CLIENT ALERTS & INSIGHTS

# EEOC Proposes Revised Regulations Regarding the Americans with Disabilities Act

NOVEMBER 1, 2009

Authors: Joseph N. Gross

On January 1, 2009, the ADA Amendments Act of 2008 (the "Act") became law. The Act amended the Americans with Disabilities Act (the "ADA") by, among other things, redefining "the definition of disability under the ADA [to] be construed in favor of broad coverage. . . ." The Act specifically rejected several holdings of the U.S. Supreme Court and regulations of the Equal Employment Opportunity Commission ("EEOC") that more narrowly interpreted the operative terms "disability," "substantially limits," and "major life activity." As stated in the Act and by the EEOC, "[t]he effect of these changes is to make it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the ADA," with the intention of shifting focus from an assessment of whether an individual has a "disability" to whether discrimination had occurred.

While the Act retained the ADA's basic definition of "disability" as "an impairment that substantially limits one or more major life activities, a record of such impairment, or being regarded as having such an impairment," it contained the following directives concerning the way that several of the statutory terms should be interpreted:

- The term "disability" shall be construed broadly;
- An impairment's substantial limitation on a "major bodily function" is sufficient to constitute a disability;
- The ameliorative effects of mitigating measures (other than ordinary eyeglasses or contact lenses) should be disregarded; and
- Impairments that are episodic or in remission are disabilities if they would be substantially limiting when active.

On September 16, 2009, in light of these directives, the EEOC issued a Notice of Proposed Rulemaking ("NPRM") to conform its regulations to the Act. The EEOC will accept public comments until November 23, 2009. Some of the most significant changes proposed by the EEOC to the regulations are as follows:

Changes to "Major Life Activities" Definition

The Act expanded "major life activities" to include:

- caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working; and
- major bodily functions, such as functions of the immune system, normal cell growth; and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

In its proposed regulations, the EEOC added three additional examples of "major life activities" - sitting, reaching, and interacting with others - and several "major bodily functions" - hemic, lymphatic, musculoskeletal, special sense organs and skin, genitourinary, and cardiovascular. The proposed regulations make clear that the purpose of adding major bodily functions to the list of major life activities is to make it easier for individuals with certain types of impairments to have a disability. Persons with cancer, which affects the major bodily function of normal cell growth, or diabetes, which affects the major bodily function of the endocrine system, will now find it much easier to prove that they are disabled under the ADA.

Changes to "Substantially Limits" Definition

According to both the Act and the EEOC, determination of whether an individual is experiencing a substantial limitation in performing a major life activity is a common-sense assessment based on comparing an individual's ability to perform a specific major life activity (including major bodily functions) with that of most people in the general population. However, the proposed regulations do not suggest a length of time that the major life activity must be substantially limited. Rather, the proposed regulations provide that temporary, non-chronic impairments of short duration with little or no residual effects usually will not be considered disabilities - for example: the common cold, seasonal or common influenza, a sprained joint, minor and non-chronic gastrointestinal disorders, appendicitis, seasonal allergies, and broken bones that are expected to heal completely.

Other Rules of Construction Changes

The Act provides that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. The proposed regulations list examples of such episodic impairments, including epilepsy, hypertension, multiple sclerosis, asthma, diabetes, major depression, bipolar disorder, and schizophrenia.

In its proposed regulations, the EEOC provides non-exhaustive lists of some impairments that will consistently meet the definition of "disability" when analyzed in light of the Act: deafness, blindness, intellectual disability (formerly known as mental retardation), partial or completely missing limbs, mobility impairments requiring the use of a wheelchair (a mitigating measure), autism, cancer, cerebral palsy, diabetes, epilepsy, HIV/AIDS, multiple sclerosis, muscular dystrophy, major depression, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia. The EEOC also provides examples of impairments that may be substantially limiting for some individuals but not for others: asthma, back and leg impairments, and learning disabilities.

Mitigating Measures

The Act provides that mitigating measures (such as medication, medical equipment and devices) other than "ordinary eyeglasses or contact lenses" should not be considered in assessing whether an individual has a "disability." In addition to those examples set forth in the Act, the EEOC lists "surgical interventions that do not permanently eliminate an impairment" as an example of a mitigating measure that should not be considered.

Changes to "Regarded As" Definition

"Regarded as" being disabled no longer requires a showing that an employer perceived an individual to be substantially limited in a major life activity; rather, an applicant or employee who is subjected to an adverse employment action because of an actual or perceived impairment will meet the "regarded as" definition of disability, unless the impairment is both transitory and minor. The EEOC provides that for purposes of the "regarded as" definition of disability, an impairment is transitory and minor if it lasts or is expected to last no longer than six months. The proposed regulations provide that "regarded as" coverage can apply if an employer takes a prohibited employment action based on an individual's use of a mitigating measure for, or for the symptoms of, an impairment, even if the employer is unaware of the underlying impairment (e.g., an employer that refused to hire someone because he takes anti-seizure medication regarded the individual as having a disability, even if the employer did not know the impairment for which the medication was being used).

Posters

The EEOC issued a new "EEO is the Law" poster, which employers must post by November 21, 2009. The new poster reflects the new expansive definition of disability under the Act. The EEOC is also permitting employers to simply post a supplement to their current poster. These posters can be found here.

**Additional Information**

If you have additional questions, would like to discuss the impact of the revisions to the ADA on your specific operations and policies, or have comments to the NPRM, please contact any of the following members of Benesch's Labor & Employment Practice Group:

Maynard A. Buck at 216.363.4694 or mbuck@beneschlaw.com

Joseph N. Gross at 216.363.4163 or jgross@beneschlaw.com