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CLIENT ALERT: EEOC Publishes ADAAA Final Regulations

On March 25, 2011, the EEOC's final regulations to implement the Americans with Disabilities Act Amendments Act ("ADAAA") were published in the Federal Register. The EEOC has also issued Questions and Answers and a Fact Sheet addressing the regulations.

The EEOC issued a Notice of Proposed Rule Making ("NPRM") with draft regulations that was published in the Federal Register on September 23, 2009. Therefore, most employers are already acquainted with the ADAAA's changes and the bulk of the EEOC's new regulations, but employers should note that the EEOC made many revisions and refinements to the final regulations based on the comments and questions it received. The long-anticipated publication of the final regulations is the perfect opportunity for employers already familiar with the NPRM to review the final regulations and learn about the minor changes.

The ADAAA significantly expanded the scope of "disability" under the ADA by rejecting several Supreme Court decisions and portions of the EEOC's former ADA regulations that had adopted a narrower interpretation of disability than was originally intended by Congress. In the ADAAA, Congress directed the EEOC to revise its regulations to conform to the ADAAA's overarching purpose "to carry out the ADA's objectives of providing 'a clear and comprehensive national mandate for the elimination of discrimination' and 'clear, strong, consistent, enforceable standards addressing discrimination' by reinstating a broad scope of protection to be available under the ADA."

To effectuate that mandate, the ADAAA and EEOC regulations have retained the ADA's basic definition of disability (1) having a physical or mental impairment that substantially limits one or more major life activities, (2) having a record of such an impairment; or (3) being regarded as having such an impairment), but altered the analysis that now accompanies that definition. The new analysis results in a far more inclusive understanding of what types of impairments rise to the level of an ADA disability.

Broader interpretation of "substantially limits"

The regulations instruct that the "substantially limits" aspect of the disability definition is to be construed broadly and is not meant to be a demanding standard. It requires an individualized assessment, but the required degree of functional limitation is lower than the standard previously applied under the ADA. Specifically, the impairment at issue is not required to "significantly or severely restrict" an individual from performing a major life activity to qualify as a substantial limitation.

The regulations indicate that while every situation requires an individualized assessment, the following conditions should, in virtually all cases, easily be concluded to substantially limit the major life activities indicated:

- deafness (hearing)
- blindness (seeing)
- an intellectual disability (brain function)
- partially or completely missing limbs or mobility impairments requiring the use of a wheelchair (musculoskeletal function)
- autism (brain function)
- cancer (normal cell growth)
- cerebral palsy (brain function)
- diabetes (endocrine function)
- epilepsy (neurological function)
- Human Immunodeficiency Virus (HIV) infection (immune function)
- multiple sclerosis (neurological function)
- muscular dystrophy (neurological function)
- major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia (brain function)

The regulations also specify that measures used to mitigate the effects of an impairment (with the exception of ordinary glasses or contact lenses) cannot be considered as part of the disability determination. The regulations provide the following non-exhaustive list of examples of mitigating measures:

- medication, medical supplies, equipment, or appliances, low-vision devices (defined as devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aid(s) and cochlear implant(s) or other implantable hearing devices, mobility devices, and oxygen therapy equipment and supplies;
- use of assistive technology;
- reasonable accommodations or "auxiliary aids or services" (as defined by 42 U.S.C. 12103(1));
- learned behavioral or adaptive neurological modifications; or
- psychotherapy, behavioral therapy, or physical therapy

Thus, when determining whether an impairment rises to the level of an ADA disability, one must examine the impairment's impact as though the individual had taken no mitigating measures. For example, to determine whether an individual with a prosthetic limb has a disability, one must consider the individual's limitations without the prosthesis, not his or her functional limitations when aided by the use of the prosthesis. By way of further example, the ameliorative effects of an individual's insulin use cannot be considered when determining if the individual's diabetes qualifies as an ADA disability.

Before the enactment of the ADAAA, impairments that were episodic or in remission were not always considered as ADA disabilities because the individual was not "substantially limited" except when the impairment became active. The ADAAA and the final regulations make clear that that type of impairment qualifies as an ADA disability if it would substantially limit a major life activity when active. For example, if a person with epilepsy would be substantially limited during a seizure, even if

the seizures are infrequent and brief, that individual is disabled for ADA purposes. Other examples listed in the regulations include multiple sclerosis, cancer, hypertension, diabetes, asthma, major depressive disorder, bipolar disorder, and schizophrenia. Individuals with these types of impairments are now essentially treated as presumptively disabled under the ADA.

Expansion of "major life activities"

The ADAAA and regulations also expand the ADA's non-exhaustive list of major life activities, specifying that an activity need not be of "central importance to daily life" to qualify as a major life activity. The examples listed now include:

- Caring for oneself
- Performing manual tasks
- Seeing
- Hearing
- Eating
- Sleeping
- Walking
- Standing
- Lifting
- Bending
- Speaking

The ADAAA also created a new category of major life activity, "major bodily functions," which the regulations define to include the following:

- genitourinary
- bowel
- bladder
- neurological
- brain
- respiratory
- circulatory
- cardiovascular
- endocrine
- hemic
- lymphatic
- musculoskeletal
- reproductive functions
- the operation of an individual organ within a body system

The impact of this expanded list is heightened by the regulations' clarification that "the ability to perform one or more particular tasks within a broad category of activities does not preclude coverage under the ADA." For example, an individual with diabetes is substantially limited in his or her endocrine functions and therefore has a qualifying disability under the new "major bodily functions"

category. The individual does not need to also prove that his or her diabetes limits the major life activity of eating. The impairment only has to substantially limit one major life activity to qualify as an ADA disability. By way of further example, an individual with HIV infection is substantially limited in the function of the immune system, and therefore is an individual with an ADA disability regardless of whether his or her HIV infection substantially limits him or her in other major life activities.

Shifted focus for "regarded as"

Additionally, as directed by the ADAAA, the EEOC's regulations have made it easier for individuals to qualify for ADA protection under the "regarded as" prong of the disability definition. The regulations specify that an individual satisfies the "regarded as" requirement by establishing that he or she has been subjected to an action prohibited by the ADA because of an actual or perceived physical or mental impairment regardless of whether the impairment actually limits or is perceived to limit a major life activity. Thus, the regulations instruct that the "regarded as" analysis should focus on the employer's actions rather than what the employer might have believed about the extent of the individual's impairment. Despite this easier standard, the regulations specify that the "regarded as" clause does not apply to transitory and minor impairments, defined as having an actual or expected duration of six months or less. This "transitory and minor" exception applies only to the regarded as clause. Short-term impairments that are substantially limiting can qualify as disabilities under the other two prongs of the definition.

What employers can expect

The EEOC's final regulations are consistent with the ADAAA mandate that the ADA should be read expansively and protect individuals to the greatest extent allowable under the law. The practical implication of the expanded scope of the disability definition is that it is now easier for individuals to qualify for ADA protections. This means that employers will likely see an increase in the number of reasonable-accommodation requests they receive, as well as a general increase in disability discrimination claims. When defending against these claims, employers will see a shift in defense strategy. Because the definition of disability is now so inclusive, there will be far fewer situations in which employers will successfully contest an employee's disabled status. The focus will now almost always be on addressing the employee's ability to perform the essential functions of his or her job and demonstrating that the employer properly engaged in the reasonable-accommodation process, as well as demonstrating the reasons for taking any employment action were unrelated to the disability.

For help with applying the EEOC's new regulations to your particular circumstances, please contact your MBJ attorney.

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