

## **EEOC Issues Final Regulations on the ADAAA**

On March 25, 2011, the EEOC (Equal Employment Opportunity Commission) will publish its final regulations implementing the ADA Amendments Act after receiving and considering over 600 comments on its proposed regulations that were issued in September 2009. The regulations will take effect on May 24, 2011.

The regulations, like the actual amendments to the ADA, make it clear that the standard for determining whether a particular condition is a disability under the ADA is lower. The EEOC emphasized that the final rule received bipartisan support at the Commission. The final regulations are generally viewed as an improvement for employers over the proposed regulations. However, what is abundantly clear from the ADAAA, itself, as well as the regulations, is that employers will have little ability to argue that a condition is not a disability and instead must focus on the issues of reasonable accommodation and the interactive process.

The definition of a “disability” remains the same under the regulations. It is a (1) physical or mental impairment that substantially limits a major life activity; (2) a record of such an impairment; or (3) being regarded as having such an impairment so long as the actual or perceived impairment is not transitory or minor.

The regulations make it clear that if an individual is not claiming any failure to make a reasonable accommodation and does not actually require a reasonable accommodation, the employee should proceed under the “regarded as” prong, which does not require a showing of an impairment that substantially limits a major life activity. “Regarded as” cases then are meant for cases claiming classic types of discrimination or harassment, i.e. failure to hire and promote, demotion, termination. In order to establish the defense of a “transitory and minor” condition under the “regarded as” prong, the employer must establish this based on an objective standard and not merely that the employer believed the condition to be transitory and minor. Transitory is defined as lasting less than six months.

The regulations clarified that the term “major life activity” includes “major bodily functions” such as functions of the immune system and circulatory system, brain and bladder function and that the list of major bodily functions is not exhaustive.

One area of the proposed regulations that received much criticism from employer groups was a list of conditions that will virtually always be found to be a disability. While the final regulation still contains this principle, the EEOC did include that individualized assessments are still required. The EEOC did delete a section from the proposed rules that listed conditions that would not normally be considered disabilities.

The EEOC did not adopt a standard to define “substantially limits” but instead identified “rules of construction” for determining if a condition “substantially limits” a major life activity. These rules of construction emphasize the expansive coverage intended by the amendments and that “substantially limits” is not meant to be a demanding standard and need not prevent or significantly or severely restrict the individual from performing a major life activity. The rules identify that only one major life activity need be affected.

The final rules deleted a section that was in the proposed regulations that adopted a “type of work” standard to define a substantial limitation in “working.” Employers criticized this section and the final rule contains no such section. The final regulations retained the traditional “class or broad range of jobs” language rather than introducing this new standard.

The final regulations retained in the “substantial limitations” section the ability of the employer and courts to consider the “manner, condition and duration” in which an employee can perform an activity but included language that such an analysis may often be unnecessary. The EEOC did decline to adopt a minimum duration of an impairment to be considered in an actual or record of impairment case so conceivably an impairment that lasts only several months could be a disability.

The final regulations make it clear that mitigating measures, except for ordinary eyeglasses and contact lenses, may not be considered in determining if an impairment substantially limits a major life activity but, negative side effects may be considered.

The ADAAA intentionally made disability cases much easier for employees by essentially taking whether or not a condition is a disability out of the equation. The EEOC’s final regulations continue this trend. The effect of the ADAAA is already present as the number of disability charges with the EEOC spiked 23% in 2010. Employers must adjust their focus in these cases to the reasonable accommodation and interactive process in order to prevail both in the workplace and in the courtroom.

If you have any questions about this article, or would like assistance structuring an internship program please contact Julie A. Proscia, Esq. Julie Proscia is a partner at SmithAmundsen LLC in the labor and employment practice group. Julie exclusively represents management in employment issues and may be contacted at (630) 587-7911 or at [jproscia@salawus.com](mailto:jproscia@salawus.com).