LEGAL UPDATES

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EEOC Publishes Final Regulations under the Americans with Disabilities Act Amendments Act (ADAAA)

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On March 25, 2011, the Equal Employment Opportunity Commission (EEOC), having obtained approval of the proposed final regulations by the Office of Management and Budget (OMB), published regulations interpreting the 2008 amendments to the Americans with Disabilities Act. These approved regulations*, effective on May 24, 2011, closely follow the legislation overturning several restrictive court decisions and broadening employee rights under the disability laws. The ADAAA and these implementing regulations make it much easier for persons claiming disability discrimination to advance their claims. Before the ADAAA, the focus was on whether the individual making a claim under the law was a qualified individual with a disability that substantially limited a major life activity. Under the ADAAA and these regulations, the focus moves from the existence of a disability to the employer's compliance with its obligations under the law not to discriminate against and to accommodate those individuals with disabilities.

* Copies of the Regulations and Interpretative Appendix, Fact Sheet on the EEOC's Final Regulations Implementing the ADAAA, Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008, and Questions and Answers for Small Businesses: The Final Rule Implementing the ADA Amendments Act of 2008 are available through links in the left-hand column of this page.

One of the most significant features of the regulations is the EEOC's decision to list what are de facto "per se" disabilities, something not contained in the ADA Amendments Act. This non-exhaustive list of conditions that the EEOC has determined to be protected disabilities under the law includes some impairments that historically resulted in some analysis of whether there was a

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disability within the meaning of the law. While some of the listed conditions (deafness, blindness, missing limbs, for example) were generally conceded as disabilities, other listed conditions (such as cancer, diabetes, major depression and bipolar disorder) were subject to a more rigorous examination of whether the mere existence of the condition or impairment constituted a disability.

Keeping with the tenor of the ADAAA, the definition of "disability" in the regulations defines the sweep of the changes:

> The definition of "disability" in this part [of the regulations] shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA. The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability.
>
> 29 CFR § 1630.1(4).

Similarly, whether impairment constitutes a disability under the ADA depends on whether the impairment "substantially limits an individual in a major life activity. The term 'substantially limits' shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. 'Substantially limits' is not meant to be a demanding standard." 29 CFR § 1630.2(j). The regulations set forth nine rules of construction of "substantially limits," among which are the following:

The comparison is with "most people in the general population."

The "threshold issue of whether an impairment 'substantially limits' a major activity should not demand extensive analysis."

The determination of substantial limitation is to be made "without regard to the ameliorative effects of mitigating measures (excluding ordinary eyeglasses or contacts)". However, "non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen may be considered when determining whether an individual's impairment substantially limits a major life activity." 29 CFR § 1630.2(j)(4)(ii).

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

> 29 CFR §1630.2(ii), (iii), (vi), (vii).

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In determining whether there is a substantial limitation in a major life activity, the analysis can include “the condition under which the individual performs the major life activity; and/or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity” (29 CFR § 1630.2(4)(i)).

"Major life activities" as defined in the regulations are more expansive, adding sitting, reaching and interacting with others to the activities listed in the ADAAA. (29 CFR § 1630.2(i)(1)(i)) The regulations also expand the list of "major life activities" as defined in the statute to include special sense organs and skin, genitourinary, bladder, cardiovascular, hemic and musculoskeletal function, the operation of major bodily functions and systems and the operation of an individual organ within a body system. In determining a major life activity, the term “major” is not determined by reference to whether it is of “central importance to daily life.” (29 CFR § 1630.2(i)(ii)(2)).

Another provision to note is the prohibition against discrimination against disabled individuals in regard to leaves of absence, sick leave or any other leave. 29 CFR § 1630.4((a)(v). The EEOC has been challenging, with some success, maximum leave time policies as violating the ADA requirement of an individual assessment of whether a reasonable accommodation is available. These regulations may provide further impetus for such claims, claims which — by their nature — may give rise to class action treatment.

What This Means to You

The ADAAA has resulted in a 23 percent increase in the number of disability charges filed with the EEOC in FY 2010 from the prior fiscal year. These regulations, while not as difficult for employers as the regulations proposed in September 2009, still place the onus on employers to demonstrate that they have complied with the ADA, as amended. Employers should reexamine their employment practices to ensure that they are consistent with the law and these regulations with the understanding that the ground rules that existed prior to January 2009 are no longer in play.

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