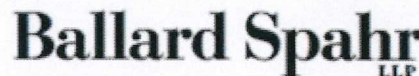




## Final ADA rules significantly expand scope of coverage for disabled workers

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On March 25, 2011, the U.S. Equal Employment Opportunity Commission (EEOC) issued its final revised Americans with Disabilities Act (ADA) **regulations and interpretive guidance** to implement the ADA Amendments Act of 2008 (ADAAA). The final regulations will become effective on May 24, 2011.



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The ADAAA, which went into effect on January 1, 2009, overturned a series of U.S. Supreme Court rulings that had narrowed the scope of protections afforded by the ADA. The ADAAA made important changes to how the basic definition of the threshold term “disability” should be interpreted. As a result, the EEOC estimates that between 12 million and 38 million workers now will be covered under the ADAAA, or as many as one in every four in the U.S. civilian labor workforce. The final regulations provide employers with a new and expanded set of rules for determining who is considered “disabled” under the ADA.



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Below is a summary of key changes to the current EEOC regulations and interpretive guidance set forth in the final regulations.

### Definition of 'Disability'

The ADAAA defines disability as:

- 1.a physical or mental impairment that substantially limits one or more major life activities;
- 2.a record of physical or mental impairment that substantially limited one or more major life activities; or
- 3.being regarded as disabled such that an individual was subjected to a prohibition action because of an actual or perceived impairment that is not both “transitory and minor.”

The final regulations offer separate guidance on each of the three definitions of “disability,” with the repeated admonition that the standards for determining whether an individual is “disabled” under the ADA should be construed in favor of broad coverage and not demand extensive analysis.

### Substantially Limited

Under the “actual” and “record of” prongs of the definition of “disability,” an individual must prove that the impairment complained of “substantially limits” a major life activity. The concept of “substantially limits” is not relevant under the “regarded as” prong.

Based on the broad scope of coverage intended by Congress, the EEOC concluded that its prior formulation of “substantially limits” (i.e. severely limits) requires a more expansive definition. The final regulations, therefore, make clear that “substantially limits” is a lower functional threshold than “prevents” or “severely or significantly restricts,” as Supreme Court decisions and prior EEOC regulations had defined the term.

The final regulations state that an impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to “most people in the general population.” The comparison to most people in the general population continues to mean a comparison to other people and not to those similarly situated.

### **Relevance of Duration in Assessing 'Substantially Limiting'**

Despite requests from commenters, the final regulations do not specify any specific minimum duration for the effects of an impairment to be deemed substantially limiting. The EEOC specifically refused to apply a six-month definition for actual impairments, which is the definition of “transitory” under the regarded as prong of the definition. Instead, the EEOC specifically stated that the effects of an impairment lasting or expected to last less than six months can be substantially limiting.

### **Major Life Activities**

The ADA provides a non-exhaustive list of “major life activities.” The final regulations expand this definition by including sitting, reaching, and interacting with others. Moreover, the regulations reinforce that whether an activity is a “major life activity” is no longer determined by reference to whether it is of “central importance to daily life.”

The regulations also expand the definition of major life activities by adding a non-exhaustive list of “major bodily functions,” including neurological, musculoskeletal, special sense organ, respiratory, cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine functions. The purpose of adding major bodily functions to the list of major life activities is to make it easier to find that individuals with certain types of impairments have a disability.

### **Impairments That Are Virtually 'Per Se' Disabilities**

Despite objections from employers and employer groups, the EEOC included in the final regulations a list of disabilities that will “virtually always” meet the definition of disability. According to the EEOC, even though the ADA requires an individualized assessment of each situation, these conditions, by their inherent nature, are capable of a “predictable assessment,” which will result in a finding that they are disabilities.

Examples are deafness, blindness, intellectual disability (formerly known as mental retardation), partially or completely missing limbs, partially or completely missing limbs or

mobility impairments requiring use of a wheelchair (a mitigating measure), autism, cancer, cerebral palsy, diabetes, epilepsy, HIV/AIDS, multiple sclerosis, muscular dystrophy, major depression, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder, and schizophrenia.

### **Mitigating Measures**

The final regulations confirm that employers no longer are permitted to take into account the ameliorative effects of “mitigating measures,” other than ordinary eyeglasses or contact lenses, in determining whether an impairment substantially limits a major life activity. Moreover, the determination of whether an individual’s impairment substantially limits a major life activity is unaffected by whether the individual chooses to forgo mitigating measures. Rather, the determination of disability must focus on whether the individual would be substantially limited in performing a major life activity. For example, someone who began taking medication for hypertension before experiencing substantial limitations related to the impairment would still be an individual with a disability if, without the medication, he or she would not be substantially limited in cardiovascular or circulatory system functions.

### **Episodic or Dormant Impairments**

Consistent with the ADAAA’s coverage of impairments that are episodic or dormant, the final regulations state that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. The final regulations provide specific examples of such impairments, including autism, cancer, epilepsy, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia.

### **'Regarded As' Definition of Disability**

The EEOC affirmed that coverage under the “regarded as” prong should “not be difficult to establish.” An individual is protected under this definition if he or she has been subjected to an action prohibited by the ADA “because of an actual or perceived physical or mental impairment whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity.” The final regulations thus make clear that the “regarded as” definition no longer requires a showing of the severity of the impairment.

An important limitation to the “regarded as” prong is that the actual or perceived impairment cannot be both transitory (lasting or expected to last for six months or less) and minor. Thus, the final regulations provide employers with a defense to claims asserted under this prong that, objectively, the impairment would be both transitory and minor.

The final regulations also clarify that an employer has no obligation to provide reasonable accommodation for individuals disabled under the “regarded as” prong, only with respect to the actual disability or record of prongs.

### **Conclusions**

The final regulations substantially expand the scope of employee coverage under the ADA, putting greater emphasis on the interactive dialogue and accommodation process, rather than the threshold question of whether an employee has a qualifying disability.

As a result of these changes, employers should consider a number of measures between now and the effective date of the final regulations, including (1) reviewing and updating ADA policy, (2) scheduling ADA training for HR professionals and supervisors/managers, (3) reviewing and revising ADA medical questionnaires to conform to the new regulations, and (4) updating statements of essential functions for use in the interactive accommodation dialogue.

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