

Almost twenty (20) years after enactment of the first comprehensive statute to provide protection for most persons with disabilities, the EEOC has issued new regulations expanding the coverage of the Americans with Disabilities Act (ADA) in the employment setting.

First enacted in 1991, the ADA prohibits employers that have fifteen (15) or more employees from discriminating against persons with disabilities by refusing to hire them, denying them promotions, segregating them, or otherwise discriminating against them in connection with the terms and conditions of their employment. The law also makes it unlawful to retaliate against any person who has filed a charge, testified in a proceeding under the Act, or otherwise complained of disability discrimination.

Unlike other civil rights statutes, the ADA also requires employers to provide “reasonable accommodations” for applicants and employees with disabilities. Courts have recognized that a reasonable accommodation often requires employers to treat persons with disabilities differently or even more favorably than the employer treats non-disabled persons. The underlying concept behind the reasonable accommodation requirement is that without these “accommodations” persons with disabilities are at a significant disadvantage as compared with non-disabled persons in the workforce. The reasonable accommodation process is intended to put disabled and non-disabled persons who are equally qualified for employment on an equal footing in connection with their ability to obtain employment and engage in work.

Although the language of the ADA suggested broad coverage for persons with disabilities, a series of court cases in the last fifteen years considerably undermined those protections, making it very difficult for a person with a disability to prevail in litigation. In response to those court cases, in 2009 the federal Congress enacted the Americans with Disabilities Act Amendments Act (ADAAA). EEOC’s new regulations to the ADAAA, which become effective May 24, 2011, significantly redefine several critical definitions in the statute and are intended to make it much easier for persons with disabilities to prevail in their claims against employers.

Coverage Under the ADA

Essentially the ADA protects four classes of individuals:

- Persons who have physical or mental impairments that substantially limit one or more of their major life activities.
- Persons who have a record or history of such an impairment.
- Persons who are perceived to have such an impairment, even if they do not have one.
- Persons who associate with persons who have such an impairment.

Prior to 2009 and the new amendments many courts, including the United States Supreme Court, took a rather narrow view of who was protected as a person with a disability. A long series of decisions in the first twenty (20) years after passage of the ADA required plaintiffs to carry a heavy burden of demonstrating a significant impairment before they could even establish a prima facie case. The new amendments and regulations make it clear that this is no longer the case.

Essentially the regulations take a two-prong approach. While the official definition of “disability” under the ADAAA remains the same as it was under the ADA, the Congressional intent was clearly to expand coverage of the law. EEOC’s regulations reflect this intent by redefining both what constitutes a “substantial limitation” and a “major life activity.” They also make some important changes in other definitional areas.

Major Life Activities

EEOC’s regulations provide a non-exhaustive list of examples of what it now considers to constitute a “major life activity.” These examples include such traditional concepts as “seeing” and “hearing” but also add other examples that were not previously included such as “caring for oneself,” “concentrating,” and “interacting with others. The full “non-exhaustive list” also includes (1) performing manual tasks; (2) eating; (3) sleeping; (4) walking; (5) standing; (6) sitting; (7) reaching; (8) lifting; (9) bending; (10) speaking; (11) breathing; (12) learning; (13) reading; (14) communicating; and (15) working.

In addition the regulations opine that major life activities now include the operation of all major bodily functions including functions of the immune system; special sense organs and skin; normal cell growth; digestive; genitourinary; bowel; bladder; neurological; brain; respiratory; circulatory; cardiovascular; endocrine; hemic; lymphatic; musculoskeletal; and reproductive functions. Major life activities also include the operation of an individual organ within a body system.

Substantially Limited

One of the biggest changes in the law dealt with who is “substantially limited” in performing a major life activity. Previously the ADA was interpreted to mean that “substantially limited” suggested that any limitation had to be permanent or at least long term or that the disability had to prevent or severely restrict one or more major life activities. Under the ADAAA and the new regulations, an individual must be significantly limited in performing a major life activity *only as compared to most people in the general population*. However, the impairment no longer has to prevent or significantly restrict a major life activity to be considered “substantially limiting.” Thus even a short-term impairment may be considered a disability if it is substantially limiting. This is an important change

from EEOC's prior practice of not accepting disability discrimination charges unless the impairment was expected to last a minimum of six months.

In determining whether an impairment "substantially limits" a major life activity employers are still charged with considering the condition, manner or duration of the impairment. For some "presumptive impairments," however, this analysis will be only cursory because there will be a legal presumption that persons with certain specific impairments are "substantially limited." These impairments include (1) deafness; (2) blindness; (3) intellectual disability (formerly mental retardation); (4) partially or completely missing limbs; (5) mobility impairments requiring use of a wheelchair; (6) autism; (7) cancer; (8) cerebral palsy; (9) diabetes; (10) epilepsy; (11) HIV infection; (12) multiple sclerosis; (13) muscular dystrophy; (14) major depressive disorder; (15) bipolar disorder; (16) PTSD; (17) obsessive-compulsive disorder; and (18) schizophrenia.

An additional change is that episodic disabilities or disabilities that are in remission are now considered to be substantially limiting, even if they are no longer actively affecting the person. For example, contrary to prior interpretations, under the new law a person who has cancer or lupus and whose condition is in remission will still be a person with a disability even though the person has no active symptoms of the impairment at the present time.

Mitigating Measures

Under the ADA, the determination of whether or not a person had a disability usually took into account the positive effects of mitigating measures such as seizure medications, hearing aids, etc. Under the new amendments, these positive effects of mitigating measures are not to be considered in making the determination with the exception of regular eyeglasses or contact lenses. However, the negative effects of mitigating measures, such as chemotherapy, which may cause nausea and vomiting, are considered in determining the existence of a disability and the need for an accommodation.

Qualified person with a disability

This term has been eliminated under the new regulations; however, it appears that the concept is unchanged. In order to qualify for a particular job the person with a disability must still satisfy the requisite skill, experience, education, and other job related requirements of the employment position that the individual holds or desires and, with or without reasonable accommodation, must be able to perform the essential functions of that position.

Reasonable accommodation

This concept is unchanged under the ADAAA. For purposes of the ADAAA, a reasonable accommodation is any modification or adjustment to a job, an employment practice, or the work environment that makes it possible for an individual with a disability or a person with a history of an impairment to enjoy an equal employment opportunity. Reasonable accommodations generally fall into one of three categories that remain the same under the new rules:

- Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position that the qualified applicant desires.
- Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position.
- Modifications or adjustments that enable an employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by other, similarly situated employees without disabilities.

Although it may take decades to realize the full import of these changes, it is already clear that employment rules and employer's obligations under the ADA have now significantly changed. While we still lack answers to how the courts are going to accept these expanded protections, one clear message from the Congress and the EEOC is that employment practices with respect to persons with disabilities are going to be much more closely scrutinized than ever before.