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## LABOR & EMPLOYMENT ALERT



CONTACTS

### Equal Employment Opportunity Commission Implements Expanded Federal Disability Discrimination Law

On March 25, 2011, the Equal Employment Opportunity Commission ("EEOC") issued its [final regulations](#) implementing the Americans with Disabilities Act Amendments Act of 2008 (the "Act"). The EEOC also revised its interpretative appendix to the regulations, "which the Commission will be guided by . . . when resolving charges of employment discrimination." The Act became effective on January 1, 2009. It was designed by Congress "to reinstate a broad scope of protection" under federal disabilities law by expanding the definition of the term "disability." See [Goodwin Procter's October 7, 2008 Client Alert](#) for a review of the major changes engendered by the Act. Congress retained the basic three-part definition of "disability": (i) a physical or mental 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. However, it changed the meaning of these terms.

While the Act provides some direction, it delegated to the EEOC the authority to issue regulations "implementing the law's definitions of disability." Congress specifically directed the EEOC to revise its regulations defining the term "substantially limits." This Client Alert reviews the major revisions made by the EEOC to its regulations, with a particular focus on the EEOC's new interpretation of the term "substantially limits."

#### Major Life Activities

The Act includes a broad, non-exhaustive list of "major life activities," which includes "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." The regulations add sitting, reaching and interacting with others to this list of major life activities.

Under the Act, "major life activities" now include operations of major bodily functions, including "functions of the immune system, normal cell growth, digestive, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." The regulations add several other examples of major bodily functions that constitute major life activities, including hemic, lymphatic, musculoskeletal, special sense organs and skin, genitourinary, and cardiovascular systems. The addition of major bodily functions as "major life activities" represents the Act's shift in focus away from the physical manifestations of an impairment and the impact of an impairment on the ability to work in favor of broader coverage.

#### The "Substantially Limits" Standard

As directed by Congress, the EEOC has revised its original standard for determining whether an impairment substantially limits a major life activity in favor of broader coverage. The previous standard required a comparison to the "average person in the general

population.” Under the revised regulations, “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.” According to the EEOC, the new standard provides a more “common-sense assessment” for determining whether an impairment is substantially limiting.

The regulations provide the following rules of construction to guide the analysis of whether an individual’s impairment substantially limits a major life activity:

- 1. Broad Construction.** The term “substantially limits” must be construed broadly in favor of extensive coverage. “An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity” to be considered substantially limiting. According to the EEOC, “substantially limits” is not designed to be a demanding standard.
- 2. Focus on Discrimination.** The focus in ADA cases should be on whether discrimination occurred, not on whether an individual with a physical or mental impairment is disabled. Thus, “the threshold issue of whether an impairment ‘substantially limits’ a major life activity should not demand extensive analysis.”
- 3. Individualized Assessment.** An individualized assessment is always required to determine whether an impairment substantially limits a major life activity. The regulations identify several impairments for which the individualized assessment “will, in virtually all cases, result in” a disability finding, including deafness, blindness, intellectual disability (formerly known as mental retardation), partially or completely missing limbs, mobility impairments requiring use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV/AIDS, multiple sclerosis, muscular dystrophy, major depression, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder and schizophrenia. The EEOC’s final regulations, unlike the proposed regulations that preceded them, do not list examples of impairments that will rarely substantially limit a major life activity.
- 4. Expert Analysis Typically Unnecessary.** The new inquiry into whether an individual is substantially limited compared to “most people in the general population” will rarely require scientific, medical or statistical analysis.
- 5. Mitigating Measures.** The positive effects of mitigating measures on an impairment may not be considered when determining whether or not an individual’s impairment substantially limits a major life activity. This revision is intended “to eliminate the catch-22” created by courts under the prior law where individuals subjected to discrimination were unable to invoke the ADA’s protections because their impairments were mitigated by medicines, medical supplies, behavioral adaptations and other interventions. The disability determination now “must focus on whether the individual would be substantially limited in performing a major life activity without the mitigating measure.” Examples of mitigating measures that cannot be considered are medications, hearing aids, assistive technology, reasonable accommodations, learned behavioral modifications, psychotherapy and physical therapy. The EEOC makes one exception for ordinary eyeglasses and contact lenses, the effect of which can be considered in determining whether an individual is substantially limited in a major life activity.
- 6. Episodic Impairments.** “An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.” Examples of such impairments include cancer, epilepsy, hypertension, multiple sclerosis, asthma, diabetes, major depression, bipolar disorder and schizophrenia.
- 7. One Substantial Limitation Sufficient.** “An impairment that substantially limits one major life activity need not substantially limit other major life activities” to be “considered a substantially limiting impairment.”
- 8. Short-Term Impairments.** An impairment that lasts or is expected to last fewer than six months may still substantially limit an individual’s ability to perform a major life activity compared to most in the general population. For example, according to the EEOC’s appendix to the regulations, a shoulder injury resulting in a 20-pound lifting restriction lasting several months would constitute a disability under the new regulations. Nevertheless, duration of an impairment remains a permissible consideration; according to the appendix to the regulations, “[i]mpairments that last only for a short period of time are typically not covered . . . [unless] sufficiently severe.”
- 9. Condition, Manner or Duration.** To determine whether an impairment is substantially limiting, “it may be useful in appropriate cases to consider, as compared to most 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.” Relevant considerations include “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 activity can be performed,” and the negative effects of mitigating measures. According to the EEOC, the focus should be on “how a major life activity is substantially limited, and not on what outcomes an individual can achieve.”

### **Substantially Limited in Working**

According to the appendix, courts will rarely need to consider whether an individual with an impairment is substantially limited in working, because the individual is likely to be substantially limited in another major life activity. In the rare situation that a substantial limitation on the ability to work must be established, individuals can do so by “showing that the impairment limits his or her ability to perform a class of jobs or broad range of jobs” as compared to “most people having comparable, training, skills, and abilities.”

The employee should be assessed based on “the nature of the work that [the employee] is limited in performing (such as commercial truck driving, assembly line jobs, food service jobs, clerical jobs, or law enforcement jobs)” or on the “job-related requirements that an individual is limited in meeting (for example, jobs requiring repetitive bending, reaching, or manual tasks, jobs requiring heavy lifting, prolonged sitting or standing, extensive walking, driving, or working under conditions such as high temperatures or noise levels).”

### **“Regarded As” Coverage**

The Act and the new regulations also make it easier for an individual to establish coverage under the “regarded as” disability definition by removing the requirement created by courts that the individual show that the employer “believed the individual’s impairment (or perceived impairment) substantially limited performance of a major life activity.” According to the EEOC, the focus in “regarded as” cases should be on how an employee “has been treated because of a physical or mental impairment . . . rather than on what an employer may have believed about the nature of the [employee’s] impairment.”

Under the new regulations, the employee is “regarded as” having a disability whenever the employer “takes an action prohibited by the ADA (e.g., failure to hire, termination, or demotion) based on an individual’s impairment or on an impairment that the [employer] believes the individual has.” The Act and the regulations retain the exception to this rule – the employee is not covered under the “regarded as” prong when the employer establishes that the impairment is objectively both transitory (lasting or expected to last for six months or less) and minor.

The Act and the regulations clarify that an employee covered only under the “regarded as” prong is not entitled to a reasonable accommodation. Further, according to the appendix, “in cases where reasonable accommodation is not at issue, the [“regarded as”] prong provides a more straightforward framework” than the “actual disability” and “record of disability” prongs “for analyzing whether discrimination occurred.”

### **Practical Effects of the EEOC’s Changes**

Under the EEOC’s new “substantially limits” standard, more impairments will constitute disabilities, and, therefore, trigger protection under the Act. As a result, the number of disability discrimination claims is likely to increase. Further, courts will spend less time analyzing whether an impairment is substantially limiting, and more time deciding whether discrimination occurred. Employers will have more difficulty obtaining summary judgment by establishing that the employee’s impairment is not substantially limiting. The result will likely be more jury trials on the questions of whether the employer discriminated against the employee and whether the employer failed to reasonably accommodate the employee’s disability.

To ensure compliance with the Act and the new regulations, an employer generally should assume that an employee with a physical or mental impairment may be entitled to protection. If such an employee requests an accommodation for an impairment, the employer should engage the employee in an interactive process to consider whether the requested accommodation is reasonable, not unduly burdensome and would enable the employee to perform his or her job effectively.

The Act and the EEOC's new regulations leave unaltered several important principles of federal disability discrimination law. A disabled employee generally will not be able to dispute the employer's failure to accommodate an impairment unless the employee has requested an accommodation. In addition, employees are not entitled to insist on their preferred accommodations if the employer offers effective alternatives. Further, disabled employees still must be able to effectively perform their essential job functions, with or without reasonable accommodation. As in the past, a disability is not an excuse for poor performance or misconduct.

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