LLB&L

EEOC Issues Final Regulations for the ADA Amendments Act of 2008

Authors

Hanna Fister Norvell
Houston, TX
713-226-1423
hnorvell@lockelord.com

Saira Najam
Houston, TX
713-226-1685
snajam@lockelord.com

On March 25, 2011, the Equal Employment Opportunity Commission (EEOC) published its final regulations regarding the Americans with Disabilities Act ("ADA"), in light of the ADA Amendments Act of 2008 ("ADAAA") that went into effect on January 1, 2009. The much-anticipated final regulations are effective May 24, 2011. The Commission also published a revised interpretive guidance (also known as the appendix), which includes many illustrative examples. See full text of regulations and appendix by clicking here.

The ADAAA preserves the original three-part definition of the term "disability" as a physical or mental impairment that substantially limits one or more major life activities; a record (or past history) of such an impairment; or being regarded as having a disability. While the basic terms do remain the same, the ADAAA significantly broadens the meaning of key terms (underlined above) in the disability definition, thereby expanding the class of protected individuals under the ADA. The stated purpose of these changes is to make it easier for an individual to establish he/she has a disability for the purpose of statutory coverage, and to shift the focus of the ADA to whether the employer complied with its obligations to reasonably accommodate the employee and whether discrimination occurred. Hence, employers should review their policies and procedures and train employees to likewise shift their focus under the ADA to ensure discrimination is prohibited and prevented, and to explore and provide reasonable accommodations as appropriate.

The final regulations largely track the statutory changes made by Congress in 2008 to the interpretation of "disability" and much of what the EEOC initially proposed for comment back in September 2009. Notably, neither the ADAAA nor the final regulations change the definitions of "qualified individual," "direct threat," "reasonable accommodation" or "undue hardship" or the applicable burdens of proof.

The EEOC has already experienced some of the effects of the new ADA, receiving 25,165 disability discrimination charges in fiscal 2010, up 23 percent from 21,451 charges the previous year. Below is a summary of the most significant changes from the prior ADA and its regulations.

I. New Expansive Interpretation of "Disability"

- "Impairments" that will "virtually always" result in a finding of a disability include, but are not limited to, blindness, deafness, missing limbs, mobility impairments requiring the use of a wheelchair, autism, cancer, intellectual disability, diabetes, epilepsy, post-traumatic stress disorder, muscular dystrophy, multiple sclerosis, obsessive compulsive disorder, bipolar disorder and major depression. There is no "per se" disability which would eliminate the need to conduct an "individualized assessment," but this assessment should be "simple and straightforward" with respect to the impairments discussed above.

- "Major Life Activities" now also include sitting, reaching, thinking, communicating, interacting with others and the operation of major bodily functions (e.g., the functions of the immune system, special sense organs and skin, normal cell growth and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, hemic, lymphatic and reproductive functions), to name just a few. The activity in question does not have to be of "central importance to daily life" as was the case under the old ADA.

- "Substantially Limits" no longer means "significantly" or "severely" restricts. Instead, the final regulations include the following guidelines:
  - The determination of whether an impairment "substantially limits" a major life activity requires an individualized assessment.

- No longer meant to be a demanding standard, the term "substantially limits" is to be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA.
- An impairment is a disability if it substantially limits, alone or in combination with other impairments, an individual to perform a major life activity as compared to "most people in the general population," an analysis which usually does not require scientific, medical, or statistical data.
- Employers may consider the condition under which the individual performs the major life activity, the manner in which it is performed, or the duration of time it takes to perform.
- While a significant or severe restriction is no longer required, not every impairment will be substantially limiting.
- Positive effects of mitigation measures are not to be considered in the determination of whether an impairment substantially limits a major life activity. As such, with the exception of "ordinary" eyeglasses or contacts, the effects of mitigating measures like medication, medical equipment and devices, prosthetic limbs, low vision devices (e.g., devices that magnify a visual image), hearing aids, mobility devices, oxygen therapy equipment, use of assistive technology, reasonable accommodations, learned behavioral or adaptive neurological modification, psychotherapy or physical therapy are no longer relevant in the "substantial limitation" inquiry. For example, an individual with diabetes is to be evaluated without considering the ameliorative effect of his/her insulin medication. Note, the ADAAA does allow for the consideration of the negative effects of a mitigating measure (i.e., negative side effects of a medication or a medical treatment) in the determination of whether a disability exists.
- Impairments that are episodic or in remission can still qualify as a disability if it would substantially limit a major life activity when active.
- There is no durational requirement for an impairment to be considered a disability. For example, an impairment lasting fewer than six months (i.e., transitory impairment) can still be considered a disability.

- An individual with a "record of a disability" (someone with a history of a disability or someone misclassified as currently having a disability) also is entitled to reasonable accommodations. As the regulations explain, such an employee may need leave or a schedule change to permit him/her to attend follow-up or monitoring appointments from a health care provider.

- The "regarded as disabled" prong has been vastly expanded and is likely to be used in situations which do not concern a request for an accommodation. Importantly, there is no longer an analysis of whether the employee has an actual "substantial limitation on a major life activity." Instead, a "regarded as" claim is made by alleging the employee was subjected to an adverse employment action based on any actual or perceived impairment. Given the ease in which individuals establish ADA coverage under this prong, employers are cautioned to take all steps to avoid using or even appearing to use any impairment as a reason for making employment decisions.
  - A "transitory or minor impairment" is an affirmative defense to "regarded as" coverage. In making this defense, a covered employer cannot rely on his/her subjective belief that the actual/perceived impairment was transitory or minor when objectively this is not the case. For example, an employer cannot assert that he/she believed an employee's bipolar condition was transitory and minor because bipolar disorder is not an objectively transitory and minor condition. Further, an individual who is only being "regarded as" disabled is not entitled to any reasonable accommodations.

II. Other Key Provisions to Note

- Positive or negative effects of mitigating measures can be considered in deciding issues other than the existence of a disability, such as whether an employee is qualified for a particular position, needs a reasonable accommodation, or poses a direct threat. For example, an individual with a disability who is taking appropriate medications to alleviate symptoms may not need any reasonable accommodations. However, an employer cannot require an employee to use any specific mitigating measure.

- Qualification standards, employment tests, or other selection criteria based on a person's uncorrected vision is now clearly prohibited unless the employer can show it is job related for

Offices

Atlanta

Austin

Chicago

Dallas

Hong Kong

Houston

London

Los Angeles

New Orleans

New York

Sacramento

San Francisco

Washington DC

www.lockelord.com

the position in question or consistent with business necessity.

- Pregnancy itself is still not considered to be an impairment and therefore cannot be a disability on its own. However, certain impairments resulting from pregnancy (e.g., gestational diabetes, lifting restrictions) could still meet the actual disability test, as well as satisfy the "record of" or "regarded as" types of claims.

III. ADAAA Compliance Action Items for Employers

With this expanded coverage, many more employees are eligible for reasonable accommodations and other protections under the ADA. Therefore, employers are advised to take steps to ensure their managers and Human Resources employees understand their duties to engage in the interactive process, to analyze and provide reasonable accommodations, and to prevent or stop any discrimination and harassment based on actual or perceived impairments of any nature. Some suggestions include:

- Consider utilizing one person or group to make or review all accommodation decisions and policies related to the ADA. This person or group can develop expertise on the topic and ensure better understanding, consistency and compliance.

- Review and update job descriptions as well as accommodation, leave and return to work policies, procedures and forms. These documents should relate to business requirements, comply with the ADA, allow for modification when necessary as an accommodation, and be helpful in the interactive process to determine potential accommodations.

- Focus on the interactive process.
  - When approached by an employee requesting an accommodation, employers should engage the employee and join in an interactive process of open dialogue to arrive at a workable solution. In doing so, employers should ask employees to describe how the alleged disability affects their job performance and inquire about the various types of accommodations which may improve performance or make job performance possible. More than one discussion, and sometimes several discussions, may be needed.
  - Potential accommodations may include leave time, modified schedule or duties, or changes to policies, among other things.
  - Supporting medical documentation may still be required.
  - Consider creating forms to assist with the process, to ensure that the interactive process is thorough, and to document all discussions related to the interactive process.

This short summary does not discuss all the potential implications or aspects of the ADA or constitute legal advice. As always, we are happy to assist you with any questions you may have.

About the Author:

Hanna Norvell is Board Certified in Labor and Employment law, she exclusively represents employers in matters related to compensation, wrongful termination, retaliation, harassment and discrimination (Title VII of the Civil Rights Act), wages and hours, disability accommodation (ADA), leaves of absence, Family and Medical Leave Act (FMLA), federal contractor obligations (OFCCP and other statutes), layoffs, unemployment compensation, workplace violence, employee privacy, internet/social media use, workplace investigations, drug testing, medical exams, employment handbooks and policies, and employee and management training.

Saira Najam is an associate in Locke Lord's Houston office practicing in the area of Labor and Employment law.