BY-LINED ARTICLE

Presumed Disability: Proposed regulations reflect the EEOC's intent to vigorously enforce the amended Americans with Disabilities Act

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May 2010
HR Magazine

 As the Americans with Disabilities Act approaches the 20th anniversary of its enactment this summer, it finally may be about to enter its prime.

Much about the law, signed initially by President George H.W. Bush on July 26, 1990, remains uncertain. Just a single candle has been lit since the law was expanded by the Americans with Disabilities Act Amendments Act, signed into law by President George W. Bush on Sept. 25, 2008, and effective on Jan. 1, 2009. Next January, the Amendments Act will enter the terrible twos.

Since enactment of the Amendments Act, employers have voiced renewed interest and concern, particularly after the U.S. Equal Employment Opportunity Commission (EEOC) issued proposed regulations to enforce the Amendments Act. The proposed regulations reflect the view that federal officials will presume certain impairments are covered by the Americans with Disabilities Act (ADA). The proposed rule is particularly illuminating because it presents an unvarnished picture of official thinking on the amendments' effect—thinking that should give employers pause: Commission officials apparently conclude that a large number of impairments now will be considered ADA disabilities.

Many organizations and employers have commented that the proposed regulations stray from the individual determination of disability that remains part of the ADA.

Whether the commission wins the battle over how to interpret the Amendments Act in the rulemaking process, and ultimately in the courts, remains to be seen. But make no mistake: By the Amendments Act, the EEOC was dealt a winning hand in litigation, one that employers should not assume is mere bluff.

Broadened Coverage

Although the proposed rule took some employers by surprise, most employers have been aware for some time that the Amendments Act gives the ADA a much more expansive reach.

True, the ADA's two critical components remain unchanged. An employer:

- Still cannot discriminate against a qualified individual with a disability.
- Must make reasonable accommodations on behalf of qualified individuals with disabilities, as long as the accommodations do not impose undue hardship.

However, the ADA's definition of disability was expanded by the Amendments Act. The amendments were passed by Congress based on the idea that the U.S. Supreme Court had improperly and severely narrowed the protections of the ADA. As a result, the amendments overturn Toyota Motor Manufacturing Kentucky Inc. v. Williams, 534 U.S. 184 (2002), and Sutton v. United Air Lines Inc., 527 U.S. 471 (1999).

The commission subsequently issued proposed regulations on Sept. 23, 2009. While these regulations were not final when this article went to press, the commission made clear its intent to interpret the new law expansively.

Five Significant Changes

Under the amendments, "disability" continues to be defined as a physical or mental impairment that substantially limits one or more major life activities.

However, the amendments made five significant changes to various terms used in the definition of "disability" to broaden coverage.

Specifically, the amendments:

- Broaden the definition of "substantially limits."
- Establish a specific, yet not exhaustive, list of major life activities.
- Establish that episodic conditions and conditions in remission may constitute disabilities.
- Prohibit consideration of most mitigating measures in determining whether an individual has a disability.
- Broaden the definition of being "regarded as having an impairment."

When evaluating these changes, keep in mind the amendments' command to employers, judges and juries: "The definition of disability shall be construed in favor of broad coverage of individuals under the ADA, to the maximum extent permitted by the terms of the ADA."

'Substantially Limits'

The EEOC took this command to heart in its proposed regulations. It defines "substantially limits" broadly. An impairment need not prevent, or significantly or severely restrict, an individual's performance of a major life activity to be considered "substantially limiting" and rising to the level of a disability, according to the proposed rule.

Conspicuously absent from the proposed regulations are any references to the factors of "condition, duration and manner" in assessing whether an impairment substantially limits a major life activity—factors that are mentioned in the current ADA regulations.

The Society for Human Resource Management (SHRM), and other groups, have asked the commission to change the proposed rule to specify that these factors be considered in determining whether an impairment is substantially limiting.

Even if the changes are made, do not forget that "substantially limits" has in fact been substantially broadened by the amendments. Moreover, the significance of this expansion can be fully understood only in connection with the other changes made by the amendments.

Major Life Activities

Originally, the ADA did not include examples of major life activities, although the Supreme Court indicated in Toyota that "major life activities" should be interpreted narrowly.

In contrast, the amendments provide a list of major life activities—and define them broadly. These activities include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, speaking, breathing, learning, concentrating, thinking, interacting with others and working. Proposed regulations expand the list by adding bending, reading and communicating.

The amendments go further by adding major bodily functions to the list of major life activities: functions of the immune system; normal cell growth; and bladder, bowel, brain, circulatory, digestive, endocrine, neurological, respiratory and reproductive functions. The proposed regulations expand this list by adding hemic, lymphatic, musculoskeletal, special sense organs and skin, genitourinary, and cardiovascular functions.

Under the amendments, it remains true that if an individual is substantially limited in one major life activity, it is not necessary that the condition limit other major life activities. For example, if an individual is substantially limited in a major life activity other than working, it will be unnecessary to determine whether he or she is substantially limited in working. Conversely, if an individual is substantially limited in the major life activity of working, it will be unnecessary to determine whether he or she is substantially limited in another major life activity. This affects the amount of information an employer has a need, or right, to obtain.

The major life activity of working has been defined broadly in the proposed regulations. Under the prior law, an individual generally had to be precluded from performing a broad range of jobs. Under the proposed regulations, the individual must be limited in performing only a more narrowly defined "type of work": certain types of jobs such as assembly line work or commercial truck driving, or jobs requiring repetitive tasks. These might include heavy lifting or prolonged sitting or standing.

How the EEOC and courts wind up interpreting all of the amendments' expansive terminology remains to be seen, but the trend should be clear to employers: More individuals will be covered by the ADA.

Episodic Conditions

For example, prior to the amendments, some courts had ruled that episodic conditions and conditions in remission were not disabilities because the conditions were not substantially limiting at the time of the adverse action.

The amendments clarify that an episodic impairment or one in remission are disabilities if they would substantially limit a major life activity when active. Examples include asthma, depression, epilepsy and hypertension.

Mitigating Measures

Overturning Sutton, the amendments clarify that the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. Examples of measures that may not be considered in assessing whether an employee has a disability include medication, medical devices, prosthetics, hearing aids, mobility devices and assistive technology.

There is a specific but not unlimited exception for eyeglasses.

Expansion of 'Regarded As'

Perhaps the biggest expansion of the law relates to the "regarded as" prong. Previously, an individual could be perceived as disabled generally only if the individual:

- Had a physical or mental impairment that substantially limited a major life activity as a result of the attitude of others toward the impairment.
- Did not have a physical or mental impairment that substantially limited a major life activity but was treated as having a substantially limiting impairment.

As a result of the amendments, an individual may be regarded as having a disability if he or she is subject to adverse action because of actual or perceived physical or mental impairment, "whether or not the impairment limits or is perceived to limit a major life activity." "Substantially limits" is entirely removed from this part of the analysis.

The amendments include a narrow exclusion for temporary and minor conditions. Temporary means expecting to last six months or fewer. But this exclusion applies only to perceived disabilities and does not apply to claims of discrimination based on current or prior disabilities.

Ballooning Definition

Under its proposed regulations, the EEOC took an aggressive stance, listing certain impairments that will consistently meet the definition of disability: AIDS, autism, bipolar disorder, blindness, cancer, cerebral palsy, deafness, diabetes, epilepsy, HIV, intellectual disabilities, major depression, mobility impairments requiring the use of a wheelchair, multiple sclerosis and muscular dystrophy, obsessive-compulsive disorder, post-traumatic stress disorder, and schizophrenia.

SHRM and other groups have expressed concern that the commission's identification of certain impairments as disabilities is inconsistent with the individual functional assessment established by the ADA.

However, even if the regulations are modified by the commission or the regulations are rejected by the courts, we now have insight into how federal officials perceive these conditions. It may be difficult to convince them that these impairments are not disabilities.

Case-by-Case Analysis

The proposed regulations also list impairments that may be disabling for some individuals but not for others. Examples include asthma, back or leg impairments, carpal tunnel syndrome, high blood pressure, hyperthyroidism, learning disabilities, panic disorder and depression other than major depression, and psychiatric impairments such as anxiety disorder. Again, even if the regulations change, we now know that, with regard to these and similar conditions, the EEOC is likely to allow employers more flexibility in evaluating the extent of the impairment to determine whether the individual has an ADA disability.

Finally, the proposed regulations list impairments that are not usually disabilities, as follows: Temporary impairments of short duration with little or no residual effects will not be deemed disabilities. Examples include a broken bone expected to heal completely, the common cold, minor and not chronic gastrointestinal disorders, seasonal or common influenza, and a sprained joint.

The bottom line is that more conditions will be considered ADA disabilities. As a result, the focus for employers no longer will be what constitutes an ADA disability, but instead what constitutes a reasonable accommodation, the subject of next month's "Legal Trends" column.