The EEOC's Final Regulations Under the ADAAA: How These Changes Will Affect Internal Policies and Procedures of Municipalities and Other Employers

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The Americans with Disabilities Act[1] ("ADA") was enacted in 1990 to prevent individuals who suffer from a disability from experiencing discrimination in a variety of places and circumstances. In September 2008, the Americans with Disabilities Act Amendment Act[2] ("ADAAA") was signed into law by then President George W. Bush and went into effect January 1, 2009. The ADAAA emphasized that the definition of "disability" should generally be construed in favor of a broad coverage of individuals "to the maximum extent permitted by the terms of the ADA."[3]

Moreover, the ADAA sought to ensure that an extensive analysis of a defined disability should necessarily take place. From the ADAAA, the term "major life activities" became a buzzword for determining whether a disability in fact existed. The ADAAA also changed the interpretation of the term "disability" by affirmatively rejecting several United States Supreme Court decisions and portions of the Equal Employment Opportunity Commission's ("EEOC") ADA regulations.[4] The purpose and 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."[5]

In September 2009, the EEOC issued a Notice of Proposed Rulemaking to issue regulations interpreting the ADAAA.[6] In May 2011, the EEOC's final revised Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended ("Regulations") and accompanying interpretative guidance went into effect.[7] These Final Regulations confirm that the ADAAA and the EEOC have intentionally and overtly lowered the bar for establishing the existence of a disability within the meaning of the ADA. As a result, the ADA now focuses the inquiry on whether a reasonable accommodation was made and whether discrimination occurred. Employers must now understand that the question changes from "Is there a disability?" to "Was a reasonable accommodation made?"[8]

A New Risk Management Analysis

The ADA amendments and the respective EEOC Final Regulations reinforce the paramount importance to employers of having — and updating — comprehensive written policies, periodic compliance audits, and manager-supervisor education programs relating to an enforcement environment that now focuses on reasonable accommodation. Included in any potential revisions should be an analysis of how to identify employees with a potential need for accommodations; the determination of appropriate accommodations to consider; the process for engaging in an interactive process with the employee; evaluating whether potential accommodations pose an undue hardship for the employer; and the ongoing, continual monitoring and evaluating of accommodations to ensure they are effective and meet the employee's (and employer's) needs.

As explained below, public employers must be aware of the significantly altered legal landscape and alter their approach to liability prevention by focusing on six new key issues: (1) a broadened definition of "disability," (2) a list of disabilities causing per se "impairment," (3) new rules that lower the standard for meeting the "substantially limits" requirement, (4) an expanded scope of "major life activities," (5) the introduction of the concept of a "record of" an actual disability, and (6) a modified interpretation of "regarded as" disabled.

Broadening the Definition of "Disability"

The EEOC's Final Regulations state there will be a shift in focus in ADA

cases from whether an individual meets the definition of "disability" to whether covered entities have complied with their obligations and whether discrimination has actually occurred.

Previously, the threshold question was whether an individual's impairment satisfied the definition of "disability." Although this question is still an important component of any analysis under the Regulations, the Regulations make it clear that any and all issues as to whether an impairment qualifies as a disability should be construed in favor of the impaired individual.[9] The Regulations provide that the definition of "disability" is to be "broadly" construed "to the maximum extent permitted by the terms of the ADA."[10]

This new broad scope given to the term "disability" is based, in part, on the continuing de-emphasis on whether an impairment actually qualifies as a disability. In contrast, the ADA, when originally enacted, focused more on whether an impairment qualified as a disability, and did not have the expansive list of impairments that presumptively fell under the definition of "disability." However, since that time, Congress — in enacting the ADAAA — and certain state legislatures have taken a more expansive view of what should come within the definition of "disability." Thus, in moving the emphasis away from the threshold question of whether the impairment qualifies as a disability, the EEOC is simply following the lead these legislative bodies have taken in expressing a desire for a more expansive view of the kinds of things that should be covered by the definition of a "disability."

Although the Regulations still track the three-part definition of "disability" retained under the ADAAA — namely: (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[11] — the Regulations minimize the emphasis once placed on whether the alleged "disability" falls under the provisions of the ADA. The Regulations accomplish this by supplying new broad interpretations of these key italicized phrases in the definition of "disability."

Disabilities Causing "Impairment"

The Final Regulations contain a single list of impairment examples that, based on an individualized assessment, should "easily be concluded to be disabilities."[12] The EEOC instructs that the impairment examples will result in a finding of a disability under the ADA in "virtually all cases."[13] 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.[14]

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Although technically still subject to an individual finding, inclusion on this list will mean, in practice, that virtually every individual suffering from an above-listed condition or illness is "disabled" under the ADA. This per se inclusion is a departure from the ADA, which originally dictated that an individualized assessment was always required to determine whether or not someone was disabled. Again, the inclusion of the "example" impairment list is more in line with the Regulations' overarching goal of moving the emphasis away from whether or not someone is disabled and instead, focusing on whether any discrimination actually took place, and what steps were taken to accommodate the impaired person.

"Substantially Limits"

The Regulations also set forth nine rules of construction to be applied when determining whether an impairment "substantially limits" a major life activity. In general, the Regulations seek to lower the standard for meeting the "substantially limits" requirement. The Regulations state that, to be considered substantially limiting under the ADAAA, the impairment does not have to prevent, severely limit, or significantly restrict a major life activity. Instead, "substantially limits" is generally to be construed broadly and in favor of expansive coverage.

The nine specified rules of construction to be applied in construing whether an impairment "substantially limits" a major life activity are:

- The definition of "substantially limits" shall be broadly construed.[15]
- An impairment does not need to prevent or severely restrict the individual from performing

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a major life function to be considered significantly limiting.[16]

- The primary object is "whether covered entities have complied with their obligations, not whether an individual's impairment 'substantially limits' a major life activity."[17]
- An individualized assessment is still required for each individual.[18]
- "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.[19]
- The ameliorative effects of mitigating measures (other than eyeglasses or contact lenses) should not be considered when determining whether an impairment substantially limits a major life activity.[20]
- "An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."[21]
- "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."[22]
- Short-term impairments (lasting less than six months) can still be considered "substantially limiting."[23]

Of course, these factors are only guidelines for courts to use in their assessment of what "substantially limits" means. Courts may or may not utilize all these factors when determining "whether an impairment 'substantially limits' a major life activity." In addition, courts may use their own different factors or guidelines as they see fit.

"Major Life Activities" Expanded

The EEOC's Final Regulations expand the definition of "major life activities" through two non-exhaustive lists, one leaning toward daily "activities," and the other leaning toward "major bodily functions." The "activities" list includes familiar daily tasks such as caring for oneself, seeing, hearing, eating, sleeping, walking, sitting, and standing, used previously by the legislation.[24] The "activities" list expands to new tasks, such as reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, interacting with others, and working.[25] These new "activities" are no longer required to be of central importance to daily life, as was previously the case. The second list includes major bodily functions of the immune system, special sense organs, normal cell growth, and digestive, bladder, and musculoskeletal functions.[26]

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Importantly, the Regulations effectively overrule *Toyota Mfg. Inc. v. Williams*,[27] wherein the United States Supreme Court held that, when determining whether an activity qualified as a "major life activity," the activity must be one of "central importance to most people's daily lives."[28] 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 second prong in the "disability" definition.[29] According to the Regulations, reasonable accommodations may be required for individuals with a record of an impairment that substantially limits a major life activity.[30] This provision is aimed at ensuring that individuals are not discriminated against because of a history, or misdiagnosis, of a disability. Moreover, the Regulations state that an employee does not have to know of the record of the disability for the individual to qualify under the ADAAA.[31] However, in practice, an individual should not be able to make a claim for an accommodation for a disability he or she does not have due simply to being misdiagnosed with that qualifying disability.

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."[32] Under the Regulations, the interpretation of "regarded as" hinges on the manner in which the individual was treated by the employer. Otherwise, coverage under this prong "should not be difficult to establish."[33] An employee no longer needs to show that the employer perceived the employee to be substantially limited in a major life activity to establish that he or she was "regarded as" disabled; rather, the employee only need show that he or she was subjected to a prohibited action because of an actual or perceived impairment.[34]

As for the employer's defense— that the impairment was only "transitory and minor"— the Regulations do not define the term "minor." However, the Act does define the term "transitory" as meaning six months or less.[35] The Regulations also do not include any examples of impairments that could be considered "transitory and minor." The burden is on the employer to show that the impairment was "transitory and minor,"[36] without the aid of any examples or clear regulatory guidance on the types of impairments that should generally be considered as such. This lack of examples and direction is in sharp contrast to the numerous, almost per se, examples of the types of impairment that should qualify as disabilities.

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).[37] 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 confirms that both the positive and negative effects of mitigating measures may be considered in determining whether an individual requires a reasonable accommodation.

Conclusion

The ADAAA and interpreting Regulations overtly set a lower bar for establishing whether an individual has a disability within the meaning of the ADA, and shift the focus of the inquiry to whether a reasonable accommodation was made and whether discrimination occurred. These regulatory developments point to a significant new direction in the approach public employers must take when developing, updating, and implementing policies, procedures and programs addressing reasonable accommodation. Most certainly, the recent May 2011 effective date of the Regulations means that attorneys will have much work ahead of them to create new responses to new compliance requirements for their respective municipality, employer, or client.

Notes

1. 42 U.S.C. §§ 12101 *et seq*.
2. Pub. L. No. 110-325, 122 Stat. 3553 (2008), codified as 42 U.S.C. § 12102 *et seq*. The Act and Regulations are available online at http://www.eeoc.gov/laws/statutes/adaaa_info.cfm.
3. 42 U.S.C. § 12102(4)(A).
4. *See, e.g.*, Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) (a "disability" had to limit more than one major life activity, and people with disabilities were not eligible under the ADA if their conditions could be mitigated by medication, assistive technology and equipment, or learned behavioral adaptations), Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002) (establishing a standard that, to be "substantially limited," an individual had to have an impairment that "prevented or severely restricted" the individual from performing activities that were of central importance to daily life).
5. 29 C.F.R. § 1630.4.
6. 74 Fed. Reg. 48431 (Sept. 23, 2009).
7. 76 Fed. Reg. 16978 (2011), codified at 29 C.F.R. pt. 1630.
8. "The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability." 29 C.F.R. § 1630.1(c)(4).
9. 29 C.F.R. § 1630.1(c)(4).
10. 29 C.F.R. § 1630.4.
11. 29 C.F.R. § 1630.2(g).
12. 29 C.F.R. § 1630.2(j)(3)(iii).
13. 29 C.F.R. § 1630.2(j)(3).
14. 29 C.F.R. § 1630.2(j)(3)(ii).
15. 29 C.F.R. § 1630.2(j)(1)(i).
16. 29 C.F.R. § 1630.2(j)(1)(ii).
17. 29 C.F.R. § 1630.4.
18. 29 C.F.R. § 1630.2(j)(1)(iv).
19. 29 C.F.R. § 1630.2(j)(1)(v).
20. 29 C.F.R. § 1630.2(j)(1)(vi).
21. 29 C.F.R. § 1630.2(j)(1)(vii).
22. 29 C.F.R. § 1630.2(j)(1)(viii).
23. 29 C.F.R. § 1630.2(j)(1)(ix).
24. 42 U.S.C. § 12102(2)(A).
25. *Id*.
26. 42 U.S.C. § 12102(2)(B)).
27. 534 U.S. 184 (2002).
28. *Id*. at 187.
29. 29 C.F.R. § 1630.2(g)(1)(ii).
30. 29 C.F.R. § 1630.2(j).
31. 29 C.F.R. § 1630.2(k).
32. 29 C.F.R. § 1630.2(g)(1)(iii).
33. 29 C.F.R. § 1630, Appendix—Interpretive Guidance on Title I of the Americans With Disabilities Act, note on *Section 1630.2(l)Regarded as Substantially Limited in a Major Life Activity*.
34. "An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." 42 U.S.C. § 12102(3)(A).
35. 42 U.S.C. § 12102(3)(B).
36. 29 C.F.R. § 1630.15(f).
37. 42 U.S.C. § 12102(4)(E)(i). ML

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