



# ALERT

## ADAAA Regulations What Is New and What To Do

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### Background

**In March 2011, more than two years after passage of the Americans with Disabilities Act Amendments Act (“ADAAA”), the EEOC issued Regulations implementing the statutory amendment. The new Regulations will become effective May 24, 2011.**

### Overview

The Regulations are generally consistent with the ADAAA and do not impose significant additional substantive obligations on employers beyond those triggered by the ADAAA. The Regulations clarify and confirm that the ADAAA is to be broadly interpreted. They also emphasize that employers should focus less on whether a particular individual is disabled and more on whether the individual is qualified to perform the essential functions of the job and if needed, whether a reasonable accommodation can be provided. The following highlights some of the more significant changes effected by the new Regulations:

#### **Identification of Impairments that are “virtually always” a Disability**

The final Regulations fall short of providing a list of per se disabilities by including language to clarify that the determination of disability remains an “individualized assessment.” However, the Regulations provide examples

of “predictable assessments” that “virtually always” meet the definition of disability. These conditions include deafness, blindness, intellectual disabilities, partially or completely missing limbs or mobility impairments requiring the use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post traumatic stress disorder, obsessive compulsive disorder, and schizophrenia.

#### **Continuation of Broad Definition of “Substantially Limits”**

The final Regulations state that the term “substantially limits” is “not meant to be a demanding standard.” The Regulations clarify that an impairment need not significantly restrict or severely restrict the performance of major life activities to qualify as substantially limiting. An impairment is a disability if it substantially limits the an individual's ability to perform a major life activity as compared to most people in the general population. Except in the cases of ordinary eyeglasses or contact lenses, the determination of whether an impairment substantially limits a major life activity is to be made without regard to the ameliorative effects of mitigating measures. An impairment that is episodic is considered a disability if it would substantially limit a major life activity when active. Under certain circumstances even the effects of an impairment lasting or expected to last fewer than six months can be substantially limiting.

In conducting the analysis of whether an impairment is substantially limiting, the Regulations suggest that employers should examine factors such as the condition, manner, and duration of the individual's performance of the activity.

#### **Expansion of “Major Life Activities”**

Under the ADAAA, the term “major life activities” was expanded to include “major bodily functions.” A “major bodily function” includes functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. The addition of major bodily functions to the list of “major life activities” further broadens the scope of impairments for which employers must provide a reasonable accommodation.

#### **Treatment of “Regarded As” Disability Claims**

The Regulations make it easier for individuals to establish coverage under the “regarded as” prong of the definition of disability. The Regulations clarify that the concepts of “major life activities” and “substantially limits” are not relevant in evaluating a claim that an individual is “regarded as” disabled.

This analysis is now solely confined to whether the employer treated the individual differently as a result of his or her assumed impairment rather than whether an individual is actually disabled or what an employer may have believed about the nature of the person's impairment.

The Regulations clarify that an employer

is not required to provide a reasonable accommodation for an individual who is simply “regarded as” having a disability. On the other hand, if the employer takes an adverse employment action against an individual whom the employer regards as disabled, the individual may still pursue a charge of disability discrimination against an employer.

## Impact

As public knowledge of the ADAAA grows, so will disability discrimination claims. In 2010, there was a 17% increase in EEOC charges alleging disability discrimination over 2009. The number of charges is the highest since enforcement of the ADA began in 1992. Disability discrimination charges are expected to increase dramatically in 2011. Unfortunately, not only will there be an increase in disability discrimination claims, the ADAAA and the Regulations make it more difficult for employers to defend disability claims. Employers will be less likely to win cases on summary judgment because of the ADAAA’s more expansive definition of disability and the fact issues associated with determining whether an accommodation is reasonable.

## Best Practices

- Review job descriptions regularly to ensure that they still adequately and accurately describe the essential functions of a position. Make sure that job descriptions are consistent with job postings and other work related materials.
- Request written documentation of employees’ job related impairments from individual’s health care provider where such impairments are not obvious (i.e. nature and severity of impairment, specific activities limited by the impairment, and the degree to which activities are limited

by impairment). Provide the individual’s health care provider with the pertinent written job descriptions.

- Revisit employment policies on disabilities and reasonable accommodation to make sure that any definitions used in the policies track the new law and Regulations.
- Provide ongoing training to supervisors and managers. Management should be trained on changes to the ADAAA’s definition of disability, including the “regarded as” standard. Ensure that supervisors and managers understand measures that reduce or mitigate impairment, such as medications, prosthetics, and assistive technology, can no longer be used in determining if an individual has a disability. Supervisors and managers need to understand that making negative or derogatory remarks in response to an accommodation request can be considered unlawful discrimination or retaliation.
- Focus on employee performance and conduct in making personnel decisions. Employers should avoid making assumptions or comments about an employee’s medical or psychiatric condition which might lead employees to believe that employment decisions are being made on the basis of a disability or perceived disability.
- Scrutinize performance evaluations and disciplinary write-ups to avoid inappropriate references to what might be considered a disability.
- Create and follow an accommodation policy. The ADAAA makes the interactive process the central focus of employer compliance. The employer should engage the individual requesting the accommodation in respectful dialogue about potential accommodations.

The accommodation decision and the basis for the decision should be clearly communicated to the individual requesting the accommodation with a witness present. Consider creating an Accommodation Log to ensure that a consistent process is followed.

- Document all aspects of the accommodation process, including an individual’s request for accommodation, all phases of the interactive process, and the employer’s response to all requests, including the rationale and data supporting any refusal to provide an accommodation on the grounds of “undue hardship.”
- The EEOC has released two Question-and-Answer documents about the Regulations to aid the public and employers in understanding the law and new regulations, available on the EEOC website at [www.eeoc.gov/laws/statutes/adaaa\\_info.cfm](http://www.eeoc.gov/laws/statutes/adaaa_info.cfm).

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