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Disabilities in the Workplace – Regulations to Implement the Equal Employment Provisions of the Americans With Disabilities Act Amendments Act

The Americans with Disability Act (ADA), 42 U.S.C. 12101, et seq., enacted in 1990 to prevent employment discrimination on the basis of an employee’s disability, defines “disability” as “a physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.”

This definition of disability has not changed; however, the enactment of the ADA Amendments Act of 2008 (ADAAA) and the final regulations promulgated thereunder have expanded the scope of this definition with specific rules of construction favorable to employees.

Starting on May 24, 2011, employers will be subject to the ADAAA final regulations, which sets forth new, lengthy rules to guide compliance with a broader application of ADA discrimination protections for an expanded class of disabled individuals.

Americans with Disability Act Amendments Act of 2008

In response to Supreme Court cases that were perceived to have restricted the definition of a disability, the ADAAA, effective January 1, 2009, was enacted to expand ADA protections by making it easier for individuals to establish the presence of a disability under the ADA. In general, the ADAAA retained the definition of disability, but expanded the scope by revising the definitions of “major life activities,” “substantially limits,” and “regarded as” with respect to having a disability. A section was also added stating that reasonable accommodations are not available to individuals who are only “regarded as” individuals with disabilities, and a provision was added about qualification standards and tests related to uncorrected vision.

Most importantly, the ADAAA included rules of construction that requires the definition of disability and the term “substantially limits” to be construed in favor of broad coverage of individuals. Furthermore, the definition of an “impairment” was greatly expanded to require only a limitation of one major life activity, and an impairment that is episodic or in remission is now considered a disability if it would substantially limit a major life activity when active.

Starting May 24, 2011, employers will be subject to the ADAAA final regulations...new rules to guide compliance with a broader application of ADA discrimination protections for an expanded class of disabled individuals.

Additionally, ameliorative effects of mitigating measures are no longer to be considered. Thus, mitigating measures such as medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies; use of assistive technology; reasonable accommodations or auxiliary aids or services; or learned behavioral or adaptive neurological modifications no longer are to be examined. However, the ameliorative effects of ordinary eyeglasses or contact lenses are to be considered in determining whether an impairment.

In short, the ADAAA makes it easier for employees to meet the definition of disability under the ADA, expands the class of employees protected by this Act by first eliminating the consideration of mitigating measures (except ordinary eyeglasses or contact lenses) when determining whether a person's impairment substantially limits a major life activity, and expands the definition of "major life activities" with two non-exhaustive lists of examples that include major bodily functions.

Final ADAAA Regulations and Appendix

The Equal Employment Opportunity Commission (EEOC) issued final regulations on March 25, 2011, effective May 24, 2011, with the intent to provide enforceable standards under the ADA. Consistent with this purpose, the final regulations provide detailed guidance for analyzing disabilities protected by the ADAAA under each of the "prongs" – the "actual disability" prong; the "record of" prong, and/or the "regarded as" prong. The regulations clarify the meanings of the terms "physical or mental impairment," "major life activities," "substantially limits," "a record of," and "regarded as," with examples and applications.

The regulations specifically indicate that the terms "substantially limits" and "a record of" are to be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA, and the term "major life activities" should not be interpreted strictly to create a demanding standard for disability. Further, the regulations expand the definition of "major life activities" to include certain major bodily functions, including functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, reproductive functions, and the operation of an individual organ within a body system.

In a disability discrimination case, the regulations emphasize that the inquiry should be whether discrimination has occurred, and not whether an impairment "substantially limits" a major life activity. A "substantial limitation" is determined without regard to ameliorative effects of mitigating measures or the fact that an impairment is episodic or in remission, and with no requirement that an impairment prevent, or severely or significantly restrict a major life activity, which was the standard in effect prior to the regulations.

An individual "regarded as" having an impairment does not require a reasonable accommodation, which means the determination of whether an impairment "substantially limits" an employee is not relevant to the inquiry. In addition, for claims brought under the "regarded as" prong, a defense is available for an employer that can prove the impairment is both "transitory" (lasting or expected to last six months or less) and "minor."

Finally, the regulations clarify the rights of disabled employees under the ADAAA by prohibiting discrimination on the basis of disability with respect to specific employment actions, including actions relating to hiring, demotions, terminations, pay changes, job assignments and classifications, leave, fringe benefits available, training and financial services, social events, and "any other term, condition, or privilege of employment." An individual may not be subject to qualification standards and/or tests that tend to screen out an individual with a disability or a class of individuals with disabilities unless selection is made based on uncorrected vision for a job related reason that is a business necessity.

How the Final ADAAA Regulations Differ From the Proposed ADAAA Regulations

In drafting the final ADAAA regulations and the accompanying final appendix, the EEOC considered over six hundred comments submitted by individuals, federal and state agencies and commissions, civil rights groups, disability groups, health care provider groups, employer associations, and attorneys.

Based on these comments, the EEOC modified the proposed ADAAA regulations in an attempt to provide clarity where groups expressed confusion with respect to the analysis of ADA coverage. The final regulations set out up front the purpose of the ADAAA to “make it easier for people with disabilities to obtain protection under the ADA” by construing the definition of disability “broadly in favor of expansive coverage.” This language was added to the final regulations, as a result of the EEOC’s concern that the proposed regulations failed to articulate this intent. Thereafter, the EEOC modified the structure of the proposed regulations and inserted additional rules and guidance for the determination of a disability under the ADA.

Nine Rules of Construction. The EEOC built on the language of the proposed regulations to form nine “rules of construction” for use in determining whether an impairment is substantially limiting for purposes of analyzing whether an impairment is an ADA protected disability under the “actual disability” and “record of” prongs of the definition of disability:

1. Construe the term “substantially limits” broadly in favor of expansive coverage.
2. Determination of “substantially limits” is made by comparing an individual’s ability to perform a major life activity with “most people in the general population.”
3. Focus of ADA coverage should be on whether an employer has complied with their obligations, which means the analysis of whether an impairment “substantially limits” a major life activity should not be demanding.
4. The “substantially limits” assessment should be individualized and applied as a lower standard than that used prior to the ADAAA.
5. Use of scientific, medical, or statistical analysis as evidence that an impairment “substantially limits” a major life activity is not required or prohibited.
6. The ameliorative effects of mitigating measures is not considered in the “substantially limits” analysis, with the exception of eyeglasses and contact lenses.
7. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
8. An impairment need only impair one major life activity to be considered a substantially limiting impairment.
9. An impairment need not be “transitory and minor,” which means impairments that last fewer than six months may be substantially limiting.

Of these rules, the only new provisions added to the final regulations are #5 (use of scientific, medical or statistical evidence) and #8 (only one major life activity need be impaired). All of the other rules were contained within the proposed regulations.

In addition to the nine rules of construction, the final regulations add that a substantial limitation may be established by the “condition, manner, or duration” of the impairment in certain situations. Further, the type of evidence permitted for establishing whether an impairment would be substantially limiting without using the ameliorative effects of a mitigating measure that the individual uses was added to the final appendix. Such evidence includes: evidence of limitations a person experienced prior to using a mitigating measure; evidence concerning the expected course of a particular disorder absent mitigating measures; or readily available and reliable information of other types.

The final regulations add examples to the proposed regulations list as to what constitutes mitigating measures: psychotherapy, behavioral therapy and physical therapy. The final regulations eliminate the example of “surgical interventions, except for those that permanently eliminate an impairment” as a mitigating measure; rather, the determination of whether a surgical intervention is a mitigating measure should be made on a case-by-case basis.

While mitigating measures may not be considered when assessing whether an impairment is substantially limiting, the final regulations specify that any negative, non-ameliorative effects of mitigating measures may in fact be considered.

The proposed regulations advised that the determination of an individual’s ability to perform a “major life activity” be compared with the abilities of “most people in the general population.” The final regulations state that use of scientific, medical, or statistical analyses may be used to establish this comparison, but is not required. Further, the EEOC added language to clarify that a comparison to “most people” also applies to individuals with learning disabilities, even though the learning disability itself may have been diagnosed by a different comparison.

Comments questioned the application of the ADAAA to pregnancy-related conditions. To address this issue, the EEOC revised the regulations to provide that, while pregnancy itself is not an impairment that the ADA regards as a disability, a pregnancy-related condition may be considered a disability if the impairment substantially limits a major life activity. Further, the final regulations provide that where there is a “record of” the pregnancy-related impairment that substantially limits a major life activity, or an individual is “regarded as” having a pregnancy-related impairment that is not “transitory and minor,” such pregnancy-related impairment may not be the basis for a prohibited employment action.

Coverage Under the ‘Regarded As’ Prong. In the final regulations, the EEOC clarified how to analyze coverage under the “regarded as” prong for establishing a disability. Under the “regarded as” prong, the ADA protects individuals regarded as having actual or perceived impairments that are not transitory or minor from discrimination by their employers. As a result of the ADAAA and the accompanying regulations, the class of individuals that may proceed with a disability established under the “regarded as” prong is expanded to include all actual and perceived impairments that are not transitory or minor, regardless of whether or not the impairment substantially limits a major life activity, which means the number of claims brought under the “regarded as” prong is likely to increase. While the “regarded as” prong was not often used as a source of coverage prior to the ADAAA, this is expected to change due to the expanded class of individuals covered under the “regarded as” prong, as well as the explicit instruction of the final regulations to initially evaluate all situations that do not involve reasonable accommodation under the “regarded as” prong for establishing a disability.

The Impact of the ADAAA and the Final Regulations on Employers

Accommodation Costs. Employers are now responsible for providing accommodations to a more expansive class of disabled employees. This class includes employees limited by functions of the immune system, normal cell growth, and brain, neurological, and endocrine functions, which includes employees suffering from autism, multiple sclerosis, muscular dystrophy, cancer, diabetes, epilepsy, cerebral palsy, HIV infection, and mental disabilities.

The types of accommodation these individuals will most commonly need are changes in schedule (revising start and end times or break times), swapping of marginal functions, the ability to telework, policy modifications (e.g., altering for an individual with a disability when or how a task is performed, or making other types of exceptions to generally-applicable workplace procedures), allowing employees to make up hours missed, creating compressed workweek schedules, reassignment to a vacant position for which the individual is qualified, time off for treatment or recuperation, or other similar accommodations. The costs associated with these accommodations may include administrative costs associated with implementation of the accommodations, equipment costs for employees working from home, temporary replacement of the disabled employees, and lost productivity.

Some larger, one time costs may be incurred for physical accommodations for ADA covered employees, including voice recognition software for individuals with difficulty typing, a large computer screen for individuals with difficulty seeing, accessible restrooms, automatic doors, and the installation of a ramp or other means of physical access.

Legal and Administrative Costs. While the ADA and the final regulations are intended to minimize litigation with respect to certain provisions of the law, the expanded class of individuals protected by the ADA from disability discrimination will likely result in an increase in the number of disability discrimination charges filed with the EEOC, increased lawsuits, and additional costs incurred from defending these actions.

In order to comply with the new rules regarding disability discrimination and avoid ADA violations, employers may incur expenses associated with updating internal policies and procedures to reflect the broader definition of disability, training personnel to ensure appropriate compliance with the ADA and the final regulations, and adjudicating additional requests for accommodations.

Conclusion

The ADA, effective with respect to discriminatory acts that occurred on or after January 1, 2009, significantly broadened protections for disabled employees. The ADA final regulations, effective May 24, 2011, provide additional guidelines for employers to comply with a stricter discrimination law as applied to a larger class of disabled individuals. Therefore, it is critical for employers to become familiar with the new rules of the ADA final regulations and monitor their compliance with the rules in order to avoid inadvertent violations.

This *GT Alert* was prepared by Eric B. Sigda and Abby Natelson. Questions about this information can be directed to:

- [Eric B. Sigda](mailto:sigdae@gtlaw.com) – 212.801.9386 | sigdae@gtlaw.com
- [Abby Natelson](mailto:natelsona@gtlaw.com) – 212.801.9322 | natelsona@gtlaw.com
- Any member of [Greenberg Traurig's Labor & Employment Group](#) listed below
- Or your [Greenberg Traurig](#) attorney

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GT's LE Blog at <http://www.gtleblog.com/>.

Albany
518.689.1400

Amsterdam
+31 20 301 7300
Dennis Veldhuizen

Atlanta
678.553.2100
Ernest LaMont Greer
David Long-Daniels
Natasha Wilson
Todd D. Wozniak

Boston
617.310.6000
Joseph W. Ambash
Paul Murphy

Chicago
312.456.8400
Ruth A. Bahe-Jachna
Paul T. Fox
Michael D. Karpeles
Matthew Prewitt

Dallas
214.665.3600
Hugh E. Hackney

Delaware
302.661.7000

Denver
303.572.6500
Naomi G. Beer
Jeannette M. Brook
Brian L. Duffy

Fort Lauderdale
954.765.0500
William R. Clayton
Paul B. Ranis
Caran Rothchild
Michele L. Stocker

Houston
713.374.3500
L. Bradley Hancock
Mary-Olga Lovett

Las Vegas
702.792.3773
Tami Cowden
Mark D. Kemple

London*
+44 (0) 203 349 8700
Naomi Feinstein

Los Angeles
310.586.7700
Michelle Lee Flores
Mark D. Kemple

Miami
305.579.0500
Joseph Z. Fleming
Julissa Rodriguez
Ronald M. Rosengarten

New Jersey
973.360.7900
Jonathan Israel
Eric B. Sigda

New York
212.801.9200
Jerrold F. Goldberg
Jonathan Israel
Abby Natelson
Eric B. Sigda
Jonathan Sulds

Orange County
949.732.6500
Richard Hikida
Todd R. Wulffson

Orlando
407.420.1000
Michele Johnson
Ronald Schirtzer

Palm Beach County North
561.650.7900
Bridget A. Berry
Mark F. Bideau
Lorie M. Gleim

Palm Beach County South
561.955.7600
Stephen A. Mendelsohn

Philadelphia
215.988.7800
James N. Boudreau
Kelly Bunting
Robert M. Goldich

Phoenix
602.445.8000
Mary E. Bruno
John Alan Doran
Michael Mason
Daniel B. Pasternak
Lawrence Rosenfeld
Mona M. Stone
Jeffrey H. Wolf

Sacramento
916.442.1111
Kurt A. Kappes
Carol Livingston
James Nelson

San Francisco
415.655.1300
Scott Lawson
Kenneth Steinthal

Shanghai
+86 21 6391 6633

Silicon Valley
650.328.8500
William J. Goines
Magan P. Ray

Tallahassee
850.222.6891
Lorence Bielby
John Londot

Tampa
813.318.5700
Cynthia May
Richard C. McCrea
Peter Zinober

Tysons Corner
703.749.1300
Craig A. Etter
John Scalia

Washington, D.C.
202.331.3100

White Plains
914.286.2900

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