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A Significant Expansion

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Approximately one year after former President Bush signed the Americans with Disabilities Amendments Act (ADAAA), the EEOC has finally issued proposed regulations and an Interpretive Guidance for public comment. As expected, the new regulations make significant changes in how certain terms under the ADA are defined, which certainly will give rise to more disability claims. Disturbingly, however, they provide little guidance to Human Resource professionals and managers responding to requests for accommodation. Here is a summary of the most significant changes and guidance to the regulations.

Disability

A person is disabled if he has either 1) physical or mental impairment that substantially limits one or more major life activities, 2) a record of such impairment, or 3) is regarded as having such an impairment.

Actual Disability

The new regulations do not substantively change the definition of physical or mental impairment, but they do affect what constitutes a "major life activity." Specifically, major life activities are those that "most people in the general population can perform with little or no difficulty." The ADAAA provides a non-exhaustive list of activities and major bodily functions that are examples of major life activities. The EEOC has added a number of major bodily functions such as special sense organs, skin, and musculoskeletal, among others.

With respect to redefining "substantially limits" the EEOC essentially states what it is not rather than what it is. Specifically, the EEOC states that "an impairment is a disability . . . if it 'substantially limits' the ability of an individual to perform a major life activity as compared to most people in the general population. The new regulations then provide that the impairment does not have to prevent or significantly or severely restrict the individual from performing a major life activity, but must be more than a temporary, non-chronic impairment of a short duration that has little or no residual effects. Thus, "substantially limits" is less than a significant restriction and more than a temporary nonchronic condition. Unfortunately, there is a good bit of room between those two concepts. Thus, rather than decreasing the amount of litigation on the issue of disability, the EEOC's failure to provide better guidance may ultimately lead to more litigation on the issue with varying standards for what constitutes "substantial" in the appellate courts.

Rules of Construction for Determining Whether a Substantial Limitation Exists

The EEOC has provided a number of rules of construction to be used in evaluating whether or not an impairment substantially limits a major life activity.

1. The term "substantially limits" is to be viewed in favor of broad coverage of individuals and should not require extensive analysis.
2. In comparing an individual's limitation to the ability of most people in the general population, employers and courts should utilize a "common sense" standard that should not require medical or scientific evidence. The EEOC, however, fails to recognize that when an individual says he is substantially limited in a major body function or in mental activity such as concentrating, thinking, etc., medical evidence unavoidably will be required.
3. Individuals with impairments that substantially limit a major life activity are not required to also show that they are limited in performing activities that are of central importance to daily life.
4. An impairment need not substantially limit more than one major life activity. For example, individuals who have AIDS, and whose immune systems are substantially limited, are not required to further show that they are substantially limited in reproduction or any other major life activity.
5. An impairment may substantially limit a major life activity even if it lasts or is expected to last fewer than six months. One question then, is how many months can the condition last and not be substantially limiting. The EEOC provides a hint in an example concerning a lifting restriction that is expected to last for "several months or more" being substantially limited, which suggests that less than three months may be too short a time period for a limitation to be substantial.
6. The analysis should not focus on what an individual can do despite the impairment; rather, it should focus on the limitation the impairment imposes. This is the position the EEOC always has taken. Many courts, however, have rejected this position and routinely focus on what an individual has achieved despite the impairment. *See, e. g. Emory v. AstraZeneca Pharms. LP*, 401 F.2d 174 (3d Cir. 2005)(whether plaintiff's substantial limitation is determined by limitations he has not overcome); *Ristrom v. Asbestos Workers Local 34 Joint Apprentice Comm.*, 370 F. 3d 763 (8th Cir. 2004)(plaintiff who has graduated from high school, completed two years in apprenticeship, and passed tests in program not substantially limited by ADD).
7. The positive effects of mitigating measures may not be considered. Negative effects of mitigating measures may be considered in determining whether a substantial limitation exists. Mitigating measures do not include ordinary eyeglasses or contact lens. They do include such things as:

   - medication
   - medical supplies
   - equipment
   - appliances

- low-vision devices (i.e. those that magnify, enhance, or augment a visual image)
- prosthetics
- hearing aids
- cochlear implants or other hearing device implants
- mobility devices
- oxygen therapy equipment and supplies
- assistive technology
- reasonable accommodations or auxiliary aids and services
- learned behavioral or adaptive neurological modifications
- surgical interventions that do not permanently eliminate the impairment

8. An episodic impairment or impairment in remission is a disability if it would substantially limit a major life activity when active. Examples of such impairments include multiple sclerosis, asthma, cancer, hypertension, seizure disorders, and psychiatric impairments such as depression, bi-polar disorder, and post traumatic stress disorder. The questions that ultimately will be litigated, however, are how long can a person in remission be considered disabled and whether the likelihood that an individual will come out of remission has any bearing on whether he is disabled.

"Automatic" Disabilities?

The EEOC has provided a list of impairments that it believes consistently will meet the definition of disability because of the impairment's characteristics. The list includes impairments such as:

- deafness
- blindness
- intellectual disability, (e.g., mental retardation)
- completely or partially missing limbs
- mobility impairments that require the use of a wheelchair
- autism
- cancer
- cerebral palsy
- diabetes
- epilepsy
- HIV or AIDS
- multiple sclerosis and muscular dystrophy
- major depression
- bi-polar disorder
- post-traumatic stress disorder

- obsessive-compulsive disorder
- schizophrenia

The EEOC makes clear that this list is not exhaustive. This position, however, is inconsistent with Congress' intent that whether an individual is disabled requires an individual analysis.

"Sometimes" Disabilities

The new regulations provide a number of examples concerning impairments that may substantially limit an individual in a major life activity. The EEOC cites the following conditions as examples: asthma, high blood pressure, learning disability, panic disorder, anxiety disorder, hyperthyroidism, carpel tunnel syndrome, or certain types of mental impairments such as panic or anxiety disorders.

Never Disabilities

These are temporary non-chronic impairments of short duration with little or no residual effects, such as a sprained ankle, broken leg, or common colds.

Substantially Limited in Working

The regulations formerly provided that an individual was substantially limited in working if he was precluded from a broad range or a class of jobs. An individual will be viewed as substantially limited in working if the impairment substantially limits an individual's ability to perform, or to meet the qualifications for the type of work at issue. The "type of work at issue" includes the job the individual has been doing or the job for which the individual has applied, as well as jobs with similar qualifications or job-related requirements that the impairment would substantially limit the individual from doing.

Determining the type of work at issue includes comparing the work of an individual who is substantially limited in performing to the work most people with comparable training, skills, and abilities do. For example, a type of work could be driving commercial motor vehicles regulated by the DOT, assembly line jobs, or law enforcement jobs. Further, the relevant type of work could be determined by looking at the job-related requirement that an individual is substantially limited in meeting compared to most people performing such jobs.

The EEOC gives examples of job-related requirements that are involved in certain types of work such as repetitive bending, reaching, manual tasks, repetitive or heavy lifting, prolonged sitting or standing, or driving. Job-related requirements also would include certain types of work environments that involve, for example, high temperatures, high noise levels, high stress, or rotating or excessively long shifts. Finally, an individual's ability to obtain other employment will not preclude a finding that the individual is substantially limited in working.

"Perceived As" Disability

Individuals can prove that they are regarded as having a disability by showing they were discriminated against because of an actual or perceived physical or mental impairment. But an employer is no longer required to believe that the actual or perceived impairment substantially limited a major life activity to incur liability. Rather, if an employee can show a prohibited employment action occurred because of an actual or perceived impairment, then coverage is established.

A perceived as claim cannot be established if the impairment is transitory, i.e., has lasted less than six months *and* is minor. But if an employer believes the employee has an impairment that is not transitory and minor, (AIDS, for example), the employer has perceived the employee as disabled. More importantly, if an employer takes prohibited action against an employee based on that employee's symptoms or use of a mitigating measure — even if the employer does not know what the impairment is — the employer has perceived the employee as disabled.

The EEOC provides the example of an employer who refuses to hire an individual for a driving job because the employee takes anti-seizure medication. An employer who asks an employee whether he needs an accommodation, however, will not be viewed as having perceived the employee as disabled.

Reasonable Accommodation

The EEOC now specifically states that employers must accommodate not only individuals with actual disabilities, but also individuals with records of disabilities. Employers, however, are not required to accommodate "perceived-as" disabilities. Importantly, the positive and negative effects of mitigating measures may be considered when evaluating whether an individual needs an accommodation and whether an individual is a direct threat.

Qualification Standards

The EEOC has added a provision stating that qualification standards, employment tests, or other selection criteria based on a person's uncorrected vision is prohibited unless the employer can show that the standard, test or criteria is job related to the position for which it is required, and is consistent with business necessity.

What Employers Need to Know

These new regulations are now open for public comment and may change. Nevertheless they point clearly to an era of heightened scrutiny in the area of disability claims and requests for reasonable accommodation under the ADA. Moreover, more disability harassment claims may make their way to the courts given the lower threshold to be considered disabled. It remains to be seen how much of this new approach will be endorsed by courts, but we recommend a cautious approach. Employers should review their current policies on non-discrimination and

reasonable accommodation, and ensure that supervisors are well trained to handle all potential disability claims or requests for accommodation in an appropriate manner.

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