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## **EEOC Posts New ADAAA Regulations**

When Congress passed the Americans with Disabilities Amendments Act to expand protections to disabled workers, it ordered the Equal Employment Opportunity Commission (EEOC) to create regulations implementing the changes. On September 22, the EEOC published proposed changes to several sections of part 1630 of the current ADA regulations to bring them in line with the ADA Amendments Act of 2008 (ADAAA), which took effect on January 1, 2009. There will be a 60-day period for public comment and possible revisions before the new rules become final, but substantial portions of the proposed regulations will likely become law.

The proposed rules provide guidance and clarification on several major changes under the ADAAA. In essence, the ADAAA expands the definition of what qualifies as a “disability,” i.e., by broadening what constitutes a “major life activity” and including “major bodily functions” within the definition; eliminates the mitigation defense, so that an employee’s disability will be assessed without regard to any mitigating measures; lessens the required showing for employees who claim to have been “regarded as” having a disability; and instructs that, in ADA suits, courts should focus the analysis on the alleged discrimination rather than on the plaintiff’s disability.

While the proposed regulations do not change what is an “impairment” under the ADA, they expand on the list of what constitutes a “major life activity” and add three activities that are not listed in the current regulations: sitting, reaching and interacting with others. The proposed rules also supplement the ADAAA’s examples of “major bodily functions” by specifying that the hemic, lymphatic, musculoskeletal, special sense organs and skin, genitourinary and cardiovascular systems are also covered. Further, the proposed rules note that for an individual to be substantially limited, the individual’s impairment “need not severely restrict or significantly restrict performance of a major life activity.” Rather, “the comparison of an individual’s limitation to the ability of most people in the general population often may be made using a common-sense standard, without resorting to scientific or medical evidence.”

The proposed rules also address episodic and permanent impairments and provide examples of episodic impairments that would, when active, constitute a “disability.” These include epilepsy, multiple sclerosis, hypertension, asthma, diabetes, major depression and bipolar disorder. The list also includes cancer, even if in remission, if it “could return in a substantially limiting form.” Additionally, the proposed rules include examples of temporary, non-chronic impairments that usually would not be deemed disabilities, such as the common cold, seasonal flu and allergies, sprained joints and broken bones expected to heal completely. The EEOC notes that there are also examples of impairments that, if they substantially limit a major life activity, will “consistently meet the definition of disability,” such as deafness, blindness, partially or completely missing limbs, cancer, autism, HIV/AIDS, diabetes and a number of mental diseases.

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In addition, to show that a person is limited in the major life activity of “working,” the proposed rules provide that an individual need only show that an impairment substantially limits his ability to perform, or to meet the qualifications for, a “type of work,” such as commercial truck driving, or to perform “job-related requirements,” such as frequent or heavy lifting or prolonged standing or sitting. This would change the current regulations’ requirement that a person claiming a substantial limitation in his ability to perform certain jobs be substantially limited in performing a “class or broad range of jobs.”

A final highlight is that while the ADAAA expands protection for being “regarded as” disabled, the proposals note that the law does not require employers to reasonably accommodate an individual who is merely “regarded as” disabled. Accordingly, the EEOC notes that asking an employee whether he or she needs a reasonable accommodation will not be deemed to be regarding that employee as disabled nor violate the ADA.

#### **FOR MORE INFORMATION**

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