



A REVIEW OF THE ADA AAA FINAL REGULATIONS

by Ari G. Burd and Jay S. Becker

Although the ADA Amendments Act of 2008 (ADAAA) was enacted on Sept. 25, 2008, and became effective Jan. 1, 2009, the U.S. Equal Employment Opportunity Commission (EEOC) did not issue the final amended regulations to the ADAAA until March 25, 2011. These regulations, which became effective on May 24, 2011, provide guidance to employers regarding the treatment of their disabled employees. The main thrust of these regulations is to shift the focus from whether an individual's impairment is a disability to whether discrimination is the cause of any adverse employment action.

In enacting the ADAAA, Congress sought the reinstatement of a "broad scope of protection" for individuals.¹ Without actually changing the definition of a "disability," the ADAAA makes it easier for an individual seeking protection under the Americans with Disabilities Act (ADA)² to establish that he or she has a disability within the meaning of the statute.³ It accomplishes this change by appreciably expanding the rules of construction used to determine if a person qualifies as disabled. In making these changes, the ADAAA in essence overturns a number of United States Supreme Court decisions that Congress indicated had interpreted the definition of "disability" far too narrowly. These decisions, such as *Sutton v. United Airlines, Inc.*,⁴ *Murphy v. UPS*,⁵ *Albertsons v. Kirkingburg*,⁶ *Toyota v. Williams*,⁷ and others had denied protection to individuals suffering from a variety of impairments such as cancer, diabetes and epilepsy, which are now all covered under the ADAAA.

Under both the ADA and the ADAAA, a disability is determined using a three-pronged approach, and is defined as either:

1. 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
2. A record of a physical or mental impairment that substantially limited a major life activity (referred to as "record of"); or
3. 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 (referred to as "regarded as").⁸

The rules also contain a broad definition of "physical or mental impairment." The definition includes any physiological disorder or condition; cosmetic disfigurement; or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin and endocrine. Also covered are any mental or psychological disorder, such as intellectual disability (previously referred to as mental retardation), organic brain syndrome, emotional or mental illness, and specific learning disabilities.⁹

The definition of "impairment" in the new regulations is almost identical to the definition in the EEOC's original ADA regulations, except that the immune and circulatory systems have been added to the list of body systems that may be affected by an impairment. These systems are specifically mentioned in the ADAAA's examples of major bodily functions.

Examples of "major life activities" are also discussed within the new regu-

lations; however, most of the examples provided date back to the original ADA regulations, EEOC guidance or case law. The non-exhaustive list of such activities includes caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working.

The regulations do expand the scope of "major life activities" to include the operation of major bodily functions, including functions of the immune, digestive, neurological, respiratory, circulatory, and reproductive systems, to name a few. Also specifically included in the final regulation is the operation of an individual organ within a body system (such as a kidney or liver). While there is no *per se* list of impairments that must be considered disabilities, the individualized assessment of some kinds of impairments will virtually always result in a determination of disability (such as deafness, blindness, cancer, diabetes, HIV).

The interpretation of the term "substantially limits" is of great importance to the ADAAA. A definition of the term was specifically omitted from the final regulation. In doing so, the EEOC argued such a definition would likely lead to greater focus and attention paid to the threshold issue of coverage under the act, which was not Congress's intent. Instead, the regulations provide nine rules of construction that must be applied in determining whether an impairment substantially limits (or substantially limited) a major life activity.¹⁰ These rules of construction seek to ensure that a wide range of individuals will be covered under the ADA.



1. *Broad construction*: “Substantially limits” is to be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA, and is not meant to be a demanding standard.
2. *Comparison to general population*: An impairment will be considered 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 individual need not have an impairment that prevents or significantly or severely restricts him or her from performing a major life activity in order to be considered substantially limited.
3. *Extensive analysis is not needed*: The primary focus in cases brought under the ADA should be whether covered entities have complied with their obligations, not whether an individual’s impairment substantially limits a major life activity. The emphasis in ADA cases should be squarely on the merits, and not on the initial coverage question.
4. *Individualized assessment*: There continues to be a need for an individualized assessment. When making this assessment, the term “substantially limits” is to be interpreted and applied to require a degree of functional limitation that is considerably lower than the standard applied previously.
5. *Use of scientific or medical evidence*: The comparison of an individual’s performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis. Such evidence remains permissible when appropriate.
6. *Mitigating measures*: The determination of whether an impairment substantially limits a major life activity is made without regard to the ameliorative effects of mitigating measures (with the exception of the ameliorative effects of ordinary eyeglasses or contact lenses). This change is meant to protect individuals from discrimination who were previously not considered disabled because the positive effects of their

medication, medical supplies or other interventions were taken into consideration.

7. *Impairments in remission or episodic*: An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity in its active state.
8. *Only one substantial limitation required*: An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.
9. *Impairments lasting fewer than six months*: The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting; however, this assessment only applies to the “regarded-as” coverage (the third prong of the disability definition).

“Regarded as” coverage is now easier than ever for individuals to establish. Under the original ADA, an individual seeking coverage under this definition had to show that a covered entity *believed* the individual’s impairment or *perceived* impairment substantially limited performance of a major life activity. Now a covered entity “regards” an individual as having a disability if it takes a prohibited action (termination/demotion/failure to hire) based on an individual’s impairment or an impairment that the entity believes the individual has. In essence, the focus is now on how the covered entity treats the individual because of his or her impairment, rather than what the covered entity may have actually believed about the individual’s impairment.¹¹ The regulation also makes clear that reasonable accommodations are not required for those “regarded as” having a disability, as opposed to those with an actual disability or with a record of disability.¹²

Clearly the ADAAA and the EEOC’s final regulations make it easier for individuals to establish their right to protection pursuant to the ADA. These regulations will ensure that the attention of future litigation is shifted away from the question of whether a disability actually exists to whether discrimination has, in fact, occurred. ■

Endnotes

1. 29 CFR § 1630.1 (c)(4).
2. 42 U.S.C. § 12101 *et seq.*
3. Fact Sheet on the EEOC’s Final Regulations Implementing the ADAAA at http://www.eeoc.gov/laws/regulations/adaaa_fact_sheet.cfm.
4. 527 U.S. 471 (1999).
5. 527 U.S. 516 (1999).
6. 527 U.S. 555 (1999).
7. 534 U.S. 184 (2002).
8. 29 CFR § 1630.2(g).
9. 29 CFR § 1630.2(h).
10. 29 CFR § 1630.2(j)(1)(i)-(ix).
11. 29 CFR § 1630.2(l).
12. 29 CFR § 1630.2(g)(1)(iii).

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