

EMPLOYMENT LAW

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Proposed Regulations Mirror Congressional Attempt to Broaden ADA

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By passing the ADA Amendments Act of 2008 (ADAAA), Congress sought to significantly broaden the reach of the Americans with Disabilities Act (ADA). The U.S. Equal Employment Opportunity Commission (EEOC) is now following suit by authorizing a Notice of Approved Rulemaking (NPRM) under which it will revise the existing ADA regulations. Its proposed regulations were published in the Federal Register on September 23, 2009 with a stated goal of ensuring that the regulations conform to the ADAAA and Congressional intent.

The proposed regulations certainly mirror the ADAAA's attempt to significantly reduce the likelihood that any physical or mental impairment of any significance would not be a disability covered by the ADA. To begin with, "major life activities" are defined as "basic activities, including major bodily functions, that most [of] . . . the general population can perform with little or no difficulty." This comparison between the individual's limitation and the general public's ability "may be made using a common-sense standard," without the use of medical or scientific evidence. Furthermore, in determining whether a disability "substantially limits" a major life activity, an impairment need not "prevent, or severely restrict" performance of such activity. The proposed regulations also state that as long as an impairment limits a major life activity, as broadly defined above, the individual need not show how such limitation impedes the individual from carrying out daily tasks, underscoring the overturning of the Supreme Court's decision in *Toyota Motor Mfg., Ky. v. Williams*. Finally, the proposed regulations echo the ADAAA's requirement that ameliorative effects of mitigating measures are not to be considered in the disability analysis.

Also worth noting is that for the first time, the EEOC has provided a non-exhaustive list of impairments that will consistently qualify as disabilities, including autism, cancer, diabetes, cerebral palsy, epilepsy, major depression, missing limbs, obsessive compulsive disorder, HIV or AIDS, and others. The regulations explain that the analysis of such impairments can be done "quickly and easily," consistently resulting in a determination that the individual is disabled. This sweeping language seems to effectively eliminate any meaningful disability analysis for the various listed impairments.

These regulations again underscore our earlier assessment that as a result of the ADAAA, an employer should assume that an employee with any genuine physical or mental condition that is affecting their job performance is "disabled," and move forward in determining whether such employee can be reasonably accommodated in performing the essential functions of his or her position. Congress has now dramatically altered the landscape

with respect to ADA claims. The widespread success of employers in arguing that an employee was not “disabled” as defined by the statute when defending claims under the ADA, and the corresponding reluctance of the plaintiff’s bar to bring such claim,s is now a thing of the past.

The publication of the proposed regulations will be followed by a 60-day public comment period, ending November 23, 2009, during which written comments may be submitted to the EEOC. At the conclusion of the comment period, the EEOC will review the comments and make revisions to the regulations accordingly. The proposed regulations can be found at <http://edocket.access.gpo.gov/2009/pdf/E9-22840.pdf>, along with instructions on submitting a comment.

If you have any questions about this alert, please contact one of our labor attorneys listed below.

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