circulatory system, will be considered a disability without an additional showing that any other activities are affected. The term "major," according to the Regulations, shall not be interpreted to create a demanding standard for demonstrating disability.

Furthermore, the Regulations provide a list of examples of impairments that "in virtually all cases" will be found to substantially limit a major life activity. That list includes, but is not limited to, deafness, blindness, intellectual disability (formerly termed mental retardation), partially or completely missing limbs or mobility impairments requiring use of a wheelchair and multiple sclerosis. Impairments which may be construed as less intuitively "substantially limiting," such as autism, cancer and "major

depressive disorder[s]," are also included on this list. Under the Regulations, "the necessary individualized assessment should be particularly simple and straightforward."

The term "disability" also applies to individuals who have a "record of" an actual disability. According to the EEOC, this provision is aimed at ensuring that individuals are not discriminated against because of a history, or misdiagnosis, of a disability. An individual may be covered by this second prong even if the employer does not know of the record of disability. The EEOC confirmed, in the Regulations, that reasonable accommodations may be required for individuals with a record of an impairment that substantially limits a major life activity. Practically, however, if an individual was misdiagnosed with an otherwise qualifying "disability," but is not otherwise "disabled," it is doubtful that they would have a basis to argue for an accommodation even under the ADAAA.

The third prong of the definition of "disability" covers individuals subjected to prohibited actions because they are "regarded as," by the employer, substantially limited in a major life activity, unless the impairment is "transitory and minor." Coverage under this prong, the EEOC observes, "should not be difficult to establish." This determination hinges on the manner in which the individual was treated by the employer, and not any functional test. The individual need not show that the employer perceived him or her to be substantially limited in the ability to perform a major life activity or that the impairment relied on by the employer was substantially limiting. The Regulations confirm that individuals merely "regarded as" disabled are not entitled to reasonable accommodations under the ADA. According to the EEOC, the "regarded as" prong "should be the primary means of establishing coverage in ADA cases that do not involve reasonable accommodation."

As stated above, the Regulations establish that the "regarded as" prong does not apply to impairments that are both "transitory," that is, having an actual or expected duration of six months or less, and "minor." The Regulations do not define the term "minor." The six month "transitory" portion of the definition of the "regarded as" prong does not apply to the "actual disability" or "record of disability" prongs. Therefore, an employee who is actually impaired or has a record of an actual disability will be considered disabled even if the impairment lasts less than six months.

The expansive interpretation of "disability" set forth in the Regulations is not surprising in light of the directive of Congress in enacting the ADAAA. The treatment of major bodily functions as a major life activity under the Regulations, as well as the list of impairments that presumptively fall under the definition of disability, represent a stark departure from the ADA as originally enacted. In issuing the Regulations, the EEOC falls into line with states, such as California, which have legislatively taken a more expansive view of those who fall within the definition of a "disability." These provisions, and others, will certainly result in more employees and applicants for employment falling within the protections of the ADA. As a result, the EEOC expects that "there will be an increase in the number of EEOC charges and lawsuits filed." We recommend that employers carefully review their employment policies, procedures, position descriptions, employment postings and the like for compliance with these principles. Employers should also take appropriate actions to ensure that their management and human resources personnel are made aware of, and where appropriate provided with training to prepare for the impact of, the new Regulations regarding matters such as recruitment, hiring, reasonable accommodation, discipline, discharge and other terms and conditions of employment.

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