

Equal Employment Opportunity Commission Issues Final Regulations Expanding Scope of Coverage for Employees Claiming Discrimination under the Americans with Disabilities Act

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On March 25, 2011, the Equal Employment Opportunity Commission (EEOC) published the final version of new regulations and interpretive guidance implementing the Americans with Disabilities Amendments Act of 2008 (the Amendments Act), which revised the original Americans with Disabilities Act of 1990 (ADA). Reversing a series of Supreme Court and lower federal court decisions restricting the definition of "disability," the Amendments Act made it easier for individuals to qualify as "disabled" under the ADA, a threshold test for bringing a discrimination claim. The EEOC, charged with enforcing the ADA's prohibitions on employment discrimination on the basis of disability, issued proposed regulations in late 2009 incorporating the revised disability standards and seeking public comment.

Now, the EEOC has released the final text of the new regulations going into effect on May 24, 2011, along with an appendix containing interpretive guidance that will guide the EEOC in investigating charges of discrimination. The final regulations include a number of sweeping changes making it easier for plaintiffs to establish that they are disabled. Among the more notable changes are:

- Lessening the threshold requirement for an ADA plaintiff to establish that he or she is disabled by rejecting the prior standard requiring that an impairment prevent, or significantly or severely restrict, a major life activity

Authors

Todd A. Bromberg
Partner
202.719.7357
tbromberg@wiley.law

Practice Areas

Employment & Labor

- Providing non-exhaustive lists of examples of major life activities and of impairments that are virtually always disabilities
- Including impairments that are episodic or in remission in the definition of disability
- Making clear that pregnancy and age are not themselves disabilities, but that pregnancy- and age-related impairments may be disabilities and
- Expanding the definition of "major life activities" to include "major bodily functions"

Essentially, the new regulations shift the focus away from whether an impairment is a disability-by making clearer what is and is not a disability-to whether an employer has provided a disabled employee with a reasonable accommodation. For employers, this change in emphasis highlights the need to utilize experienced counsel in responding to a disabled employee's request for an accommodation. Each request will necessitate a response tailored to that employee's particular impairment and position, and the needs of the employer's business. Counsel can help fashion an accommodation satisfying an employer's ADA obligations while also ensuring that an employer does not suffer an undue burden from the accommodation. Also, counsel can set up a training program for an organization's human resource professionals and front-line managers to guide them through the accommodation process.

Background: A Series of Supreme Court Cases Restricting the Scope of the ADA and the Congressional Response

Generally, the ADA forbids employers from discriminating against applicants and employees on the basis of disability. To state a case of employment discrimination under the ADA, a plaintiff must initially show that he or she has a disability protected under the statute, defined under the law as: "a physical or mental impairment that substantially limits one or more major life activities of such individual," "a record of such an impairment," or "being regarded as having such an impairment." In the decade and a half after the law's enactment in 1990, federal courts (and even the EEOC at times) focused their energies on interpreting the definition of disability, crafting a strict standard that excluded many plaintiffs from coverage. For instance, in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), the Supreme Court held that mitigating measures treating the underlying impairment should be taken into account to determine whether a person is "disabled": thus, if a person has an impairment that would be a disability if left untreated, and that person takes medicine eliminating the effects of the impairment, that person would not be disabled. As another example, the Supreme Court and the EEOC had construed the phrase "substantially limits" as equivalent to preventing, or significantly or severely restricting, an individual from engaging in a major life activity.

In 2008, Congress enacted the Amendments Act to arrest this trend of narrowing the definition of "disability." As Congress explained in the "Findings and Purposes" section of the Amendments Act, these cases eliminated "protection for many individuals whom Congress intended to protect" and "incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities." In Congress's view, extensive litigation over whether a person was disabled was misdirected on "the minutia of an individuals' impairment" rather than larger issues, such as whether discrimination had occurred and

whether a reasonable accommodation could have been made. To shift attention back to these issues, the Amendments Act instituted a number of changes, reflected in the final regulations and interpretive guidance, to make it easier for plaintiffs to clear the initial hurdle of proving they have a disability.

"Substantially Limits" a Major Life Activity

As noted above, an impairment qualifies as a disability if it "substantially limits" one or more major life activities. The final regulations clarify that an impairment need not prevent, or significantly or severely restrict, a major life activity to qualify as a disability; that the term "shall be construed broadly in favor of expansive coverage"; and that this is not "a demanding standard," requiring only that an impairment "substantially limit[] the ability of an individual to perform a major life activity as compared to most people in the general population." To make its repudiation of prior case law as clear as possible, the new regulations explain that this standard is a lower one than the prior one.

Continuing its attack on how the ADA had been applied, the new regulations explain that whether an impairment substantially limits a major life activity does not include the mitigating effects of measures treating the impairment (with one notable exception), but can include the negative effects of the treatment, such as negative side effects, burdens associated with a particular treatment, and complications arising from surgery. The interpretive guidance explains that this eliminates a catch-22 that had arisen where a plaintiff would take medication to treat a disability to make himself a more productive employee, an employer would discriminate against that employee on the basis of the disability, and the plaintiff would lose in court because the impairment no longer substantially limited the employee during treatment.

Now, a person is disabled if, in his or her untreated state, the impairment substantially limits a major life activity, or if the negative effects of the treatment substantially limit a major life activity. This can be shown via evidence of the person's condition before the treatment or the expected course of the impairment in the absence of the treatment. The only mitigating measure that may prevent an individual from qualifying as disabled is "ordinary eyeglasses or contact lenses": if the eyeglasses or contact lenses "fully correct" the underlying visual impairment, then the person is generally not disabled (with regard to the major life activity of seeing) because Congress determined as a policy matter that such use "is not significant enough to warrant protection under the ADA."

To make this determination easier to navigate, the final regulations provide the following non-exhaustive list of impairments that "virtually always result in a determination of disability":

- Deafness
- Blindness
- An intellectual disability
- Partially or completely missing limbs
- Mobility impairments requiring the use of a wheelchair

- Autism
- Cancer
- Cerebral palsy
- Diabetes
- Epilepsy
- Human Immunodeficiency Virus (HIV)
- Multiple sclerosis
- Muscular dystrophy
- Major depressive disorder
- Bipolar disorder
- Post-traumatic stress disorder
- Obsessive compulsive disorder and
- Schizophrenia

The final regulations also set forth the following factors to assist in determining whether an impairment is a substantial limitation: "as compared to most people in the general population, the condition under which the individual performs the major life activity; the manner in which the individual performs the major life activity; and/or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity." This can include consideration of:

- The difficulty, effort or time required to perform a major life activity
- Pain experienced when performing a major life activity
- The length of time a major life activity can be performed and/or
- The way an impairment affects the operation of a major bodily function

Further, an impairment is a disability, even if it is "episodic or in remission[,] if it would substantially limit a major life activity when active." According to the interpretive guidance, this expanded definition would encompass (without being limited to) conditions like epilepsy, multiple sclerosis, cancer, hypertension, diabetes, asthma, major depressive disorder, bipolar disorder, post-traumatic stress disorder and schizophrenia if, "when active, the impairment or the manner in which it manifests (e.g., seizures) substantially limits a major life activity." The fact that the period in which the impairment substantially limits a major life activity "may be brief or occur infrequently is no longer relevant to" the analysis.

And the final regulations give the following non-exhaustive list of mitigating measures that cannot be taken into account in determining whether a disability exists:

- Medication

- Medical supplies, equipment or appliances
- Low-vision devices (devices that magnify, enhance or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses)
- Prosthetics, including limbs and devices
- Hearing aids and cochlear implants or other implantable hearing devices
- Mobility devices
- Oxygen therapy equipment and supplies
- Use of assistive technology
- Reasonable accommodations or "auxiliary aids or services"
- Learned behavioral or adaptive neurological modifications and
- Psychotherapy, behavioral therapy, or physical therapy

Finally, the interpretive guidance clears up a few misconceptions about what is and is not an impairment that can give rise to a disability. Physical conditions that are not the result of a physiological disorder are not impairments, such as eye color, left handedness, height, weight, muscle or pregnancy. But a "pregnancy-related impairment" can be a disability if it substantially limits a major life activity. Also, "common personality traits," like being quick tempered, are generally not impairments unless they are "symptoms of a mental or psychological disorder." Neither is advanced age an impairment by itself, but "various medical conditions commonly associated with age, such as hearing loss, osteoporosis, or arthritis would constitute impairments."

Major Life Activities

To qualify as a disability, an impairment must substantially limit a "major life activity." As part of the Amendment Act's efforts to expand the protections of the ADA, the final regulations incorporate a number of changes making it easier for plaintiffs to demonstrate that a major life activity has been substantially limited. First, an activity qualifies as a "major life activity" even if it is not "of central importance to daily life," casting aside a stringent standard set by a 2002 Supreme Court case. For instance, the interpretive guidance explains that "lifting" is not central to daily life, but it is a major life activity, and an impairment that substantially limits lifting is a disability.

To assist employers, the new regulations provide the following non-exhaustive list of major life activities:

- 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

Second, the Amendments Act expanded the phrase "major life activities" to include "the operation of a major bodily function." This change addressed the risk that certain impairments were being discounted as disabilities, despite their debilitating nature, because of a restrictive interpretation of the word "activity." For instance, courts struggled with whether a five year old with HIV was disabled, given that it was unlikely the child's reproductive activities had been substantially limited; whether Hepatitis B's effects on liver function made it a disability, because Hepatitis B patients could still perform major life activities like eating, working and reproducing; and whether a stage three breast cancer patient was disabled, because she could still perform activities like caring for herself, sleeping and concentrating. To clear up this confusion, the new regulations identify the following non-exclusive list of "major bodily functions," the substantial limitation of which gives rise to a disability:

- The immune system
- Special sense organs and skin
- Normal cell growth
- Digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal and reproductive functions and
- The operation of an individual organ within a body system

To make concrete how an impairment may impact a major bodily function, the interpretive guidance provided the following examples: "cancer affects an individual's normal cell growth; diabetes affects the operation of the pancreas and also the function of the endocrine system; and Human Immunodeficiency Virus (HIV) infection affects the immune system. Likewise, sickle cell disease affects the functions of the hemic system, lymphedema affects lymphatic functions, and rheumatoid arthritis affects musculoskeletal functions."

Regarded as Having an Impairment

In addition to discrimination because of an impairment that substantially limits one or more major life activities of such individual, or a record of such an impairment, the ADA prohibits discrimination because an employer regards an employee as "having such an impairment." Like many of the other changes, the Amendments Act and the final regulations overrule a number of court cases restricting the applicability of this provision. For instance, courts had held that a plaintiff claiming "regarded as" discrimination needed to show that the employer subjectively believed the impairment substantially limited the plaintiff in a major life activity, thereby aligning this provision with the other forms of discrimination requiring proof of a substantially limiting impairment.

As the interpretive guidance explains, these cases left a number of individuals that Congress meant to protect outside the scope of the section's coverage. The "regarded as" provision is different from other forms of ADA discrimination, because it was enacted to combat "unfounded concerns, mistaken beliefs, fears, myths, or prejudice about disabilities," which Congress found to be "often just as disabling as actual impairments." It seeks to eliminate not only discrimination because of an actual disability but also discrimination motivated by negative perceptions of an impairment, because this is akin to discriminating on the basis of disability.

To restore Congress's original intent, the final regulations make three major changes. First, the final regulations explain that a plaintiff does not have to show that the actual or perceived impairment is or would be substantially limiting, or that the employer perceived the impairment to be substantially limiting. All that a plaintiff has to prove is that an employer took an adverse action because of an actual or perceived impairment. Second, they create an affirmative defense for employers who are sued under this provision, shielding them from liability if the impairment was objectively both "transitory and minor." "Transitory" is defined "as lasting or expected to last six months or less." It is important to note that this concept of an impairment being "transitory and minor" only applies to "regarded as" discrimination and not the other types of discrimination prohibited by the ADA. Third, the final regulations somewhat ease the burden on employers by relieving them of the duty to make a reasonable accommodation for "regarded as" discrimination.

How does this work in practice? The interpretive guidance gives the following example: "[I]f an employer refused to hire an applicant because of skin graft scars, the employer has regarded the applicant as an individual with a disability. Similarly, if an employer terminates an employee because he has cancer, the employer has regarded the employee as an individual with a disability." Further, to establish the affirmative defense, the employer must prove the impairment was objectively both transitory and minor, without regard to the employer's subjective beliefs about the condition, as the following example from the interpretive guidance

makes clear: "[A]n individual who is denied a promotion because he has a minor back injury would be 'regarded as' an individual with a disability if the back impairment lasted or was expected to last more than six months. Although minor, the impairment is not transitory. Similarly, if an employer discriminates against an employee based on the employee's bipolar disorder (an impairment that is not transitory and minor), the employee is 'regarded as' having a disability even if the employer subjectively believes that the employee's disorder is transitory and minor."

Somewhat paradoxically, while an employer's subjective belief that an impairment is transitory and minor is not sufficient to establish the affirmative defense, an employer's subjective belief that a person is impaired is sufficient to negate the affirmative defense: "At the same time, an employer that terminated an employee with an objectively 'transitory and minor' hand wound, mistakenly believing it to be symptomatic of HIV infection, will nevertheless have 'regarded' the employee as an individual with a disability, since the covered entity took a prohibited employment action based on a perceived impairment (HIV infection) that is not 'transitory and minor.'"

Conclusion

The final regulations and interpretive guidance are a mixed bag for employers. On the one hand, the final regulations make it easier for employers to determine whether an employee has a disability requiring a reasonable accommodation. On the other hand, Congress and the EEOC have gone to great lengths to ease the burden on ADA plaintiffs to satisfy their threshold requirement in litigation of proving the existence of a disability.

As a result, human resources departments need to communicate their companies' obligations under the ADA to front line managers, who are the ones initially handling employees' requests for accommodations. At a minimum, they should provide to managers the list of impairments that, according to the EEOC, will almost always be disabilities.

They also need to ensure that a process exists to take in and carefully consider requests for accommodations given the heightened risk of litigation exposure and the fact that, with the definition of disability less likely to be disputed, courts will increasingly base their decisions on liability on whether an employer has made a reasonable accommodation. This highlights the additional importance of having in-house counsel and human resources professionals work closely with experienced employment counsel to: (i) craft accommodations that allow disabled employees to work without posing an undue burden on the company, and (ii) ensure that front-line managers understand their ADA obligations and utilize appropriate strategies for dealing with employees who seek to abuse the ADA's protections to evade work.