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EEOC Issues its Proposed Regulations Interpreting the ADA Amendments Act

By Barry H. Uhrman

The Americans with Disabilities Amendments Act ("ADAAA"), which took effect on January 1, 2009, represented the first significant legislative modification to the Americans with Disabilities Act ("ADA") since Congress enacted the ADA in 1990. The effect of the ADAAA was to overturn U.S. Supreme Court decisions that had narrowed the scope of the statute and to broaden coverage of individuals to the maximum extent permitted by the terms of the ADA.

On September 23, 2009, the Equal Employment Opportunity Commission ("EEOC") published its proposed regulations and accompanying interpretive guidance. The definition of "disability" remains the same: (i) an impairment that substantially limits one or more major life activities; (ii) a record of such an impairment; or (iii) being regarded as having such an impairment. The proposed regulations, however, change how these statutory terms are interpreted in several key ways, including expanding the meaning of "disability" and clarifying key terms such as "substantially limits" and "major life activity." The net effect is that the threshold to establish whether an employee is a qualified individual with a disability under the ADA has been lowered significantly. This will undoubtedly expand the number of individuals who are considered disabled and will make defending ADA claims more difficult for employers.

Defining "Substantially Limits"

The EEOC's proposed regulations revise the definition of "substantially limits" by providing that a limitation does not have to "significantly" or severely restrict a major life activity in order to meet the standard. An impairment will satisfy the "substantially limits" requirement if it substantially limits an individual's ability to perform a major life activity as compared to most people in the general population. The regulation also deletes reference to the terms "condition, manner, or duration" under which a major life activity is performed. Temporary, non-chronic impairments of short duration with little or no residual effects (such as the common cold, seasonal or common influenza, a sprained joint, minor and non-chronic gastrointestinal disorders, or a broken bone that is expected to heal completely) usually will not substantially limit a major life activity.

In its interpretive guidance, the EEOC states that the determination of whether an individual is substantially limited is a "common-sense assessment" of an individual's ability to perform a major life activity. This comports with the ADAAA's requirement that the determination of whether an individual's impairment is a disability under the ADA should not demand extensive analysis.

Defining "Major Life Activities"

Under the EEOC's proposed regulations, "major life activities" are defined as basic activities that most people in the general population can perform "with little or no difficulty." The regulations also expand the non-exhaustive list of major life activities to include sitting, reaching, and interacting with others, in addition to working, performing manual tasks, and the other major life activities set forth in the ADAAA.

The ADAAA provides that major life activities include the operation of major bodily functions, including functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, circulatory, respiratory, endocrine, and reproductive functions. The proposed regulations add several other examples -- hemic, lymphatic, musculoskeletal, special sense organs and skin, genitourinary, and cardiovascular. The stated purpose of adding major bodily functions

to the list of major life activities is to make it easier to find that individuals with certain types of impairments have a disability.

Major Life Activity of "Working"

In addressing working as a major life activity, the EEOC notes that there may be situations in which an impairment substantially limits a person's ability to meet certain job-related requirements, even though it does not impose substantial limitations outside the workplace. The proposed regulations specify that an individual who is substantially limited in working can be qualified for the employment position the individual holds or desires. Rather than demonstrating exclusion from a "class of jobs" or a "broad range of jobs," the proposed regulations delineate a more straightforward approach - an individual must only demonstrate that the impairment substantially limits the ability to perform or meet the qualifications for the "type of work" at issue.

The "type of work" includes the individual's current job, the one applied for, and those with similar requirements. The proposed regulations provide that the "type of work" may be determined by the nature of the work the individual is substantially limited in performing as compared to others with comparable skills, such as commercial truck driving, assembly line jobs, food service jobs, clerical jobs, or law enforcement jobs. In addition, a "type of work" may be determined by reference to job-related requirements, such as jobs that require repetitive bending, reaching, or manual tasks; repetitive or heavy lifting; prolonged sitting or standing; extensive walking; driving; or working rotating, irregular, or excessively long shifts.

The regulations also make clear that an individual's ability to obtain similar employment with another employer is not dispositive of whether an individual is substantially limited in working. Similarly, someone who is substantially limited in a type of work will be substantially limited in the major life activity of working, even if the individual possesses skills that would qualify him or her for another type of work.

Episodic Impairments

Under the proposed regulations, an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. The EEOC lists specific examples of impairments it believes to consistently meet the definition of disability, including: epilepsy, hypertension, multiple sclerosis, asthma, cancer, and psychiatric disabilities (such as depression, bipolar disorder, and post-traumatic stress disorder).

The EEOC also lists several examples of impairments that may be disabling depending on the circumstances, including: asthma, high blood pressure, learning disabilities, psychiatric impairments (such as panic disorder, anxiety disorder, and some forms of depression), and carpal tunnel syndrome.

Mitigating Measures

The proposed regulations implement the ADAAA's prohibition on the consideration of mitigating measures when determining whether a condition substantially limits an individual's major life activities. Examples of mitigating measures include medication, prosthetics, use of assistive technology, auxiliary aids or services, and surgical interventions that do not permanently correct an impairment. The proposed regulations specifically exclude eyeglasses and contact lenses from the list of mitigating measures that should not be considered.

While the ameliorative effects of mitigating measures cannot be considered in determining whether an impairment substantially limits a major life activity, they may be considered in determining whether they would eliminate the need for reasonable accommodation.

Defining "Record Of" An Impairment

An individual has a record of a disability if he has a history of, or has been misclassified as having, a substantially limiting impairment. For example, a job applicant who was previously diagnosed with and treated for prostate cancer, and whose doctor says he no longer has cancer, nevertheless has a "record of" a substantially limiting impairment. In addition, an employee who was previously misdiagnosed with bipolar disorder and hospitalized as the result of a

temporary reaction to medication she was taking has a record of a substantially limiting impairment, even though she did not actually have bipolar disorder.

Proof of an employer's reliance on a record of disability is no longer necessary to establish coverage under the "record of" component of the definition. An employer's knowledge of an individual's past substantially limiting impairment relates to whether the employer engaged in discrimination, not to whether an individual is covered under the Act.

"Regarded As" Claims

The definition of "regarded as" has been changed so that it no longer requires a showing that the employer perceived the individual to be substantially limited in a major life activity. Under the proposed regulations, an individual can satisfy the "regarded as" prong of the definition of disability by demonstrating that the employer took a prohibited action (such as failure to hire or termination) based on the individual's actual or perceived impairment. "Regarded as" claims, however, cannot be based on transitory and minor impairments where the impairment is expected to last less than six months.

The proposed regulations also provide that employers are only required to provide reasonable accommodations for individuals who can demonstrate they have an impairment that substantially limits a major life activity, or a record of such impairment. Employers do not need to provide reasonable accommodations to individuals who are regarded as disabled, which is consistent with existing Ninth Circuit case law.

Practical Advice and To Do List for Employers

The public is invited to submit written comments to the EEOC through November 23, 2009. The EEOC will review comments concerning the proposed changes to the regulations and the interpretive guidance. The EEOC will then issue final regulations and provide an effective date upon which they will be implemented.

These changes are significant for employers as they will make it easier for individuals to establish a disability (and claims of disability discrimination) under the ADA. Employers must understand their legal obligations and requirements with respect to the new regulations and disabled employees. Employee handbooks and other written policies will need to be updated to comply with the new regulations. Most importantly, employers must ensure that all human resources personnel, supervisors, and managers are trained regarding the new regulations to avoid costly litigation landmines.◆

Jones, Skelton and Hochuli's Employment Law Practice Group will continue to keep you apprised of all future developments concerning the Americans with Disabilities Act and the EEOC's proposed regulations. Please feel free to contact us with any questions you may have regarding these important developments in employment law.

About The Author

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Mr. Uhrman joined Jones, Skelton & Hochuli in 2007 and concentrates his practice on employment law, complex litigation and governmental liability. He has successfully defended Title VII, ADA, ADEA and FMLA cases for Fortune 500 clients and public and private sector employers. Mr. Uhrman has extensive experience revising sexual harassment and other employment policies for employee handbooks. In addition, he has authored articles and seminar materials regarding leaves of absence under the ADA and FMLA.

Mr. Uhrman has also represented clients in other areas of employment law, with an emphasis on intellectual property and trade secrets. He has successfully defended multi-million dollar copyright infringement, defamation and trade secrets cases. Mr. Uhrman has also represented private sector employers in cases involving employment law torts, including interference with business advantage, violation of the right of publicity, and tortious interference with contractual relationships.

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