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## The GSH 60-Second Memo

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### EEOC's Proposed ADA Regulations Are Now Available for Public Comment

By Marcie B. Cornfield, Esq.

The ADA Amendments Act (ADAAA), which went into effect January 1, 2009, expressly authorized the EEOC to revise its regulations to conform to changes made by the Act. On September 16, 2009, the EEOC approved a Notice of Proposed Rulemaking (NPRM) revising such regulations. The NPRM, published in the Federal Register in September, carries a 60-day period for public comment.

The changes to the ADA are expansive. As the EEOC states, "the NPRM emphasizes that the definition of disability -- an impairment that poses a substantial limitation in a major life activity -- must be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA, and should not require extensive analysis."<sup>[1]</sup> Simply put, the ADAAA significantly expands the ADA. Some of the proposed regulations include the following:

- **Expanding the definition of major life activities:** The proposed regulations include two non-exhaustive lists of major life activities. The first list includes activities, such

as caring for oneself, hearing, seeing, sitting and lifting, whereas the second list includes major bodily functions, some of which were not originally included by Congress.

- ***Providing that mitigating measures may no longer be taken into account:*** With the exception of eyeglasses or contact lenses, the positive effects from an individual's use of one or more mitigating measures are ignored. However, the ADAAA allows consideration of the negative effects from use of a mitigating measure in determining if a disability exists. For example, the side effects of a medication taken to treat a medical condition will be taken into account in determining whether or not the underlying condition counts as a disability.
- ***Providing that conditions which are episodic or in remission may be considered a disability:*** Impairments that are episodic or in remission, such as epilepsy, cancer, and many kinds of psychiatric impairments, are disabilities if they would "substantially limit" major life activities when active.
- ***Revising the definition of working:*** The proposed regulations also provide a more straightforward way of demonstrating a substantial limitation in the major life activity of working. In fact, the terms "class of jobs" and "broad range of jobs in various classes" have been eliminated and replaced with "type of work," which the proposed regulation explains as "includ[ing] the job the individual has been performing or for which he is applying, and jobs that have qualifications or job-related requirements which the individual would be substantially limited in performing as a result of the impairment." In other words, to be substantially limited in working, it now appears that an individual must be substantially limited in one type of job rather than various jobs.
- ***Revising the definition of "regarded as":*** The definition no longer requires a showing that the employer perceived the individual to be substantially limited in a major life activity. Instead, it provides that an applicant or employee who is subjected to an action prohibited by the ADA (e.g., failure to hire, denial of promotion, or termination) because of an actual or perceived impairment will meet the "regarded as" definition of disability unless the impairment is both transitory and minor. This means that it will be much easier for an individual to prove that he or she was regarded as disabled.
- ***Including a List of Impairments that Will Consistently Meet the Definition of Disability:*** This list includes autism, cancer, cerebral palsy, diabetes, epilepsy, HIV/AIDS, multiple sclerosis, major depression and post-traumatic stress disorder, to name a few.

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- ***Including a List of Impairments that May Be Disabling for Some Individuals But Not for Others:*** This list includes asthma, high blood pressure, learning disabilities, back and leg impairments, anxiety disorder and performing manual tasks, to name but a few.

What do these proposed changes mean? For starters, it means that the ADA will be broadly expanded. It also means that for quite some time, there will be some potential confusion regarding whether someone is covered under the ADA. For instance, the proposed regulations do not seem to clarify whether only insulin-dependent individuals will be considered diabetic. Due to this broad expanse, employers may want to submit comments to the EEOC about the proposed regulations, as the EEOC will evaluate all comments received and may revise the proposed regulations in response to those comments. Employers should also consult with an attorney regarding the implications of these changes. Employers may also want to consider whether their current ADA policies comply with the proposed regulations, as the EEOC will surely begin to apply a new level of scrutiny when it comes to ADA charges.

For more information, you may also go to the following websites:

EEOC: <http://www.eeoc.gov/>

Federal Register: <http://www.gpoaccess.gov/fr/>

[1] See Commission Approves Proposed ADA Regulations for Public Comment, available at <http://www.eeoc.gov/press/9-16-09f.html> (last visited October 8, 2009).

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