



The GSH 60-Second Memo

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EEOC Publishes New, Final ADA Regulations

By Marcie B. Cornfield, Esq.

As we are well aware, the ADA Amendments Act (the "ADAAA" or "Amendments Act"), which went into effect on January 1, 2009, significantly expands the ADA. Acting on Congressional authorization in the Amendments Act to revise its regulations to reflect and conform to the changes being made to the ADA, the EEOC issued for public comment a Notice of Proposed Rulemaking ("NPRM") on September 23, 2009, with proposed updated regulations.

In response to the NPRM, the EEOC received well over 600 public comments from groups representing employers, individuals with disabilities, and other interested individuals. The final regulations have now been published, and true to Congressional intent, the regulations reflect a significantly expanded ADA. As the EEOC stated when publishing the final regulations, "In enacting the ADAAA, Congress made it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the statute." The regulations include the following:

- *The final regulations clarify how to analyze major life activity.* The Amendments Act amended the definition of "disability" in the ADA to include a new definition of "major life activities" that included a list of activities that will be considered major life activities and a list of "major bodily functions" that are also considered major life activities. The final regulations not only incorporate these new definitions and examples, but also expands upon them. Despite objections from employers that its inclusion would make disciplining employees more difficult, the final regulations retain "interacting with others" as a general example of a major life activity. The final regulations also retain as

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additional examples of "major bodily functions" the functioning of "special sense organs and skin" and of the "hemic, lymphatic, [and] musculoskeletal" systems. The final regulations also make clear that these lists are not exhaustive.

- *The final regulations provide rules of construction for determining whether an impairment constitutes a disability.* Rather than provide a list of impairments that would "consistently," "sometimes," or "usually not" be disabilities, as had been done in the preliminary version of the regulations, the final regulations instead provide nine rules of construction to guide the analysis and explain that by applying those principles, most impairments will be found to constitute disabilities under the revised ADA. While the EEOC maintains that the determination of whether an impairment substantially limits a major life activity requires an individualized assessment, the final regulations now provide examples of impairments that should easily be considered disabilities, including epilepsy, diabetes, cancer, HIV infection, and bipolar disorder. The final regulations also provide a list of impairments that will limit at least one major life activity, such as deafness, blindness, an intellectual disability (previously referred to as mental retardation), autism, cancer, cerebral palsy, diabetes, epilepsy, multiple sclerosis, major depressive disorder, bipolar disorder and post-traumatic stress disorder, obsessive compulsive disorder and schizophrenia. By taking this approach, the EEOC hopes to shift the focus of analysis and litigation away from the threshold issue of whether an impairment is covered under the ADA and toward the issue of accommodation and compliance.
- *The final regulations clarify that mitigating measures may no longer be taken into account when determining whether an individual is disabled.* As part of its new nine rules of construction, the final regulations reflect the new ADA provision prohibiting the consideration of mitigating measures (save ordinary eyeglasses or contact lenses) when determining whether someone has a disability. Thus, other common mitigating measures, such as hearing aids and medication, can no longer be taken into account. By way of example of the impact of the new ADA provision, the final regulations state: "Someone who began taking medication for hypertension before experiencing substantial limitations related to the impairment would still be an individual with a disability if, without the medication, he or she would now be substantially limited in functions of the cardiovascular or circulatory system." The final regulations also clarify, however, that an analysis of the pre-mitigating factor condition will rarely be necessary because under the expanded definition of "major life activity," the analysis can now focus upon whether the individual is limited in a "major bodily function."
- *The final regulations provide examples of episodic impairments which may be considered disabilities.* Under

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the newly revised ADA, impairments that are episodic (such as epilepsy) or in remission (such as cancer) are disabilities if they would be substantially limiting when active. The EEOC's appendix to the final regulations provide examples of impairments that may be episodic, including hypertension, diabetes, asthma, major depressive disorder, bipolar disorder, and schizophrenia. As GSH has written in the past, courts have already begun seeing litigation on this new change.

- *The final regulations simplify coverage under the "regarded as" prong.* Under the revised ADA, the focus for showing an employee was regarded as having a disability is no longer on what the employer believed about the nature of the individual's impairment. Rather, the focus is now on how a person has been treated because of a non-minor and non-transitory physical or mental impairment, regardless of the employer's belief. By way of example, the EEOC cites the following hypothetical in the appendix to the final regulations: "If an employer discriminates against an employee based on the employee's bipolar disorder (an impairment that is not transitory and minor), the employee is 'regarded as' having a disability even if the employer subjectively believes that the employee's disorder is transitory and minor."

The final regulations differ from the NPRM in a number of other ways as well. For instance, in the NPRM, the EEOC attempted to replace the existing familiar language of "class or broad range of jobs" with a new standard "type of work." However, based on feedback received and a desire to avoid articulating a new standard, the EEOC has decided to retain the familiar "class or broad range" language in the final regulations. The final regulations also retained the concepts of "condition, manner, or duration," which help the analysis of whether an impairment substantially limits a major life activity. That concept had been deleted in the NPRM version of the regulations. One of the most telling changes from the NPRM to the final regulations is the EEOC's deletion of examples of conditions that are usually not impairments under the newly-revised ADA. One reason for this deletion may be because the proposed language was inconsistent with Congress' overall goal of a broad expansion of the ADA.

Overall, the focus of the ADA has changed from whether the individual is considered disabled under the ADA to whether an accommodation can be - or has been - offered. For employers, this means that it is more important than ever to engage in the interactive process and to document, document, document. Not only should engaging in the interactive process be documented, but there should be solid documentation and justification for every employment decision made. This is especially true in light of the changes to the "regarded as" prong, which will now focus on how the employee was treated and what employment actions were taken, regardless of the employer's belief about the employee's condition. Of course, the appendix to the final regulations also indicates that the EEOC will be taking a closer look at whether employees actively engage in the interactive process with their employers. This makes

the need for documentation even more important.

Employers are best advised to become familiar with the regulations. Because many examples of conditions which will now be considered disabilities were placed within the appendix to the final regulations, employers would be wise to review that as well. As always, once such a review is done, employers should review existing policies, revising as necessary, and provide additional training to employees.

For employers interested in yesterday's developments regarding the Milwaukee Paid Sick Leave Ordinance, please [click here](#).

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