



## EEOC Releases Guidance on the Americans with Disabilities Act Amendments Act

*On January 1, 2009, the Americans with Disabilities Act Amendments Act of 2008 (ADAAA) took effect, significantly expanding the class of individuals who are considered disabled and entitled to protection under federal law. The Equal Employment Opportunity Commission (EEOC) has now issued proposed regulations to implement the employment provisions of the ADAAA.*

### Background

The Americans with Disabilities Act of 1990 (ADA) targeted, among other things, the elimination of employment discrimination against individuals with disabilities. The ADAAA, signed into law in 2008, substantially expanded the reach of the ADA and the Rehabilitation Act of 1973 (covering Federal employees) by adopting a less restrictive definition of disability. (See our December 18, 2008 [For Your Information](#).) In this way, Congress sought to make it easier for job applicants and employees to secure the protections of the ADA, including reasonable accommodation, and expressly authorized the EEOC to revise its regulations to conform to changes made by the ADAAA.

On September 23, 2009, the EEOC issued [proposed regulations](#), along with a question and answer [guide](#), to implement the employment provisions of the ADAAA. Key changes to the ADA echoed in the proposed regulations are highlighted below.

### An Expanded Definition of “Disability”

Under the ADA and ADAAA, an individual is considered to have a disability if he or she has a physical or mental impairment which substantially limits one or more major life activities, has a record of such impairment, or is regarded by an employer as having such impairment. However, the ADAAA and the proposed regulations change the way these terms should be interpreted, and shift the focus to “whether discrimination occurred, not on whether an individual meets the definition of ‘disability.’” The EEOC guidance effectively broadens the ADA definition of disability by enlarging the definition of major life activity, eliminating consideration of most mitigating measures in determining whether an individual is disabled, and expanding the definition of “regarded as” having a disability.

**BUCK COMMENT.** *As the EEOC recognized, many of the individuals who would meet this lower disability threshold are likely to have less severe physical or mental limitations and need less extensive accommodations than current regulations require. As a result, employers may be able to accommodate*

*their needs under existing employer policies and procedures (e.g., use of accrued leave, short- or long-term disability benefits, voluntary transfers) or under other statutes (e.g., FMLA, workers' compensation).*

Importantly, the proposed regulations retain current exceptions to the reasonable accommodation requirement. Thus, an employer would not have to reasonably accommodate an individual's request if the accommodation would cause the employer undue hardship, the individual is not qualified (i.e., cannot perform the essential job functions with or without reasonable accommodation), or the individual would pose a direct safety threat even with an accommodation.

**Major Life Activity.** The proposed regulations expand the definition of major life activities, defining them as basic activities (which could be major bodily functions) that most people in the general population can perform with little or no difficulty. By eliminating prior references to "the average person" or similarly situated individuals, the EEOC proposes an analysis based on what it deems a common sense approach "that does not require an exacting or statistical analysis."

The regulations expand the definition of major life activities through two non-exhaustive lists. The first list includes some activities previously identified by EEOC regulations but added others from the ADAAA. Previously identified activities include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. The proposed regulations add sitting, reaching, and interacting with others.

The second list includes major bodily functions, many of which were spelled out in the ADAAA and some of which have now been added by the EEOC as further illustrative examples. Those previously identified include functions of the immune system, normal cell growth, and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. Additional examples provided by the EEOC include special sense organs and skin, and genitourinary, cardiovascular, hemic, lymphatic, and musculoskeletal functions.

**Substantially Limits.** The regulations confirm that the term "substantially limits" is to be construed in favor of broad coverage and should not require extensive analysis. To meet the new standard, a limitation need no longer prevent, or "significantly" or "severely" restrict, a major life activity.

**Impairments That Are Disabilities and Those That Are Not.** The proposed regulations confirm that an impairment that is episodic or in remission is a disability if it would, when active, substantially limit a major life activity. Further, the regulations would extend protection against employer actions based on symptoms of an impairment as well.

The EEOC has now identified individuals who will consistently meet the definition of disability by virtue of their physical or mental impairments, without the need for an extensive individual assessment. Those impairments include deafness, blindness, intellectual disability, missing limbs, mobility impairments requiring the use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV or AIDS, multiple sclerosis, muscular dystrophy, depression, bipolar disorder, obsessive-compulsive disorder, post-traumatic stress disorder, or schizophrenia.

**BUCK COMMENT.** *The EEOC estimates that as many as 1 million additional workers would consistently meet the definition of disability under the ADA. Although it is unclear how many would require a reasonable accommodation, employers should expect an uptick in requests for accommodation and a likely increase in the number of discrimination charges filed by individuals with impairments.*

Temporary, non-chronic impairments of short duration (i.e., less than 6 months) with few or no residual effects generally will not be considered disabilities, while chronic, episodic conditions as well as those in remission (e.g., cancer, asthma) will be. However, an impairment that is permanent, of long duration or chronic would not automatically qualify as a disability if it does not otherwise substantially limit a major life activity.

**Record of Impairment.** Protection has been expanded to individuals misclassified as disabled. Further, prior EEOC guidance has been eliminated that suggested an actual record of disability relied on by the employer (e.g., medical or employment records) was needed to establish a disability. As proposed, the regulations would only require some evidence that an individual has a history of a substantially limiting impairment.

**Reduced Mitigating Measures.** The regulations confirm that mitigating measures – with the exception of ordinary eyeglasses or contact lenses – may no longer be considered in assessing whether an individual has an impairment that substantially limits a major life activity. Among the mitigating measures that may no longer be considered in determining whether an individual is disabled are medication, prosthetics, hearing aids, assistive technology, and employers' accommodations. However, employers may still take into account the effects of medication when assessing the need for reasonable accommodation and in determining whether an individual would pose a direct safety threat even with accommodation.

**BUCK COMMENT.** *More individuals with some degree of hearing impairment will likely be considered disabled under the new standard. Although at least one major health carrier has recently taken the position that hearing aids must be covered in the same manner as other durable medical equipment, the proposed regulations do not expressly address this or other group health plan coverage issues. When informally asked whether a plan that excluded hearing aids would violate the new rules, the EEOC indicated that for now it would continue to analyze health plan limitations based on whether the plan is making a disability-based distinction and, if so, whether the limitation is a subterfuge for discrimination.*

**Expanded “Regarded As” Prong.** To be regarded as disabled under existing regulations, an individual must be able to show that the employer perceived him or her to be substantially limited in one or more major life activities. The proposed regulations would eliminate the need to show the employer believed that the impairment (or perceived impairment) substantially limited performance of a major life activity. They focus instead on whether the employer took an action prohibited by the ADA (e.g., failure to hire or promote, termination) based on an actual or perceived physical or mental impairment. A job applicant or employee generally would meet the “regarded as” having a disability test, unless the impairment is both transitory and minor. However, individuals covered only under the “regarded as” test would not be entitled to reasonable accommodation.

**Qualification Standards and Employment Tests.** The regulations provide that qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision can only be used if job-related and consistent with business necessity.

## Effective Date

The EEOC has not proposed an effective date, but has requested that comments on the proposed regulations be submitted by November 23, 2009.

## Conclusion

Although the regulations must still be finalized, the EEOC's final regulations are expected to be more liberal than those now in place. As the disability bar is lowered to conform to the ADAAA, employees and job applicants who were not previously considered to have a disability will now be protected under federal law. As a result, employers are likely to see more requests for reasonable accommodation, especially from those individuals who will consistently meet the EEOC's definition of disability. Employers may also experience an increase in the number of discrimination charges filed by job applicants and employees claiming impairments.

In anticipation of meeting the ADAAA's broader nondiscrimination requirements, employers should begin their review of handbooks, employment policies and practices (particularly disability-related policies), and employee benefit plans. Buck's consultants would be pleased to assist you in this review, and in updating your compliance training.

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*This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.*