

Labor Law Bulletin

EEOC Gives Guidance on ADA Amendments Act

On September 23, 2009, the EEOC published proposed regulations interpreting the ADA Amendments Act of 2008 (“ADAAA”). The ADAAA became effective January 1, 2009 and significantly expanded the coverage of the Americans with Disabilities Act (“ADA”). As explained in prior newsletters, the effect of the ADAAA is that many more individuals are now covered by the ADA and eligible for reasonable accommodation. The EEOC is accepting public comments on its proposed regulations through November 23, 2009, and will issue final regulations at some point thereafter. We do not expect the EEOC to make significant changes from the proposed regulations issued on September 23.

What do the new regulations accomplish?

The EEOC did not mince words in explaining the intent behind its regulations:

The definition of disability in this part shall be construed broadly, to the maximum extent permitted by the terms of the ADA. [T]he focus of an ADA case should be on whether discrimination occurred, not on whether an individual meets the definition of “disability.”

The regulations include a number of provisions that are likely to be controversial:

An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered a disability.

An impairment may substantially limit a major life activity even if it lasts, or is expected to last, for fewer than six months.

Someone with a 20-pound lifting restriction that is not of short-term duration is substantially limited in lifting, and need not also show that he is unable to perform activities of daily living that require lifting in order to be considered substantially limited in lifting.

The regulations highlight the ADAAA’s expanded list of “major life activities” that must be considered in determining whether an individual is disabled. The list now includes broad concepts of “concentrating, thinking, communicating, interacting with others” and bodily functions of the “special sense organs . . . normal cell growth . . . endocrine, hemic, lymphatic” systems, among others. Many of these, of course, will be very difficult for employers to assess or quantify.

The regulations also emphasize the ADAAA’s mandate that “mitigating measures” (such as medication, hearing aids, prosthetics, mobility devices and even “surgical interventions”) may not be considered in determining whether an individual is substantially limited in a major life activity. So even if a mitigating measure can correct or eliminate the effects of the condition, the individual will still be considered disabled.

Is there any good news for employers?

Yes. The regulations maintain the existing requirement that the individual must be a “*qualified* individual with a disability.” That means the individual “satisfies the requisite skill, experience, education and other job-related requirements of the [job] and who, with or without reasonable accommodation, can perform the essential functions of such position.” Thus, employers still may require applicants and employees to meet essential job requirements, which,

for most jobs, include regular and predictable attendance and conformance to basic performance and behavioral rules. Likewise, an employee with a 20-pound lifting restriction may be disabled, but he may not be a qualified individual with a disability if heavy lifting is an essential function of the job and no accommodation is available.

Also, despite noting that conditions lasting less than six months may be a disability, the proposed regulations recognize that “[t]emporary, non-chronic impairments of short duration . . . such as the common cold, seasonal or common influenza, a sprained joint, minor or non-chronic gastrointestinal disorders, or a broken bone that is expected to heal completely” usually will not be a disability.

What should you do?

The ADAAA and the EEOC’s proposed regulations will result in more accommodation requests and increased obligations on employers to meet those requests. Employers should:

- implement and disseminate a reasonable accommodation policy setting forth the

company’s commitment to accommodate disabled employees and explaining how and to whom employees may request accommodations

- train supervisors, managers and human resources staff on the ADAAA and the accommodation process
- consider creating standard forms for employees to use to request accommodations and for the Company to document the accommodation process
- engage in an “interactive process” with the employee requesting accommodation to determine an appropriate accommodation
- seek legal counsel when in doubt about a requested accommodation

If you have any questions about the EEOC’s proposed regulations, the ADAAA or any disability-related issue, please contact **Thomas M. Wilde** (312-609-7821), **Laura Sack** (212-407-6960), **Christopher L. Nybo** (312-609-7729) or any other Vedder Price attorney with whom you have worked.

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