



MAY 2011

New ADA Amendments Act Rules Expand Disability Protections Effective May 24, 2011

On May 24, 2011, new regulations governing the Americans with Disabilities Act Amendments Act (ADAAA) took effect, affecting all private, state, and local government employers with 15 or more employees. These regulations significantly broaden protection for employees, expand the class of individuals covered by the act, and lower the bar of evidence necessary for coverage. Employers may wish to review and, if necessary, modify their policies and procedures to ensure compliance with the new rules.

SIMPLIFIED DETERMINATION OF DISABILITY

The final regulations continue to define a covered disability in three ways: (1) a physical or mental impairment that substantially limits one or more major life activities, (2) a record of a physical or mental impairment, or (3) an actual or perceived impairment that is not transitory and minor. Added to this definition is a nonexhaustive list of conditions that, while still requiring the usual individualized assessment, will virtually always be deemed "disabilities," including the following:

- Deafness (hearing)
- Blindness (seeing)
- Intellectual disability (brain function)
- Partially or completely missing limbs or mobility impairments requiring the use of a wheelchair (musculoskeletal functions)
- Autism (brain function)
- Cerebral palsy (brain function)
- Diabetes (endocrine function)
- Epilepsy (neurological function)
- Human immunodeficiency virus (HIV) infection (immune function)
- Muscular dystrophy and multiple sclerosis (neurological function)

- Mental or emotional disabilities such as major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia (brain function)
- Cancer (cell growth)

Although the regulations state that not every impairment is considered a disability, the definition of disability is interpreted in favor of broad coverage and thus means that it is now extremely difficult for employers to argue that an impairment does not qualify an employee for initial coverage under the act.

NO EXTENSIVE ANALYSIS OF "SUBSTANTIALLY LIMITS"

Previously, a key consideration in determining the existence of a disability had been the presence of a "substantial limitation" on a major life activity; under this standard, the impairment had to significantly restrict an individual from performing a major life activity. The bar has now been lowered to require merely a degree of functional limitation, as the new regulations dictate that the term should be "construed broadly in favor of expansive coverage" and is not meant to be a "demanding standard." Thus, the impairment need only substantially limit the individual's ability to perform a major life activity as compared to *most people* in the general population (no longer the average person in the general population). Individualized assessments are still required but should demand much less analysis.

MAJOR LIFE ACTIVITIES

The scope of what constitutes a major life activity has also been broadened. In addition to long-standing examples such as seeing, hearing, sleeping, lifting, and speaking, the list now also includes **major bodily functions**, such as, among others, the immune system, skin/sense organs, digestion, and brain, respiratory, circulatory, musculoskeletal, and reproductive matters. Major bodily functions also include the operation of an individual organ within a larger system. While "working" remains defined as a major life activity, the discussion of that issue has been minimized, suggesting that most impairments fit under another activity.

Additionally, an impairment now need only substantially limit one major life activity. An individual whose condition substantially limits a major life activity is not required to also demonstrate a limitation in the ability to perform activities of central importance in daily life. For example, an individual with diabetes need only show a substantial limitation in the endocrine function, not also a substantial limitation in eating.

Condition, Manner, or Duration

Further expanding the act's reach, even the effects of an impairment lasting fewer than six months could be substantially limiting and constitute a disability during that time, as the regulations qualify that the "condition, manner, or duration" of the impairment should now be given less weight than in the past. The regulations no longer call for an evaluation of the nature or severity of the impairment, the duration or expected duration of the impairment, and the actual or expected impact of the impairment.

Additionally, an "impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." Rejecting earlier court decisions, the new regulations provide that a condition that is either episodic or in remission may still constitute a disability under the act if the condition substantially limits a major life activity when active.

Therefore, conditions such as epilepsy, cancer, asthma, diabetes, schizophrenia, hypertension, or major depressive disorder may now fall within the scope of the act, even if the condition is active for only brief periods.

Mitigating Measures Generally Cannot Be Considered

Previously, positive mitigating measures that eliminate or reduce the effect of an impairment have been considered when determining whether an individual had a disability under the act. The new regulations emphasize that the question now is whether the impairment is substantially limiting in the absence of the mitigation. Measures used to mitigate the effects of an impairment can no longer be considered as part of the disability determination.

While a narrow exception exists for ordinary eyeglasses or contact lenses, the regulations provide a nonexhaustive list of other aids that must be disregarded, including the following:

- Medication, medical supplies, equipment or appliances; hearing aids; cochlear or other implants; low-vision devices (defined as devices that magnify, enhance, or otherwise augment a visual image but not including ordinary eyeglasses or contact lenses); prosthetics, including limbs; mobility devices; and oxygen therapy equipment and supplies
- Use of assistive technology and auxiliary aids or services
- Learned behavioral or adaptive neurological modifications
- Psychotherapy, behavioral therapy, or physical therapy

Even if a condition is controlled by mitigating measures, an employee is likely still protected under the act if the condition otherwise meets the requirements for a "disability" without the controlling measure.

Significantly, the regulations also provide that the negative effects of mitigating measures should be considered when determining if a condition substantially limits a major life activity. Examples include side effects of medication or other burdens associated with treatment of the condition at issue.

"REGARDED AS" DISABLED

The regulations also lift the burden on the employee to establish qualifying conditions under the "regarded as" prong of the definition of a "disability." An employee need only show that the employer took prohibited action based on the perceived existence of a disability. Importantly, the regulations reiterate that the concepts of "major life activities" and "substantial limitations" are not relevant when determining if an individual is regarded as disabled. According to the regulations, "the focus is on how the person was treated rather than on what an employer believes about the nature of the person's impairment."

PRACTICAL IMPLICATIONS

With the new regulations comes a renewed focus on whether employers are meeting their obligations to refrain from discrimination and to provide reasonable accommodations. Employers may want to review job descriptions to ensure that they are updated and include a description of the essential functions of the specific position. Further, employers may consider evaluating their internal procedures for determining reasonable accommodations, including the

new requirements for accommodating temporary disabilities.

The law has not changed regarding the obligation to engage in an interactive process with employees who make requests for accommodations.

As a reminder, accommodations need not be provided if doing so poses an undue hardship to the employer, meaning significant expense or difficulty, or if individuals do not need accommodations to perform the essential functions of their job. Accordingly, careful analysis of both their own resources and the specific requirements of the position is in order when faced with such requests. For more information on reasonable accommodation, you may refer to the [EEOC's Guidance on Reasonable Accommodation and Undue Hardship](#).

The full text of the [ADAAA regulations is available here](#).

For more information regarding the application of the ADAAA, or if you would like assistance developing and/or reviewing job descriptions, disability policies, and procedures, please contact any of the following members of our [Labor & Employment Group](#):

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