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Management Alert

EEOC Issues Proposed Regulations Under the Americans with Disabilities Act, Invites Public Comment by November 23, 2009

On September 23, 2009, the EEOC published proposed new regulations under the Americans with Disabilities Act (ADA). The EEOC's *Notice of Proposed Rulemaking* is the agency's first effort at providing guidance under the ADA Amendments Act of 2008 (ADAAA), which was enacted on September 25, 2008, and became effective January 1, 2009.

As noted in a previous Seyfarth *Management Alert*, the ADAAA specifically rejected several Supreme Court decisions that had narrowly construed the term "disability" and the ADA generally, and explicitly broadened the ADA to protect a greater number of individuals. The ADAAA further instructed EEOC to issue implementing regulations that would do the same. Thus, EEOC issued its Notice of Proposed Rulemaking, which echoes the ADAAA in providing that "[t]he definition of disability in this part shall be construed broadly, to the maximum extent permitted by the terms of the ADA."

The EEOC is seeking public comment on these proposed regulations by November 23, 2009, and Seyfarth is helping lead that process on behalf of employers. Highlights of the proposed regulations include the following:

A New Definition of "Substantially Limits"

The ADA provides that an impairment is a disability if it "substantially limits" an individual's ability to perform a major life activity. The term "substantially limits" previously had been interpreted as "significantly restricts," which resulted in many ADA claims being dismissed for failure to show a qualifying disability. The ADAAA expressly instructed EEOC to issue new regulations defining "substantially limits" more broadly.

Accordingly, proposed rule 1630.2(j)(2)(i) describes the ADAAA as shifting the "focus of an ADA case" to the question of "whether discrimination occurred, not on whether an individual meets the definition of 'disability.'" Proposed rule 1630.2(j)(2)(iv) suggests that the question of whether an individual is "substantially limited" in a major life activity "should not require extensive analysis" and "often may be made using a common-sense standard, without resorting to scientific or medical evidence." Likewise, proposed rule 1630.2(j)(2)(vi) states that the relevant inquiry is "how a major life activity is substantially limited, not on what an individual can do in spite of an impairment."

Proposed rule 1630.2(j)(2)(ii) further notes that "an individual whose impairment substantially limits a major life activity need not also demonstrate a limitation in the ability to perform activities of central importance to daily life." This follows from Congress's repudiation of several U.S. Supreme Court decisions under the ADA. The proposed rule offers the examples of an individual "with a 20-pound lifting restriction that is not of short-term duration" and an individual "with monocular vision whose depth perception or field of vision would be substantially limited"—individuals now protected under the ADAAA.

Additionally, proposed regulation 1630.2(j)(2)(iii) and (iv) provide that where an impairment substantially limits one major life activity, it need not also limit other major life activities to qualify as a disability, and that cases holding otherwise are contrary to the ADA as amended. For example, an individual with diabetes will be considered disabled based upon the substantial limitation of his endocrine system, and an individual with epilepsy will be considered disabled based on the substantial limitation of brain function (or, during a seizure, of other major life activities). An individual "whose normal cell growth is substantially limited due to cancer" will not be required to show a substantial limitation of another major life activity.

Proposed rule 1630.2(j)(2)(v) would seemingly foreclose the argument that an impairment is not substantially limiting solely because it is "temporary," as it rejects any "durational minimum" and states that "an impairment may substantially limit a major life activity even if it lasts, or is expected to last, for fewer than six months." Conversely, proposed rule 1630.2(j)(8) preserves the understanding that "temporary, non-chronic impairments of short duration with little or no residual effects . . . usually will not substantially limit a major life activity."

Proposed rule 1630.2(j)(7) discusses the major life activity of working at length, noting among other things that "an individual with a disability will usually be substantially limited in another major life activity" aside from working. The rule provides guidelines for analyzing work limitations, while at the same time noting that the question of whether an individual's ability to work is substantially limited "should not require extensive analysis." The proposed rule also cautions that "the fact that an individual has obtained employment elsewhere is not dispositive of whether an individual is substantially limited in working."

Expansion of "Major Life Activities" and Addition of "Major Bodily Functions"

The ADAAA itself added several new activities to the non-exhaustive list of major life activities covered by the ADA, including "sleeping, ... concentrating, thinking, [and] communicating." The ADAAA also expanded the concept of "major life activities" to include "the operation of major bodily functions" such as the "immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." The proposed regulations mirror these changes at sections 1630.2(i)(1) and (2), but add three more major life activities—sitting, reaching, and interacting with others—plus the "major bodily functions" of the special sense organs, skin, genitourinary, cardiovascular, hemic, lymphatic, and musculoskeletal systems as "further illustrative examples."

In addition, proposed rule 1630.2(j)(5) lists a number of conditions that "will consistently meet the definition of disability" based on "certain characteristics associated with these impairments," and includes in this list autism, cancer, cerebral palsy, diabetes, epilepsy, HIV and AIDS, multiple sclerosis, muscular dystrophy, major depression, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia. Comments to the proposed rules will likely point out that this contravenes the original ADA's rejection of any "per se" disability.

Mitigating Measures

As noted in Seyfarth's previous *Management Alert*, the ADAAA rejects numerous Supreme Court and federal appellate court decisions holding that "mitigating measures" (e.g., medications, prosthetics, corrective surgery, hearing aids, and mobility devices) should be considered in assessing whether an individual is "disabled" under the ADA. Going forward, impairments are to be evaluated in their unmitigated state when determining whether the individual is substantially limited in a major life activity, except that ordinary eyeglasses and contact lenses may be considered. Proposed regulation 1630.2(j)(3) reflects these changes.

Episodic Impairments and Impairments in Remission

The ADAAA extended the ADA to cover individuals with episodic impairments or conditions in remission, if the impairment would substantially limit a major life activity in its active state. Proposed rule 1630.2(j)(4) provides a non-exhaustive list of examples, including "epilepsy, hypertension, multiple sclerosis, asthma, cancer, and psychiatric disabilities such as depression, bipolar disorder, and post-traumatic stress disorder."

"Regarded As" Analysis

The ADAAA significantly expanded coverage for individuals "regarded as disabled" by prohibiting discrimination based on the employer's alleged perception of a mental or physical impairment, *even if that impairment is not perceived as an actual disability*. This means, for example, that a minor lifting restriction which might not rise to the level of an actual disability (under the major life activity of working or otherwise) could nonetheless be the basis of a "regarded as" claim.

Proposed rule 1630.2(l) states that proof that an individual was denied employment because of an impairment is sufficient to establish coverage under the ADA, even without "evidence that the employer believed the individual was substantially limited in any major life activity." The proposed rule offers the example of an individual who is not hired because he takes anti-seizure medication, even if the employer does not know why the individual is taking such medication. At the same time, the proposed rule excludes "minor and transitory impairments" with an actual or expected duration of less than six months, distinguishing between the examples of an individual who cannot type for three weeks due to a sprained wrist (transitory and minor) and an individual believed to have carpal tunnel syndrome (not transitory and minor).

Like the ADAAA itself, the proposed regulations state that there is no duty to provide reasonable accommodations to those "regarded as" having a disability. However, the proposed rules go beyond the statute in requiring that employers reasonably accommodate those with a "record of" disability absent undue hardship. (It is unclear how or why an employer should accommodate an individual with a record of disability if that individual is not actually, presently disabled.)

Impact of Proposed Rules on Employers

Supplementary Information preceding the proposed regulations discusses the difficulties of estimating the number of individuals who will now be covered under the ADA. This prefatory information also acknowledges that treating certain impairments as "consistently" meeting the definition of disability may significantly expand this number. Consequently, defendants are far less likely to prevail on a claim that an individual is not disabled and therefore is not covered under the ADA or does not require accommodation. Further, the proposed rules emphasize that much of the case law and other guidelines under the original ADA are contrary to the ADAAA and should be disregarded.

Given this, and regardless of what form the regulations ultimately take, employers are well-advised to recognize that common conditions not previously considered disabling will now likely be ADA-covered disabilities. Rather than questioning whether an individual is disabled, employers should focus on reasonable accommodation, and whether an individual with a physical or mental condition is otherwise qualified to perform essential job functions, with or without reasonable accommodation. In particular, employers must reevaluate their job descriptions, job qualification standards, and reasonable accommodation procedures (including leave of absence procedures) to ensure that they are internally consistent, current and defensible. Seyfarth has developed a number of tools to assist employers in taking the necessary steps to help ensure compliance with the ADAAA.

For more information, please contact the Seyfarth attorney with whom you work or any Labor & Employment attorney on our website (*www.seyfarth.com/LaborandEmployment*).

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