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REPORT

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DISABILITIES

New Americans with Disabilities Act Amendment Act Regulations: EEOC Expands Coverage of ADA to You and Your Employees

BY LAWRENCE P. POSTOL

If you are over 40 years old, chances are you have some chronic physical or mental impairment, e.g. diabetes, hypertension, arthritic changes in your knees or back. If so, you are protected by the Americans with Disabilities Act.

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The Equal Employment Opportunity Commission on March 25, 2011, published regulations (29 C.F.R. § 1630), implementing the 2008 Americans with Disabilities Act Amendments Act (''ADAAA'') (76 Fed. Reg. 16,978) (36 EDR 343, 3/30/11). The ADAAA was intended to expand the coverage of the ADA, so the focus would not be on who is covered by the ADA, but rather whether the employer meets its obligations under the ADA—not to discriminate against the disabled, and to

provide disabled persons reasonable accommodations so they can perform the essential duties of the job. In its ADAAA Regulations, EEOC appears to have expanded the coverage of the ADA virtually to everyone.

The ADA defines a disability as a physical or mental impairment that substantially limits a major life function. The ADAAA Regulations expanded the definition of major life functions, and require that a condition be considered before the mitigating effects of corrective measures, e.g. use of medicine, or medical supplies and equipment such as braces. The ADAAA Regulations, by essentially taking the word ''substantially'' out of the definition, and by further expanding the definition of ''major life functions'' to include any bodily function, provide an expansive definition of a covered disability. So expansive, that it is difficult to imagine anyone with a permanent or chronic physical or mental impairment that will not be protected by the ADA.

Before the 2008 Amendments, the courts so restricted the definition of a covered disability that few employees benefited from the intended protection of the ADA. The 2008 Amendments and EEOC in its Regulations left no doubt that there is a new sheriff in town, and employers now must provide reasonable accommodations to virtually anyone with a physical or mental impairment.

The ADA Regulations define key terms in the negative, saying what the word does not mean, without ever saying what is does mean.

The ADA Regulations make no attempt to help employers comply with the ADA by providing clear definitions and rules as to what is, or is not, allowed. Possibly this was intentional since, in the absence of any clear safe harbors, employers must assume coverage by the ADA or face possible liability. The ADA Regulations define key terms in the negative, saying what the word does not mean, without ever saying what is does mean. If the goal of the Regulations was to allow the maximum number of people the ability to sue for disability discrimination, then it is mission accomplished. For employers who may have been hoping for the same guidance and protection, the Regulations will disappoint.

The ADA protects persons who have a disability, who have a record of a disability, or who are ''regarded as'' disabled. The ''regarded as'' definition comes into play if an employer believes that person cannot do a job because of a physical or mental impairment. Before the ADAAA, to prevail in court, the worker had to show that the ''regarded as'' physical or mental impairment met the definition of a disability—it SUBSTANTIALLY limited a major life function. The Regulations remove the requirement for ''substantiality'' when the issue is discrimination (''regarded as'') and there is no claim for a reasonable accommodation. Thus, if an employer refuses to hire someone because of any physical or mental impairment (that is not transient and minor), then the person can sue under the ADA. The disabled will have their day in court, and employers will have to be prepared to show their decision was not based on the person's physical or mental impairment.

Moreover, even if the issue is whether a reasonable accommodation is needed, the vast majority of persons with a physical or mental impairment still will be entitled to protection (reasonable accommodations) because the definition of ''major life functions'' is so broadly defined (essentially anything wrong with the human body) and the term ''substantially'' is essentially ignored in the ADAAA Regulations. EEOC tells us the word ''substantially'' does not mean ''significant'' or ''severely restrict,'' but EEOC never tells employers what is does mean. Thus, an employer will be hard pressed to prove any physical or mental impairment does not substantially limit a major life function, and thus qualify for ADA protection.

Minor or Transient Conditions. Moreover, the exclusion of minor and transient conditions only applies to the ''regarded as'' category of disability. Thus, in determining if someone has a disability, or record of a disability, the automatic exclusion of minor conditions lasting less than six months does not apply. EEOC reasoned that those definitions require a substantial limitation of a major life function, so the clear six-month exclusion rule was not needed. The problem is the ''substantially limits'' definition was largely rendered meaningless by the EEOC Regulations. Thus, employers have no clear guidance as to whether any particular temporary condition is not covered by the ADA.

Key Provisions of Regulations. The key provisions of the ADAAA Regulations that make ADA coverage so expansive are as follows:

§ 1630.1(c)(4)	''the definition of 'disability' in this part shall be construed broadly in favor of expansive coverage to the maximum extent, permitted by the terms of the ADA.''
	''The question of whether an individual meets the definition of disability under this part should not demand extensive analysis.''
§ 1630.2(g)(3)	If the issue does not involve a request for reasonable accommodation, ''the evaluation of coverage can be made solely under the 'regarded as' prong of the definition of disability, which does not require a showing of an impairment that substantially limits a major life activity or a record of such an impairment.'' *See also* § 1630.3(j)(2) and § 1630.3(l)(i).
§ 1630.2(h)	Adds to the list of physical or mental impairments that may be a disability ''cosmetic disfigurement,'' ''emotional or mental illness,'' and limitation of ''special sense organs, skin, genitourinary, cardiovascular, hemic, lymphative and musculoskeletal function.''
§ 1630.2(i)(1)(ii)	''The operation of a major bodily function includes the operation of an individual organ within a body system.''
§ 1630.2(i)(2)	''A major life function need not be of central importance to daily life.''
§ 1630.2(j)(1)(i)	''The term 'substantially limits' must be 'construed broadly in favor with expansive coverage.' ''
§ 1630.2(j)(1)(ii)	The term ''substantially limits'' does not mean ''significantly or severely restrict.''
§ 1630.2(j)(1)(iii)	The application of the term ''substantially limits'' should *not* demand extensive analysis.
§ 1630.2(j)(1)(v)	Proving a substantial limitation should ''*not* require scientific, medical or statistical analysis.''

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§ 1630.2(j)(1)(ix)	The exclusion for minor conditions which last less than six months only applies to ''regarded as'' disabilities, and not to actual disabilities or record of a disability.
§ 1630.2(j)(4)(ii)	In determining if a condition is a disability, ''negative side effects of medication can be considered,'' as well as if a person must compensate for them by, use of ''additional time or effort.''
§ 1630.2(j)(1)-(5)	The benefits of mitigating measures must be ignored in evaluating conditions (e.g., medicine, braces) and this includes ''learned behavioral or adaptive neurological modification'' and ''psychotherapy, behavioral therapy or physical therapy.'' The benefits of surgery is considered only if it permanently eliminates an impairment.
§ 1630.2(k)	For those with a ''record of a disability,'' one reasonable accommodation is ''to attend follow-up or 'monitoring' appointments with a health care provider.''

EEOC claims its regulations will allow for ''predictable, consistent and workable application of the ADA'' (§ 1630.3(j)(3)). However, there is nothing predictable or workable about the Regulations, except that employers must treat essentially all physical and mental conditions as covered disabilities, and employers face greatly increased ADA litigation. For example, if a condition is minor and transient, it cannot be ''regarded as'' a disability. However, it still can be a disability if it substantially limits a major life function. Simple, right? It would have been preferable and fairer to simply say that any temporary condition which resolves within six months is not a covered disability.

EEOC does give a list of conditions that it says will ''virtually always'' be considered to be disabilities: deafness, blindness, intellectual disability (mental retardation), partial or total missing limbs, use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV, multiple sclerosis, muscular dystrophy, major depressive disorders, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia (§ 1630.3(j)(3)(ii) & (iii)). Thus, employers should assume coverage for these conditions.

Anything Helpful for Employers? So do the Regulations provide anything helpful for employers? Well, to be qualified for a job, a disabled person must satisfy ''the requisite skill, evidence, education and other job-related requirements'' of the job (§ 1630.2(m)). Also, employers need not provide reasonable accommodations to someone who does not have a disability, but merely is regarded as having a disability (§ 1630.2(o)(4)). In addition, if a condition is minor and transient (less than six months), then it cannot be ''regarded as'' a disability, and if it does not substantially limit a major life function, then an employer need not provide reasonable accommodations to the worker.

The Regulations certainly fulfill the ADAAA's mandate to expand the coverage of the ADA. The ADAAA and Regulations may well have gone too far in the sense that essentially everyone over 40 years old will likely be protected by the ADA—it is the rare exception of a person who does not have any chronic condition by age 40. After passage of the ADAAA in 2008, employers have seen an ever increasing number of ADA claims. The new Regulations can be expected to add fuel to this fire.

Workers and disability groups applaud the Regulations, saying that the ADAAA and the Regulations right the wrong caused by the courts' narrow interpretation of what is a covered disability under the ADA. Indeed, before 2008, employers won the vast majority of ADA cases by arguing the worker's condition was not severe enough to be a protected disability.

For employers, the ADAAA and Regulations go too far, in that any person who suffers any adverse employment action (e.g., firing, not getting a raise, discipline) and who has a chronic physical or mental impairment, or even a temporary condition which is not minor, can allege discrimination under the ADA. Likewise, they can request reasonable accommodations if their impairment limits a major life function, which includes any bodily function.

The disabled argue this is precisely what Congress intended, protection of anyone with any physical or mental impairement.

One thing is certain—as employers face an aging workforce, as baby boomers continue to age and work, employers will have to deal with an increasing number of ADA claims. Employers were largely able to ignore the ADA before because of its Catch 22—a worker had to have a severe condition to meet the definition of being disabled, but not so severe they were not qualified for the job (i.e., able to perform the essential duties of the job with reasonable accommodations). Employers escaped litigation at the ''disability'' definition stage, and thus never had to face whether their reasonable accommodation process was adequate. Now, for the first time, they will have their accommodation procedures tested, and many employers will not be prepared and will fail. If an employer does not know what the reasonable accommodation of job restructuring is, and most do not, they better learn it, and the other requirements of the ADA.