

Labor and Employment E-news

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The EEOC Issues Final ADA Regulations and Accompanying Interpretive Guidance Implementing the ADA Amendments Act of 2008

Butzel Long will be holding a webinar on the new ADAAA regulations next month. Please watch for the invitation in your inbox.

On Friday, March 25, 2011, the Equal Employment Opportunity Commission published its final regulations and accompanying interpretive guidance to implement the ADA Amendments Act of 2008 ("ADAAA"). The final regulations will take effect on May 24, 2011.

Background

The ADAAA was signed into law by President George W. Bush on September 25, 2008, with a statutory effective date of January 1, 2009. In the ADAAA, Congress directed the EEOC to revise its regulations to conform to changes made by the Act. On September 23, 2009, the EEOC published proposed regulations under the ADAAA. The EEOC received more than 600 public comments on its proposed regulations from affected individuals, civil rights groups, employer representatives, and other government agencies.

The changes contained in the final regulations update the EEOC's disability regulations and implement the ADAAA. The final regulations are intended to simplify the determination of who has a "disability" and make it easier for workers to establish that they are protected by the ADA.

For example, the ADAAA and the final regulations define a disability using a three-pronged approach:

- a physical or mental impairment that substantially limits one or more major life activities (sometimes referred to in the regulations as an "actual disability"); or
- a record of a physical or mental impairment that substantially limits a major life activity ("record of"); or
- when a covered entity takes an action prohibited by the ADA because of an actual or perceived impairment that is not both transitory and minor ("regarded as").

“Major Life Activities” Under the New Regulations

What constitutes a “major life activity” has been a significant issue in litigation. The final regulations provide a non-exhaustive list of examples of major life activities, with the intent of providing a broader construction of that term, including: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working. The new regulations have added *reading*, *bending* and *communicating* to the list of activities which, if substantially limited, could be deemed a disability.

The final regulations also provide that major life activities 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, lymphatic, musculoskeletal, and reproductive functions. The final regulations state that major bodily functions include the operation of an individual organ within a body system (e.g., the operation of the kidney, liver, or pancreas).

“Physical or Mental Impairments” Under the New Regulations

The final regulations also define “physical or mental impairment” as any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, lymphatic, skin and endocrine. They also cover any mental or psychological disorder, such as intellectual disability (formerly termed mental retardation), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Coverage of Impairments Which are “Episodic” or “In Remission” Under the New Regulations

While much in the final regulations and accompanying guidance is not surprising and comports with the language of the ADAAA, there are some significant changes to note. For example, the ADAAA and the final regulations extend coverage to individuals with an impairment that is *episodic* or *in remission*, if the impairment would substantially limit a major life activity when active. The non-exhaustive list of examples of such conditions includes epilepsy, multiple sclerosis, cancer, and psychiatric disabilities such as major depressive disorder, bipolar disorder, and post-traumatic stress disorder. Indeed, an impairment such as cancer, that is in remission but that may possibly return in a substantially limiting form, will be a disability under the ADAAA and the final regulations.

Disabilities Presumed to be Covered Under the New Regulations

Furthermore, while the final regulations do not establish any conditions which are *per se* protected disabilities, they do provide examples of specific impairments that should “easily” be concluded to be disabilities, as well as examples of major life activities that the impairments substantially limit. The impairments include: deafness, blindness, intellectual disability, partially or completely missing limbs, mobility impairments requiring use of a wheelchair, autism, cancer, cerebral palsy, diabetes,

epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder, and schizophrenia.

Temporary Impairments May be Protected

Also of note in the final regulations is the EEOC's rejection of the argument that temporary impairments are not substantially limiting, and thus not disabling. Indeed, the EEOC specifically rejects any durational minimum and provides in the final regulations that the effects of an impairment lasting fewer than six months can be substantially limiting. It is unclear how this particular regulation will be interpreted by the courts, but is certainly something of which employers should take note.

Broader Scope of Who May be "Regarded as Disabled" Under the New Regulations

Finally, the regulations revise the definition of "regarded as" to clarify that a covered entity "regards" an individual as having a disability if it takes an action prohibited by the ADA (e.g., failure to hire, termination, or demotion) based on an individual's impairment or on an impairment the covered entity believes the individual to have, unless the impairment is both transitory (lasting or expected to last for six months or less) and minor. This new formulation of "regarded as" having a disability is different from the original ADA formulation, which required an individual seeking coverage under this part of the definition to show that a covered entity believed the individual's impairment (or perceived impairment) substantially limited performance of a major life activity. Individuals covered only under the "regarded as" prong are not entitled to reasonable accommodation – accommodations are required only for those covered under the first prong ("actual disability") or second prong ("record of disability").

The Final Regulations, accompanying Question and Answer documents, as well as a fact sheet, are available on the EEOC website at http://www.eeoc.gov/laws/statutes/adaaa_info.cfm. Though the final regulations were just published, they are considered applicable retroactively to claims dating back to January 1, 2009. The new rules apply to companies with 15 or more employees.

What Does This Mean For Employers?

- The ADAAA and the final regulations will make it much more difficult for employers to argue that an employee with an impairment is not "disabled" under the Act.
- As a result, employers will more frequently be required to engage in the interactive process of determining whether a reasonable accommodation can be provided. Therefore, employers should reassess their job descriptions and job qualification standards.
- Documentation is, as always, very important. Employers should train their managers and Human Resources professionals to recognize and respond to a request for an accommodation, in order to ensure that employment decisions are based on legitimate, non-discriminatory reasons.
- More charges of disability discrimination, and subsequent litigation, from a broader range of employees, are likely as employees and employers test the meaning of ADAAA and the

final regulations, especially in light of the expanded list of impairments that now may be considered "disabling." It is anticipated that the focus of ADA claims/litigation will shift from whether an individual is covered under the ADA to whether a reasonable accommodation can be provided.

If you have any questions regarding this E-News Bulletin, please contact your Butzel Long attorney or the author of this E-news Bulletin.

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