

Labor and Employment Law Bulletin

EEOC Issues Final ADA Amendments Act Regulations

The EEOC's final regulations implementing the ADA Amendments Act of 2008 ("Amendments Act") were published in the Federal Register on March 25, 2011, and will be effective on May 24, 2011. As anticipated, the regulations make it much easier for employees to establish that they are "disabled" within the meaning of the ADA.

The Amendments Act provides that the definition of "disability" must be construed in favor of broad coverage "to the maximum extent permitted" by the ADA, and the determination of whether an individual has a disability "should not require extensive analysis." In its recently published final regulations, the EEOC explained: "The effect of these changes is to make it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the ADA."

The practical effect of the Amendments Act and the EEOC's final regulations is that the primary focus of the ADA has shifted from determining whether an individual has a disability to determining whether the employer provided reasonable accommodation.

The key points in the final regulations are:

Definition of Disability: While the definition of disability remains "a physical or mental impairment that substantially limits one or more . . . major life activities," the regulations emphasize that going forward, determining whether an employee has a disability "should not demand extensive analysis." Notably, certain conditions – such as deafness, autism, cancer, cerebral palsy, epilepsy, diabetes,

bipolar disorder, post-traumatic stress disorder, HIV and MS – will now "virtually always" be found to be disabilities because of their "inherent nature."

Major Life Activities: Whether an activity is "major" is not to be determined by its "central importance to daily life," and the regulations provide a nonexhaustive list of activities (such as sleeping, thinking and interacting with others) and the operation of major bodily functions (such as the immune system, normal cell growth and reproductive functions) that qualify.

Substantially Limits: The term "substantially limits" must be construed broadly to permit expansive coverage to the maximum extent contemplated by the ADA, and is not meant to be a "demanding standard." Further, an impairment "need not prevent, or significantly or severely restrict" the performance of a major life activity to be considered substantially limiting, and scientific, medical and statistical analysis are not necessary to confirm that it is.

Impairments that are Episodic or in Remission: Impairments that are episodic, such as epilepsy, or in remission, such as cancer, are disabilities if they substantially limit a major life activity when active.

Mitigation: Whether an impairment is a disability must be considered without regard to mitigation or ameliorative measures, such as medication, equipment and aids, with the exception of contact lenses and ordinary eyeglasses.

Regarded As: Employees no longer need to show that their employers perceived them to be substantially limited in a major life activity to established that they were “regarded as” disabled, but rather only that they were subjected to a prohibited action because of an actual or perceived impairment.

No Minimum Duration: Impairments lasting only a short period of time may be disabilities if “sufficiently severe.” The duration of the impairment is “only one factor in determining whether [it] substantially limits a major life activity,” and according to the regulations, the effects of ailments lasting even less than six months can be substantially limiting.

Practical Impact for Employers

The Amendments Act and the EEOC’s final regulations set a low bar for establishing that an impairment qualifies as a disability and confirm that the primary focus of the EEOC is and will remain on reasonable accommodations and whether discrimination occurred. For employers, this highlights the importance of implementing or updating reasonable accommodation policies and practices. This includes training human resource professionals, supervisors and managers in how to:

- Recognize an employee’s potential need for accommodation
- Identify potential accommodations to consider
- Engage in an interactive process with the employee to identify and evaluate potential accommodations and determine which would enable the employee to perform the essential functions of his or her job
- Evaluate whether any potential accommodations would pose an undue hardship on the employer

- Evaluate whether the employee poses a direct threat to him/herself or others
- Monitor and, if necessary, re-evaluate accommodations once they are in place to ensure that they are effective

While the human resources department typically should lead the accommodation process, supervisors and managers play important roles. Often it is the frontline supervisor who first is aware of an employee’s limitations and need for accommodation. Likewise, the frontline supervisors often have the most complete understanding of the employee’s job duties. For these reasons, training regarding the accommodation process should include supervisors and managers.

For further information regarding the impact of the regulations on your business’ policies and practices, please contact **Thomas M. Wilde** (312-609-7821), **Elizabeth N. Hall** (312-609-7795), **Laura Sack** (212-407-6960), or **Amy L. Bess** (202-312-3361).

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