Equal Employment Opportunity Commission Issues Sweeping Regulations Implementing the Americans with Disabilities Act Amendments Act

Client Advisories

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Believing that several Supreme Court decisions had too narrowly construed what constituted a "disability" under the Americans with Disabilities Act, Congress in 2008 passed the Americans with Disabilities Act Amendments Act (the "ADAAA"). The ADAAA sought to make it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the statute. On March 25, 2011, the Equal Employment Opportunity Commission (the "EEOC") issued its final regulations implementing the ADAAA. These final regulations go into effect on May 24, 2011 and fundamentally alter the way Companies must evaluate potential ADA claims.

The basic wording of the ADA, and in particular the definition of "disability," remains unchanged; an individual seeking protection under the ADA must still show that he or she has a physical or mental impairment that "substantially limits a major life activity." However, as the new regulations repeatedly admonish, the interpretation of "substantially limits" is now significantly altered. Under the new regulations, an impairment does not need to prevent or severely or significantly restrict a major life activity to be considered "substantially limiting." Instead, the phrase simply means "something more than moderate." The term, according to the regulations, "is not meant to be a demanding standard."

Determining Whether an Individual Has a Disability Using Nine "Rules of Construction"

The EEOC explicitly refused to try its hand at redefining the "substantially limits" threshold. Instead, when determining whether someone has an impairment that might rise to the level of a disability, there are now nine "rules of construction" that must be considered:

- The term "substantially limits" shall be construed broadly in favor of coverage;

- 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 primary object of attention should be whether the Company has complied with its statutory obligations, not whether the individual has an impairment that substantially limits a major life activity;
- The determination is an individualized assessment, and the functional limitation required must be lower than has been previously applied by the courts;
- The comparison of the individual's functional limitation when compared to others in the general population usually will not require scientific, medical, or statistical analysis;
- The determination of whether the impairment substantially limits a major life activity shall *not* take into account the ameliorative effects of mitigating measures, such as medications that control the condition, except for normal prescription glasses or contacts;
- An impairment that is episodic or in remission is still considered a disability if it would substantially limit a major life activity when active;
- The impairment only needs to limit one major life activity in order to qualify as a disability; and
- Even impairments lasting or expecting to last fewer than six months can still be considered substantially limiting for purposes of determining whether the individual has a disability.

List of Activities That Constitute a "Major Life Activity" Is Significantly Expanded

The new regulations also significantly expand the list of items that constitute a "major life activity." As originally set forth in the ADA, the new regulations contain a non-exhaustive list of daily activities that are considered major life activities. These activities include caring for oneself, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working.

For the first time, however, the new regulations also set forth a non-exhaustive list of *bodily functions* that, if significantly limited by an impairment, would qualify the individual as disabled. These bodily functions include digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. Also included is the operation of the immune system, special sense organs, and skin, as well as normal cell growth.

To underscore the requirement that companies (and courts) spend less analysis on the determination of whether an individual is disabled, the new regulations list a number of impairments that "should easily be concluded" are disabilities. Among these seemingly automatic disabilities are deafness, blindness, intellectual disability (*i.e.*, mental retardation), partially or completely missing limbs, mobility impairments requiring the use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, obsessive compulsive disorder, and schizophrenia.

The New Regulations Also Refocus the "Regarded As" Disabled Prong of the ADA

In addition to expanding the scope of what impairments qualify as an actual disability, the new regulations also reconfigure what is meant by being "regarded as" disabled.

In the past, it was incumbent upon the individual to prove that the Company believed the individual had a disability, even if he or she did not, and took an adverse job action on the basis of that mistaken belief. Under the new regulations, whether the Company believes the individual's impairment rises to the level of a disability is irrelevant. Instead, the individual need only show that he or she had an impairment and that the Company took an adverse job action because of the impairment.

The new regulations give the Company an affirmative defense as to "regarded as" claims. A Company will be able to defeat a "regarded as" claim if it can demonstrate that it had an objective basis to believe that the individual's impairment was "transitory and minor." Under the regulations, "transitory" is defined as an impairment *objectively* believed to last six months or less.

What Employers Need To Do in Response To the New Regulations

Companies must respond to these new regulations in a number of ways. First, all disability-related policies must be reviewed to ensure they comply fully with the new regulations. Managers and other decision-makers must receive training so that they understand what they can-and cannot-do when confronted by an individual who may potentially have a disability. In particular, managers need to understand that their focus should be in looking for reasonable accommodations (if sought by the employee or obviously needed), instead of trying to determine how severe the person is affected by his or her condition.

Most importantly, Companies should place more emphasis on developing and maintaining accurate and complete job descriptions. Those job descriptions should fully list all of the essential functions of a position. Managers must be reminded to assess an employee's skills relative to those essential functions. When dealing with a potentially-disabled employee, decision-makers must understand that they cannot take an adverse job action until they can clearly demonstrate that (a) all attempts at reasonable accommodation have been made, and (b) the employee still cannot perform one or more of the enumerated essential functions.

If you have questions or concerns related to the new EEOC regulations or other labor and employment matter, please contact a member of Archer's Labor and Employment Department at (856) 795-2121 in Haddonfield, N.J., at (908) 788-9700 in Flemington, N.J., or at (215) 963-3300 in Philadelphia.

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