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On March 25, 2011, the Equal Employment Opportunity Commission (EEOC) issued its final rule implementing regulations under the ADA Amendments Act (ADAAA). While the new regulations, effective on May 24, 2011, address some of the concerns raised by employers with the proposed rules, the final rule ultimately hews close to the ADAAA, which went into effect January 1, 2009. In its Interpretive Guidance, the EEOC took the opportunity to repudiate explicitly specific case precedent and concepts formerly used by employers to defend against claims of disability discrimination.

EEOC Issues Regulations Under the ADA Amendments Act

By Margaret Hart Edwards and Patrick Martin

On March 25, 2011 the Equal Employment Opportunity Commission (EEOC) belatedly issued its final rule implementing regulations under the ADA Amendments Act (ADAAA). The new regulations become effective on May 24, 2011 (60 days from the date of publication).

While the EEOC did address some of the concerns raised by employers with the proposed rules, the final rule ultimately hews close to the ADAAA, which went into effect January 1, 2009. And, in its changes to the Interpretive Guidance, the EEOC took the opportunity to repudiate explicitly specific case precedent and concepts formerly used by employers to defend against claims of disability discrimination.

The central concept in the ADAAA and the new rules is a significant expansion of the definition of “disability” under the law. This expanded definition means that millions more workers will be covered by the law, and the number of claims of disability discrimination may be expected to grow. This major change in the definition of disability is accomplished by expanding the definition of the components of the definition of disability, and by simplifying the definition of disability for those regarded as disabled. The overall objective is repeatedly emphasized by the EEOC: the focus for employers and the courts is not on the threshold question of whether a disability exists, but on engaging in the interactive process and providing reasonable accommodations.

Changes in the Components of “Disability”

While the ADAAA and the rules still provide that a disability is an impairment that substantially limits a major life activity, the definitions of major life activity and “substantially limits” are changed. As the words have stayed the same, but the meanings have changed, going forward employers must use with great caution all cases on these issues decided under the ADA before amendment.

Major Life Activity Redefined

Major life activity is now defined under the rules to encompass not only those activities formerly included, but several more such as “interacting with others.” While employer

advocates opposed this specific inclusion, the disability rights voices prevailed. Inclusion of the activity of “interacting with others” will pose a continuing challenge for employers confronted with claims that problematic employee conduct caused by mental disabilities is protected. The ADAAA also added the operation of a major bodily function as a major life activity, and the EEOC added to the statutory definitions to include virtually every physiological function. Thus, major life activities now include the functioning of the immune, musculoskeletal, neurological, brain, genitourinary, circulatory, and reproductive systems, and all major organs.

A major life activity need not be determined by reference to whether it is of central importance to daily life. Nor is the degree of impairment to be confused with whether a particular activity is a major life activity.

The EEOC makes it plain that the intention is to include virtually all physical and mental conditions, except those which have never been considered impairments, such as genetic predisposition to a disease (now covered by the Genetic Information Nondiscrimination Act), pregnancy (but not pregnancy-related disability), eye color, left-handedness, and personality traits such as a bad temper.

The sweep of the definition of major life activity is such that the EEOC eliminated its former regulations and guidance regarding the major life activity of “working.” As a person is most likely to have a limitation on another major life activity, the EEOC determined there would be little occasion to focus on the major life activity of working in and of itself. The EEOC also noted in its amended Interpretive Guidance that many of the cases formerly analyzed in terms of whether the employee was substantially limited in the major life activity of working will be analyzed under the “regarded as” prong of the definition of disability. Nonetheless, in the Interpretive Guidance, the EEOC retained the existing familiar language of “class or broad range of jobs” and said, “Demonstrating a substantial limitation in performing the unique aspects of a single specific job is not sufficient to establish that a person is substantially limited in the major life activity of working.”

Substantially Limits Redefined

The EEOC explicitly declined to redefine “substantially limits.” Rather, it created nine “rules of construction,” derived from the ADAAA language and legislative history to be applied to make a determination of “substantially limits.” The net effect of these rules of construction is effectively to write the word “substantially” out of the law. These rules are:

1. “Substantially limits” is to be construed as broadly as the ADA allows.
2. The impairment need only substantially limit the ability to perform a major life activity compared to most people in the general population. It need not prevent, or significantly or severely restrict, the individual from performing the major life activity. This is noteworthy as “substantially” evidently means something less than “significantly.” This may be the subject of future litigation.
3. The focus of analysis is on whether employers have complied, not on whether the impairment substantially limits a major life activity. This rule is ancillary to rule number one.
4. The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. The degree of limitation is lower than it was pre-ADAAA. And, while the EEOC eliminated its previously proposed list of impairments that would “consistently,” “sometimes,” or “usually not” be disabilities, as well as its recommended list of “per se” disabilities, it introduced a new concept resulting in much the same outcome. The final rules contain the concept of “predictable assessments,” meaning that by applying its new rules of construction, there are impairments that in virtually all cases will be considered disabilities, such as: deafness, blindness, intellectual disability (formerly called mental retardation), missing limbs, autism, cerebral palsy, cancer, diabetes, HIV infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia. As a result, in many cases, the “individualized assessment” will be perfunctory.
5. The comparison of an individual’s performance of a major life activity to that of the general population will not usually require scientific, medical or statistical analysis, although such analysis may still be used. For those with learning disabilities, the comparison is still with those without the learning disability, even though the usual method of diagnosis may be in terms of the difference between actual and expected achievement of the individual. Further, success in school does not mean that the person does not have a protected disability.

6. The ameliorative effects of mitigating measures are ignored for the purposes of determining substantial impairment. In contrast, the negative effects of mitigating measures, such as the side effects of medications, should be considered. While the EEOC eliminated the confusing proposed inclusion of surgical interventions, the final rule added psychotherapy, and behavioral and physical therapy as examples of mitigating measures. The ADAAA made an exception for “ordinary eyeglasses or contact lenses,” which may be taken into account in determining whether or not a person has a disability. Consistent with the ADAAA, aids for those with “low vision” are not “ordinary eyeglasses.” The EEOC declined to include more detail in the definition of ordinary eyeglasses or contact lenses or low vision devices, leaving that determination to case-by-case analysis. The EEOC said in its amended Interpretive Guidance that, if any employer imposes a qualification standard that requires uncorrected vision, adversely affected applicants or employees may challenge that standard, and the employer will be required to demonstrate that the qualification standard is job-related and consistent with business necessity. If a person has mitigating means available and fails to use them, that fact may affect the determination as to whether the individual is qualified or poses a direct threat.
7. An impairment that is episodic or in remission is a disability, even if not active or in remission. This applies to a broad range of episodic conditions, conditions with “flare ups,” and conditions that may be at least temporarily cured. As noted above, the EEOC removed a provision in its proposed regulations addressing impairments permanently fixed by surgery as “confusing.”
8. Only one major life activity need be substantially limited. In the amended Interpretive Guidance, the EEOC uses the example of a person with a 20-pound lifting restriction that lasts for several months. That restriction is sufficient to substantially limit a major life activity without any showing that the person is unable to perform other activities of daily living. Without referencing the several cases litigated by the EEOC on the subject, the EEOC also cites the example of a person with monocular vision who has adjusted to the condition as someone who has a substantial impairment on the major life activity of seeing.
9. For the purposes of determining whether an individual has an actual disability (“prong one” of the tripartite definition of covered persons), or has a record of a disability (“prong two” of the tripartite definition), impairments that last or are expected to last less than six months may be substantially limiting. This is notable as the EEOC specifically declined to create a bright-line exclusion for short-term limitations, reacting to strong comments from disability rights advocates who argued that short term conditions can impose very significant limitations on a major life activity. The final rule retains the concepts of “condition, manner, or duration” as factors that may be relevant to the determination of whether an impairment substantially limits a major life activity. Thus, duration is just a factor, along with severity, and it is likely that this signals the development of a “sliding scale” standard: the more severe, the less lengthy the duration need be, and vice versa.

Using the “Regarded As” Disabled Prong to Prove Discrimination

Under the ADAAA and the rules, persons who are regarded as disabled need not show that they have a substantial limitation on a major life activity, but only that they were regarded by the employer as having a disability, and because of that were subject to an adverse employment action. These are the elements of the prima facie case of a “regarded as” claim. An exception is provided by the ADAAA for impairments that are “transitory and minor.” *Transitory* means lasting or expected to last six months or less. The EEOC rules make this exception an affirmative defense, and place the burden of proof on the employer. Whether the impairment is transitory and minor must be determined objectively, not subjectively by the employer. As the employer has only very limited access to medical information about candidates for employment (and none about applicants) and employees, employers may have considerable difficulty using this defense.

The EEOC eliminated the language from its former Interpretive Guidance about “myths, fears, and stereotypes” as having the wrong focus. The EEOC explains that it does not matter whether myths, fears, or stereotypes motivated the employer’s decision, only whether the employer’s decision was based on an actual or perceived impairment.

The final rule eliminated the proposed guidance that actions taken because of an impairment’s symptoms or because of the use of mitigating measures could qualify as “regarded as” actions. However, the EEOC stated that, “[n]o negative inference concerning the merits of this issue should be drawn from this deletion.” Thus, employers should be aware that they could be subject to claims of violation of the ADA when disciplining employees for violating a workplace rule where they have knowledge of an underlying impairment.

The EEOC also explains that the “regarded as” prong should be the primary means of establishing coverage under the ADA in cases that do not involve the need for reasonable accommodations. Individuals who do not have need for accommodation are better served asserting these claims under the “regarded as” prong (“prong three”) of covered persons as their burden of proof is minimal. Claims under prong three are already standard in most disability lawsuits. In the future, this claim will become a more important focus for employee advocates.

The EEOC rules incorporate the clarification provided by the ADAAA that persons who are regarded as disabled, but who do not claim to have an actual disability or a record of disability, need not be provided with reasonable accommodations. Thus, there is no interactive process duty with respect to these persons.

Other Points of Note

The EEOC acknowledged receiving many requests from employers to clarify what evidence of disability an employer may request or rely upon. The EEOC declined to address this issue, saying that its earlier guidance on the subject is sufficient, and that the ADAAA did not change the requirements.

The EEOC eliminated the term “qualified individual with a disability” from the regulations and Interpretive Guidance, as the ADAAA no longer uses this term, but the simpler “individual with a disability.” This change does not appear to modify or reduce the plaintiff’s burden to demonstrate that he or she is qualified for the position in question.

The EEOC also changed other terms to reflect more current usage. “Intellectual disability” is the new term for mental retardation. HIV infection is used instead of “HIV and AIDS.”

Finally, the EEOC adopted the term “actual disability” to refer to persons claiming protection under prong one of the definition of covered persons.

Practical Steps for Employers

1. Update disability discrimination policies and reasonable accommodation processes to conform to the ADAAA and regulations, including changes in language.
2. Train human resources personnel and managers on their duties under the ADAAA, and the need to focus primarily on nondiscrimination, interactive process, and reasonable accommodation. The days of “severely restricted” are gone. Never assume that an individual will not be considered disabled and, thus, not protected under the ADA.
3. Document the interactive process. Being able to show what efforts were taken to engage in the interactive process will be critically important to an employer’s defense to ADA claims.
4. Review qualifications standards that may tend to screen out individuals with disabilities to make sure that the standards are job-related and consistent with business necessity.
5. Make sure that charges of disability discrimination are handled by a person with appropriate expertise, as the charges may be used in more systemic investigations and litigation by the EEOC or private litigants.

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