

Proposed Regulations for the Americans with Disabilities Act Amendments Act

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The Equal Employment Opportunity Commission (EEOC) has published extensive regulations interpreting the Americans with Disabilities Act Amendments Act (ADAAA) which came into effect in January 2009. In enacting these amendments, Congress aimed to overturn the effects of several court decisions which had narrowed the coverage of the ADA. The proposed regulations will help to interpret the scope of that expanded coverage.

The ADAAA clarifies that an applicant or employee is covered by the ADA if his or her impairment substantially limits one major life activity. That activity need not be “of central importance to daily life” for the person to be covered by the ADAAA. The proposed regulations provide the example of a person with a significant lifting restriction, who would not need to also show an inability to perform any other major life activities due to that restriction.

Major Life Activities

Major life activities now include the functioning on a major bodily system. The proposed regulations provide the example of rheumatoid arthritis, which affects the musculoskeletal system. The ADAAA also covers those with an impairment that is episodic or in remission, such as asthma or cancer, if it would substantially limit a major life activity when active. The proposed regulations explain that certain impairments will consistently result in a person’s coverage by the ADA, including intellectual disability (mental retardation), amputations, cerebral palsy, diabetes, epilepsy, major depression, and HIV or AIDS. In addition, other impairments may be disabling for at least some applicants or employees. For example, the proposed regulations state that a person with high blood pressure could be substantially limited in the functioning of their circulatory system, compared to most people.

Substantially Limits

An impairment need not necessarily last more than 6 months to be substantial, under the proposed regulations. In addition, the proposed regulations change the regulatory definition of substantially limits, to remove a comparison to the “average person in the general population,” so that an applicant or employee’s limitations on a major life activity should now be compared to “most people in the general population.” The proposed regulations emphasize that the person with a disability need not show that the impairment prevents or significantly or severely restricts the activity. In addition, an employee should not be required to produce scientific or medical evidence to establish that a limitation is substantial.

Ability to Work

The proposed regulation provide a different explanation of when an applicant or employee would be substantially limited in the ability to work, which is now listed as a major life activity in the

ADAAA. The new regulations would remove the requirement that the person be limited in a class or broad range of jobs. Instead, a person would be covered by the ADA if he or she is limited in the ability to perform the current or prospective job, and jobs with similar qualifications or job-related requirements. The limitation would be compared to most workers with comparable training, skills and abilities. The proposed regulations provide the example of a person with carpal tunnel syndrome, who may not be substantially limited in the ability to perform manual tasks, but could still be limited in her ability to perform her job and other jobs requiring similar repetitive tasks. Note that under the proposed regulations, the lack of expert testimony regarding the jobs the person cannot perform or the person's ability to find other work would not necessarily prevent the person from being substantially limited in the ability to work.

Mitigating Measures

The substantial limitation determination must be made without regard to the ameliorative effects of mitigating measures. Under the ADAAA, mitigating measures that will no longer be considered include different types of treatment;¹ the use of assistive technology, reasonable accommodations or auxiliary aids or services; and learned behavioral or adaptive neurological modifications. As an example, the proposed regulations state that a person with diabetes who would be substantially limited without medication would be covered by the ADA. The proposed regulations also add "surgical intervention" as another type of mitigating measure which should not be considered. In contrast, the ameliorative effects of ordinary eyeglasses or contact lenses can still be considered in determining whether an impairment substantially limits a major life activity.²

Regarded as Disabled

The proposed regulations also explain that a person may be protected against discrimination if they are regarded as disabled, if an employment decision is based on an actual or perceived impairment. An adverse action based on a symptom of, or mitigating measure for, an impairment would be prohibited under the proposed regulations. For example, an applicant who is denied employment because of his anti-seizure medication would have a claim for discrimination. The person need not show that the employer perceived the impairment to limit a major life activity. An adverse action based on an impairment that is both transitory and minor, such as a broken bone, would not be prohibited. Note that an employer need not accommodate a person who is regarded as, but is not actually, disabled.

¹ Examples provided include medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies.

² As used in the amendment, the term "ordinary eyeglasses or contact lenses" means lenses that are "intended to fully correct visual acuity or eliminate refractive error;" and the term "low-vision devices" means devices that "magnify, enhance, or otherwise augment a visual image."

Recommendations

The proposed regulations were publicized on September 23, 2009 and comments will be solicited for 60 days. Employers are advised to carefully review the proposed regulations to determine if their practices are in compliance. In determining whether an employee qualifies for ADA coverage as a person with a disability, to be sure to include the following:

- 1) Employees or applicants who use some type of treatment or device to reduce the effects of their impairment, but would be substantially limited without that treatment or device;
- 2) Employees or applicants who are at least substantially limited in the performance of one major life activity;
- 3) Employees or applicants with a condition that is episodic or in remission, if it is substantially limiting when active.