



Entrepreneurs' Organization
Orange County

Legal Update: April 27, 2011 - EEOC Issues New Disability Regulations



EEOC Issues New Disability Regulations

**c/o EO Orange County Sponsor
Snell & Wilmer LLP**

**written by Attorney Christy D. Joseph (714) 427-7028
(with help from S & W colleagues across the USA)**

The Equal Employment Opportunity Commission (“EEOC”) has issued regulations implementing the Americans with Disabilities Act Amendments Act (“the Amendments Act”), providing further interpretive guidance for the statutory amendments. One of the central purposes of the Amendments Act is to expand the definition of disability, which Congress criticized as having been too narrowly construed by the Supreme Court. The practical effect of the Amendments Act and interpreting regulations is that more individuals will qualify as disabled and will be entitled to reasonable accommodations at the workplace. Moreover, the broad coverage of the Amendments Act increases the number of employees protected under the Americans with Disabilities Act (“ADA”), thereby increasing the likelihood of litigation if companies are not complying with the statutory requirements.

The Amendments Act and regulations retain the basic definition of “disability,” but make clear that the interpretation of the term has changed. Disability is still defined in a three-pronged manner. Disability means:

1. a physical or mental impairment that substantially limits one or more major life activities of the individual (“actual disability”);
2. a record of a physical or mental impairment that substantially limited a major life activity (“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 transitory and minor (“regarded as”).

However, the Amendments Act specifically overruled the Supreme Court’s 2002 decision in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, which required that the “substantially limits” part of the definition had to relate to a “major life activity” that was of “central importance to most people’s daily lives.” The regulations demonstrate Congress’ intention that there should not be a demanding standard when determining whether a person is disabled. This “inappropriately high level” of scrutiny has been replaced with a standard in favor of broad coverage of individuals.

Further, mitigating measures other than ordinary eyeglasses or contact lenses cannot be considered in determining whether an individual has a disability. If the effects of a disability can be mitigated, but an employee is not taking steps to mitigate the disability, this cannot be held against the employee. Similarly, any ameliorative effects of mitigating measures used may not be considered when determining whether someone has a disability. Of significance, impairments that are episodic or in remission can be considered disabilities. As recognized

during the EEOC's public meeting last month discussing the employment of people with mental disabilities, the Amendments Act is particularly helpful to people with psychiatric disabilities—as these impairments can often-times be episodic.

The regulations also provide greater clarity as to when reasonable accommodations must be provided. The statutory requirement has remained the same –companies must provide reasonable accommodations to individuals with a disability who are employees or applicants for employment, unless doing so would cause an undue hardship. However, the duty to provide a reasonable accommodation only extends to individuals who meet either of the first two prongs of the disability definition – employees with an actual disability or record of a disability. Reasonable accommodations do not need to be provided to individuals who only meet the third prong – those who are “regarded as” having a disability. Even still, employees who are regarded as having a disability can establish a violation of the ADA if they are perceived as having an impairment and the employer discriminated against them because of the impairment.

The main point for companies to keep in mind is that the primary focus of the ADA is on whether discrimination occurred—not whether an individual is disabled. The practical effect is that employers should, in almost all instances, move right into the interactive process as the majority of employees will be able to establish an actual disability or record of a disability. Moreover, the regulations reiterate that an individualized assessment is required to determine whether an impairment substantially limits a major life activity. Accordingly, it is now even more important that human resources representatives sit down with employees and discuss why they may be struggling at work and begin the interactive process to determine if a reasonable accommodation might help, assuming the employee is disabled. Companies should ensure that these conversations, and all efforts to provide reasonable accommodations, are documented in writing and maintained with their employees' confidential medical files.

The regulations also include a new provision making clear that a person cannot sue under the ADA pursuant to a reverse discrimination-type theory, by claiming that he or she is an individual without a disability, and he or she was discriminated against because of his or her lack of disability.

The Amendments Act was effective as of January 1, 2009 and does not apply retroactively. The regulations are effective as of May 24, 2011 and apply to all private, state and local government employers with 15 or more employees; employment agencies; labor organizations and joint labor-management committees. Companies should ensure that policies, procedures and practices comply with these regulations.