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Briefly
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UNDERSTANDING AND COMPLYING
WITH THE NEW ADA DISABILITY REGULATIONS

Catherine Shuck

"…the regulations implement Congress' intention that disability should be interpreted more broadly in order to make it easier for people to obtain protection under the ADA…"

On March 24, 2011, the Equal Employment Opportunity Commission (EEOC) issued its final regulations under the ADA Amendments Act of 2008 (ADAAA). The ADAAA was enacted on September 25, 2008, and took effect on January 1, 2009. The final regulations are codified at 29 C.F.R. part 1630, and take effect on May 24, 2011.

Purpose of ADAAA

The ADAAA made significant changes to the way in which courts must determine whether an individual is disabled for purposes of the ADA. Through the years, many federal courts had narrowly defined the term "disability" and dismissed ADA lawsuits, finding the employee was not "disabled" within the meaning of the ADA. The ADAAA and the regulations keep the ADA's black-letter definition of the term "disability" - that is, a disability is a physical or mental impairment that substantially limits one or more major life activities; a record (or past history) of such impairment; or being regarded as having a disability. However, the regulations implement Congress' intention that "disability" should be interpreted more broadly in order to make it easier for people to obtain protection under the ADA, and to shift the question from whether a person is disabled to the question of how a person should be treated in the workplace. The regulations do this by adopting "rules of construction" to use when determining if an individual is substantially limited in performing a major life activity.

What is a Substantial Limitation

The final rule does not contain a new definition of "substantial limitation", but instead sets out nine rules of construction. These rules of construction include that: (1) Congress intended ADA coverage to be broadly construed; (2) the individuals limitation should be compared with most people in the general population; an impairment need not prevent, significantly restrict, or severely restrict the individual, but with the caveat that not every individual with an impairment is covered; (3) no extensive analysis of coverage is required so the merits of the discrimination claim can be considered; (4) although an individual assessment is required, the standard for whether an impairment "substantially limits" an individual is lower than the pre-ADAAA standard; (5) a claimant's ability to perform a major life activity is to be compared to most people and it need not be exacting so that it usually will not require scientific, medical, or statistical evidence; (6) the ameliorative effects of mitigating measures are not to be considered in determining whether an individuals condition is substantially limiting (with the exception of ordinary glasses and contact lenses); (7) episodic impairments or those in remission are covered if they would substantially limit a major life activity when active; (8) an individual need only prove a substantial limitation in one major life activity; and (9) an impairment may be substantially limiting regardless of its duration (i.e., impairments lasting only a few months or even a few weeks may be covered, depending on the severity of the impairment).

What is a Major Life Activity

The statute and regulations expand the definition of "major life activity" to specifically include such activities as standing, lifting, bending, reading, concentrating, sleeping, thinking, working, caring for oneself, seeing, hearing, eating, walking, speaking, breathing, learning, and communicating. Also included as major life activities are the operation of major bodily functions such as the immune system, normal cell growth, digestive, bowel, bladder, neurological and brain, respiratory, circulatory, endocrine, and reproductive functions.

Impairments That Will "Virtually Always" Be A Disability

The EEOC regulations provide that there are some conditions that will "virtually always" be a disability. These include:

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- Autism (brain function)
- Cancer (normal cell growth
- Diabetes (endocrine function)
- HIV infection (immune function)
- Deafness (hearing)
- Blindness (seeing)
- Intellectual disability (brain function)
- Missing limbs and mobility/wheelchair use (musculoskeletal)
- Cerebral palsy (brain function)
- Epilepsy (neurological function)
- Multiple sclerosis (neurological function)
- Major depressive disorder, bipolar disorder, post traumatic stress disorder, obsessive compulsive disorder and schizophrenia (brain function)

Because it is apparent that the person with an impairment on the above list "virtually always" has a disability, employers generally are not supposed to consider the condition, manner, or duration of the limitation to determine whether the individual is disabled.

Impairments that are not on the list of presumptive disabilities can be a disability if they substantially limit an individual in the ability to perform a major life activity. In making this determination one should remember that the ADAAA expressly states that the term "substantially limits" is to be interpreted broadly and in favor of coverage. The ADAAA contains several guidelines, including that it is not necessary that the impairment "prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting…but that not every impairment will constitute a disability…" In determining whether an impairment not on the list is substantially limiting in a major life function, one should remember the nine factors listed above and then 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 the condition, manner, or duration of a limitation may itself include many factors, including, among other things, the difficulty, effort, or time it takes the individual to perform a major life activity; whether the individual experiences pain when performing a major life activity; the time for which a major life activity can be performed; and/or the effect the impairment has on the operation of a major bodily function.

Under the new regulations, and unlike the interpretation the Supreme Court had previously given to the ADA, in determining whether an impairment is substantially limiting and therefore whether a person is covered under the ADA, it is **not** permissible to consider the effect that ameliorative devices or treatments (e.g., assistive devices or medication) may have on the individuals ability to function. The only exception is for ordinary eye glasses and contact lenses that are intended to fully correct vision or refractive error. It is very important to remember that the prohibition of taking into consideration the effects of mitigating measures only applies in determining whether a person is covered under the ADA. Mitigating measures **may** be considered in determining whether a reasonable accommodation is necessary and, if so, what the reasonable accommodation should be.

On the other hand, the negative side effects of ameliorative measures, such as medication, or the burdens of particular treatment regimen, **may** be considered when determining whether an individual's impairment substantially limits a major life activity.

Additionally, whether or not someone chooses to use an ameliorative measure does not affect the analysis of whether the individual's impairment substantially limits a major life activity. So, for example, the fact that an individual chooses not to use an available medication that would minimize the impact of the impairment on the individual may not be considered in determining whether the person is disabled.

Duration of Impairments

Of particular interest is the fact that the final regulations reject the idea that an impairment must substantially limit a major life activity for a particular length of time to constitute a "disability". Instead, contrary to previous belief, the regulations state that a substantially limiting impairment that is expected to last for fewer than six months could be considered a covered disability, since duration is only one relevant factor in determining whether one is disabled under the first or second prongs of the definition of disability.

Although controversial and contrary to the express language of the ADAAA itself, as well as the regulations, some believe that if an impairment is not on the list of those that are virtually always considered to be disabilities one can consider as a "rule of thumb" that, in order to be a covered disability, generally an impairment must be substantially limiting for at least three to five months. However,

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FLSA WHISTLEBLOWER PROTECTION
NOT LIMITED TO WRITTEN COMPLAINTS

Gerard Jabaley

"*Kasten* puts employers on notice that oral, internal complaints can trigger the antiretaliation protection of the FLSA."

The Fair Labor Standards Act (FLSA) prohibits an employer from discharging or in any manner discriminating against an employee who has filed any complaint about activity allegedly violative of the Act. In *Kasten v. Saint-Gobain*, - S. Ct. - , 2011 WL 977061 (March 22, 2011), the Supreme Court ruled that this protection extended to oral complaints, not just complaints presented in writing.

Kevin Kasten claimed that he had been discharged because he made oral complaints to management about the location of company timeclocks, which he believed deprived employees of compensation for time they spent getting ready to begin work, in violation of the FLSA. The Circuits were split as to whether complaints needed to be in writing to trigger the Acts protection. The Fifth and Ninth Circuits had found that oral complaints were covered; the Tenth, Eleventh, Sixth, and Eighth Circuits had held that "informal" complaints were covered, but the Second Circuit had found that an informal complaint was not sufficient to trigger whistleblower protection.

Justice Breyer wrote the opinion for the Court. He examined dictionary definitions for "file", uses of the word in other legislation and in regulations, the context in which the word (or a variant thereof) appeared elsewhere in the FLSA, and other legislation with antiretaliation provisions, and concluded that there was no basis for limiting its meaning to written documents. He then reviewed the remedial purpose underlying the FLSA. Noting that many workers were poorly educated or even illiterate, he concluded that requiring that complaints be only in writing would be inconsistent with Congress' intent. The Court also noted that this broader view was congruent with that of the Secretary of Labor, who is charged by Congress with enforcing the law, and that this interpretation was reasonable and not inconsistent with the statutory language. The Seventh Circuits judgment rejecting Kasten's complaint because it was not in writing was reversed.

Justices Scalia and Thomas dissented, saying they would have affirmed the Seventh Circuit; they took the position that the antiretaliation provision does not apply to complaints to the employer at all, but only to complaints made to a Court or government enforcement agency. Justice Scalia did his own work with the dictionary, but focused on "complaint", which he took to mean a grievance addressed to a court or enforcement agency, not just an expression of job dissatisfaction to one's employer.

The most interesting aspect of this otherwise fairly straight forward case is the emphasis that both the majority and the dissent focused on words and their meanings: simple statutory construction has come a long way in the past 30 years. Had this case come before the Warren Court, the analysis might have begun and ended with the "spirit" of the law. Since then, there has been a renewed emphasis on text and plain meaning. Next to the Constitution, a well-thumbed dictionary must reside on every Justice's desk.

Kasten puts employers on notice that oral, internal complaints can trigger the antiretaliation protection of the FLSA. When deciding whether to discipline or discharge any employee, the employer should take special care to determine whether the employee has complained about wages or hours, and ensure that its decision has a legitimate, nondiscriminatory basis.

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even those who take that position state that if the impairment is serious enough, it can constitute a disability, regardless of the duration for which it is substantially limiting.

While it is certainly possible that certain provisions of the regulations, including the regulation stating that temporary and short term impairments can be disabilities, may be challenged in court, for right now it is the interpretation given by the EEOC.

The Greatly Expanded "Regarded As" Theory of Discrimination

One of the most important changes in the ADAAA and its final regulations is the manner in which it addresses the "regarded as" theory of statutory protection. The regulations now provide that a person is regarded as having a disability if an employer takes a "prohibited action against them because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity." Prohibited actions include discrimination in any of the terms, conditions or privileges of employment. In other words, it used to be thought that it was not unlawful for an employer to take an action against an employee because the employer perceived the employee as having an impairment that the employer did not perceive to be substantially limiting. It is now clear that this is no longer the law and that in such a case, a violation would be found.

Contrary to the impact that the duration of an impairment has on the analysis under the "actual" or "record of" prongs of the definition of disability, under the "regarded as" prong of the definition Congress provided that it is **not** unlawful to discriminate against an individual because of a perceived impairment if the impairment is "transitory **and** minor." Whether or not the impairment is transitory and minor is an objective determination.

It is also important to remember that only those who have an "actual" disability and those who have a "record" of a disability are entitled to a reasonable accommodation. Those who are "regarded as" being disabled are not entitled to an accommodation. Rather, they are only protected from having an action taken against them **because of** the perceived disability.

Because in most cases it will be easier to establish coverage under the "regarded as" prong, and because it is only necessary to establish liability under one prong, unless an employee needs a reasonable accommodation, most employees will likely claim coverage under the "regarded as" prong. Because the breadth of the "regarded as" provision is so large, it will be safest to assume that any person who has a physical or mental impairment more serious than a cold or flu is covered and then move on to the next step of the analysis.

What Defenses Remain Available to Employers?

With the major expansion of the coverage provisions of the ADA, it is important to remember that neither the ADAAA nor implementing regulations change the requirement that a person be "qualified" to perform the job in question with or without reasonable accommodation. The ADAAA only shifts the focus from whether someone has a covered disability, to whether the person is qualified, whether a reasonable accommodation is available and, if so, what the reasonable accommodation should be, as well as to whether there is a basis other than the individuals impairment to take an adverse employment action.

The requirement that a proposed accommodation be reasonable still applies, as does the requirement that generally a person with a disability must request an accommodation. Similarly, the requirement that the employer and the employee engage in an interactive process in order to determine an appropriate accommodation still exists. As part of this process, an employer may still ask for reasonable documentation showing a disability and a need for reasonable accommodation where the disability and need for accommodations are not obvious or already known.

Additionally, the defenses that have always been available are still available and unchanged. An employer is not required to provide an accommodation that would cause the employer an "undue hardship" - in other words an accommodation that would require significant expense or difficulty. Similarly, an employer is not required to employ an individual who poses a "direct threat" to himself or others.

Of course, with respect to a claim that an employer took an adverse action because of a disability, the lack of knowledge of the disability or impairment is still a good defense. This is yet another reason why a person making employment decisions should not discuss medical conditions with employees.

Are The New Regulations Enforceable?

It is likely that the new regulations, broad as they are, are enforceable, or at least employers should assume so. It should be noted that the regulations were issued with the unanimous approval of both Democratic and Republican members of the EEOC, suggesting consensus. In light of the significant expansion of the ADA, it is important that each company consult with its own labor and employment counsel to determine the best approach to address these complicated issues in their workplace.