



U.S. regulations shift focus from disability to accommodation

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EEOC Publishes Long-Awaited Regulations Under the ADA Amendments Act

More than two years after the Americans with Disabilities Amendments Act ("ADAAA") became effective, the EEOC has issued Final Rules and Regulations ("Regulations") that were published in the March 25, 2011 Federal Register. The Regulations, which become effective May 24, 2011, further demonstrate the ADAAA's objective of broadening employee coverage to the maximum extent permitted. They also continue to shift focus from whether an employee is "disabled" to whether an employer has satisfied its legislative obligations to accommodate without discriminating.

Although the definition of "disability" remains whether a physical or mental impairment exists that substantially limits one or more major life activities; a record of such an impairment; or being regarded as having such an impairment; how "disability" should be interpreted by employers has changed.

Coverage under the ADAAA continues to require proof of a substantial limitation, but the Regulations specify that this is not intended to be a demanding standard. The EEOC seeks to implement Congressional intent to establish consistent and workable standards by establishing "rules of construction," including the requirements that:

- ▶ A lower degree of functional limitation be applied
- ▶ "Substantially limits" be read broadly in favor of expansive coverage
- ▶ Determining whether an impairment substantially limits a major life activity be made without regard to the ameliorative effects of mitigating measures (except for "ordinary eyeglasses or contact lenses")
- ▶ Episodic impairments or impairments in remission still qualify as disabilities if they would when active

The Regulations also expand the definition of "major life activities" through two non-exhaustive lists. The first list focuses on activities, some of which the EEOC has already recognized, such as walking. But some are new and include sleeping, concentrating, thinking and reading. The second list focuses on major bodily functions, such as the immune system, normal cell growth, and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions.

In another broadening of coverage, the Regulations make no mention of any six-month

durational requirement for establishing a disability, and instead specify that an impairment for any duration may be a covered disability.

The Regulations also elaborate on the ADA's coverage of individuals with episodic conditions or conditions in remission. They offer a non-exhaustive list of covered conditions, including cancer, post-traumatic stress disorder, major depressive disorder and multiple sclerosis.

Despite acknowledging that the determination of a disability requires an "individualized assessment," the EEOC lists conditions that will "virtually always" constitute a disability. These include cancer, cerebral palsy, diabetes, epilepsy, multiple sclerosis, major depressive disorder, bipolar disorder, obsessive compulsive disorder and autism.

"Regarded as" claims also gain support under the Regulations. Such claims may be based upon an alleged perception of impairment, irrespective of whether that impairment is perceived as an actual disability. Though employers need not reasonably accommodate an employee with a "regarded as" disability, they must accommodate employees with a "record of disability," unless they establish that it would be an undue burden.

Employers consequently should interpret "disability" broadly and focus on properly and fully participating in the interactive process. Employers should use the time before the Regulations become effective to review and sharpen their reasonable accommodation policies and procedures, and to provide training to management, human resources and legal staff on the ADA and these EEOC Regulations.

Feel free to direct any questions or concerns about the ADA and the Regulations to the authors of this Alert, or the Reed Smith attorney with whom you work regularly.

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