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EEOC Publishes Final Regulations Implementing the ADA Amendments Act

The Americans with Disabilities Act Amendments Act of 2008 (the "ADAAA or the "Act") became effective on January 1, 2009. The ADAAA made many significant changes in the definition of "disability" under the Americans with Disabilities Act ("ADA") and directed the Equal Employment Opportunity Commission ("EEOC") to revise its ADA regulations to reflect these changes. In the fall of 2009, the EEOC published its proposed regulations, which were discussed in our November 2009 client alert.

The EEOC's final regulations were published on March 25, 2011. These regulations become effective on May 24, 2011, and will apply to claims dating back to January 1, 2009. Generally speaking, the final regulations are similar to the proposed regulations and provide the following changes:

The EEOC Has Reinterpreted the Previous Definition of "Disability." The final regulations emphasize that the definition of disability is to be construed broadly. The regulations maintain the ADAAA's and ADA's definition of "disability" as a physical or mental impairment that substantially limits one or more major life activities, a record (or past history) of such an impairment, or being regarded as having a disability. The regulations, however, substantially alter the interpretation of these terms, making it easier for millions of Americans to establish that they have a protected disability under the ADA.

The final regulations emphasize that determining whether an employee has a disability should not require extensive analysis. Unlike the approach taken in the proposed regulations, the final regulations do not provide a list of impairments that would "consistently," "sometimes" or "usually not" be disabilities. Nevertheless, the regulations do list conditions that will, "in virtually all cases," result in the finding of a disability. These include deafness, autism, cancer, cerebral palsy, epilepsy, post-traumatic stress disorder, diabetes, HIV infection, multiple sclerosis and bipolar disorder. The regulations emphasize, however, that an individualized assessment to determine whether an impairment substantially limits a major life activity is still required.

The EEOC Has Relaxed the Standard for Demonstrating that an Impairment is "Substantially Limiting." As with the proposed regulations, the final regulations provide that an impairment need not prevent or severely or significantly restrict a major life activity to be considered "substantially limiting." The final regulations expressly provide that "substantially limited is not meant to be a demanding standard." An impairment that is episodic (such as epilepsy) or in remission (such as cancer) is a disability if it would substantially limit a major life activity when active.

There is also no minimum duration specified in the final regulations that an impairment must last in order to qualify as a disability. Hence, impairments lasting a short period of time may be disabilities if they are "sufficiently severe." The regulations note that effects of ailments lasting even less than six months can be substantially limiting.

The EEOC Has Provided a Non-Exhaustive List of "Major Life Activities." The regulations revoke the rule that a major life activity must be of central importance to most peoples' daily lives, but they do not provide a specific definition. Instead, as with the proposed regulations, the final regulations offer a non-exhaustive list to describe what constitutes a "major life activity," including caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, communicating, concentrating and thinking. The regulations also provide that "major life activities" include "major bodily functions", such as the circulatory and immune systems, special sense organs and skin, normal cell growth, and respiratory, lymphatic or reproductive functions. The operations of individual organs in systems (such as the heart, liver or lungs) are also considered "major bodily functions." The regulations specifically state that the term "major" shall not be strictly interpreted to create a demanding standard in determining the existence of a disability.

Unlike the proposed regulations, the final regulations do not alter the definition of "working" as a major life activity, but rather retain the standard that courts have traditionally used to determine whether a condition substantially limits the ability to work – requiring that the employee be unable to perform a "class" or "broad range" of jobs in order to be considered limited in the major life activity of working.

The EEOC Has Expanded Coverage for Individuals "Regarded As" Disabled. As with the proposed regulations, the final regulations make it easier for individuals to establish that they are disabled because they are "regarded as" having a disability. Under the regulations, an individual will be "regarded as" disabled if he or she is subjected to an action prohibited by the ADA (*e.g.*, failure to hire, denial of promotion or termination) because of an actual or perceived impairment, whether or not the impairment limits or is perceived to limit a major life activity. Thus, under the final regulations, an individual will be covered by the ADA even if he cannot show that the employer perceived him to be substantially limited in a major life activity, so long as he can show that the employer took action against him because of an actual or perceived physical or mental impairment. The regulations provide that an employer may defend against a claim that an employee was "regarded as disabled" by showing that "the impairment is (in the case of an actual impairment) or would be (in the case of a perceived impairment) 'transitory and minor."' Transitory is defined as "lasting or expected to last six months or less."

The EEOC Has Limited the Consideration of Mitigating Measures. As with the proposed regulations, the final regulations provide that the determination of whether an impairment substantially limits a major life activity must be made without regard to the ameliorative effects of mitigating measures, such as medication or hearing aids. The only exception is that ordinary eye glasses or contact lenses may be considered.

Since these new regulations broaden the interpretation and scope of the term "disability," employers should be prepared for an increase in claims under the ADAAA. Indeed, the regulations now state that "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 meets the definition of disability. The question of whether an individual meets the definition of disability . . . should not demand extensive analysis." As a result, employers should review and update their policies regarding the offering of reasonable accommodations to disabled employees and strengthen their documentation processes. For further information concerning the new regulations and for their practical impact, contact any Frantz Ward labor and employment attorney at Frantz Ward LLP, 2500 Key Center, 127 Public Square, Cleveland, Ohio 44114-1230, (216) 515-1660, attorneys@frantzward.com.

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