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EEOC Final Regulations Under the ADA Amendments Act

Latest Strategies to Avoid and Defend Americans With Disabilities Act Claims

TUESDAY, MAY 17, 2011

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Today's faculty features:

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**EEOC Final Regulations
Under the Americans with Disabilities Amendments Act**

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What We Will Cover ...

- Regulatory Overview
- Substantially Limits
- Major Life Activities
- “Per Se” Disabilities
- Mitigating Measures
- Dormant or Episodic Impairments
- “Regarded As” Protection

Regulatory History

ADA Amendments Act

- ADA Amendments Act of 2008
 - Signed into law 9/25/08
 - Took effect 1/1/09
- Key Objectives:
 - Broadest possible coverage of protected individuals – “to the maximum extent permitted” by ADAAA
 - Determination whether individual has disability should not demand extensive analysis
 - Primary focus should be whether employer has complied with its obligations, not whether individual has qualifying disability
 - Reverses impact of Supreme Court rulings narrowing coverage

EEOC Regulations

- Rulemaking Process
 - EEOC Proposed Regulations (9/23/09)
 - EEOC Final Regulations (3/25/11) – Effective 5/24/11
- DOJ Adoption under Titles II and III?
- EEOC estimates as many as:
 - 38.4 million working Americans impacted
 - 6.1 million more labor force participants will seek reasonable accommodation
 - Annual incremental cost of \$183 million to U.S. employers

ADA Definition of Disability

“Disability” Defined

With respect to an individual, the term "disability" means:

(A) a physical or mental impairment that **substantially limits** one or more of the **major life activities** of such individual;

(B) a record of such an impairment; or

(C) being **regarded as** having such an impairment.

42 U.S.C. § 12102(2); *see also* 29 C.F.R. § 1630.2(g).

Substantially Limits

Substantially Limits

- Old EEOC Definition:

The term "substantially limits" means: (i) Unable to perform a major life activity that the average person in the general population can perform; or (ii) **Significantly restricted** as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the **average person** in the general population can perform that same major life activity.

- New EEOC Definition:

The terms substantially limits means an impairment **substantially limits** the ability of an individual to perform a major life activity as compared to **most people** in the general population.

Substantially Limits

- “Most People”
- Condition, Manner, Duration
- Transitory Conditions

Major Life Activities

Major Life Activities

- **Old EEOC Definition:**

Those basic activities that the average person in the general population can perform with little or no difficulty, including functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

- **New EEOC Definition:**

- Expands traditional list of MLAs
- Adds new non-exhaustive list of Major Bodily Functions (MBFs)
- Removes requirement that activity be one which average person in general population can perform
- Clarified that only one MLA/MBF is needed

Major Life Activities

- New List of Traditional MLAs:
 - Caring for oneself
 - Performing manual tasks
 - Walking
 - Seeing
 - Hearing
 - Speaking
 - Breathing
 - Learning
 - Working
 - Eating
 - Sleeping
 - Standing
 - Sitting
 - Bending
 - Reaching
 - Lifting
 - Reading
 - Concentrating
 - Thinking
 - Communicating
 - Interacting with others

Major Life Activities

- New List of MBFs:

- Immune system (e.g., HIV infection)
- **Special sense organs and skin**
- Normal cell growth (e.g., cancer)
- Digestive
- **Genitourinary**
- Bowel
- Bladder
- Neurological (e.g., Parkinson's disease)
- Brain
- Respiratory
- Circulatory
- **Cardiovascular**
- Endocrine (e.g., diabetes)
- **Hemic** (e.g., sickle cell)
- **Lymphatic** (e.g., lymphadema)
- **Musculoskeletal** (e.g., rheumatoid arthritis)
- Reproductive systems

“Per Se” Disabilities

“Per Se” Disabilities

- Some disabilities, due to inherent nature, lend themselves to “predictable assessment”
- “Virtually always” will qualify as substantially limiting
- No individualized assessment needed

“Per Se” Disabilities

- Deafness
- Blindness
- Intellectual disability
- Partially or completely missing limbs or mobility impairments requiring the use of a wheelchair
- Autism
- Cancer
- Cerebral palsy
- Diabetes
- Epilepsy
- Human Immunodeficiency Virus (HIV) infection
- Multiple sclerosis
- Muscular dystrophy
- Major depressive disorder
- Bipolar disorder
- Post-traumatic stress disorder
- Obsessive compulsive disorder
- Schizophrenia

Mitigating Measures

Mitigating Measures

- New EEOC Regulations:

The “determination of whether an impairment is substantially limiting shall be made without regard to the ameliorative effects of mitigating measures.”

- Exception: “ordinary eyeglasses or contact lenses”

Mitigating Measures

- Medication
- Medical supplies, equipment, or appliances
- Low-vision devices (defined as devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses)
- Prosthetics including limbs and devices
- Hearing aid(s) and cochlear implant(s) or other implantable hearing devices
- Mobility devices
- Oxygen therapy equipment and supplies
- Use of assistive technology
- Reasonable accommodations or “auxiliary aids or services”
- Learned behavioral or adaptive neurological modifications
- **Psychotherapy, behavioral therapy, or physical therapy**

Mitigating Measures

- Surgical interventions
- Non-ameliorative effects of mitigating measures
 - negative side effects of medication
 - burdens associated with a treatment regimen
 - complications from surgery
- Refusal to use mitigating measures

Dormant or Episodic Impairments

Dormant or Episodic Impairments

- **New EEOC Regulations:**

An “impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”

- **Examples:**

- hypertension
- diabetes
- asthma
- major depressive disorder
- bipolar disorder
- schizophrenia
- post-traumatic stress disorder

“Regarded As” Protection

“Regarded As”

- New EEOC Regulations:

ADAAA regulations now define “regarded as” as meaning that the individual has been subjected to an action prohibited by the ADA because of an actual or perceived impairment that is not both transitory and minor.

- “Regarded as” prong does not require a showing that the impairment substantially limits a MLA
- No entitlement to reasonable accommodation under “regarded as” prong

“Regarded As”

- Transitory and Minor Defense:
 - No definition of “minor”
 - “Transitory” means lasting or expected to last six months or less
- Prohibited Actions – Causation
 - “Because of” actual or perceived impairment
 - Examples: refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment



EEOC Final Regulations Under the ADA Amendments Act (ADAAA)



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Part II: Reasonable Accommodation



Employer Obligation to Provide
Reasonable Accommodation

Reasonable Accommodation Under the ADAAA

- Three important points:
 - The ADAAA does not change the definition of reasonable accommodation or address specific issues relating to reasonable accommodation
 - Because of broadened definition of “disability” employers likely will have to provide accommodations to larger group of applicants and employees (except for individuals only “regarded as” having a disability)
 - Employers should spend less time deciding whether individual has a disability and more time on determining whether an accommodation can be provided

Requests for Reasonable Accommodation

- **Generally, an individual with a disability must request reasonable accommodation** (except where employer knows or should know that employee has a mental or physical disability that is interfering with his performance of job tasks)
- A request for reasonable accommodation is a request for some **change in the workplace or in the way things are done** that is needed for a medical condition

Requests for Reasonable Accommodation (cont.)

- Do not have to be in writing
- Do not have to use “magic words”
- May come from a third party (e.g., an employee’s family member, doctor)

Types of Reasonable Accommodation

- Making facilities accessible
- Part-time or modified work schedules
- Job restructuring (through elimination of **non-essential** functions)
- Permitting use of accrued or unpaid leave for treatment, therapy, or training related to disability
- Telework

Types of Reasonable Accommodation (cont.)

- Acquiring assistive devices or modifying existing equipment
- Adjusting supervisory methods
- Providing readers or interpreters
- Reassignment to a vacant position

Timing of Requests

- May be made at any time during the application process or during employment
 - Employee does not lose the right to request an accommodation because he did not do so during application stage
- Employees may make more than one request for reasonable accommodation

Timing of Requests (cont.)

- Impairments that are “Episodic or in Remission”
 - Condition does not have to be currently “active” to request reasonable accommodation
 - Focus is on whether impairment substantially limits (or would limit) a major life activity when or if it became active

Timing of Requests (cont.)

- Employee cannot avoid discipline for violating a performance or conduct rule by telling employer he has a disability
- When employer learns of disability, employer should begin the “**interactive process**” (i.e., consider whether a reasonable accommodation would enable employee to meet rule in the future)

Interactive Process

- Employer should engage in an interactive process (i.e., **meaningful dialogue**) with the individual asking for an accommodation
- May involve determining whether the individual has a disability, what accommodations are possible, or both

Interactive Process (cont.)

- What should employer do to show “good faith”?
 - **Meet** with employee directly, when possible, and ask what he needs
 - **Request information** regarding employee’s condition and limitations
 - If necessary, request employee to provide information from his doctor regarding his condition and limitations (or request consent to send questions to doctor)

Interactive Process (cont.)

- **Analyze the particular position** at issue and determine its purpose and essential functions
- **Consider specific accommodation requested** by employee and, if necessary, explore and discuss alternatives
- **Discuss** how accommodation would be implemented
- If initial accommodation is not effective, meet with employee again to discuss and implement other possible accommodations
- **Document** each step taken, particularly if accommodation was not provided

Interactive Process (cont.)

- Is all of the responsibility on the employer?
 - No, the ADA regulations and case law establish that the responsibility to engage in the interactive process is shared between the employee and employer
 - Employer is not liable when it did not know (or should not have known) of employee's disability, or the employee failed to engage in the interactive process

Documenting Disabilities

- An employer may obtain reasonable documentation that an employee has a disability and needs an accommodation if the disability and need for accommodation are not obvious
- Employer may require that documentation of the existence of an impairment come from a health care professional

Documenting Disabilities (cont.)

- Documentation under ADAAA will probably be different:
 - Will focus on limitation individual would experience **without** mitigating measures
 - May include more information about how **major bodily function** (e.g., kidney, bladder function) is substantially limited

Use (or Non-Use) of Mitigating Measures

- Use of mitigating measures or their side effects may be relevant to **whether employee is “qualified”** (i.e., can perform a job’s essential functions)

- For example:
 - Is employee taking medication that makes him drowsy in the morning?
 - Does the employee need breaks to take medication, rest, or eat a snack?
 - Does employee’s treatment interfere with her ability to focus or concentrate?

Use (or Non-Use) of Mitigating Measures (cont.)

- The negative effects from the use (or non-use) of a mitigating measure may also be relevant to **whether an employee poses a direct threat**

- For example:
 - Employee's chemotherapy causes extreme fatigue and nausea
 - Employee refuses to take medication for hypertension
 - Employee with diabetes does not monitor what she eats

Choosing an Accommodation

- Primary consideration should be given to the employee's choice
- Employer may ultimately choose from among accommodations, as long as the one provided is effective

Actions not Required

- Lowering production or performance standards
- Excusing violations of conduct rules that are job-related and consistent with business necessity (e.g., frequent absences or lateness, being under the influence of alcohol at work, sleeping on the job)
- Removing an essential function

Undue Hardship

- Means “significant difficulty or expense”
- Consider the following factors:
 - Nature and cost of accommodation
 - Resources available to employer (e.g., EAP, Job Accommodation Network)
 - Impact of the accommodation on the employer’s operations

Going Beyond Legal Obligations

- Employers may take actions that are not required as reasonable accommodations
- Employer will not be deemed to have regarded an individual as having a disability just because it exceeded its legal obligations
- Employer may inform an employee that it is taking an action beyond what the ADA requires

Going Beyond Legal Obligations (cont.)

- Examples of situations in which any employer may exceed its obligations include:
 - Providing a temporary measure while considering a request for reasonable accommodation
 - “Accommodating” a temporary, non-chronic condition or a long-term condition that is not substantially limiting

What if an Employee Will Not Accept Accommodation?

- Employer may not require someone to accept a reasonable accommodation
- Someone who does not accept an accommodation and, as a result, cannot do the job, meet conduct and performance rules, or would pose a “direct threat” will not be considered qualified

Burdens of Proof

- Plaintiff/employee need only show that an accommodation seems reasonable on its face
- Once plaintiff/employee has shown that the accommodation she needs is “reasonable,” burden shifts to defendant/employer to show that it did provide an accommodation or that accommodating the plaintiff/employee would have imposed an undue hardship

Penalties for Failure to Provide a Reasonable Accommodation

- Reinstatement (if plaintiff/employee constructively discharged or terminated)
- Accommodation
- Backpay
- Promotion
- Compensatory and punitive damages

Confidentiality

- Information about an employee's reasonable accommodation must be kept confidential
 - **Exception:** Information may be disclosed to supervisors and managers for necessary work restrictions or reasonable accommodations
 - **Exception:** Information may be disclosed to individuals involved in making decisions about reasonable accommodations
 - **Exceptions:** When necessary for emergency treatment; to officials investigating compliance with ADA; for workers' compensation and insurance purposes

Resources

- U.S. Department of Labor (for information on Family and Medical Leave Act)
www.dol.gov/esa/whd/fmla
- Job Accommodation Network (JAN)
<http://janweb.icdi.wvu.edu/>
- ADA Disability and Business Technical Centers (DBTACs)
1-800-949-4232 (Voice/TTY)

Resources (cont.)

- Registry of Interpreters for the Deaf
(301)608-0050 (Voice/TTY)
- Disabilityinfo.gov
- RESNA Technical Assistance Project
<http://www.resna.org/hometa1.htm>

Questions?

- Please see EEOC's website www.eeoc.gov
- Or, contact:

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Strategies for Avoiding and Defending Against ADA Claims

presented for

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*Participation in this seminar does not establish an attorney-client relationship between Duane Morris LLP and any participant (or his or her employer.) Further, no statements made in this seminar or in the materials should be construed as legal advice pertaining to specific factual situations.

Hypothetical

Employee working in company's telemarketing center advises her supervisor that due to her medical condition, she needs to be able to work from home one day per week to adjust to her medication each week.

Is the employer required to agree to this employee's limitations?

Hypothetical

Supervisor advises HR department that due to her treatments for cancer, she needs to be able to work part time for a few months.

Is her employer required to agree to this request?

Hypothetical

Employee of social services agency advises his supervisor that his medical condition, an anxiety condition, makes it difficult for him to concentrate and he has trouble meeting his deadlines. He advises his supervisor that what would really help would be if he could have an assistant or if his supervisor would remind him each week of all of his deadlines.

Is this request reasonable?

Hypothetical

Employee takes a leave of absence to treat depression. Initially, the leave is for ten weeks. Employee does not return after ten weeks. Instead, employee indicates, through her doctor, that she needs another six weeks of leave, which would take her beyond the FMLA-provided twelve weeks of leave. Employee is poor performance so ideally, her employment would be terminated.

Is the employer required to provide the additional leave time?

Hypothetical

Employee's performance is steadily declining. Reason to believe depression is cause. Employee has become increasingly withdrawn. Having previously been enthusiastic and positive, employee is now jaded and negative. Employee also has sad affect and often appears to be on the verge of tears. Do you raise your concerns about depression when talking with the employee about his performance? Can you raise the EAP? If so, how?

Hypothetical

Employee discloses existence of alcohol problem in response to final warning. What effect does disclosure have on final warning? Expectations going forward? What accommodation is appropriate?

Hypothetical

Employee provides doctor's note requesting "removal of all stress-inducing responsibilities." How should you respond?

Potential Barriers to Interactive Process

1. Employee does not provide medical information
 - a. Document requests and time frames to respond

Potential Barriers to Interactive Process

2. Employee refuses to submit a medical examination by health care professional selected by company
 - a. Inquire as to reason why and document same
 - b. Address if reasonable

Potential Barriers to Interactive Process

3. Employee does not agree to reasonable accommodation offered by employer
 - a. Inquire as to basis for employee's refusal and document same
 - b. Address if reasonable

Practical Impact of ADAAA in Litigation

1. Many conditions which previously were not disabilities under ADA will be deemed disabilities under ADAAA
2. Inquiries will be narrower and less extensive in determining whether disability exists in light of broader definition of disability
 - a. Limited use of experts on issue of whether individual is disabled
 - b. Experts more likely to be used on issue of whether offered accommodation was reasonable; whether individual posed direct threat or undue hardship

Practical Impact of ADAAA in Litigation

3. Far fewer cases will be won on summary judgment on issue of whether employee is “disabled”
 - a. Where close call as to whether individual is disabled, employers should proceed to engage in interactive process in response to accommodation requests
4. Increased risk in “regarded as” cases of written communications by managers
 - a. Critical for supervisors/managers to focus on problems with performance or behavior as opposed to perceived underlying cause in light of broader definition of “regarded as”
 - i. Important before
 - ii. Even more important now

Common Mistakes Made By Employers

1. Only engaging in reasonable accommodation process if employee formally initiates it

Common Mistakes Made By Employers

2. Having front-line supervisors obtain the medical information

Common Mistakes Made By Employers

3. Focusing on disability and not essential job functions

Common Mistakes Made by Employers

4. Failing to use job description when focusing on essential job functions

Common Mistakes Made by Employers

5. Dismissing unreasonable requests without exploring more reasonable ones

Common Mistakes Made by Employers

6. Assuming that burden is on employee and/or his or her doctor to make proposals and not evaluating independently other alternatives

Common Mistakes Made by Employers

7. Failing to consider other accommodation decisions in similar situations
 - a. Eliminating essential functions temporarily without preserving legal position that going beyond legal obligation

Common Mistakes Made by Employers

8. Eliminating essential functions temporarily without preserving legal position that going beyond legal obligation

Common Mistakes Made by Employers

9. Failing to understand potential right of employee to leave of absence under not only ADA but also FMLA

Common Mistakes Made by Employers

10. Sharing medical information beyond need to know, narrowly defined

THANK YOU

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