Final ADAAA Regulations Briefing: How Low Can You Go?

The final ADA Amendments Act of 2008 (ADAAA) regulations have fueled numerous questions by employers seeking guidance on just how low the bar on the ADA definition of disability has become. Because the ADAAA and now the final regulations substantially expand the scope of employee coverage, employers need to understand their obligations under the law.

Brian D. Pedrow and Alexandra Bak-Boychuk reviewed the change landscape and provided guidance on adapting in a webinar on April 7, 2001. Please visit the event page on our website to listen to the webinar. If your organization needs guidance in revising its ADA policies and job descriptions or assistance in training or streamlining the accommodations process, please contact us. Below are responses to some questions asked by employers during the webinar:

Is chronic back pain a disability?

It might be. The new regulations now provide that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. Now that major bodily functions are included in the broader list of major life activities, chronic back pain could substantially limit the operation of the musculoskeletal system and, thus, be covered.

Are pregnancy or complications from pregnancy disabilities?

Pregnancy is not a disability because it is not an impairment. According to the EEOC, a pregnancy-related impairments that substantially limit a major life activity or major bodily function may now be covered. This means that the EEOC now may view conditions, such as severe morning sickness or gestational diabetes, as covered ADA disabilities.

If an employee submits a doctor's note limiting lifting to 10 lbs with no end date, but the job description includes lifting up to 15 lbs on a regular basis and 25 lbs on an occasional basis, is the employee disabled?

Lifting is now expressly included in the non-exhaustive list of major life activities. If an underlying physical impairment substantially limits the ability to lift, this employee is likely to have a covered disability. Nothing in the new regulations, however, requires an employer to alter the essential functions of the job as a reasonable accommodation. Rather, an accommodation should be designed to enable the employee to perform the essential functions of the job. Thus, a key question in the accommodation dialogue will be whether lifting is an essential function of the job.

Do I need to accommodate an employee with a rotator cuff tear that the employee decides not to repair?

A rotator cuff injury could substantially limit the muscles that help move and stabilize the shoulder joint and, thus, qualify as a disability. Just because an employee chooses not to repair the injury does not change that employee's status in terms of having a covered ADA disability. In the new regulations, the EEOC specifically stated that an employee's decision to forego a mitigating measure, such as surgical intervention, does not change the fact that he or she may be substantially limited in a major life activity. However, the fact that the employee opts to forego surgery may be relevant to an assessment of whether the employee can perform the essential functions of the job, with or without an accommodation, and/or whether the employee poses a direct threat to health or safety.

As an employer needing to hire personnel for driving and operating heavy equipment, can I ask applicants if they have any conditions that would prevent them from performing those tasks?

The regulations do not change the right of employers to make certain pre-employment inquiries. You may still ask applicants if they are able to perform the essential functions of the position, with or without reasonable accommodation, as long as all applicants are asked to do this.

Is heart disease a disability?

Yes. Heart disease would qualify as a disability if it substantially limits the body's circulatory system, a major bodily function. Even if an employee can control the effects of heart disease through diet and medication, that individual is still covered.

If we presume an employee is qualified under the ADAAA, must we accommodate continued absences beyond the normal FMLA or short term disability maximum periods?

Nothing in the new regulations changes the existing ADA rules and court decisions governing the provision of additional leave time as a form of reasonable accommodation.

My employees occasionally attend seminars for job purposes. Do the new regulations change how accessible the seminar has to be?

In the new regulations, the EEOC expressly decided not address or change the definition of reasonable accommodation. If an employer has employees with sensory impairments, for example, the employer would be required to provide reasonable accommodation to

ensure that such employees can enjoy the full benefits of employment, including the opportunity to participate in job-related seminars.

In light of the clear intent of the regulations to broaden disability coverage to the maximum extent possible, does it make sense for an employer to challenge coverage rather than just address the reasonable accommodation issue?

In many cases, it may not make sense to challenge coverage, particularly given the list of "per se" or "virtually always" disabilities. The EEOC, in adopting the final regulations, expressly noted that this was one of the Congressional purposes behind the ADAAA – to spend less time and focus on the threshold coverage issue and move instead onto the issue of accommodation. Nevertheless, nothing in the new regulations modified the existing rules governing the circumstances under which an employer is permitted to seek medical verification of the existence of a disability.

Did the new regulations modify the definition of what it means to have a "record of" disability?

Yes. The new regulations make clear that this prong of the definition of disability shall be construed broadly and not demand extensive analysis. Someone who does not currently have a substantially limiting impairment, but who had one in the past, is covered by this definition. For example, an employee who had cancer ten years ago but is determined by a doctor to be cancer- free could now be protected.