

[Click here](#) to view the event page

[Click here](#) for a recording of program

How Low Can You Go?

New EEOC Regulations

Lower Bar on ADA Definition of Disability



Your Presenters



Brian D. Pedrow, Esquire
Partner, Ballard Spahr LLP
Labor & Employment Group



Alexandra Bak-Boychuk, Esquire
Associate, Ballard Spahr LLP
Labor & Employment Group

Agenda

- Regulatory History
- Substantive Changes:
 - Substantially Limits
 - Major Life Activities
 - “Per Se” Disabilities
 - Mitigating Measures
 - Dormant or Episodic Impairments
 - “Regarded As” Protection
- Employer Action Items

Regulatory History

ADA Amendments Act

- ADA Amendments Act of 2008
 - Signed into law 9/25/08
 - Took effect 1/1/09
- Key Objectives:
 - Broadest possible coverage of protected individuals – “to the maximum extent permitted” by ADAAA
 - Determination whether individual has disability should not demand extensive analysis
 - Primary focus should be whether employer has complied with its obligations, not whether individual has qualifying disability
 - Reverses impact of Supreme Court rulings narrowing coverage

EEOC Regulations

- EEOC Proposed Regulations (9/23/09)
- EEOC Final Regulations
 - Issued 3/25/11
 - Effective 5/24/11
- DOJ Adoption under Titles II and III?

Regulatory Impact Analysis

- EEOC estimates as many as:
 - 38.4 million working Americans impacted
 - 6.1 million more labor force participants will seek reasonable accommodation
 - Annual incremental cost of \$183 million to U.S. employers
- EEOC estimates could be far too low

ADA Definition of Disability

“Disability” Defined

With respect to an individual, the term "disability" means:

(A) a physical or mental impairment that **substantially limits** one or more of the **major life activities** of such individual;

(B) a record of such an impairment; or

(C) being **regarded as** having such an impairment.

42 U.S.C. § 12102(2); *see also* 29 C.F.R. § 1630.2(g).

Substantially Limits

Substantially Limits

- Old EEOC Definition:

The term "substantially limits" means: (i) Unable to perform a major life activity that the average person in the general population can perform; or (ii) **Significantly restricted** as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the **average person** in the general population can perform that same major life activity.

- New EEOC Definition:

The terms substantially limits means an impairment **substantially limits** the ability of an individual to perform a major life activity as compared to **most people** in the general population.

Substantially Limits

- “Most People”
- Condition, Manner, Duration
- Transitory Conditions

Major Life Activities

Major Life Activities

- **Old EEOC Definition:**

Those basic activities that the average person in the general population can perform with little or no difficulty, including functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

- **New EEOC Definition:**

- Expands traditional list of MLAs
- Adds new non-exhaustive list of Major Bodily Functions (MBFs)
- Removed requirement that activity be one which average person in general population can perform
- “Major” doesn’t seem to mean “major” any longer
- Only one MLA/MBF is needed

Major Life Activities

- New List of Traditional MLAs:

- Caring for oneself
- Performing manual tasks
- Walking
- Seeing
- Hearing
- Speaking
- Breathing
- Learning
- Working

- Eating
- Sleeping
- Standing
- Sitting
- Bending
- Reaching
- Lifting
- Reading
- Concentrating
- Thinking
- Communicating
- Interacting with others

Major Life Activities

- New List of MBFs:

- Immune system (e.g., HIV infection)
- **Special sense organs and skin**
- Normal cell growth (e.g., cancer)
- Digestive
- **Genitourinary**
- Bowel
- Bladder
- Neurological (e.g., Parkinson's disease)
- Brain
- Respiratory
- Circulatory
- **Cardiovascular**
- Endocrine (e.g., diabetes)
- **Hemic** (e.g., sickle cell)
- **Lymphatic** (e.g., lymphadema)
- **Musculoskeletal** (e.g., rheumatoid arthritis)
- Reproductive systems

Major Life Activities

- “Working”
 - EEOC moved all discussion from regulations to Interpretive Appendix
 - Working is only relevant in “very targeted situations”
 - Vast majority of cases, some other MLA/MBF will be impacted
- Pre-ADAAA standard maintained in Interpretive Appendix

“Per Se” Disabilities

“Per Se” Disabilities

- Some disabilities, due to inherent nature, lend themselves to “predictable assessment”
- “Virtually always” will qualify as substantially limiting
- No individualized assessment needed

“Per Se” Disabilities

- Deafness
- Blindness
- Intellectual disability
- Partially or completely missing limbs or mobility impairments requiring the use of a wheelchair
- Autism
- Cancer
- Cerebral palsy
- Diabetes
- Epilepsy
- Human Immunodeficiency Virus (HIV) infection
- Multiple sclerosis
- Muscular dystrophy
- Major depressive disorder
- Bipolar disorder
- Post-traumatic stress disorder
- Obsessive compulsive disorder
- Schizophrenia

Mitigating Measures

Mitigating Measures

- New EEOC Regulations:

The “determination of whether an impairment is substantially limiting shall be made without regard to the ameliorative effects of mitigating measures.”

- Exception: “ordinary eyeglasses or contact lenses”

Mitigating Measures

- Medication
- Medical supplies, equipment, or appliances
- Low-vision devices (defined as devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses)
- Prosthetics including limbs and devices
- Hearing aid(s) and cochlear implant(s) or other implantable hearing devices
- Mobility devices
- Oxygen therapy equipment and supplies
- Use of assistive technology
- Reasonable accommodations or “auxiliary aids or services”
- Learned behavioral or adaptive neurological modifications
- **Psychotherapy, behavioral therapy, or physical therapy**

Mitigating Measures

- Surgical interventions
- Non-ameliorative effects of mitigating measures
 - negative side effects of medication
 - burdens associated with a treatment regimen
 - complications from surgery
- Refusal to use mitigating measures

Dormant or Episodic Impairments

Dormant or Episodic Impairments

- New EEOC Regulations:

An “impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”

- Examples:

- hypertension
- diabetes
- asthma
- major depressive disorder
- bipolar disorder
- schizophrenia
- post-traumatic stress disorder

“Regarded As” Protection

“Regarded As”

- New EEOC Regulations:

ADAAA regulations now define “regarded as” as meaning that the individual has been subjected to an action prohibited by the ADA because of an actual or perceived impairment that is not both transitory and minor.

- “Regarded as” prong does not require a showing that the impairment substantially limits a MLA
- No entitlement to reasonable accommodation under “regarded as” prong

“Regarded As”

- Transitory and Minor Defense:
 - No definition of “minor”
 - “Transitory” means lasting or expected to last six months or less
- Prohibited Actions – Causation
 - “Because of” actual or perceived impairment
 - Examples: refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment

Employer Action Items

Employer Action Items

- ADA Policy
- Supervisory Training
- ADA Medical Inquiries & Questionnaires
- Statements of Essential Job Functions