

EEOC Issues Final Regulations on the ADA

By Kai McGintee, Linda McGill and Andrea Johnstone | April 2011

On March 24, 2011, the U.S. Equal Employment Opportunity Commission issued its final rules implementing the 2008 Americans with Disabilities Amendments Act (“ADAAA”). As most employers know by now, the ADAAA, and the EEOC’s regulations, make it substantially easier for employees to meet the legal definition of disabled.

Although the new rules are similar to the proposed regulations published by the EEOC back in 2009, they are not identical. As the EEOC explained, “the final regulations modify or remove language that groups representing employer or disability interests had found confusing or had interpreted in a manner not intended by the EEOC.”

No “Per Se” Disabilities

Most significantly, the final regulations rejected the approach of creating a categorical list of “per se” disabilities, which was criticized because it dispensed with the traditional method of assessing the effect of impairments on an individual, rather than the mere fact of a diagnosis. In doing so, the EEOC revives the individualized assessment approach. Nonetheless, while the final regulations no longer state that certain impairments will consistently be considered disabilities, they do still include a strong presumption regarding certain impairments. In this regard, the final regulations provide examples of impairments that should easily be considered disabilities, such as epilepsy, diabetes, cancer, HIV infection, and bipolar disorder.

Guidance on “Substantially Limits”

In addition, the final regulations offer more extensive guidance on the term “substantially limits” than the proposed regulations. According to the final regulations, in determining whether an individual is substantially limited in a major life activity, employers may compare them to “most people in the general population.” In doing so, employers may consider (1) the condition under which the employee performs the major life activity; (2) the manner in which the employee performs the major life activity; (3) how long it takes the employee to perform the major life activity (and how long they are able to perform it); (4) the difficulty, effort, or time required to perform a major life activity; (5) any pain experienced when performing a major life activity; and (6) any adverse effects of mitigating measures (such as side effects of medication). However, employers are instructed to focus on the extent to which an impairment limits a major life activity, not on what outcomes an individual can achieve. Thus, the fact that someone achieves a high level of academic success does not necessarily negate a determination that he suffers from an intellectual disability.

"Regarded As" Still Problematic for Employers

Arguably the most far-reaching and challenging provisions of the final regulations involve employees claiming that they were "regarded as" having a substantially limiting impairment. As most employers now know, the new ADA makes it significantly easier for employees to pursue and prevail in claims alleging that the employer perceived them as being disabled.

The final rules provide that an individual is "regarded as having such an impairment" if the employer takes an action prohibited by the ADA (e.g., failure to hire, termination, or demotion) based on an actual or perceived mental impairment, even if the employer is ultimately able to establish a defense to such a claim. Nonetheless, the rules clarify that a finding of "regarded as" coverage is not itself a finding of liability. Employees will still have to prove that an employer discriminated on the basis of disability, which requires an analysis of whether the individual was qualified for the position sought or held.

Under the ADAAA, employers may challenge a claim under the "regarded as" prong by showing that the impairment in question, whether actual or perceived, is **both** "transitory and minor." However, the final rules do not offer any bright line rules about what when an impairment is "transitory and minor." Instead, the rules offer general interpretive guidance as to this defense. First, a condition is considered transitory if the impairment lasts or is expected to last less than six months. Second, the analysis of whether an impairment is "minor" must be an objective inquiry. Finally, the defense is unavailable if the impairment is not actually transitory and minor, even if the employer believes it to be.

What the EEOC Rules Mean For Employers

If your company appropriately modified its policies and practices to comply with the ADA Amendments Act enacted in 2008, the issuance of the final rules should not have any major effect on your business. Nonetheless, the regulations clarify and offer helpful guidance to employers regarding the implementation of the ADAAA. Most importantly, the final rules underscore that many more employees will now be covered under the ADA and entitled to reasonable accommodations. As a result, employers should review their accommodation procedures and train human resources and supervisory personnel about the wide range of impairments and circumstances triggering ADA rights and responsibilities. Lastly, employers in Maine and New Hampshire should remember that state disability discrimination laws are different than the ADA and considerably more stringent.

If you have any questions about either the state or federal discrimination laws, please do not hesitate to contact Kai McGintee at (207) 228-7116, Linda McGill at (207) 228-7226, Andrea Johnstone at (603) 623-8700, or contact any member of Bernstein Shur's Labor & Employment Practice Group.