

March 25, 2011

On March 24, 2011, the Equal Employment Opportunity Commission released its much anticipated Final Rule ("Final Regulations") implementing the American with Disabilities Act Amendments Act of 2008 ("ADAAA"). The Final Regulations will be published in the Federal Register on March 25, 2011.

Background on ADAAA

Enacted on September 25, 2008, the ADAAA was the result of a bipartisan effort to overturn several Supreme Court decisions and broaden the scope of the Americans with Disabilities Act of 1991 ("ADA") by expanding the definition of "disability" and certain other protections afforded by the ADA. These changes went into effect on January 1, 2009. The EEOC published a Notice of Proposed Rulemaking ("Proposed Regulations") on September 23, 2009, to address the changes to the ADA imposed by the ADAAA.

Summary of Final Regulations

The Final Regulations retain many of the provisions from the Proposed Regulations. The key provisions of the Final Regulations include:

- Providing rules of construction for employers to use when determining if an individual is substantially limited in performing a major life activity, including:
 - Finding that an impairment need not prevent or severely or significantly limit a major life activity to be considered "substantially limiting," but noting that not every impairment will constitute a disability;
 - Construing "substantially limits" broadly and in favor of coverage;
 - Determining whether an individual suffers from a disability does not require an extensive analysis, but it requires an individualized assessment;
 - Determining whether an impairment substantially limits a major life activity is made without regard to the ameliorative effects of mitigating measures, such as medication or hearing aids, but employers can consider the effects of ordinary eyeglasses or contact lenses on vision impairments;
 - Determining whether an impairment substantially limits a major life activity will not usually require scientific, medical, or statistical evidence;
 - Finding that an impairment that is episodic or in remission is a disability if it substantially limits a major life activity when active; and
 - Finding that impairments lasting fewer than six months can be substantially limiting.
- Amending the definition of physical or mental impairment to include immune and circulatory systems.
- Amending the "regarded as" prong of disability to include employers that take adverse actions based on an individual's impairment or based on an impairment the employer believes the individual has, unless the impairment is transitory and minor.

It is important to note that the Final Regulations do not amend or interpret the definitions of "qualified," "direct threat," "reasonable accommodation," and "undue hardship," and do not change who has the burden of proof in demonstrating these requirements. Moreover, the regulations recognize that individuals who only meet the "regarded as" definition of disability are not entitled to receive a reasonable accommodation.

Main changes in Final Regulations

Although the Final Regulations retain many of the provisions from the Proposed Regulations, it departs from the Proposed Regulations in several respects:

No List of Automatic Disabilities: The Proposed Regulations provided a list of certain disabilities, such as

deafness, blindness, and diabetes, that would qualify as "per se" disabilities without any individualized assessment of the impairment. The Final Regulations eliminate the "per se" category of disabilities and instruct employers to conduct individualized assessments of impairments to determine whether they constitute disabilities. Even though there should be a case-by-case assessment of impairments, the Final Regulations provide examples of impairments that should "easily be concluded to be disabilities," such as deafness, blindness, cancer, diabetes, and epilepsy.

Adds to List of Major Bodily Functions: The Proposed Regulations stated that major life activities include the operation of major bodily functions, including functions of the immune system, special sense organs and skin, normal cell growth, and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The Final Regulations add to the list of major bodily functions the operation of an individual organ within a body system (i.e., operation of the kidney, liver, or pancreas).

Adds Several New Mitigating Measures: The Proposed Regulations provided a non-exhaustive list of mitigating measures, including medication, hearing aids, mobility devices, that could be used to eliminate or reduce the symptoms or impact of an impairment. The Final Regulations expand the list to include psychotherapy, behavioral therapy, and physical therapy.

Permits Consideration of Condition, Manner, and Duration of the Impairment: In the Proposed Regulations, the EEOC did not address whether or how an employer should factor into the disability determination the conditions under which, manner in which, and length of time an individual can perform a major life activity. The Final Regulations recognize that employers may consider these factors, which may include the difficulty an individual experiences performing a major life activity, the pain experienced when performing a major life activity, the length of time the major life activity can be performed, and/or the way or extent an impairment affects the operation of a major bodily function.

Conclusion

EEOC emphasized in its press release concerning the Final Regulations that the effect of the ADAAA and the new regulations "is to make it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the ADA." Given the lesser burden on employees and other individuals to establish that they are disabled, employers need to be especially vigilant in determining whether they have affirmative obligations to provide reasonable accommodations and, if so, the accommodations that should be provided. Managers will be required to engage in a meaningful interactive process with individuals who have impairments to ascertain whether the individuals can perform essential job duties with reasonable accommodations by the employer. To ensure that this happens, employers should train their HR representatives and managers on the practical implications of the ADAAA and the Final Regulations and provide them with clear guidelines for interacting with applicants and employees.

If you would like to discuss these issues further or have questions about this *Alert*, please contact one of the attorneys listed above.

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