

EEOC PROPOSED ADAAA REGULATIONS CONTAIN IMPORTANT CHANGES

By John Vering

On September 23, 2009, the EEOC issued long-awaited proposed regulations to interpret and implement the ADA Amendments Act of 2008 (ADAAA) which became law on January 1, 2009. These proposed regulations will not only greatly expand the number of applicants and employees who will be considered “disabled” but will fundamentally alter the type of analysis that every employer must make in order to determine whether an individual is considered disabled under the ADA. This Alert will highlight some of the most important changes that these proposed regulations would make.

°The proposed regulations list a number of impairments “that will consistently meet the definition of disability” including: deafness, blindness, intellectual disability (formerly termed mental retardation), partially or completely missing limbs, mobility impairments that require the use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV or AIDS, multiple sclerosis, muscular dystrophy, major depression, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia. This is a major change from prior law and regulations which required an individualized assessment of the impact of the impairment on the individual on a case by case basis.

°The proposed regulations provide two non-exhaustive lists of “major life activities.” The first list is of activities (which is taken directly from the ADAAA statute itself) includes caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others and working. The second list includes the major bodily functions listed in the ADAAA (functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions), and adds special sense organs, and skin, genitourinary, cardiovascular, hemic, lymphatic, and musculoskeletal.

°The proposed regulations relax the standard for when an individual is substantially limited in the major life activity of “working.” Prior regulations provided that the analysis was whether the individual was substantially limited from performing a class or broad range of jobs. Under the proposed regulations, an impairment substantially limits the major life activity of working when it substantially limits an individual’s ability to perform, or to meet the qualifications for a “type of work” (e.g., commercial truck driving, assembly line jobs, clerical jobs or law enforcement jobs).

°Under the proposed regulations, an impairment need not prevent, or significantly or severely restrict the individual in performing a major life activity or bodily function; it is enough if the individual’s ability to perform a single major life activity or bodily function is limited when compared to that of most people in the general population.

°Mitigating measures (other than ordinary eyeglasses or contact lenses) can no longer be considered in determining whether an impairment is substantially limiting. Thus, for example, the diabetic whose condition is completely controlled by insulin or the epileptic whose condition is completely controlled by seizure medication will be considered disabled if their condition, if untreated, would substantially limit a major life activity. Similarly, an individual who can hear normally with a hearing aide would also be considered disabled.

°An impairment that is episodic or in remission, such as cancer or epilepsy or bipolar disorder, is a disability if it would substantially limit a major life activity if active.

°The proposed regulations also make a major change in who is disabled because they are “regarded as disabled.” Under the new proposed regulations, it no longer required that the employer perceive the individual to be substantially limited in a major life activity. Rather, it is enough if he or she is subject to an adverse employment action (e.g., failure to hire or termination) based on the employer’s belief that the employee suffers from an impairment that is not transitory (lasting less than 6 months) and minor. Two examples from the proposed regulations of perceiving someone as being disabled are refusing to hire someone because they take anti-seizure medication or because of a facial tic. The only good news for employers is that individuals covered only because they are “regarded as disabled” are not entitled to reasonable accommodation.

°Because the definition of disability is much broader under the proposed regulation, the number of individuals who will be deemed to have a “record of a disability” is similarly expanded.

°You might ask yourself, is anyone not disabled under these proposed regulations. The proposed regulations list several examples of temporary, non-chronic impairments of short duration with little or no residual effects that are usually not disabilities, including but not limited to, the common cold, seasonal or common influenza, a sprained joint, minor and non-chronic gastrointestinal disorders, or a broken bone that is expected to heal completely, appendicitis and seasonal allergies that do not substantially limit a person’s major life activities even when active.

These proposed amendments can be found on the EEOC website www.eeoc.gov which also contains a document entitled “Questions and Answers on the Notice of Proposed Rulemaking for the ADA Amendments Act of 2008.” The next step in the regulatory process is for the EEOC to review the comments it receives in the 60 day period after September 23, 2009 and then issue final regulations. Although the final regulations may differ in some respects from the proposed regulations, we are not expecting the EEOC to make major changes in these regulations.

The EEOC’s new regulations will certainly result in an increase in disability claims and lawsuits and increased confusion as the courts sort out and interpret the ADAAA. In addition, the focus under the ADA will now be less on whether an individual is disabled and more on 1) whether the impaired individual can be reasonably accommodated or 2) whether that individual was discriminated against because of his or her disability.

The proposed regulations contain other important changes that are too numerous to describe in this Alert.

John Vering is a long time member of SHRM-KC and currently serves on its Board of Directors in the Legislative Affairs position.