

MyHRHelp

Risk Management Tools

EEOC Changes Legal Landscape with Final Regulations on 2008 ADA Amendments Act

ejwong · Friday, April 29th, 2011

Background

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 was originally signed into law by President George W. Bush on September 25, 2008, and went into effect January 1, 2009. The EEOC issued a Notice of Proposed Rulemaking (“NPRM”) in September 2009, to issue regulations interpreting the ADAAA.

The goal of the ADAAA, as confirmed by the Regulations, expands the definition of “disability” to be construed “to the maximum extent permitted by the terms of the ADA.” The ADAAA alters the current legal landscape of interpreting the ADA by rejecting the holdings of several U.S. Supreme Court decisions and rejecting portions of the EEOC’s prior ADA regulations. In short, “the effect of these changes 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.”

Broadening The Definition of “Disability”

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.” The Regulations provide that the definition of “disability” should be “broadly” construed “to the maximum extent permitted by the terms of the ADA.” The Regulations track the three-part definition of “disability” retained under the ADAAA—(1) a physical or mental impairment that substantially limits a major life activity, (2) a record of such an impairment and (3) being regarded as having such an impairment. However, the Regulations also indicate that there will be a shift in focus in ADA cases to whether covered entities have complied with their obligations and whether discrimination occurred, as opposed to whether an individual meets the definition of “disability.”

List of Disabilities Causing “Impairment”

The Regulations retain only a single list of impairment examples that, based on an individualized assessment, will “easily be concluded to be disabilities” and, according to the EEOC, will result in a determination of coverage under the ADA in “virtually all cases.” The non-exhaustive list of disorders that “will, at a minimum, substantially limit the major life activities” includes: deafness, blindness, autism, cancer, cerebral palsy, diabetes, epilepsy, Human Immunodeficiency Virus (HIV), multiple sclerosis, muscular dystrophy, bipolar disorder, post-traumatic stress disorder (PTSD), obsessive compulsive disorder (OCD), major depressive disorder, and schizophrenia. Although not exhaustive, the inclusion of this list means that virtually every individual suffering from an above-stated illness is “disabled” under the ADA.

Construing “Substantially Limits”

The Regulations set forth nine rules of construction to be applied when determining whether an impairment “substantially limits” a major life activity:

1. The definition of “substantially limits” shall be broadly construed.
2. An impairment does not need to prevent or severely restrict the individual from performing a major life function to be considered significantly limiting.
3. The primary object is “whether covered entities have complied with their obligations, not whether an individual’s impairment ‘substantially limits’ a major life activity.”
4. An individualized assessment is still required for each individual.
5. “The comparison of an individual’s performance of a major life activity to the performance of the same...activity by most people in the general population” should not ordinarily require scientific, medical, or statistical analysis.
6. The ameliorative effects of mitigating measures (other than glasses or contacts) should not be considered when determining whether an impairment substantially limits a major life activity.
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 a substantially limiting impairment.”
9. Short-term impairments (lasting less than six months), can still be considered “substantially limiting.”

Of course, these factors are only guidelines for courts in their assessment of “substantially limits,” in light of the rules of construction explained by the Regulations. Accordingly, utilizing all factors may “often be unnecessary” when analyzing “whether an impairment ‘substantially limits’ a major life activity.”

Scope of “Major Life Activities” Expanded

The Regulations also expand the definition of “major life activities” through two non-exhaustive lists. The first list includes activities such as caring for oneself, seeing, hearing, eating, sleeping, walking, sitting, standing, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, interacting with others, and working. The second list includes major bodily functions of the immune system, special sense organs, normal cell growth, digestive, bladder, and musculoskeletal

functions.

Moreover, the Regulations effectively overrule *Toyota Mfg. Inc. v. Williams*, 534 U.S. 184, 187 (2002), wherein the United States Supreme Court held that when determining whether an activity qualified as a “major life activity,” the activity must have been of “central importance to most people’s daily lives.” The ADA no longer requires such a finding before determining whether an activity by an individual qualifies as a “major life activity.”

“Record of” Expansion

The Regulations also state the term “disability” now applies to individuals who have a “record of” an actual disability. The Regulations state that reasonable accommodations may be required for individuals with a record of an impairment that substantially limits a major life activity. 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. 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.

Re-defining “Regarded As”

The Regulations define the third prong of the definition of “disability” to cover individuals subjected to prohibited actions because they are “regarded as” substantially limited in a major life activity, unless the impairment is “transitory and minor.” The regulations do not define the term “minor” and define the term “transitory” as being six months or less. Otherwise, coverage under this prong “should not be difficult to establish.” The determination hinges on the manner in which the individual was treated by the employer, and not any functional test. Employees no longer need to show that their employers perceived them to be substantially limited in a major life activity to establish that they were “regarded as” disabled, but rather only that they were subjected to a prohibited action because of an actual or perceived impairment.

Mitigating Measures

The ADAAA provides that a determination of whether an impairment substantially limits a major life activity shall be made without reference to the ameliorative effects of mitigating measures (except for ordinary eyeglasses and contact lenses). The Regulations confirm that the side effects of the use of mitigating measures may be considered in determining whether the individual is substantially limited in a major life activity. Moreover, the EEOC confirmed that both the positive and negative effects of mitigating measures may be considered in determining whether an individual requires a reasonable accommodation.

What This Means for Employers

The ADAAA and interpreting Regulations set a lower bar for establishing that an

individual has a disability within the meaning of the ADA and focuses the inquiry more on whether a reasonable accommodation was made and whether discrimination occurred. For employers, this highlights the importance of implementing or updating reasonable accommodation policies and practices, including how to:

- Identify employees with a potential need for accommodations;
- Determine appropriate accommodations to consider;
- Engage in an interactive process with the employee;
- Evaluate whether potential accommodations pose an undue hardships on the employer;
and
- Continually monitor and evaluate in place accommodations to ensure that they are effective and meet the employee's (and employer's) needs.

This entry was posted on Friday, April 29th, 2011 at 11:10 am and is filed under [Disability-based Complaints](#), [EEOC](#), [News & Alerts](#), [Policies](#), [Reasonable Accommodation](#). You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. Both comments and pings are currently closed.