

EEOC ISSUES FINAL REGULATIONS UNDER THE ADA

Today the EEOC published in the Federal Register the Final Regulations implementing the changes made to the Americans with Disabilities Act by the ADA Amendments Act (ADAAA) that was enacted in September 2008 and became effective on January 1, 2009. The final regulations take effect on May 24, 2011.

The final regulations do not break any new ground but do clarify some of the confusion that has existed since the passage of the ADAAA. Essentially the ADAAA expanded the reach of the law by stating that the definition of "disability" should be construed broadly.

The ADAAA and the Final Regulations define a disability using a three-pronged approach:

a physical or mental impairment that substantially limits one or more major life activities (sometimes referred to in the regulations as an "actual disability"), or

a record of a physical or mental impairment that substantially limited a major life activity ("record of"), 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 ("regarded as").

The regulations implement Congress's intent to set forth predictable, consistent, and workable standards by adopting "rules of construction" to use when determining if an individual is substantially limited in performing a major life activity. These rules of construction are derived directly from the statute and legislative history and include the following:

The term "substantially limits" requires a lower degree of functional limitation than the standard previously applied by the courts. An impairment does not need to prevent or severely or significantly restrict a major life activity to be considered "substantially limiting." Nonetheless, not every impairment will constitute a disability.

The term "substantially limits" is to be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA.

The determination of whether an impairment substantially limits a major life activity requires an individualized assessment, as was true prior to the ADAAA.

With one exception ("ordinary eyeglasses or contact lenses"), the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures, such as medication or hearing aids.

An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

In keeping with Congress's direction that the primary focus of the ADA is on whether discrimination occurred, the determination of disability should not require extensive analysis.

The regulations also make it easier for individuals to establish coverage under the "regarded as" part of the definition of "disability." As a result of court interpretations, it had become difficult for individuals to establish coverage under the "regarded as" prong. Under the ADAAA, the focus for establishing coverage is on how a person has been treated because of a physical or mental impairment (that is not transitory (less than 6 months and minor), rather than on what an employer may have believed about the nature of the person's impairment.

The regulations clarify, however, that an individual must be covered under the first prong ("actual disability") or second prong ("record of disability") in order to qualify for a reasonable accommodation. In other words an individual who is only regarded as having a disability need not be offered a reasonable accommodation (as some courts in the past have held). The regulations clarify that it is generally not necessary to proceed under the first or second prong if an individual is not challenging an employer's failure to provide a reasonable accommodation.

The Federal Register notice is 202 pages long and contains a description of the history of the ADAAA and the rule making process, the regulatory changes to existing EEOC regulations, and a helpful Interpretive Guidance section at the end.

The Federal Register notice can be accessed at this link:

<http://www.federalregister.gov/articles/2011/03/25/2011-6056/regulations-to-implement-the-equal-employment-provisions-of-the-americans-with-disabilities-act-as>

The EEOC also issued a Fact Sheet that can be accessed at this link:

http://www1.eeoc.gov/laws/regulations/adaaa_fact_sheet.cfm?renderforprint=1

Finally, the EEOC has provided 33 helpful Questions and Answers that can be accessed here:

http://www1.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm?renderforprint=1

Should you have questions, please contact your regular Hall Render attorney or a member of our Employment and Labor Section.