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EEOC Final Regulations on the Americans with Disabilities Amendments Act Take Effect

On March 25, 2011, the EEOC issued its long-awaited final regulations implementing the employment provisions of the ADAAA. The final regulations, which took effect on May 24, 2011, retain many of the provisions the EEOC first proposed in September 2009, and also include several significant changes.

Background

The Americans with Disabilities Act of 1990 (ADA) targeted, among other things, the elimination of employment discrimination against individuals with disabilities. The ADA, as originally enacted, defined an "individual with a disability" as a person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of a disability, or is regarded as disabled. The Americans with Disabilities Act Amendments Act of 2008 (ADAAA), which took effect on January 1, 2009, focused almost exclusively on changing the ADA's definition of "disability" and expanding the class of individuals entitled to protection under federal law. (See our December 18, 2008 *For Your Information*.)

On September 23, 2009, the Equal Employment Opportunity Commission (EEOC) issued proposed regulations to implement the employment provisions of the ADAAA and make it easier for job applicants and employees to secure the protections of the ADA, including reasonable accommodation. (See our October 8, 2009 *For Your Information*.) On March 25, 2011, the EEOC issued final regulations, along with new interpretive guidance on Title I of the ADA in the Appendix to the final regulations.

The Final Regulations

The final regulations apply to all private and state and local government employers with 15 or more employees, employment agencies, labor organizations, and joint labor-management committees. The regulations also apply to Section 501 of the Rehabilitation Act of 1973 which prohibits employment discrimination against individuals with disabilities in the federal sector. Highlights of the final regulations are discussed below.

An Expansive Definition of "Disability"

Under the ADA's three-pronged definition of disability, 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 (an "actual disability");
- Has a "record of" such impairment; or
- Is "regarded as" having such impairment.

The ADAAA and the final regulations retain this definition but broaden the scope of ADA coverage by significantly expanding the definition of "major life activities," the interpretation of "substantially limits," and the importance of the "regarded as" definition of disability. Although the ADA's antidiscrimination provisions protect individuals who meet any of the three prongs of the definition of disability, the regulations clarify that only individuals with an actual disability or a record of disability are eligible for reasonable accommodations if needed. Individuals who only meet the "regarded as" prong are not entitled to reasonable accommodations.

Like the ADAAA, the final regulations fundamentally shift the primary focus in ADA cases from whether an individual has a disability to whether covered employers have satisfied their reasonable accommodation obligations and whether discrimination has occurred. Because the final regulations retain current exceptions to the reasonable accommodation requirement, an employer would not have to 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 health or safety threat even with an accommodation.

> ***BUCK COMMENT.*** *Recent multi-million dollar settlements with large retailers suggest that leave policies are a priority for the EEOC. Last year, a federal district court approved distribution of $6.2 million to 235 former employees of Sears who were terminated at the end of their workers' compensation leaves rather than returned to work with reasonable accommodations. Earlier this year, Supervalu/Jewel-Osco agreed to pay $3.2 million to 110 former employees who were terminated at the end of their medical leaves rather than returned to work with reasonable accommodations. These cases underscore the need for employers to review existing leave policies and ensure that employees making accommodation decisions are properly trained on ADA requirements and accommodations that can be made to return employees to work.*

Major Life Activity. The final regulations expand the definition of major life activities through two non-exhaustive lists. The first list includes some activities previously identified by EEOC regulations, such as caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. The final regulations add other activities, including sitting, reaching, and interacting with others.

> ***BUCK COMMENT.*** *Although the final regulations retain working as a major life activity, employers will rarely have to address whether an impairment substantially limits working. According to the EEOC, an individual will usually be able to establish ADA coverage by showing that another major*

life activity is substantially limited, but could demonstrate a substantial limitation in working by showing difficulty performing a "class or broad range of jobs in various classes."

The second list includes the operation of major bodily functions, making it easier to classify individuals with certain impairments as disabled. The list includes functions of the immune system, normal cell growth, and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. The final regulations add further illustrative examples including special sense organs and skin, and genitourinary, cardiovascular, hemic, lymphatic, and musculoskeletal functions.

Substantially Limits. The final regulations confirm that the term "substantially limits" is not intended to be a demanding standard that requires extensive analysis, and is to be construed broadly in favor of expansive ADA coverage. To be substantially limited in a major life activity under the new standard, an individual need not have an impairment that prevents or severely restricts him or her from activities that are of central importance to most people's daily lives. Consistent with the ADAAA, the final regulations adopt a common sense approach to determining whether an individual is substantially limited in a major life activity that the EEOC says "usually will not require scientific, medical or statistical analysis."

BUCK COMMENT. *Employers may be able to accommodate individuals who do not need extensive accommodations under existing policies and procedures (e.g., accrued leave, short- or long-term disability, voluntary transfers) or under other statutes (e.g., Family and Medical Leave Act, workers' compensation laws). What constitutes a reasonable accommodation will have to be determined on a case-by-case basis.*

The EEOC recognizes that not every impairment will constitute a "disability," but provides limited guidance on the appropriate functional limitation necessary to qualify as "substantially limiting" going forward. To make it easier for individuals with disabilities to secure ADA protections, the final regulations set out the following nine rules of construction that apply in determining whether an individual's impairment substantially limits a major life activity:

- Construe "substantially limits" broadly in favor of expansive coverage;
- Compare the individual's ability to that of most people in the general population to determine whether an impairment is "substantially limiting;"
- Focus on whether the employer has met its statutory obligations and whether discrimination has occurred, not whether an individual is disabled;
- Require "a degree of functional limitation that is lower than the standard for 'substantially limits' applied prior to the ADAAA" for an individualized assessment;
- Generally compare an individual's performance of a major life activity to that of most people in the general population rather than using a scientific, medical or statistical analysis;
- Do not consider the "ameliorative effects of mitigating measures" other than ordinary contact lenses and eyeglasses;

- Consider an impairment that is episodic or in remission to be a disability if it would substantially limit a major life activity when active;
- Assume an impairment does not have to limit more than one major life activity; and
- Assume an impairment that lasts or is expected to last less than six months can be "substantially limiting."

The final regulations make clear that the condition, manner and duration of an individual's performance of a major life activity may factor into the determination of whether an impairment is a disability. Thus, employers may consider the difficulty, effort or time needed to perform a major life activity, the amount of time the activity can be performed, the pain experienced in performing the activity, and/or the way in which the impairment affects the operation of a major bodily function.

Actual Disabilities

The final regulations explain that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. The regulations also recognize that short-term impairments and chronic impairments with short-term symptoms may qualify as disabilities.

Although the proposed regulations took the position that some types of impairments would consistently meet the definition of disability, the final regulations instead list impairments that will "virtually always" or "should easily" be found to substantially limit a major life activity. The EEOC's non-exhaustive list of impairments that would require "particularly simple and straightforward" individualized assessments includes deafness, blindness, mental retardation, missing limbs, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder, and schizophrenia.

> ***BUCK COMMENT.*** *Although the final regulations still require a case-by-case determination of whether a condition is substantially limiting, the EEOC's list of impairments that will "virtually always be found to impose a substantial limitation on a major life activity" suggests that a determination may be made quickly and easily in many cases.*

The final regulations eliminated the previously proposed list of impairments that may be disabling for some individuals but not for others, such as asthma, carpal tunnel syndrome, and high blood pressure. However, individuals with impairments like these will likely be able to show they are disabled under the final regulations.

The EEOC previously proposed that temporary, non-chronic impairments of short duration (i.e., less than six months) with few or no residual effects generally would not qualify as disabilities, while chronic, episodic conditions as well as those in remission (e.g., cancer) or asymptomatic (e.g., early-stage Parkinson's) would qualify. In a significant shift, the final regulations make it clear that temporary and short-term impairments can be "substantially limiting," and thus disabling. For example, a shoulder injury

that results in a 20-pound lifting restriction for several months would constitute a disability according to the Appendix to the final regulations.

BUCK COMMENT. *The final regulations delete previously proposed examples of temporary non-chronic impairments that typically would not be considered disabling (e.g., common cold, seasonal flu, sprains and broken bones expected to fully heal, etc.), but employers are unlikely to consider impairments that last only a short time to be disabilities unless they are sufficiently severe.*

Record of Disability

The final regulations expand ADA protection to individuals who have been misclassified as disabled as well as individuals who had a substantially limiting impairment in the past. 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.

BUCK COMMENT. *Because impairments that are episodic or in remission may now be classified as disabilities, more individuals are expected to be covered under the ADA and entitled to needed accommodations by virtue of having an actual disability as well as a record of disability.*

Regarded as Having a Disability

Under prior regulations, an individual was regarded as disabled only when the employer perceived him or her to be substantially limited in one or more major life activities. The final regulations eliminate the need for such a showing and focus instead on whether the employer took an action prohibited by the ADA (e.g., failure to hire or promote, termination) based on an individual's actual or perceived physical or mental impairment, regardless of whether the employer believes the impairment substantially limits a major life activity. To establish liability under the "regarded as" prong, the individual would still have to show that he or she is qualified for the job and does not pose a direct threat.

Under the final regulations, a job applicant or employee generally would meet the "regarded as" test unless the actual or perceived impairment is both transitory (lasting or expected to last six months or less) and minor. To defeat a claim under the "regarded as" prong, the employer has the burden to show the objectively transitory and minor nature of the impairment.

Reduced Mitigating Measures

The final regulations confirm that employers cannot consider the positive effects of mitigating measures – other than ordinary eyeglasses or contact lenses – in determining whether an individual is disabled. Although mitigating measures (such as medication, prosthetics, hearing aids, assistive technology, psychotherapy, physical therapy, and employers' accommodations) that eliminate or reduce an impairment's symptoms or impact may no longer be taken into account, employers may consider the

negative effects of mitigating measures (e.g., side effects of medication) in determining whether a disability exists.

The rule differs with respect to determining non-coverage issues, such as whether an individual needs reasonable accommodation, is qualified, or poses a direct threat. For these purposes, employers may take into account both the positive and negative effects of mitigating measures. The regulations do not require an individual to use mitigating measures or allow an employer to require their use. However, failure to use a mitigating measure may impact whether an individual is qualified for a particular job or poses a direct threat.

Effective Date

The final regulations took effect on May 24, 2011.

Conclusion

The ADAAA and its implementing regulations significantly expand coverage under the ADA and shift the focus from whether a covered disability exists to whether the employer acted in a non-discriminatory manner. With the lower disability threshold, employees and job applicants who previously would not have been considered disabled will now be protected. The EEOC estimates that employers could face an increase of approximately two million to six million reasonable accommodations requested and required, and annual incremental accommodation costs between $60 million and $183 million under the ADAAA and final regulations.

Human Resources and supervisory personnel should be trained on the new requirements with particular attention to the interactive accommodation process. Employers should ensure that their application process, leave and other disability-related policies, job descriptions, handbooks, and employee benefit plans are consistent with the ADAAA, final regulations, and applicable state laws.

Buck's consultants would be pleased to assist you in this review, and in updating your compliance training.