CLIENT ALERT: EEOC Releases Proposed Regulations to the Americans With Disabilities Amendments Act

Recently, the Equal Employment Opportunity Commission ("EEOC") published a Notice of Proposed Rulemaking ("NPRM") in the Federal Register proposing revisions to the Americans with Disabilities Act ("ADA") regulations and to the EEOC's Interpretive Guidance related to disability discrimination. Proposed revisions that are of particular interest to employers are highlighted below; for full text of the proposed rule, see the NPRM at http://edocket.access.gpo.gov/2009/pdf/E9-22840.pdf. These new proposed rules from the EEOC were issued in response to the January 2009 Americans with Disabilities Amendments Act ("the Act"), which amended different aspects of the ADA. (*See* prior September 26, 2008 and July 9, 2009 MBJ Client Alerts regarding the ADA revisions.) These new EEOC proposed rules attempt to effectuate the ADA's revisions. Although they are not yet final, enforceable regulations, they certainly demonstrate the direction the EEOC will travel in attempting to enforce these ADA revisions.

First, the Act retains the same three-part definition of disability: a physical or mental impairment that substantially limits one or more major life activities; a record of such impairment; or being regarded as having such impairment. However, the NPRM increases the "non-exhaustive" list of activities considered to be "major life activities," and now includes "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working."

"Major life activities" under the Act also include the operation of major bodily functions such as functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, circulatory, respiratory, endocrine, and reproductive functions. The proposed regulations also add hemic, lymphatic, musculoskeletal, special sense organs and skin, genitourinary, and cardiovascular functions to this list.

The EEOC's proposed regulations also potentially lower the standard for determining whether an impairment "substantially limits" a major life activity, and states that an impairment need not "severely restrict or significantly restrict performance of a major life activity" to be substantially limiting. Instead, under the proposed rules whether an impairment "substantially limits" a major life activity depends on how the individual's activities are limited "compared to most people in the general population."

Further, mitigating corrective measures, such as medications, medical equipment and devices, and prosthetic limbs are not taken into consideration when determining whether an impairment substantially limits a major life activity. Ordinary eyeglasses and contact lenses are specifically

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excluded from the list of mitigating factors, and can be considered when determining whether an individual has a disability. Additionally, negative effects of a mitigating measure, such as a side effect from medication, can be taken into account when determining whether an impairment substantially limits a major life activity. However, when an employer is determining whether an employee needs an accommodation, both negative and positive effects of a mitigating measure may be taken into account. For example, if an employee uses a mitigating measure that eliminates the need for an accommodation, the employer is under no obligation to provide one.

The NPRM also states there are certain conditions that will consistently meet the definition of "disability" without the need for detailed analysis. These conditions are blindness, intellectual disability, partially or completely missing limbs, mobility impairments requiring the use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV, AIDS, multiple sclerosis, muscular dystrophy, major depression, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder and schizophrenia. The NPRM language suggests that these impairments should be considered *per se* disabilities because "the individualized assessment of the limitations on a person can be conducted quickly and easily and will consistently result in a determination that the person is substantially limited in a major life activity."

Also, the proposed rules make clear that impairments that are episodic or in remission can be considered disabilities if they substantially limit a major life activity while active. Examples of these kinds of conditions include epilepsy, hypertension, multiple sclerosis, asthma, cancer, depression, bipolar disorder and post-traumatic stress disorder.

The EEOC's proposed regulations also redefine what it means to be substantially limited in the major life activity of working. While the EEOC's prior regulations stated that an individual needed to be substantially limited in a "class" or "broad range of jobs" to be considered substantially limited in working, the proposed regulations provide that "[a]n impairment substantially limits the major life activity of working if it substantially limits an individual's ability to perform, or meet the qualifications for, the *type of work at issue*." (emphasis added). The "type of work at issue" includes "the job the individual has been performing, or for which the individual is applying, and jobs with similar qualifications or job-related requirements which the individual would be substantially limited in performing because of the impairment." The proposed regulations also state that the type of work at issue can be determined by comparing the work an individual is substantially limited from performing to the skills of "most people having comparable training, skills, and abilities." Alternatively, according to the EEOC, the comparison can be made between the "job-related requirements that an individual is substantially limited in meeting" and most other people performing those jobs.

The Act also had changed circumstances under which an employer can be liable for "regarding" an employee or applicant as disabled. Under the prior version of the law, the employee or applicant had to show that the employer believed that he or she had an impairment that substantially limited a major life activity. Now, an employer "regards" an individual as disabled if it acts in a manner prohibited under the ADA, such as discriminating against an applicant or employee because of a perceived impairment. An individual is not "regarded as disabled" where the impairment in question

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is minor and expected to last for six months or less.

Notably, the Act does not apply retroactively, so the prior definition of disability under the ADA will apply to alleged discriminatory practices or allegations that an employer failed to accommodate an employee that occurred prior to January 1, 2009. This is true even if the employee filed a charge with the EEOC after January 1, 2009.

The public may submit comments to the proposed regulations until Monday, November 23, 2009. At the end of this period the EEOC will evaluate all of the comments and make revisions as necessary based on the comments. The EEOC will then send a final proposed regulation to the Office of Management and Budget. The final regulations will be published in the Federal Register.

In the meantime, employers should continue to review their policies and practices to ensure compliance with the ADA Amendments Act, and consider training for supervisory and management employees to promote increased awareness and knowledge of ADA best practices when dealing with potentially disabled employees and requests for reasonable accommodations.

If you have any questions about the proposed regulations, the Act, the ADA or state disability statutes, please contact your MBJ attorney.

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