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CLIENT E-NEWSLETTER

SPECIAL BULLETIN

EEOC Issues Final ADA AAA Regulations

On March 25, 2011, the Equal Employment Opportunity Commission (EEOC) issued its final regulations implementing the Americans with Disabilities Act Amendments Act of 2008 (ADAAA). The regulations take effect on May 24, 2011. The regulations make it clear that the burden is lessened on employees and other individuals to establish that they are disabled or otherwise covered under the Americans with Disabilities Act (ADA). The regulations demonstrate the EEOC's desire to shift the focus from whether an individual is disabled to whether the employer complied with its legal obligations.

Definition of Disability

While a disability is still defined as "an impairment that substantially limits a major life activity," the regulations make clear that the ADAAA in effect expands this definition by modifying several of the terms that comprise the definition and explaining that many more physical and mental conditions are now included. Thus, more individuals will now be covered by the ADA.

The regulations first make clear that the definition of "major life activity" has expanded to include more activities. Included among that non-exhaustive list of activities are the following examples:

- | | |
|---------------------------|-----------------|
| * Interacting with others | * Standing |
| * Thinking | * Sitting |
| * Sleeping | * Reaching |
| * Working | * Bending |
| * Eating | * Concentrating |
| * Walking | * Communicating |

The regulations also make clear that the term "substantially limits" is to be broadly construed to the "maximum extent" permitted under the ADA, and clarify that an impairment need not prevent or significantly or severely restrict the performance of a major life activity in order to qualify as substantially limiting. Instead, the impairment need only substantially limit the individual's ability to perform a major life activity compared to most people in the general population. The regulations also list certain conditions (among them cancer, diabetes, and epilepsy) that will now "virtually always" be found to be "substantially limiting."

¹ The final regulations, which are some 40 pages in length, are available for review at: <http://www.federalregister.gov/articles/2011/03/25/2011-6056/regulations-to-implement-the-equal-employment-provisions-of-the-americans-with-disabilities-act-as#p-3>.

Episodic Impairments, Short-Term Impairments, and Mitigation Measures

The regulations make clear that episodic impairments, such as epilepsy or in-remission cancer, are disabilities if they substantially limit a major life activity while active. They likewise state that impairments lasting (or expected to last) less than six months can be substantially limiting and thus qualify as disabilities. The new rules also clarify that a determination as to whether an impairment is a disability is now made without regard to mitigation measures (such as medication), with the exception of ordinary eyeglasses or contact lenses.

“Regarded As” Disabled

In a major change, an individual is no longer required to show that an employer perceived him to be substantially limited in a major life activity in order to establish that the individual was “regarded as” disabled. Instead, the individual must now only show that he was subjected to a prohibited action (such as a refusal to hire or a demotion) because of an actual or perceived impairment that is not transitory or minor.

This change demonstrates, quite clearly, how obtaining ADA coverage has become much easier for individuals – while the regulations themselves state that “a finding of ‘regarded as’ coverage is not itself a finding of liability,” both the ADAAA and the regulations make clear that an individual can show that he was “regarded as” disabled even when the impairment that he was perceived to have does not itself meet the definition of a disability!

Course of Action for Employers

The EEOC’s regulations demonstrate that the ADAAA dramatically “lowers the bar” for employees and other individuals to establish that they are disabled or regarded as disabled. Going forward, the focus will be on reasonable accommodation and whether discrimination occurred, rather than on if the employee qualifies as disabled under the ADA.

Thus, employers should be sure to update their reasonable accommodation policies and practices, human resources training (to focus on reasonable accommodations and the interactive process), and other related personnel procedures. Employers should be ready to determine whether a particular situation requires a reasonable accommodation and to engage in an interactive process to identify and evaluate possible reasonable accommodations.

In sum, knowledge of and compliance with the ADAAA’s requirements are crucial. While the EEOC’s regulations may result in an increase in the number of ADA claims (particularly in the number of “regarded as” claims) that are brought against employers, those employers who are well-educated regarding the ADAAA’s provisions and who take appropriate steps to comply should be well-positioned to minimize legal exposure should any issues arise.

The Kullman Firm regularly counsels employers regarding labor and employment issues such as the challenges provided by the ADAAA. If you have any questions regarding this or any other labor and employment issue, please contact the Kullman attorney with whom you customarily work.



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