



LABOR & EMPLOYMENT DEPARTMENT

# ALERT

## NEW EEOC REGULATIONS FOR ADA AMENDMENTS ACT LOWER THE STANDARD FOR DISABILITY DISCRIMINATION CLAIMS

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On March, 24, 2011, the United States Equal Employment Opportunity Commission (EEOC) issued its Final Regulations (Regulations) to the Americans with Disabilities Act Amendments Act of 2008, Pub. Law 110-325; 42 U.S.C. §§ 12101, et seq., as amended (ADAAA). The EEOC issued a Notice of Proposed Rulemaking on September 23, 2009, and the final bipartisan approved Regulations were published in the *Federal Register* on March 25, 2011. The ADAAA was enacted by Congress on September 25, 2008, and became effective January 1, 2009. The ADAAA made several significant changes to the Americans with Disabilities Act of 1990 (ADA), including overturning several Supreme Court decisions that had narrowed the definition of “disability.”

The new Regulations tend to simplify the determination of who has a disability and in accordance with the ADAAA’s broader definition of “disability” make it easier for employees to establish that they are protected under the ADA. Under the ADAAA, “disability” is still defined as:

- A physical or mental impairment that substantially limits one or more major life activities (“actual disability”);
- A record or past history of such an impairment (“record of disability”); or
- Being regarded as having a disability (“regarded as disabled”).

But the ADAAA and the Regulations state that the term disability should be interpreted in favor of broad coverage of individuals. In addition, there are some key provisions of the Regulations that will likely lead to an increased number of disability claims stemming from a broad range of employees.

### Expansive Definition of “Actual Disability” Prong and “Record of” Prong

#### 1. Guidance on “Substantially Limits”

The ADAAA instructed the EEOC to redefine the term “substantially limits” in its revision of the ADA Regulations. In compliance with that directive, the EEOC established a new set of criteria for qualifying for the designation, and expanded the meaning of the term, “substantially limits.” The Regulations state that the term “substantially limits” shall be construed broadly to allow for expansive coverage to the maximum extent permitted by the ADA and that it is not meant to be a demanding standard. In determining whether an individual is substantially limited in a major life activity, employers must still conduct an individualized assessment. However, employers may compare employees to “most people in the general population” in the following respects:

- The conditions under which the individual performs the major life activity;
- The manner in which the individual performs the major life activity;
- How long it takes the individual to perform the major life activity;
- The difficulty or effort required to perform the major life activity;
- Any pain experienced; and
- The adverse effects of any mitigating measures.

The Regulations state that the comparison of an individual’s performance of a major life activity to the performance of the same major life activity by most people

in the general population will not require scientific, medical or statistical analysis. Rather employers are instructed that in determining whether an individual has a disability they should focus on how a major life activity is substantially limited, and not on what outcomes an individual can achieve.

What is also new is that the ADAAA and the Regulations extend coverage to individuals with episodic impairments or conditions in remission, if the impairment “would substantially limit” a major life activity in an active state. The Regulations specifically provide that “[t]he fact that the periods during which an episodic impairment is active and substantially limits a major life activity may be brief or occur infrequently is no longer relevant to determining whether the impairment substantially limits a major life activity.” Further, the Regulations provide a non-exhaustive list of episodic impairments, such as hypertension, asthma, epilepsy and multiple sclerosis and psychiatric disabilities such as bipolar disorder and post-traumatic stress disorder, which are statutorily covered.

Another major change in the Regulations is that they reverse prior case law and specifically state that temporary impairments are protected. “The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting” and within the protections of the ADA. As such, the Regulations’ expansion of the term “substantially limits” will significantly increase the number of employees who will be considered disabled pursuant to the ADA.

## 2. Per Se Disabilities

The EEOC encourages employers to conduct an individualized assessment when determining if an individual is disabled. However, the Regulations also list various conditions that “in virtually all cases, result in a determination” of disability. The list includes deafness, blindness, autism, cancer, diabetes, HIV, multiple sclerosis, partially or completely missing limbs, serious mental disorders such as bipolar disorder, obsessive compulsive disorder and post-traumatic stress disorder, to name a few. The Regulations will provide some clarity for employers when determining if an individual is disabled. However, by setting forth a non-exhaustive list of conditions that are by regulatory definition virtually always substantially limiting, the EEOC has effectively undermined its directive to conduct an individualized assessment.

## Expanding “Regarded as” Prong

The ADAAA also expressly increased the coverage for individuals who are “regarded as disabled,” prohibiting discrimination based on an employer’s alleged perception of an impairment, even if that impairment is not perceived as an impairment that substantially limits a major life activity. An employee who requires an accommodation or was denied an accommodation can not proceed under a “regarded as” standard. Rather, an employee who is arguing an employer should have made an accommodation, must be able to prove either that they have an actual disability or have a record of such disability. The Regulations reiterate the ADAAA directive and state that proof that an individual was discriminated against in his or her employment because of a perceived impairment suffices to establish ADA coverage. Therefore, employees with minor restrictions could be protected and could pursue an ADA claim for being “regarded as” disabled. Employers can take solace in the fact that they are not required to provide reasonable accommodations to those “regarded as” having a disability, or for those disabilities that are transitory and minor. The ADAAA defines “transitory” as lasting less than six months. However, there is no definition in either the ADAAA or the Regulations as to what is meant by a “minor” disability.

## Looking Forward

The Regulations and the ADAAA amendments they implement appear to make it easier for employees to qualify as disabled under the ADA, therefore businesses should act strategically to mitigate their ADA exposure. Focus must shift from debating whether an individual is disabled and more on the possible accommodations for disabled employees. Because of the potentially significant liability exposure, employers will generally want to consult with qualified legal counsel when confronted with any employee disability issues. In addition, employers will want to seek assistance in reviewing and updating their organization’s employment practices and/or employee policies in response to the EEOC’s Regulations.

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