



# THE WORKPLACE WORD

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December 2009

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## EEOC Proposes Changes to ADA Regulations to Better Comply with ADAAA

In an effort to better conform with the Americans with Disabilities Amendments Act of 2008 (ADAAA)<sup>1</sup>, the Equal Employment Opportunity Commission (EEOC) is proposing new rules that will modify its Americans with Disabilities (ADA) regulations and accompanying Interpretive Guidance. If finalized as proposed, these changes will impact the way employers analyze claims of disability discrimination or harassment as well as requests for accommodation. Following is a summary of the changes, which are included in the EEOC's Notice of Proposed Rulemaking.

### "Disability" Is No Longer the Focus

Although the ADAAA retains the ADA's basic definition of "disability"<sup>2</sup>, the ADAAA changes the way this definition should be interpreted. To comply with ADAAA, the EEOC's proposed rule clarifies that "disability" will be construed in favor of broad coverage. Therefore, in most situations involving a claim of disability discrimination or harassment, employers will no longer need to conduct an extensive analysis to determine whether a particular employee is "disabled" under the ADA definition. Rather, the focus will be on whether discrimination occurred and/or whether reasonable accommodations were provided.

### "Major Life Activities" Expanded

The EEOC's proposed changes also expand the definition of "major life activities" by including two non-exhaustive lists: (1) activities;

<sup>1</sup> See *The Workplace Word*, Snell & Wilmer L.L.P., November 2008, for a brief summary of the ADAAA and its impact on employers.

<sup>2</sup> Defined as an impairment that substantially limits one or more major life activities, a record of such impairment, or being regarded as having such impairment.



and (2) major bodily functions. It does not matter if the major life activity being limited is from the first list of activities or the second list of major bodily functions. In fact, an individual will often be substantially limited (or have a record of such limitation) in more than one major life activity from one or both lists.

While the major life activities included in the EEOC's proposed regulations include many that the EEOC had previously recognized (e.g., caring for oneself, seeing, hearing, eating, sleeping and walking), they now include three new actions that were not specifically included in the ADAAA's non-exhaustive list: (1) sitting; (2) reaching; and (3) interacting with others.

The EEOC's proposed regulations also expand the list of major bodily functions, by including several that were not explicitly included in the ADAAA list: hemic, lymphatic, musculoskeletal, special sense organs and skin, genitourinary and cardiovascular.

### **"Substantially Limits" Broadened**

The EEOC's proposed regulations clarify that the phrase "substantially limits" does not mean that impairment must "significantly" or "severely" restrict an individual from performing a major life activity. Rather, the determination of impairment should be a common-sense assessment, based upon the individual's ability to perform a specific major life activity (or major bodily function) as compared to most people in the general population.

Further, instead of having to show the inability to perform a "class" or "broad range" of jobs, the EEOC's proposed changes provide that the individual is substantially limited if an impairment "substantially limits an individual's ability to perform, or to meet the qualifications for, a 'type of work.'" "Type of work" may include a class of jobs such as commercial truck driving or assembly line

work, or may refer to "job-related requirements," such as frequent lifting or prolonged standing or sitting.

### ***Conditions That Do Not Qualify As Disabilities***

Temporary, non-chronic impairments of short duration with little or no residual effects will ordinarily not be considered disabilities. Examples include:

- Common cold
- Ordinary pregnancy
- Seasonal or common influenza
- Sprained joints
- Minor and non-chronic gastrointestinal disorders
- Broken bone that is expected to heal completely
- Appendicitis and seasonal allergies that do not substantially limit a person's major life activities even when active, are not disabilities even if permanent or of long duration or chronic in nature

### ***Conditions That Qualify As Disabilities***

Impairments that "will consistently meet the definition of disability" include, but are not limited to:

- Deafness
- Blindness
- Intellectual disability (formerly known as mental retardation)
- Partially or completely missing limbs
- Mobility impairments requiring use of a wheelchair
- Cancer
- Autism
- Cerebral palsy
- Diabetes
- Epilepsy



- HIV/AIDS
- Multiple sclerosis
- Muscular dystrophy
- Certain mental diseases

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

Impairments that may be substantially limiting for some individuals, but not for others, include asthma, back and leg impairment and learning disabilities.

### Mitigating Measures

The helpful effects of mitigating measures, other than “ordinary eyeglasses or contact lenses”, should not be considered when deciding whether impairment substantially limits a major life activity. The negative effects that result from using a mitigating measure however, may be considered when determining if a disability exists. For example, a prescription drug’s negative side effect may be considered in determining whether an individual is substantially limited in a major life activity. Mitigating measures may also be considered when determining whether an individual requires a reasonable accommodation.

### New Analysis for “Regarded As”

The EEOC’s proposed rules change the definition for “regarded as” disabled claims. Rather than showing that the employer perceived the employee to be substantially limited in a major life activity, the employee may prove a “regarded as” disabled claim if the employee is subject to an

action prohibited by the ADA (e.g., terminated, not promoted, not hired) based upon an impairment the employer believes the individual has, unless the impairment is transitory (i.e., expected to last six months or less) and minor.

The EEOC rule also explicitly confirms that individuals covered only under the “regarded as” disabled prong are not entitled to reasonable accommodation.

### The ADAAA is Not Retroactive

The EEOC regulations clarify that the ADAAA does not apply retroactively. Therefore, the ADAAA would not apply to a claim of discrimination that took place before January 1, 2009. The ADAAA would apply however, to denials of reasonable accommodation if a request was made, or an earlier request was renewed, on or after January 1, 2009.

If you have any questions regarding the content of this article, you may contact your regular Snell & Wilmer attorney or one of the attorneys listed in this newsletter.

### Save the Date!

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**January 20, 2009**

**11:30 a.m. – 1:00 p.m.**

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