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New ADAAA Regulations Support Lower Barriers for ADA Plaintiffs

At long last, and after fielding over 600 public comments received since September 2009, the Equal Employment Opportunity Commission ("EEOC") recently issued its final revised regulations and accompanying interpretive guidance to implement the ADA Amendments Act of 2008 ("ADAAA"). The final regulations and the new Interpretive Guidance take effect on May 24, 2011.

Background

The ADAAA went into effect on January 1, 2009, amending the ADA primarily for the purpose of expanding the definition of what constitutes a "disability and reinstate[ing] a broad scope of protection for individuals with disabilities." The underlying concern was that too many employers (and courts) focused on whether an individual had a disability at all instead of whether the individual was qualified or could be provided a reasonable accommodation. To that end, the ADAAA overturned several Supreme Court decisions that had limited the ability of an individual to establish a "disability" under the ADA.

The EEOC is the agency charged with the development of regulations implementing the ADAAA (as well as enforcement of the statute). In keeping with that function, on September 23, 2009, the EEOC proposed a new set of regulations to implement the ADAAA. The Commission failed to enact these proposed regulations. Instead, the proposals were subject to a broad spectrum of public comments. After more than two years, the recently-published final version of these reflects a number of changes from the original proposed regulations.

Focus of the New Regulations: A Broad Definition of "Disabled"

In line with the ADAAA, the EEOC's regulations try to limit an employer's focus on whether a particular employee or individual has a disability in the first place, and move the focus to other parts of the accommodation analysis, such as whether the employee is qualified or there is a reasonable accommodation that can be provided. Therefore, the new regulations reiterate the ADA's original definition of "disability" as a physical or mental impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. The regulations emphasize that consistent with the ADAAA's purpose of reinstating a broad scope of protection under the ADA, the definition of "disability" shall be construed in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. This significantly eases the burden on plaintiffs to establish that they fit the definition of "disabled."

New "Rules of Construction" Determine "Substantially Limiting" Impairments

Rather than providing a static definition for impairments that "substantially limit" major life activities, the EEOC now provides nine "rules of construction" for that determination. These rules include the following:

- "Substantially limits" is not meant to be a demanding standard and shall be construed broadly in favor of the most expansive, maximum coverage permitted by the ADA.
- An impairment is a disability if it substantially limits an individual's ability to perform a major life activity as compared to most people in the general population, but it no longer need not prevent or significantly/severely restrict the individual from performing a major life activity in order to be considered substantially limiting.
- 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 an individual's impairment substantially limits a major life activity;
- Determining whether an impairment substantially limits a major life activity requires an individualized assessment, but the degree of functional limitation for this is lower than the standard for "substantially limits" applied prior to the ADAAA;

- Comparing an individual's performance of a major life activity to the performance by most people in the general population usually will not require scientific, medical, or statistical analysis (but where appropriate, this analysis is not prohibited);
- Determining whether an impairment substantially limits a major life activity should be without regard to the ameliorative effects of mitigating measures unless they are ordinary eyeglasses or contact lenses;
- An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active;
- An impairment substantially limiting one major life activity need not substantially limit others to be considered a substantially limiting impairment;
- Effects of an impairment lasting or expected to last fewer than six months can still be "substantially limiting."

"Substantially limiting" is therefore a moving target, relying upon a case-by-case assessment that requires assessment of the difficulty, effort, or time it takes the individual to perform the major life activity with little regard to the outcome.

Despite the new rules of construction, the regulations explicitly direct focus away from an analysis of whether an individual's impairment "substantially limits" his or her activities. According to the regulations, this element "should not require extensive analysis." Instead, the focus of an ADA case should be on whether the employer has complied with its obligations (*i.e.,* whether adverse decisions were impermissibly made by the employer on the basis of disability, whether reasonable accommodations were denied, or whether qualification standards were unlawfully discriminatory).

Expansion of the "Record of" Prong

The new regulations also expressly provide that when an employee has a record of a disability (that is, a record of once having an impairment that substantially limited a major life activity), the employer must provide reasonable accommodation. Such scenarios, while potentially uncommon, may include reasonable accommodations to prevent recurrence of a former disability.

Expansion of the "Regarded As" Prong

The new regulations greatly expand what individuals may be covered by the "regarded as" prong. Court decisions have previously required an individual to establish that an employer perceived them as having an impairment that substantially limited a major life activity in order to qualify as "disabled" under the "regarded as" prong of the definition. Under the ADAAA, an individual may establish coverage under the "regarded as" prong merely by showing that he or she was treated adversely because of impairment - *without* having to establish what the employer's beliefs were about the severity of the impairment. The new regulations reinforce that an employee is now "regarded as" having a disability if he/she is subjected to a prohibited action because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity. Stated differently, an employer need not regard someone as having a disability that would qualify as an actual disability under the ADA, but merely as having impairment.

The onus is still upon the plaintiff to demonstrate a causal connection between the prohibited action and the alleged actual or perceived impairment. And the new regulations provide an exception to coverage under the "regarded as" prong where the impairment on which a prohibited action is based is both transitory (having an actual or expected duration of six months or less) and minor. The employer must demonstrate not that it subjectively believed that the impairment was transitory and minor, but that the actual or perceived impairment was or would have been transitory and minor. However, the EEOC's focus on the "and" means that major or severe conditions lasting less than six months may be covered, and minor conditions lasting just over six months (or longer) may be covered.

Moreover, if the plaintiff meets the definition of disability only under the "regarded as" prong, the employer is not required to provide a reasonable accommodation to the perceived disability. The regulations emphasize that if an accommodation request is not at issue, the "regarded as" prong of the definition should be the primary means for bringing a disability discrimination claim, as it will be easier for an employee to establish a disability under this prong of the definition. As an example, the Interpretive Guidance includes a scenario wherein a factory worker laid off due to her carpal tunnel syndrome would not, previously, have been considered as "regarded as substantially limited in working," because she could perform other jobs. She would now be protected under the "regarded as" prong because she was fired because of her carpal tunnel syndrome, an indisputable impairment.

Ramifications for Employers

The EEOC's new regulations reinforce the ADAAA's statutory directive that employers are not to focus their primary attention on whether an individual is disabled, but on whether he or she is qualified and whether there is a reasonable accommodation that can be provided. Although the new regulations do state that "[n]ot every impairment will constitute a disability," there are very few examples of what does *not* constitute a disability, other than an impairment only needing eyeglasses or contact lenses.

By explaining and clarifying the ADAAA's expanded definition of disability, the new regulations are likely to result in a further increase in ADA claims brought against employers. In light of the ease with which employees can fall under the definition of "disabled," employers should be prepared to recognize their obligations to accommodate more employees than they have in the past. And while employers may still request medical documentation of the need for an accommodation, there should not be extensive analysis as to whether the employee is entitled to an accommodation. Employers should also ensure that front-line managers and supervisors are aware of the changed rules regarding disabilities and alerted to the need to accommodate a wide range of impairments. Given the expanded definition of what constitutes a "regarded as" disability, as well as the EEOC's GINA regulations that make it illegal for an employer to receive any information about a family member's medical or health information, employers should consider training their front-line supervisors and managers on what information or questions they can and cannot ask when an employee discusses either his or her own potential medical condition, or that of the employee's family. Finally, employers should ensure that their Employee Handbooks detail a process designed to facilitate accommodation to an employee's disability, and take steps to monitor that this process is followed in practice.

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