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EEOC Publishes Notice of Proposed Rulemaking for the ADA Amendments Act of 2008

On September 23, 2009, the Equal Employment Opportunity Commission ("EEOC") published in the Federal Register a Notice of Proposed Rulemaking ("NPRM") to revise the existing Americans with Disabilities Act ("ADA") regulations and interpretive guidance in light of the ADA Amendments Act of 2008 ("ADAAA"). The ADAAA, which became effective on January 1, 2009, overturned a series of court decisions that had purportedly narrowed the scope of the ADA and directed the EEOC to revise its regulations to restore the broad scope of protection allegedly intended by Congress. The NPRM reflects the EEOC's effort to comply with Congress' direction.

The EEOC invites the public to submit comments on the proposed regulations within the next 60 days. After the comment period, the EEOC will finalize and publish the regulations.

Highlights of the NPRM include:

- The definition of disability is to be construed broadly in favor of coverage and should not require extensive analysis.
- Impairments that are episodic or in remission are disabilities if they would be substantially limiting when active.
- A non-exhaustive list of impairments that will consistently meet the definition of disability: deafness, blindness, intellectual disability, partially or completely missing limbs, mobility impairments requiring the use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV or AIDS, multiple sclerosis, muscular dystrophy, major depression, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia. Other impairments, such as back pain, leg pain, asthma, and learning disabilities, may be disabilities for some individuals but not others. Impairments that are usually not disabilities include the common cold, season or common influenza, a sprained joint, minor and non-chronic gastrointestinal disorders, or a broken bone that is expected to heal completely.
- Mitigating measures, except for ordinary eyeglasses or contact lenses, cannot be considered in determining whether an individual is disabled, but can be considered in determining whether there is a need for a reasonable accommodation or whether an individual may pose a direct threat. Mitigating measures include, but are not limited to, medication, medical equipment, low-vision devices, prosthetics, hearing aids and cochlear implants, mobility devices, oxygen therapy equipment, assistive devices, reasonable accommodations, learned behavioral or adaptive neurological modifications, and surgical interventions, except those that do not permanently eliminate an impairment.
- Major life activities are those basic activities, including major bodily functions, that most people in the general population can perform with little or no difficulty. In addition to the non-exhaustive list set forth in the ADAAA, major life activities include sitting, reaching, and interacting with others, as well as the major bodily functions of the hemic, lymphatic, musculoskeletal, special sense organs and skin, genitourinary, and cardiovascular systems.
- An individual will be substantially limited in the major life activity of working if the impairment substantially limits the individual's ability to perform or meet the qualifications for a "type of work." The EEOC believes that the "type of work" concept is preferable to the prior concepts of "class" or "broad range" of jobs.
- To be considered a disability, an impairment does not need to prevent or significantly or severely restrict the individual from performing a major life activity. Rather, the substantial limitation determination is made by comparing the individual's ability to perform a major life activity with the ability of most people in the general population to perform the activity.
- An employer "regards" an individual as disabled if it takes an action prohibited by the ADA based on an individual's actual or perceived impairment, unless the impairment is transitory. An individual is no longer required to show that the employer believed the impairment was substantially limiting.
- An employer's obligation to provide reasonable accommodation only applies to individuals who have an actual disability or a "record of" a disability. It does not apply to individuals who are "regarded as" disabled.

The full-text of the NPRM can be accessed at <http://edocket.access.gpo.gov/2009/pdf/E9-22840.pdf>

The EEOC has also published a question and answer guide on the NPRM. The guide states that the ADAAA

does not apply retroactively, but that it would apply to the denial of a reasonable accommodation request made or renewed on or after January 1, 2009. It can be accessed at http://www.eeoc.gov/policy/docs/qanda_adaaa_nprm.html

Comments from the public will be accepted until **November 23, 2009**. If you are interested in submitting comments on the proposed regulations, have questions regarding this NPRM, or need advice on complying with the ADA as amended, please contact a labor and employment attorney at Venable.

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