



EEOC Issues Long-Awaited Final Rule Implementing the ADA Amendments Act

The ADA Amendments Act of 2008 (ADAAA) was enacted by Congress on September 25, 2008 and went into effect on January 1, 2009. After reviewing more than 600 public comments to its proposed regulations and conducting four town hall listening sessions, the Equal Employment Opportunity Commission (EEOC) published its [final rule implementing the ADAAA](#) on March 25, 2011. The final rule revises the ADAAA regulations and provides new interpretative guidance as an appendix to the rule. The final regulations and interpretative guidance go into effect on May 24, 2011.

Regarded As Disabled

One of the most significant areas addressed in the final rule is the "regarded as" prong to the three-part definition of the term disability. According to the final rule, consideration of coverage under the first prong ("actual") or second prong ("record of") of the definition of a disability is necessary *only* in situations where the individual requires a reasonable accommodation. In all other cases that do not involve reasonable accommodations, "the 'regarded as' prong should be the *primary* means of establishing coverage [under the] ADA." This is significant because an individual can now establish coverage, and ultimately liability, under the "regarded as" prong without having to demonstrate that he or she is "substantially limited" in a "major life activity."

Further, the proposed regulations stated that an individual was to be "regarded as" having a disability if

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Contacts:

[Tara A. Aschenbrand](#)
+1.614.365.2713

[Terry M. Billups](#)
+1.216.479.8505

[Michael W. Kelly](#)
+1.415.954.0375

[Steven M. Loewengart](#)
+1.614.365.2791

[Jeffrey J. Wedel](#)
+1.216.479.8767

the individual was subjected to an action prohibited by the ADA (e.g., refusal to hire, termination, demotion, harassment, or denial of any other term, condition or privilege of employment) because of: (1) an actual or perceived physical or mental impairment, or (2) symptoms resulting from an impairment, medication or any other mitigating measure used to correct an impairment. The EEOC clarified that "even if coverage is established under the 'regarded as' prong, the individual must still establish the other elements of the claim (e.g., that he or she is qualified) and the employer may raise any available defenses." The EEOC also deleted the provision that suggested prohibited actions taken on the basis of an impairment's symptoms or on the basis of mitigating measures were sufficient to establish coverage under the "regarded as" prong.

Substantially Limits A Major Life Activity

Another important area addressed in the final rule is the meaning of the term "substantially limits." The final regulations and interpretative guidance provide rules of construction that must be applied when determining whether an impairment substantially limits a major life activity. These rules of construction provide for expansive coverage of the ADA and reflect that the assessment is specific to the individual, consistent with the Amendments to the Act.

Interpretative Guidance

The final regulations and interpretative guidance also differ from the EEOC's proposed regulations in the following ways:

- Eliminates the use of the term "qualified individual with a disability" and now refers to an "individual with a disability" and "qualified individual" as separate terms. However, an individual must still establish that he or she is "qualified" for the job in question.
- Reinserts the former concepts of analyzing a "class of jobs" or a "broad range of jobs" and deletes the proposal of analyzing the "type of work at issue."
- Reinserts the former concepts of condition, manner and duration – explaining that under certain circumstances it may be appropriate to analyze the *condition* under which the individual performs the major life activity, the *manner* in which the individual performs the major life activity or the *duration* of time it takes the individual to perform the major life activity.

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- Deletes list of impairments that would "consistently," "may" or "usually not" be considered disabilities and explains that by applying the nine rules of construction, there will be some impairments that virtually always constitute a disability such as: deafness, blindness, intellectual disability, missing limbs, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, bipolar disorder, post-traumatic stress disorder and schizophrenia.

Practical Implications

The practical implications of the EEOC's final rule are that the scope of disabilities covered under the ADA is much broader than in the past and the focus of analysis has shifted from a "disability" inquiry to a "reasonable accommodation" inquiry. According to the legislative history of the ADAAA, many of the changes in the law were made to serve as "an important signal to both lawyers and courts to spend less time and energy on the minutiae of an individual's impairment, and more time and energy on the merits of the case – including whether discrimination occurred because of the disability, whether an individual was qualified for a job or eligible for a service, and whether a reasonable accommodation or modification was called for under the law." Accordingly, employers should make certain their policies and practices reflect this shift in analysis and be mindful to focus more on identifying reasonable accommodations rather than attempting to challenge whether the employee has a disability.

If you have any questions about the EEOC's Final Rule Implementing the ADAAA, please contact your principal Squire Sanders lawyer or one of the individuals listed in this Alert.

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