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Labor and Employment Relations Alert

EEOC Releases Proposed Regulations Amending the Current Americans with Disabilities Act Regulations

A year ago, Congress passed and George W. Bush signed the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA"), which of course amended the Americans with Disabilities Act ("ADA"). On September 23, 2009, the Equal Employment Opportunity Commission ("EEOC") took a step towards fulfilling the Congressional mandate imposed by the ADAAA when it released proposed regulations interpreting the ADA as amended by the ADAAA. The proposed revisions to the previously existing ADA regulations introduce several changes. Of particular importance, the proposed regulations clarify the definition of the term "substantially limits." This client alert addresses the high points of the proposed regulatory changes and provides a brief analysis of the likely effect of such changes.

"Substantially Limits"

An impairment is a disability within the meaning of the proposed regulations 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 "actual disability" standard). An individual may also be disabled if he or she has a record of such an impairment (the "record of disability" standard) or is regarded as having such an impairment (the "regarded as" standard). An impairment can be considered a disability even if it does not prevent, or even significantly or severely restrict, the individual from performing a major life activity.

The proposed regulations set forth several rules for determining whether a condition is substantially limited, including:

1. The term "substantially limits" must be construed in favor of broad coverage of individuals. Such determinations should not require an extensive analysis.
2. An individual who claims that his or her impairment substantially limits a major life activity does not have to prove the limitation affects his or her ability to perform activities of central importance to daily life. For example, an individual with a 20 pound lifting restriction of long duration is substantially limited in lifting regardless of whether he can show that he is unable to perform activities of daily living requiring lifting.
3. The impairment must "substantially limit" only one major life activity to be considered a disability. For example, an individual whose endocrine system is substantially limited due to diabetes need not also show that he is substantially limited in eating or any other major life activity.
4. The "transitory and minor" exception, discussed below, applies only to the "regarded as" standard. Disabling conditions do not need to meet a durational minimum to establish



disabled status under the “actual disability” or “record of a disability” standards. Under these standards, an impairment may substantially limit a major life activity even if it lasts, or is expected to last, fewer than six months.

5. The focus of whether an individual has a disability must be on how the major life activity is substantially limited, not on what the individual can do in spite of the impairment.
6. The analysis may not consider the ameliorative effects of mitigating measures. Therefore, an individual's ability to use a prosthetic device so that the individual is again capable of walking does not change the fact that the individual would be substantially limited in the major life activity of walking. An exception to this rule exists when the mitigating measure is ordinary eyeglasses or contact lenses intended to correct visual acuity or to completely eliminate refractive error. In such a case, the mitigating measure may be considered.

Examples of Disabled Status

The proposed regulations discuss: (i) conditions the EEOC believes meet the definition of a disability, (ii) conditions that may meet the definition of a disability, and (iii) conditions that usually do not meet the definition of a disability.

- Impairments that consistently meet the definition of a disability include: deafness; blindness; intellectual disability (formerly termed mental retardation); autism; cancer; cerebral palsy; diabetes; epilepsy; HIV or AIDS; multiple sclerosis or muscular dystrophy; major depression; bipolar disorder; post-traumatic stress disorder; obsessive compulsive disorder; and schizophrenia.
- Impairments that may meet the definition of a disability for some individuals, but not others, include: asthma; high blood pressure; a learning disability; a back or leg impairment limiting the amount of time that the individual could stand, distance he or she could walk, or weight he or she can lift; panic disorders; anxiety disorders and other psychiatric impairments; carpal tunnel syndrome; and hyperthyroidism.
- Impairments that do not usually meet the definition of disability include: the common cold; influenza; a sprained joint; minor and non-chronic gastrointestinal disorders; or broken bones expected to heal completely. Note that while the ADA expressly excludes some conditions (e.g., pregnancy), certain impairments resulting from the condition may be disabilities if they substantially limit a major life activity.

By grouping these conditions, it appears the EEOC is trying to illustrate its belief that certain impairments (and impairments with similar characteristics) do not require a great deal of individualized assessment to determine whether the impairment is a disability. The examples beg certain questions. For example, the proposed regulation's interpretation of a substantial limitation suggests a broken bone could create a short-term disabled status for the individual because the condition need not last indefinitely. However, the EEOC's examples suggest it may not be a disability. Further clarification regarding the purpose of these examples is necessary as the proposed regulations are later finalized.



“Regarded As” Standard and the “Transitory and Minor” Exception

When the ADAAA passed, Congress expressed its intention that a different standard should be applied to individuals who are regarded as being disabled. Now an individual is “regarded as” having a disability if the individual is subject to an action prohibited by the ADA, including non-selection, demotion, termination, or denial of any other term, condition, or privilege of employment, based on an actual or perceived physical or mental impairment, whether or not the impairment limits or is perceived to limit a major life activity—for example, where an employer refuses to hire someone with a facial tic because it regards that individual as having a disability, even if it does not know that the individual truly is disabled, say because the facial tic is caused by Tourette’s Syndrome.

The proposed regulations address an exception to the “regarded as” standard known as the “transitory and minor” exception. Under this exception, an individual regarded as having an illness or injury which is transitory, i.e., lasts or is expected to last six months or less, and minor will not be disabled under the ADA. For example, if an individual were not hired for a data entry position because he would be unable to type for three weeks due to a sprained wrist, the individual would not be regarded as disabled because a sprained wrist is transitory and minor. The proposed regulations make clear, however, that the same condition still could render the employee disabled under the “actual disability” or “record of disability” standards.

Conclusion

The EEOC’s release of these proposed regulations provides greater insight into the enforcement of the statutory provisions of the ADAAA, which have been in effect since January 1, 2009.

From a litigation standpoint, the ADAAA and these proposed regulations signal a new set of rules for those alleging disability discrimination. In the past, a great number of the legal challenges to the ADA’s application focused on whether the plaintiff had a disability, and less on other issues, such as whether the employer’s proffered accommodation was reasonable. Now, employers will need to rely on other defenses offered by the ADA. How disability case law will develop under the ADAAA and the new proposed regulations remains uncertain.

From a practical point of view, employers will find themselves engaging in less analysis to determine whether an employee is disabled and more “interactive dialogues” with employees concerning whether or not reasonable accommodations exist. Neither the ADAAA nor the proposed regulations make the law better for employees with disabilities with respect to the employer’s “accommodation” obligation under the ADA.

If you have any questions about the issues raised in this alert, the proposed regulations, or the ADA generally, please contact one of the authors of this alert or your Michael Best attorney.

