

Important notes about the EEOC's final ADAAA's regulations

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The US Equal Employment Opportunity Commission's (EEOC's) final regulations implementing the Americans with Disabilities Act Amendments Act of 2008 (the "ADAAA") became effective as of May 25, 2011. At their heart, these regulations, and the accompanying Interpretive Guidance, implement Congress' goal of reinstating a "broad scope of protection" by expanding the concept of "disability" under the ADA.



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As before, a disability can be defined in one of three ways: (i) a physical or mental impairment that substantially limits one or more major life activities; (ii) a record (or past history) of such an impairment; or (iii) being regarded as having a disability. The ways in which the EEOC interprets and applies each prong of this definition under the ADAAA raise important issues for employers to understand.



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"Physical or Mental Impairment" Now Defined

With regard to the first prong of the disability definition, the new regulations now define a "physical or mental impairment" as a: (i) "physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine" and (ii) "mental or psychological disorder, such as an intellectual disability (formerly termed 'mental retardation'), organic brain syndrome, emotional or mental illness, and specific learning disabilities."

The regulations also identify certain specific physical and mental impairments that should "virtually always" be considered a disability:

- ▶ Deafness;
- ▶ Blindness;
- ▶ An intellectual disability (formerly referred to as mental retardation);
- ▶ Partially or completely missing limbs or mobility impairments requiring the use of a wheelchair;
- ▶ Autism;
- ▶ Cancer;
- ▶ Cerebral palsy;

- ▶ Diabetes;
- ▶ Epilepsy;
- ▶ HIV;
- ▶ Multiple sclerosis;
- ▶ Muscular dystrophy; and
- ▶ Major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder and schizophrenia.

With respect to the identified conditions, the regulations provide that the analysis required to determine whether an impairment imposes a substantial limitation on a major life activity, discussed in more detail below, should be "particularly simple and straightforward."

Substantial Limitation of a Major Life Activity

Assuming that an employee suffers from a physical or mental limitation (other than those specifically identified in the regulations), the EEOC's new regulations set out nine "rules of construction" to assist in the determination of whether that impairment "substantially limits" the employee in a major life activity:

1. **The concept of substantial limitation should be construed broadly in favor of expansive coverage.** This "is not meant to be a demanding standard."
2. **While not every impairment will constitute a disability, an impairment is sufficient if it substantially limits an individual as compared to most people in the general population.** "An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity."
3. **The focus should be on discrimination, not whether an employee is disabled.** Accordingly, the regulations warn that the substantial limitation determination "should not demand extensive analysis."
4. **An individualized assessment of whether an impairment substantially limits a major life activity is required.** In making this assessment, however, the concept "substantial limitation" should be interpreted as requiring a lower degree of functional limitation than previously required.
5. **Scientific, medical or statistical analysis is usually not required.** However, the presentation of such evidence is not prohibited where appropriate to compare an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population.
6. **The ameliorative effects of mitigating measures are generally irrelevant.** With the single exception of "ordinary eyeglasses or contact lenses," the determination of whether an impairment substantially limits a major life activity shall be made without regard to the benefits of mitigating measures. Conversely, however, any negative effects of mitigating measures, such as medication, should be considered. With respect to whether an employee requires a reasonable accommodation, the regulations allow that both the positive and negative effects of mitigating measures may be considered, such that an employer's obligation to provide an accommodation may be eliminated depending on the mitigating measures used by an employee.
7. **Illnesses that are episodic or are in remission can be a disability if substantially limiting when active.** However, episodic conditions that impose only minor limitations,

even when active, still do not qualify as a disability.

8. **Temporary impairments can satisfy the definition of “disability.”** While, as discussed in more detail below, a “transitory and minor” impairment will be insufficient to establish a “regarded as” claim, the effects of an impairment lasting less than six months can be still be considered substantially limiting and therefore constitute a disability if otherwise appropriate.
9. **An employee need only be substantially limited in one major life activity in order to be disabled under the law.**

Major Life Activities

The regulations provide, generally, that in determining whether an activity qualifies as a “major life activity,” the term “major” should neither “be interpreted strictly to create a demanding standard,” nor by reference to whether the activity is of “central importance to daily life.” As a means of guidance and reference, the regulations go on to provide a non-exhaustive list of activities that are considered “major life activities” on which a finding of disability can be based. These include:

- ▶ Caring for oneself
- ▶ Performing manual tasks
- ▶ Seeing
- ▶ Hearing
- ▶ Learning
- ▶ Reading
- ▶ Concentrating
- ▶ Thinking
- ▶ Communicating
- ▶ Interacting with others
- ▶ Working

In light of the ADAAA's expansion of major life activities to include “major bodily functions,” the regulations also provide a non-exhaustive list of bodily functions on which a finding of disability can be based. These functions include:

- ▶ The immune system
- ▶ Special sense organs and skin
- ▶ Normal cell growth
- ▶ The digestive system
- ▶ The genitourinary system
- ▶ The bowel
- ▶ The bladder
- ▶ Neurological functions
- ▶ Brain functions
- ▶ The respiratory system
- ▶ The circulatory system
- ▶ The cardiovascular system
- ▶ The endocrine system
- ▶ The hemic system

- ▶ The lymphatic system
- ▶ The musculoskeletal system
- ▶ Reproduction functions
- ▶ The operation of an individual organ within a body system

“Regarded As” Having a Disability

In addition to clarifying the ways in which the actual disability prong should be interpreted, the new regulations also seek to clarify and simplify the way in which the “regarded as” prong should be applied. In particular, the regulations confirm that an employee who can only satisfy the regarded as prong of the disability definition is not entitled to reasonable accommodation. Further, establishing that an individual is regarded as having a disability does not, by itself, establish liability. Instead, in order to garner the ADA’s protection, such an employee must demonstrate that his or her employer took a prohibited adverse action based on the employer’s belief that the employee had a disability.

More specifically, this means that the individual has been subjected to a prohibited action because of an actual or perceived impairment that is not both “transitory and minor.” To the extent that an otherwise prohibited action is the result of an actual or perceived impairment that is both transitory (i.e., less than six months in duration) and minor, an employer will not be held liable. Whether an impairment is or would be transitory and minor is to be determined objectively, however, such that an employer’s subjective belief is insufficient to establish this defense.

Next Steps for Employers

There are steps that employers should consider taking now that the regulations are effective, if they have not done so already:

- ▶ To the extent not previously completed, employers should review and revise (as necessary) their existing policies and ADA training materials. Retraining and education of Human Resource staff and, in turn, frontline managers may be necessary to ensure that the changes made by the ADAAA and the new regulations to the concepts of “physical or mental impairment,” “substantially limits,” “major life activity” and “regarded as” disabled, as well as the shift in focus from disability to reasonable accommodation, are properly implemented.
- ▶ Human Resource staff and/or employees who communicate with third-party administrators of ADA policies should be made mindful that employees whose conditions were previously determined to not constitute a disability may now qualify for ADA coverage and protection.
- ▶ Although it is too early to tell how aggressively the EEOC will act to enforce its new regulations, employers should be sensitive to the allegations contained in any new claims that may be brought by employees under the ADA, as amended by the ADAAA, and how they may fit within the new regulations in effect.