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New Regulations Expand Definition of Disability

More workers will be entitled to 'reasonable accommodations'

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Sometimes changes in employment laws are revolutionary, as when Congress passed the Americans with Disabilities Act 20 years ago. That change brought about a new vocabulary with terms and phrases such as "reasonable accommodations" and "direct threat."

When Congress passed the Americans with Disabilities Act Amendments Act ("ADAAA") a few years ago, the change was more evolutionary. The foundation for the ADAAA was the belief that the definition of disability had been too narrowly construed by the courts.

So, it should come as no surprise that when the Equal Employment Opportunity Commission issued regulations implementing the ADAAA last month (effective May 24, 2011), the regulations would also be more evolutionary than revolutionary. Indeed, when combined with the ADAAA, the regulations emphasize that more individuals will qualify as disabled and will be entitled to reasonable accommodations at the workplace.

What the ADAAA and new regulations haven't changed is the basic definition of "disability." But what the regulations now make clear is that the term is to be interpreted very "broadly."

When the ADAAA was passed a few years ago, it overruled the Supreme Court's decision in *Toyota Motor v. Williams* nearly 10 years ago. That decision (and others) required that the "substantially limits" part of the definition of "disability" had to relate to a "major life activity" that was of "central importance to most people's daily lives."

The EEOC's new regulations emphasize that determining whether a person is disabled should not be a demanding standard. As a result, most ADA cases should no longer focus on whether the employee is "disabled" but on the underlying merits of the alleged discrimination.

To that end, the regulations eliminate the idea that certain medical conditions will always qualify as disabilities. But the regulations do call for an "individualized assessment" of whether a condition "substantially limits a major life activity." In most instances, this assessment will be straightforward. Indeed, deafness, blindness, intellectual disability, partially or completely missing limbs, autism, cancer, cerebral palsy, diabetes, HIV infection and many others will usually (but not automatically) qualify as disabilities.

The regulations also emphasize that mitigating measures (other than ordinary eyeglasses or contact lenses) cannot be considered in determining whether an individual has a disability. If the effects of a disability can be mitigated, but an employee is not taking steps to mitigate the disability, this cannot be held against the employee. Similarly, any ameliorative effects of mitigating measures used may not be considered when determining whether someone has a disability.

Episodic Illness Qualifies

In another shift, the regulations emphasize that impairments that are episodic or in remission can be considered disabilities. For example, cancer, epilepsy, hypertension, asthma, diabetes, and others, may qualify as disabilities if they are substantially limiting *when active*. The ADAAA and regulations may be cited much more often in instances of mental illness – as this type of impairment can often be episodic.


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What this means is that there are many conditions or impairments that may not have qualified under the older version of the ADA but now will. The only exceptions might be, for example, a person suffering from the common cold or the flu, or someone who wears eyeglasses or contact lenses. In short, the new broad definition of "disabilities" is nearly as broad in scope as the definition of "serious health condition" in the Family and Medical Leave Act.

Another significant change is the approach taken on the "regarded as" prong of the definition of disability. This is defined as an instance when a covered entity takes an action prohibited by the ADA because of an actual or perceived impairment that is not both transitory and minor.

In this instance, the employer need not provide a reasonable accommodation. (In the other two instances, namely an "actual" disability or a "record" of a disability, the employer is required to do so, absent an undue hardship.)

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The EEOC believes, however, that many claims will still be brought under this "regarded as" element and attorneys practicing in this area should familiarize themselves with these distinctions.

The regulations do include a new provision that states a person cannot sue under the ADA pursuant to a reverse discrimination-type theory, by claiming that he or she is an individual without a disability and was discriminated against because of his or her lack of disability.

Focus For Employers

For employees, the new regulations emphasize the employer's obligations and roles in responding to requests for accommodation. But it is still a two-way street. Merely making a request for a "reasonable accommodation" does not mean that an employer need follow that request. Rather, the employer must merely engage in the interactive process and come to a determination through that process.

For employers (and the attorneys that represent them), these regulations now make it clear that in most instances where a disability is an issue for an employee, employers should not focus on whether the employee has the disability or not. Rather, in many instances, the employer will want to engage in the interactive process (to determine what, if any, reasonable accommodations need to be made) and on ensuring that no discrimination occurs.

To that end, employers should consider training human resources representatives on how to address these issues and document them to preserve a record of the employer's actions. The EEOC regulations do emphasize further that medical records are not a taboo subject in the workplace, however. Employers are still permitted to require supporting medical information if the disability or need for accommodation is not obvious or already known.

The ADAAA became effective Jan. 1, 2009, and does not apply retroactively. The regulations are effective as of May 24, 2011, and apply to all private, state and local government employers with 15 or more employees; employment agencies; labor organizations; and joint labor-management committees. Companies should ensure that policies, procedures and practices comply with these regulations. ■