

Americans with Disabilities Amendments Act: Proposed Regulations



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DEVELOPMENTAL DISABILITIES
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INTRODUCTION



- Americans with Disabilities Act (ADA) prohibits an employer from discriminating against an applicant or employee based upon the disability
- Employers have to provide reasonable accommodations to disabled applicants or employees

INTRODUCTION



- **Failure to reasonably accommodate**
 - Failure of an employer to be reasonably flexible when faced with an employee's disability
 - Only defense is whether employer is faced with undue hardship

ADA Amendments Act



- **Changed definition of disability**
 - To provide broader coverage
 - Ordered modification of definition of “substantially limits” with respect to major life activities
 - Changed definition of perceived disability
- **Removed consideration of mitigating measures (except glasses and contacts)**

ADA Amendments Act



- Recognized as a disability a condition that is episodic or in remission that would substantially limit a MLA if active
- Expanded types of major life activities

ADAA Proposed Regulations



- **Proposed rules do the following:**
 - Clarify what it means to substantially limit a MLA
 - Explain how to evaluate mitigating measures
 - List a number of specific impairments that affect major bodily functions
 - List impairments that may be disabling for some but not others.

ADAA Proposed Regulations



- **Proposed rules do the following:**
 - Explain whether a non-permanent impairment is a disability
 - Clarify how a person can be substantially limited in the MLA or working

ADAA Proposed Regulations



- “Qualified individual”
 - Revisions have been made to the regulations to refer to “individual with a disability” and “qualified individual” as separate terms, and to change the prohibition on discrimination to “on the basis of disability” instead of prohibiting discrimination against a qualified individual “with a disability because of the disability of such individual.”

ADAA Proposed Regulations



- Substantially limits
 - ✦ Impairment need not prevent, or significantly or severely restrict, the individual in performing a MLA
 - ✦ Ability to perform MLA is compared to “most people in the general population,” using a common-sense analysis without scientific or medical evidence
 - ✦ Don’t need to show limitation in ability to perform activities of central importance to daily life

ADAA Proposed Regulations



- Substantially limits
 - ✦ An impairment need not substantially limit more than one MLA
 - ✦ No durational minimum
 - Impairment may substantially limit a MLA even if it lasts, or is expected to last, less than 6 months
 - Does apply to “regarded as” prong

ADAA Proposed Regulations



- **Mitigating measures**
 - Ameliorative effects may not be considered
 - EEOC provides a list:
 - ✦ Medication, medical equipment and devices, prosthetic limbs, low vision devices (e.g., devices that magnify a visual image), hearing aids and cochlear implants (or the like) mobility devices, or oxygen therapy equipment and supplies;
 - ✦ Assistive technology
 - ✦ Reasonable accommodations

ADAA Proposed Regulations



- Mitigating measures
 - ✦ Behavioral or adaptive neurological modifications.
 - ✦ Surgical interventions that do not permanently eliminate an impairment
- Important to note:
 - ✦ An individual who, because of use of medication or another mitigating measure, has experienced no limitations, or only minor limitations, related to an impairment nevertheless has a disability **if** the impairment **would be** substantially limiting without the mitigating measure

ADAA Proposed Regulations



- **Mitigating measures**

- ADAAA allows consideration of the negative effects from use of a mitigating measure in determining if a disability exists
- ADAAA's prohibition on assessing the positive effects of mitigating measures applies only to the determination of whether an individual meets the definition of "disability." All other determinations – including the need for a reasonable accommodation and whether an individual poses a direct threat – can take into account the positive and negative effects of a mitigating measure.

ADAA Proposed Regulations



- Specific impairments
 - Impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active
 - ✦ Epilepsy, hypertension, multiple sclerosis, asthma, cancer, and psychiatric disabilities such as depression, bipolar disorder, and post-traumatic stress disorder
 - Not exclusive list

ADAA Proposed Regulations



- Impairments that will consistently meet definition of disability
 - Deafness
 - Blindness
 - Intellectual disability (formerly termed mental retardation)
 - Partially or completely missing limbs
 - Mobility impairments requiring the use of a wheelchair

ADAA Proposed Regulations



- Autism (communicating, interacting with others, or learning)
- Cancer(normal cell growth)
- Cerebral palsy (walking, performing manual tasks, speaking, or functions of the brain)
- Diabetes (functions of the endocrine system (e.g., the production of insulin))

ADAA Proposed Regulations



- Epilepsy (functions of the brain or, during a seizure, seeing, hearing, speaking, walking, or thinking)
- HIV or AIDS (functions of the immune system)
- Multiple sclerosis and muscular dystrophy (neurological functions, walking, performing manual tasks, seeing, speaking, or thinking)

ADAA Proposed Regulations



- Major depression, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, or schizophrenia (functions of the brain, thinking, concentrating, interacting with others, sleeping, or caring for oneself).

ADAA Proposed Regulations



- List of impairments and major life activities affected are not exclusive
- Individual may have other impairments or be substantially limited in other MLAs

ADAA Proposed Regulations



- Impairments that may be disabling for some but not others
 - Might require more analysis of substantial limitation
 - Examples are provided in the regulations
 - List is illustrative, not exclusive

ADAA Proposed Regulations



- **Substantially limiting:**
 - Impairment is a disability if it substantially limits the ability of an individual to perform a major life activity “as compared to most people in the general population”
 - ✦ Replaces “average person in the general population”
 - ✦ Purportedly not substantive change, continues to mean a comparison to other people in the general population, not a comparison to those similarly situated
 - Compare amputee to non-amputees

ADAA Proposed Regulations



- **Major life activity of working**
 - Configured almost as an afterthought, as an individual will generally be substantially limited in some other MLA
 - An impairment substantially limits MLA of working if it substantially limits an individual's ability to perform, or to meet the qualifications for, the “type of work” at issue

ADAA Proposed Regulations



- Major life activity of working
 - Type of Work
 - ✦ Replaces “class” or “broad range” of jobs
 - ✦ Type of work includes job the individual has been performing, or for which the individual is applying, and jobs with similar qualifications or job-related requirements which the individual would be substantially limited in performing because of the impairment

ADAA Proposed Regulations



- **Type of Work**

- Type of work may be determined by reference to **nature of the work** an individual is substantially limited in performing because of an impairment as compared to most people having comparable training, skills, and abilities
- Examples of types of work:
 - ✦ Commercial truck driving, assembly line jobs, food service jobs, clerical jobs, or law enforcement jobs

ADAA Proposed Regulations



- **Type of Work**

- Type of work may be determined by reference to **job-related requirements** that an individual is substantially limited in meeting because of an impairment as compared to most people performing those jobs
- Examples of job-related requirements that are characteristic of types of work include, but are not limited to, jobs requiring:
 - ✦ Repetitive bending, reaching, or manual tasks; repetitive or heavy lifting; prolonged sitting or standing; extensive walking; driving; working under certain conditions, such as in workplaces characterized by high temperatures, high noise levels, or high stress; or working rotating, irregular, or excessively long shifts

ADAA Proposed Regulations



- **Transitory or non-permanent impairments**
 - Several examples of temporary, non-chronic impairments of short duration with little or no residual effects that are usually not disabilities
 - ✦ common cold, seasonal or common influenza, a sprained joint, minor and non-chronic gastrointestinal disorders, or a broken bone that is expected to heal completely

ADAA Proposed Regulations



- Appendix also states that appendicitis and seasonal allergies that do not substantially limit a person's major life activities even when active are not disabilities
- Nevertheless, an impairment can still substantially limit a MLA even if it will last less than six months (20 pound lifting restriction for several months)

ADAA Proposed Regulations



- Regarded as disabled
 - Employer regards an individual as having a disability if it takes a prohibited action based on an **actual or perceived** impairment that is not transitory (lasting or expected to last for six months or less) and minor, regardless of whether the impairment limits or is perceived to limit a major life activity
 - ✦ Known impairment or one the employer believes the individual has
 - ✦ No longer does one have to show that the employer believed the impairment (or perceived impairment) substantially limited performance of a major life activity

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- **Regarded as disabled**
 - Actions taken on the basis of an impairment's symptoms (e.g., a facial tic related to Tourette's Syndrome) or an individual's use of mitigating measures (anti-seizure medication for epilepsy) are actions taken on the basis of an impairment

ADAA Proposed Regulations



- **Employer does not regard employee as disabled when:**
 - Asks an employee if he/she needs a reasonable accommodation when it appears employee is having difficulty performing a job
 - Asks an employee for medical information as part of the reasonable accommodation “interactive process” is permitted where the disability and/or the need for accommodation is not obvious and would not trigger “regarded as” coverage
 - Seeks medical information to determine whether someone poses a direct threat, as long as the employer’s request is founded on a reasonable belief, based on objective evidence, that the individual may pose a direct threat

ADAA Proposed Regulations



- **Regarded as disabled: defenses**
 - Individual still needs to show he/she is qualified for the position
 - Employer can show direct threat, exclusion from the position is required by another federal law, or that the qualification that eliminated the individual is job-related and consistent with business necessity, or other defenses, as case may be

QUESTIONS?



THANKS FOR ATTENDING!