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Accommodation and Compliance Series

Accommodation and Compliance Series: The ADA Amendments Act of 2008

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Introduction

On January 1, 2009, the Americans with Disabilities Act Amendments Act (ADAAA) of 2008 went into effect, making some major changes to the definition of disability. The changes apply to both the ADA and the Rehabilitation Act. The following information provides an overview of some of the main changes.

DEFINITION OF DISABILITY

The ADAAA did not change the wording of the definition of disability, but it changed the meaning of some of the words used in the definition and the way they are applied.

(1) Disability.—The term "disability" means, with respect to an individual—

- A. A physical or mental impairment that substantially limits one or more major life activities of such individual;
- B. A record of such an impairment; or
- C. Being regarded as having an impairment.

Impairment

The term "impairment" did not change. It is still any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, or any mental or psychological disorder.

The term impairment does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight, or muscle tone that are within "normal" range and are not the result of a physiological disorder; characteristic predisposition to illness or disease; pregnancy; common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder; or environmental, cultural, or economic disadvantages such as poverty, lack of education, or a prison record.

Major Life Activities and Bodily Functions

Major life activities include, but are not limited to: 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, and working.

The ADAAA added the operation of major bodily functions to the definition of major life activities. Major bodily functions include functions of the immune system, special sense

organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes the operation of an individual organ within a body system.

Note that the lists provided in the definition of major life activities are not exhaustive; they are just examples of some of the activities that can be considered.

Substantially Limits

There is not a specific definition of the term “substantially limits.” Instead, there are nine “rules of construction” explaining how to determine if a person is substantially limited in a major life activity. Here are the most important rules:

1. Mitigating Measures Will Not Be Considered

When determining whether a person is substantially limited in a major life activity, ignore the beneficial effects of mitigating measures except ordinary eyeglasses or contact lenses.

Mitigating measures include: medication, medical supplies, equipment, appliances, low-vision devices other than ordinary glasses and contacts, prosthetics including limbs and devices, hearing aid(s) and cochlear implant(s) or other implantable hearing devices, mobility devices, and oxygen therapy equipment and supplies. Mitigating measures can also include the use of assistive technology, reasonable accommodations or “auxiliary aids or services,” learned behavioral or adaptive neurological modifications, or therapy.

For example, a person with epilepsy who takes medication to control her seizures will most likely be substantially limited because we will consider what her limitations would be without her medication.

And note that the ADA states that the beneficial effects of mitigating measures are ignored; if the mitigating measure itself causes any limitations, then those will be considered.

When trying to figure out what a person’s limitations might be without mitigating measures, some options include: limitations that a person experienced prior to using a mitigating measure, the expected course of a particular disorder absent mitigating measures, or readily available and reliable information of other types.

2. Limitations That Are Episodic or in Remission Will Be Considered As If Active

The fact that a person’s limitations go into remission or come and go is no longer relevant to determining whether the impairment substantially limits a major life activity. For example, a person with post-traumatic stress disorder who experiences intermittent flashbacks to traumatic events can be substantially limited in brain function and thinking based on limitations during the flashbacks.

Other examples of conditions that may be episodic or go into remission include epilepsy, multiple sclerosis, cancer, hypertension, diabetes, asthma, major depressive disorder, bipolar disorder, and schizophrenia.

3. Temporary Impairments May Meet the Definition of Disability

There is no automatic cut off for the length of time an impairment must last before it can be considered a disability. The duration of an impairment is one factor that is relevant in determining whether the impairment substantially limits a major life activity. Impairments that last only for a short period of time are typically not covered, although they may be covered if sufficiently severe.

For example, if an individual has a back impairment that results in a 20-pound lifting restriction that lasts for several months, he could be substantially limited in the major life activity of lifting even though the impairment and limitation are not permanent.

Predictable Assessments

To help make it easier to determine whether someone has a disability under the ADA, in its ADAAA regulations the Equal Employment Opportunity Commission (EEOC) provided examples of impairments that should be easily found to substantially limit a major life activity:

- Deafness substantially limits hearing.
- Blindness substantially limits seeing.
- An intellectual disability substantially limits brain function.
- Partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function.
- Autism substantially limits brain function.
- Cancer substantially limits normal cell growth.
- Cerebral palsy substantially limits brain function.
- Diabetes substantially limits endocrine function.
- Epilepsy substantially limits neurological function.
- Human Immunodeficiency Virus (HIV) infection substantially limits immune function.
- Multiple sclerosis substantially limits neurological function.
- Muscular dystrophy substantially limits neurological function.
- Major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia substantially limit brain function.

Condition, Manner, or Duration

For conditions that are not so obviously disabilities, the regulations state that in determining whether an individual is substantially limited in a major life activity, it may be useful to consider, as compared to most people in the general population, the condition under which the individual performs the major life activity; the manner in which the individual performs the major life activity; and/or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity.

Consideration of facts such as condition, manner, or duration may include, among other things, consideration of the difficulty, effort, or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; and/or the way an impairment affects the operation of a major bodily function.

Record of a Disability

An individual has a record of a disability if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities. The terms “substantially limits” and “major life activity” under the record of prong of the definition of disability are the same terms explained above.

An individual with a record of a substantially limiting impairment may be entitled, absent undue hardship, to a reasonable accommodation if needed and related to the past disability. For example, an employee who had cancer that is now cured may need leave or a schedule change to go to periodic medical appointments to make sure the cancer has not returned.

Regarded As Having a Disability

The ADAAA makes regarded as coverage under the ADA very broad. To be covered, an individual only has to establish that an employer discriminated against him because of a medical condition, whether he actually has one or the employer just thought he did. He does not have to meet the substantially-limited-in-a-major-life activity standard. One exception under regarded as is that impairments that are transitory (lasting or expected to last 6 months or less) *and* minor, are not covered. Arguably, impairments that are transitory or minor, but not both, will be covered.

For example, if an employer denies employment to a job applicant solely because the applicant has had back problems in the past, without looking at whether he can safely perform the job, the applicant will most likely be covered under the regarded as part of the definition.

REASONABLE ACCOMMODATION

The ADAAA did not change the definition of reasonable accommodation. However, the Act does clarify that only individuals who meet the first (actual disability) and second (record of a disability) parts of the definition are entitled to accommodations; individuals who only meet the third part (regarded as) are not entitled to accommodations. Even though the definition did not change, it is clear that with a broader definition of disability, more focus will be placed on providing reasonable accommodations.

Situations and Solutions:

A local police department had a qualification standard that requires all officers to have uncorrected vision of no less than 20/40 in one eye and 20/100 in the other, and visual acuity of 20/20 in both eyes with correction.

An applicant for a parking patrol officer could not meet this standard because her uncorrected vision in both eyes was less than 20/40. Even though the applicant does not have a disability, she is able to challenge the qualification standard under the ADA Amendments Act, which has a specific provision about such standards.

An employee was missing a lot of work because she and her children kept getting colds and the flu.

After she was reprimanded for missing too much work, she requested an accommodation under the ADA. Her employer determined that she did not meet the definition of disability because her medical conditions were of too short a duration and not severe enough.

An employer received a request from an employee who disclosed that he had diabetes and needed to modify his break times so he could check his blood sugar levels and administer insulin.

Because diabetes virtually always meets the definition of disability (substantially limits the functions of the endocrine system), the employer did not require medical documentation to show the employee has a covered disability, but instead focused on the need for accommodation.

An employee with a history of cancer needed time off periodically to get follow up medical testing to make sure his cancer had not returned.

The employee had a history or record of a disability and therefore was entitled to an accommodation.

An employee with bipolar disorder was able to fully control her symptoms with medication as long as she also kept a regular work and sleep schedule so she asked her employer to be excused from working overtime.

Even though the employee was able to control her symptoms with medication, she met the definition of disability. The ADA Amendments Act made it clear that you determine whether an employee has a disability by considering what limitations the employee would have if she did not take medication.

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