



## EEOC Issues Final Regulations under the ADAAA. Will this Mean Clarity for Employers or a New Litigation Minefield?

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On March 24, 2011, the Equal Employment Opportunity Commission ("EEOC") published its long awaited final regulations implementing the Americans with Disabilities Act Amendments Act ("ADAAA"), which replaced proposed regulations in the EEOC's September 2009 Notice of Proposed Rulemaking ("NPRM"). The ADAAA amended the Americans with Disabilities Act of 1990 ("ADA"), by broadening the definition of "disability," which thereby increased the number of individuals protected by the ADA. The final regulations were drafted after considering over 600 public comments from affected individuals, law firms, employer representatives, civil rights groups, and other government agencies. According to the EEOC, the final regulations have "streamlined the regulations to make them simpler to understand, as well as more predictable, consistent and workable."

To be protected by the ADA, an individual must work for an employer that employs 15 or more employees and be able to demonstrate that he or she is a qualified individual with a "disability." A qualified individual with a disability is a person who meets the legitimate skill, experience, education, or other requirements of an employment position that he or she holds or seeks, and who can perform the essential functions of the job with or without a "reasonable accommodation." The term "disability" means: "a physical or mental impairment that substantially limits one or more of the major life activities; a record of such impairment; or being regarded as having such an impairment."

The new regulations provide nine "rules of construction" to use when determining whether an individual is substantially limited in his or her ability to perform a major life activity. The regulations also include a "predictable assessments" section that includes impairments that will "virtually always" substantially limit a major life activity. For example, ailments such as epilepsy, cancer, HIV, diabetes, and bipolar disorder are included within this group of impairments. In addition, the list of major life activities has been expanded to include the operation of major bodily functions, including functions of the immune system, special sense organs and skin, normal cell growth, digestive, genitourinary, bowel, bladder,

neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. While the NPRM stated that major life activities include operation of the above-mentioned bodily functions, the final regulations add to the list of major bodily functions the operation of an individual organ within a body system, such as the operation of the heart, lungs, or liver.

Significantly, under the new regulations, an impairment can qualify as a disability even if it occurs periodically, like epilepsy, and even if it does not prevent a person from performing a major life activity such as walking, self-care or communicating. However, the final regulations emphasize that, while the standard for determining a disability is lower under the ADA, "not all impairments are disabilities." Although the determination of whether an impairment substantially limits a major life activity requires an individualized assessment, the new regulations emphasize that the primary focus of the ADA is to prevent discrimination. Therefore, the final regulations explain that it should not require an extensive analysis to determine whether an individual has a disability.

The new regulations also permit employers (and the courts) to consider "the manner, condition, or duration" in which an individual performs an activity when determining whether the individual is substantially limited. In addition, the final regulations remove a reference to "surgical intervention" as an example of a mitigating measure that employers should not consider in determining whether an individual's impairment substantially limits his or her ability to perform a major life activity. For example, whether an individual's inability to hear was surgically improved with a cochlear implant during childhood will not be considered as a mitigating measure. Instead, the final regulations recognize that determinations about whether surgical interventions should be taken into consideration when assessing whether an individual has a disability are better considered on a case-by-case basis.

One helpful inclusion in the final regulations for employers is an explanation of how an individual who is substantially limited in the major life activity of "working" must be unable to work in a "class or broad range of jobs." This explanation is included in the final regulations' appendix, which offers helpful interpretive guidance to the regulations and also explains that, since the list of major life activities has been expanded to include major bodily functions, "working" should be used as a major life activity only as a last resort. In contrast, the NPRM would have allowed individuals to claim a substantial limitation in working merely by showing a limitation related to his or her particular "type" of work.

The final regulations also clarify the rules for establishing when an individual is "regarded as" having a disability under the ADA. Specifically, the final regulations drop language from the proposed regulations that referred to "symptoms" of an impairment as the possible basis for a "regarded as" disabled claim. Instead, an individual can establish a claim under a "regarded as" theory simply by showing that he or she was subject to an action prohibited by the ADA (i.e., failure to hire or promote) based on an actual or perceived impairment, unless the impairment is both "transitory and minor." Thus, the focus is on how the employee or applicant was treated rather than on what the employer believes about the nature of the individual's impairment.

In addressing an employer's obligation to "reasonably accommodate" a qualified individual with a disability, the new regulations specify that accommodations may be required for individuals who have a "record of disability." Accommodations are not available to those claiming to be "regarded as" disabled.

In short, though easier to understand and apply, the final regulations promise 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." To steer clear of trouble, employers should establish concise procedures to minimize the risk of violating the ADA, proactively engage in the interactive process to determine whether covered individuals can perform the essential job duties with or without reasonable accommodation, and ensure that managers and human resources employees are well-versed on the requirements of the ADA.

*For more information about this topic, please contact the authors or any member of the Williams Mullen Labor & Employment Team.*

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