



Deconstructing the Final ADAAA Regulations: How to Comply with the New Guidance

Presented by

Practical Law Company

Speakers: Thomas D. Arn, Esq.
Shareholder
*Ogletree, Deakins, Nash,
Smoak & Stewart, P.C*
Phoenix, Arizona

Thomas A. Bright, Esq.
Shareholder
*Ogletree, Deakins, Nash,
Smoak & Stewart, P.C*
Greenville, South Carolina

Moderator: Kate Bally, Esq.
Head of Service
PLCLabor and Employment



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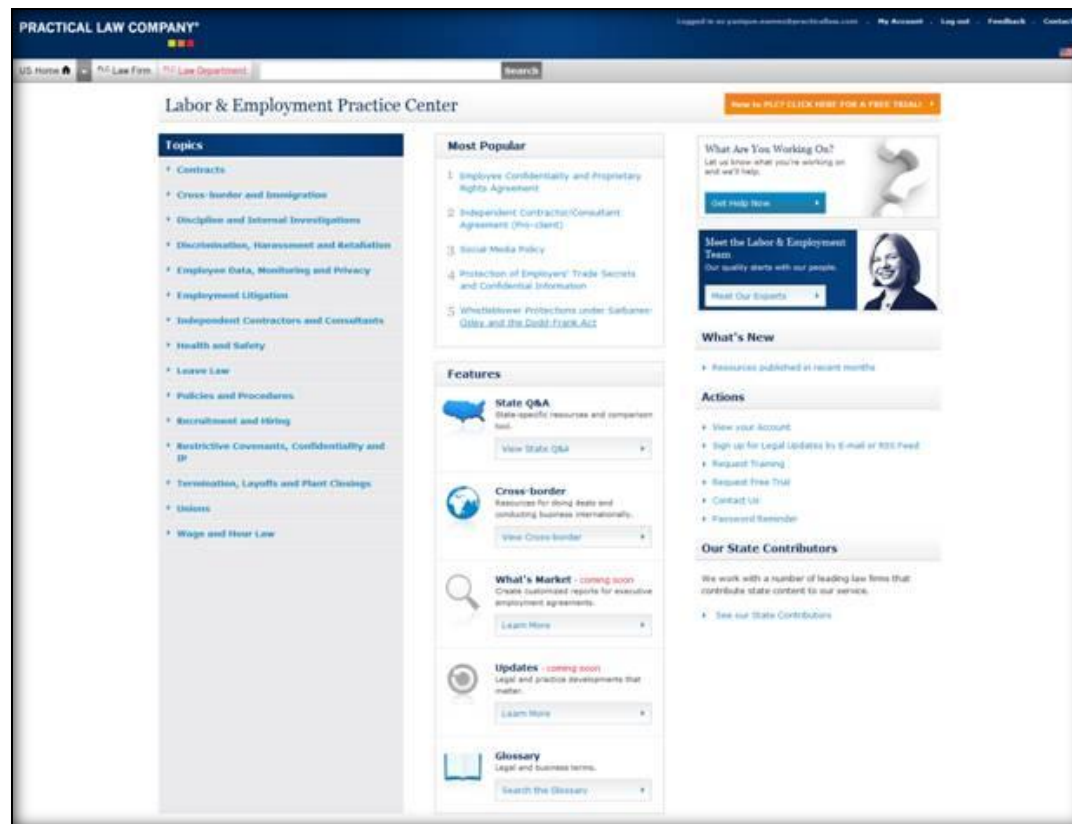
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Background

- ADA passed in 1990
- Called “a mandate for the elimination of discrimination against individuals with disabilities”
- The courts spent a great deal of time focusing on who is considered covered under the ADA as an “individual with a disability”



Background

- The United States Supreme Court, in two landmark cases, interpreted the coverage provisions of the ADA narrowly
- Congress concluded that the ADA needed to be amended to more clearly state Congress' intention for broad coverage



ADA Amendments Act of 2008

- Passed by Congress on September 25, 2008
- Expressed Congress' clear intention that the ADA be interpreted broadly and that the EEOC's current regulations were inconsistent with that intent
- Legislatively overturned the Supreme Court in two (2) cases where Congress felt the results conflicted with Congressional intent of broad protection



ADA Amendments Act of 2008

- Bottom line message – make it easier for individuals with disabilities to obtain protection under the ADA
- Directed the EEOC to promulgate new regulations to implement this intent



The Regulatory Process

- Proposed regulations issued by the EEOC on September 23, 2009
- During the subsequent 60 day comment period, the EEOC received over 600 public comments from various stakeholders



The Regulatory Process

- EEOC utilized a four-city “listening tour” to gather further input on the proposed regulations
- Final regulations delayed to allow EEOC to review and revise the proposed regulations



EEOC Charge Activity Increased Dramatically While Awaiting the Final Regulations

- ADA charge filing with the EEOC increased to over 25,000 ADA-related charges in fiscal year 2010
- That is up nearly 3,500 charges from fiscal year 2009 and up 7000 charges from 2008
- Recession + ADA Amendments Act = The Perfect Storm



Final Regulations and Revised Interpretive Guidance

- Provide for broad coverage under the ADA
- Focus on the issue of whether discrimination occurred rather than coverage issues
- Make “reasonable accommodation” a regular part of doing business



Final Regulations and Revised Interpretive Guidance

- The “regarded as” prong of the definition of disability touted as the preferred route for pursuing ADA claims that do not involve reasonable accommodation issues



Broad Coverage for Definition of “Disability”

- Determination of disability status should not require extensive analysis
- Make it easier for an individual seeking protection under the ADA to fall within the definition for coverage purposes



Broad Coverage for Definition of “Disability”

- The definition remains essentially the same – changing the way various terms under the ADA are interpreted and applied
- Attempt to make analysis of membership in a protected category (disabled) similar to the analysis under other civil rights statutes (*i.e.* race, sex, age, etc.)



The Definition of “Disability” Has Not Changed, Just the Interpretation and Application

- Still three prongs to the definition
 - Actual disability prong
 - Record of disability prong
 - Regarded as having a disability prong
- The interpretation and application of the definition is changing in “fundamental ways”



The Definition of “Disability” Has Not Changed, Just the Interpretation and Application

- First and second prong of the definition, requiring a showing of substantial limitation of a major life activity, applies only to situations where individual is seeking or has been denied reasonable accommodation
- “Regarded as” prong for all other claims of discrimination



Reverse the Restrictive Definition of “Substantially Limits” Applied by the Courts

- Supreme Court set an inappropriately high level of “limitation” on a major life activity to obtain coverage under the ADA



Reverse the Restrictive Definition of “Substantially Limits” Applied by the Courts

- The objective of ADA cases should be to ferret out discriminatory conduct and facilitate reasonable accommodation, not to ratchet-up the definition of “substantially limits” so as to create an impediment to coverage
- The determination of “substantially limits” should not demand extensive analysis



`Substantial Limitation': Nine Rules of Construction

1. The term “substantially limits” shall be construed broadly in favor of expansive coverage.
2. An 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.



'Substantial Limitation': Nine Rules of Construction

3. The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity.
4. The determination of whether an impairment substantially limits a major life activity requires an individualized assessment.



'Substantial Limitation': Nine Rules of Construction

5. The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis.
6. The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures.



'Substantial Limitation': Nine Rules of Construction

7. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
8. An impairment that substantially limits one major life activity need not substantially limit other major life activities...
9. The six-month "transitory" part of the "transitory and minor" exception to "regarded as" coverage does not apply to the "actual disability" or the "record of" prong of the definition of disability.



Condition, Manner, or Duration of a Substantial Limitation on a Major Life Activity

- The condition under which the individual performs the major life activity
- The manner in which the individual performs the major life activity
- The duration or time it takes the individual to perform a major life activity
- The focus is on how a major life activity is limited, not the outcomes the individual can achieve



Important

- Whether an individual's impairment "substantially limits" a major life activity is not relevant to coverage under the "regarded as" prong of the definition of disability



Changes to “Regarded As”

- Previous Standard: Employer must regard the employee as “disabled” before an employee may invoke the “regarded as” protection of ADA
 - *i.e.* the employer must view the employee as “substantially limited” in a “major life activity”
- ADAAA: Individual may invoke “regarded as” protection if he/she has actual or perceived impairment
 - It does not matter whether the impairment is perceived to “substantially limit” a “major life activity” of the employee



“Regarded As” Prong of Disability Definition

- “Transitory” (i.e., impairments with an actual or expected duration of six months or less) and minor impairments are not covered under the “regarded as” prong
- Employer has no duty to provide a “reasonable accommodation” to individuals under the “regarded as” prong



“Regarded As” Prong of Disability Excludes Impairments that are Both Transitory and Minor

- “Transitory” means lasting or expected to last for six months or less
- No definition of “minor”, although the Revised Interpretive Guidance makes reference to common ailments such as a cold or the flu



“Regarded As” Disability/Examples:

- Employee believed to have cancer
 - Pre ADAAA: Employee as required to demonstrate that the employer believed that the condition significantly limited a major life activity. What if the employer believed the cancer was in remission?
 - Post-ADAAA: Cancer is an impairment. No MLA analysis needed.



“Regarded As” Disability/Examples:

- Employer refuses to hire employee because of skin graft scars
 - Pre ADAAA: Employee was required to prove that the employer believed the scars were due to a condition that significantly limited a major life activity.
 - Post-ADAAA: Scars evidence an impairment. No MLA analysis needed.



“Regarded As” Prong of Disability Excludes Impairments that are Both Transitory and Minor

- It is an “objective” as opposed to a “subjective” standard
- This is a defense to a claim of discrimination
- The “transitory and minor” defense does not apply to claims under the “actual” or “record of” prongs of the definition of disability



Mitigating Measures No Longer Applicable

- ADAAA: Mitigating measures not considered in determining if individual has a substantial impairment
- You consider the impairment in its non-ameliorated state
- Exception for “ordinary eyeglasses and contact lenses”
- Consideration: Use or non-use of mitigating measures may be relevant in determining whether an individual is “qualified” or poses a direct threat



EEOC on “Mitigating Measures”

- Medications
- Medical Supplies, equipment, or appliances
- Assistive technology, auxiliary aids/services
- Learned behavioral/adaptive neurological modifications
- Surgical interventions (except which eliminate impairment)
- Exception: ordinary glasses/contacts



Mitigating Measures/Example:

- Employee with diabetes operates heavy machinery, but controls her diabetes with insulin injections
- Whether the employee is “disabled” is determined without regard to insulin injections
- But the employee’s use or nonuse of insulin injections to control her diabetes may be considered in determining whether she satisfies the positions essential qualifications and whether she poses a threat to herself and others



Physical or Mental Impairment

- Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or
- Any mental psychological disorder, such as an intellectual disability (formerly termed “mental retardation”), organic brain syndrome, emotional or mental illness, and specific learning disabilities



“Major Life Activities”

- Caring for oneself
- Performing manual tasks
- Seeing
- Hearing
- Eating
- Sleeping
- Walking
- Standing
- Sitting
- Reaching
- Lifting
- Bending
- Speaking
- Breathing
- Learning
- Reading
- Concentrating
- Thinking
- Communicating
- Interacting with others
- Working



Major Bodily Functions = Major Life Activities

“Major Bodily Functions” include:

- Functions of the immune system
- Special sense organs and skin
- Normal cell growth
- Digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions



EEOC Examples of “Disabilities”

- Missing limbs
- Autism
- Cancer
- Cerebral Palsy
- Diabetes
- Epilepsy
- HIV or AIDS
- Multiple Sclerosis
- Deafness
- Blindness
- Intellectual Disability
- Bipolar Disability
- Post-Traumatic Stress Disorder
- Obsessive Compulsive Disorder
- Schizophrenia
- Muscular Dystrophy
- Major Depressive Disorder
- Mobility Impairments



What Has Not Changed?

- Employers can still require that employees have the ability to perform the essential functions of a job, with or without reasonable accommodation
- Direct threat defense – substantial likelihood of significant harm
- Reasonable accommodation standard



Result of ADA Amendments

- More employees considered “disabled”
- Emphasis on reasonable accommodation and “interactive process”
- Essential job functions critical
- Harder to prevail on summary judgment
- More jury trials



Related Resources at www.practicallaw.com

- ✓ Disability Definition Under the ADAAA Final Regulations Flowchart
- ✓ Disability Accommodation Under the ADA
- ✓ Discrimination: Overview: ADA
- ✓ Anti-Discrimination State Surveys
- ✓ Family and Medical Leave Act Request Form



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