Employment Edge 123rd Edition—Are You Prepared to Comply with the New ADAAA Regulations?

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The long-awaited final regulations to the ADA Amendments Act of 2008 (ADAAA) go into effect next week on May 24, 2011. Although the ADAAA and the final regulations involve significant changes to the Americans with Disabilities Act (ADA), employers who paid attention when the ADAAA was enacted and who already have good disability-related practices in place should not have to make many changes to their policies or procedures. Employers should, however, review their policies and practices in light of the final regulations to ensure compliance.

Background on the Regulations

The ADA became effective in 1990 and prohibits employers with 15 or more employees from discriminating against qualified "disabled" applicants or employees. The law also requires covered employers to provide reasonable accommodations to a qualified disabled individual unless doing so would be an undue hardship. The ADAAA went into effect on January 1, 2009, and was enacted to significantly expand the ADA's definition of "disability" and to overturn U.S. Supreme Court decisions and ADA regulations that had narrowly construed the term "disability." In enacting the ADAAA, Congress made it clear that it wanted significantly more impairments to be legally protected and that it wanted future legal disputes to focus on the merits of the challenged employment decision rather than whether an individual had a protected "disability." Through the ADAAA, Congress also directed the Equal Employment Opportunity Commission (EEOC) to enact new regulations consistent with the ADAAA, resulting in the final regulations, and the EEOC's accompanying Interpretive Guidance, which become effective on May 24, 2011.

Highlights of the Regulations

The EEOC's Web site contains the full text of the final ADAAA regulations, the updated Interpretative Guidance, and an EEOC Fact Sheet and Question and Answer documents summarizing the regulations. The following is a summary of some of the more pertinent legal changes reflected in the final regulations:

- ***"Disability" Definition.*** The ADAAA and final regulations define "disability" using the following three-pronged approach:
  - a physical or mental impairment that substantially limits one or more major life activities (i.e. an "actual" disability);
  - a record of such an impairment (i.e. a "record of" disability); or
  - 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 (i.e. a "regarded as" disability).

  42 U.S.C. § 12102. While this definition is substantially similar to the ADA's definition of "disability," the ADAAA and final regulations expand the scope of individuals who will fall within the definition and protections of the amended ADA in a number of ways as summarized below. In the introductory sections to the final regulations, the EEOC estimates that the number of individuals with disabilities whose coverage has been clarified by the ADAAA ranges from 12 to 38.4 million people and that the total number of individuals with impairments cited in the law could be at least 60 million people.

- ***Major Life Activities Expanded.*** Under the "actual" disability prong, covered "major life activities" have been expanded in a non-exhaustive list of covered activities, including: "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working." In addition, "major life activities" have been expanded to include "the operation of a major bodily function" including, but not limited to, functions of the immune system, special sense organs and skin, normal cell growth, digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The regulations state, consistent with the ADAAA, that the term "major" does not create a demanding standard and

that it is no longer necessary for a major life activity to be one of "central importance to most people's daily lives." To establish a limitation in "working," however, an individual must be limited in a class or broad range of jobs.

- ***A Lower Standard for Proving a "Substantial Limitation."*** As in the past, the final regulations provide that "individualized assessments" must still be conducted to determine if an individual's impairment "substantially limits" a major life activity, but the regulations make clear that a lower legal standard now applies. The EEOC declined in the regulations to expressly define "substantial limitation," but the regulations provide nine rules of construction that include the following key principles:
  - The phrase "substantially limits" is to be construed broadly in favor of expansive coverage.
  - An impairment is a disability if it substantially limits an individual's ability to perform a major life activity as compared to most people in the general population, but an impairment does not need to prevent or significantly or severely restrict the performance of the activity. The comparison to the general population usually will not require scientific, medical, or statistical analysis.
  - The individualized assessment should not demand extensive analysis, and establishing a substantial limitation requires a lower degree of functional limitation than previously required by courts.
  - Episodic impairments or medical conditions that are in remission are disabilities if they would substantially limit a major life activity when active.
  - With the exception of ordinary eyeglasses or contact lens, mitigating measures are not to be considered when determining if an impairment substantially limits a major life activity. As such, employers may not consider the effects of measures such as medication, medical equipment and devices, prosthetics, hearing aids, mobility devices, oxygen therapy equipment, use of assistive technology, accommodations, or other mitigating measures.

- ***Conditions that Will Always be a "Disability."*** Despite stating that individualized assessments are still required, the regulations list numerous conditions that will, when the law and regulatory rules of construction are applied, consistently be viewed as meeting the definition of "disability." These conditions include such impairments as: deafness, blindness, intellectual disability, missing limbs, mobility impairments requiring use of a wheelchair, diabetes, epilepsy, autism, cerebral palsy, HIV infection, multiple sclerosis, muscular dystrophy, cancer, schizophrenia, and certain other mental health conditions.

- ***Expansion of "Regarded As" Coverage.*** The ADAAA and final regulations expand employer liability for "regarded as" disability discrimination. Before the passage of the ADAAA, a claimant had to establish that the employer perceived the individual to be substantially limited in a major life activity or, in other words, that the employer, although wrong, perceived the person to have an actual disability. Now it is unlawful for a covered employer to take an adverse action "because of an actual or perceived impairment that is not both transitory or minor" regardless of how the employer perceives the impairment or its effects. An employer can, however, present an affirmative defense where it can establish both that the impairment was transitory (lasting or expected to last for six months or less) and minor. Due to this expansion of coverage, the EEOC's Interpretive Guidance notes that coverage under the "regarded as" prong should not be difficult to establish and that, unless an individual needs an accommodation, most discrimination claims should, in the future, proceed under the "regarded as" prong. Where an individual needs an accommodation, however, he or she will need to establish coverage under the "actual" or "record of" prongs of the disability definition, as the ADAAA and regulations provide that individuals that only fall under the "regarded as" prong are not legally entitled to a reasonable accommodation.

- ***No Temporal Limit on Actual Disabilities***. While an employer can defend against a "regarded as" disability claim by establishing that an impairment is both transitory (i.e. last six months or less) and minor, no such defense exists to a claim of "actual" disability. The ADAAA and new regulations provide that short-term conditions, even if lasting less than six months, can still be an "actual" disability.

Compliance Tips

Again, employers with good practices already in place and who reviewed their practices following the passage of the ADAAA should be well-situated to comply with the final ADAAA regulations. The following are, however, some tips for responding to the regulations:

- If they have not already done so, employers should consider following the tips set forth in the 87th edition of the Employment Edge authored by Abigail Crouse about the passage of the ADAAA.
- In light of the expanded list of "major life activities" set forth in the ADAAA and the regulations, employers should consider revising written job descriptions to update the description's list of "essential functions." It is good practice to include a list of a position's "essential functions" in the job description, because, while an employer may have to grant a reasonable accommodation to permit an essential function to be performed, employers do not have to alter essential functions. Now that "major life activities" clearly include activities that are often required for many positions—such as reading, performing manual tasks, concentrating, thinking, communicating, and interacting with others—employers may want, when applicable, to identify such tasks as essential job functions.
- Employers will face increased requests for reasonable accommodations in light of the ADAAA and final regulations. In the introductory section to the final regulations, the EEOC estimates that the expansion of ADA coverage could result in an increase of between 2 to 6.1 million individuals needing accommodations. Employers will want, therefore, to be sure they are prepared to lawfully handle such requests, to engage in the required "interactive process" with applicants and employees about such requests, and that they are prepared to grant accommodations when legally required.
- Employers should ensure that managers and human resources professionals have the updated training they need to assist in meeting disability law obligations and to appropriately respond to reasonable accommodation requests. In particular, such individuals should be trained on the expanded "regarded as" disability coverage. Given the anticipated rise in "regarded as" claims, employers should remind their workforces of and conduct refresher trainings on respectful workplace requirements. Employers should also ensure that managers and human resources professionals are trained not to make comments about or act based on an individual's non-temporary and non-minor impairments. In addition, before taking any adverse action against an individual with an impairment, the employer should make sure it has thoroughly reviewed the action and the underlying facts and that the action is justified for entirely non-discriminatory reasons and supported by appropriate documentation.
- Employers should also take advantage of and review the free ADAAA and other disability-related resources available from the EEOC on its Web site.
- Finally, employers should consult with legal counsel when uncertain about their legal obligations or when the employer is presented with a particularly challenging or questionable disability determination or request for accommodation.

If you have any questions about the ADA, the ADAAA, or the final ADAA regulations, or need assistance responding to an employee's reasonable accommodation request, please contact Megan Anderson or another member of Gray Plant Mooty's Employment and Labor practice group.

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