

EEOC Initiates Rulemaking for New ADA Regulations

By Jonathan R. Mook

Introduction

On September 23, 2009, the U.S. Equal Employment Opportunity Commission ("EEOC") took the second step in the process of issuing new regulations to implement the ADA Amendments Act of 2008 ("ADAAA"). On that date, the EEOC published a Notice of Proposed Rulemaking ("NPRM") in the Federal Register.¹ Publication in the Federal Register starts the 60-day public comment period on the proposed regulations.²

In keeping with the changes enacted by the ADA Amendments Act, the EEOC's proposed regulations will fundamentally alter the way in which coverage under the ADA is analyzed and will greatly broaden the number of persons who will find protection under the statute. Acting EEOC Chair Stewart J. Ishimaru has described the Commission's action in issuing its NPRM as marking "a key step in implementing the landmark [ADA] Amendments Act, which will smooth the road for those trying to establish disability under the ADA." Without question, the EEOC's proposed new regulations will be the most significant changes to the interpretation of the ADA since the EEOC's initial regulations were promulgated almost 20 years ago.

Per Se Disabilities

Perhaps the most controversial part of the EEOC's NPRM is its identification of certain impairments that the Commission considers to be substantially limiting a major life activity on a consistent basis and, hence, a disability covered by the law. Under the present approach

to determining ADA coverage, there are no *per se* disabilities. Indeed, in its Interpretive Guidance to the existing ADA regulations, the EEOC has opined that no "determination of whether an individual is substantially limited in a major life activity" may be made in the abstract, but, rather, a determination must be made on a "case by case basis."³

The EEOC's NPRM jettisons this approach and, instead, sets forth what it deems inherently limiting impairments.⁴ These include not only those conditions that the courts uniformly have considered disabilities (such as blindness, deafness, and mobility impairments requiring the use of a wheelchair), but also impairments about which the courts have reached varying conclusions under the pre-ADAAA version of the statute. The additional impairments that the EEOC proposes be considered categorical or *per se* disabilities, include: cancer, diabetes, epilepsy, HIV, major depression, and bipolar disorder. Moreover, the EEOC's NPRM emphasizes that its list of categorical impairments is not an exclusive one; impairments not listed in the proposed regulations still could consistently meet the definition of disability.⁵

Rules of Construction

In addition to setting forth a list of various *per se* disabilities, the EEOC's NPRM also includes five new rules of construction for interpreting the ADA to provide the broadest coverage permitted under the new ADA Amendments Act:

- (1) The focus of ADA cases should be on whether discrimination has occurred and not on whether someone meets the definition of disability.⁶
- (2) An individual whose impairment substantially limits a major life activity need not demonstrate a limitation in the ability to perform "activities of central importance to daily life," as previously had been the case.⁷
- (3) An impairment that substantially limits one major life activity need not limit other major life activities to be substantially limiting.⁸
- (4) Determining whether a person's impairment substantially limits a major life activity should be made using a common sense analysis without resorting to scientific or medical evidence.⁹ No longer must an impairment prevent or significantly restrict the

¹ 74 Fed. Reg. 48,431 (2009).

² The first step in the EEOC's regulatory process began on June 17, 2009, when the Commission voted to approve the EEOC's Office of General Counsel's NPRM. The NPRM published in the Federal Register basically mirrors the proposal approved by the Commission in June. An article discussing in detail the proposal approved by the Commission at its June meeting appears in the August 2009 issue of the Bulletin. See Mook, "EEOC Starts Process of Promulgating New ADA Regulations," 9 Bender's Lab. & Empl. Bull. 382 (2009).

³ 29 C.F.R. App. § 1630.2(j).

⁴ Proposed 29 C.F.R. § 1630.2(j)(5).

⁵ Proposed 29 C.F.R. § 1630.2(j)(5)(iii).

⁶ Proposed 29 C.F.R. § 1630.2(j)(i).

⁷ Proposed 29 C.F.R. § 1630.2(j)(ii).

⁸ Proposed 29 C.F.R. § 1630.2(j)(iii).

⁹ Proposed 29 C.F.R. § 1630.2(j)(iv).

performance of a major life activity as had been the case under the original ADA.

- (5) Impairments lasting fewer than six months still may be substantially limiting, although temporary, non-chronic impairments of short duration with little or no residual effects will not be deemed disabilities.¹⁰

Major Life Activities

The ADAAA sets forth a statutory list of examples of what constitute major life activities for purposes of the statutory analysis. This list includes activities that would commonly be considered to be “major,” such as seeing, breathing, standing, and thinking. In addition to the statutory list, the EEOC’s NPRM adds three activities not mentioned in the ADAAA: sitting, reaching, and interacting with others.¹¹ (The EEOC’s NPRM also adds to the ADAAA’s examples of “major bodily functions” that constitute major life activities by specifying that the hemic, lymphatic, musculo-skeletal, special sense organs and skin, genitourinary, and cardiovascular systems are covered.¹²)

Substantially Limited in Working

The EEOC’s NPRM follows the approach approved by the Commission in June 2009, and adopts a new conceptual framework for analyzing whether a person is substantially limited in working. The ADA Amendments Act specifically includes working as a major life activity, and the EEOC’s NPRM provides that an impairment need only substantially limit a “type of work” in order to be disabling.¹³ Presently, the EEOC’s 1991 regulations require that an impairment must substantially limit the person in a “class” or “broad range” of jobs.¹⁴

The EEOC’s NPRM rejects this approach as being too restrictive and explains that its new “type of work” analysis should be broadly construed to include such jobs as commercial truck driving, assembly line jobs, food service jobs, clerical jobs, and law enforcement jobs.¹⁵ Similarly, the NPRM explains that a “type of work” may be understood in reference to job related requirements such as those requiring repetitive bending, reaching or manual tasks, frequent or heavy lifting, or jobs requiring prolonged standing or sitting. (Proposed 29 C.F.R. § 1630.2(j)(7)(iii)(C).)

¹⁰ Proposed 29 C.F.R. § 1630.2(j)(v).

¹¹ Proposed 29 C.F.R. § 1630.2(i)(1).

¹² Proposed 29 C.F.R. § 1630.2(i)(2).

¹³ Proposed 29 C.F.R. § 1630.2(j)(7)(ii).

¹⁴ Proposed 29 C.F.R. § 1630.2(j)(3)(i).

¹⁵ Proposed 29 C.F.R. § 1630.2(j)(7)(iii)(B).

Other Proposed Changes

In other respects, the EEOC’s NPRM basically adopts the statutory changes of the ADA Amendments Act. These include the following:

- In conformity with the provisions of the ADAAA, the EEOC’s proposed NPRM provides that in determining whether an impairment is substantially limiting, the beneficial effects of mitigating measures are not to be considered.¹⁶ In this context, mitigating measures include medication, medical equipment, and prosthetic devices. The only exception is for ordinary eyeglasses and contact lenses.¹⁷
- Like the ADAAA, the EEOC’s NPRM specifically states that an impairment that is episodic or in remission meets the definition of disability if it would substantially limit a major life activity when active.¹⁸
- The EEOC’s NPRM incorporates the ADAAA’s construction of being regarded as disabled by specifying that an employer “regards” a person as disabled by taking an adverse action based upon the person’s actual or perceived impairment.¹⁹ As long as the impairment is not minor and lasts (or is expected to last) more than six months, it does not matter whether the impairment substantially limits a major life activity.²⁰
- As specified in the ADAAA, the EEOC’s NPRM provides that an employer is not required to reasonably accommodate individuals covered under only the “regarded as” prong of the definition of disability.²¹

Impact of Proposed Regulations

When Congress enacted the ADA Amendments Act, it sought to ensure a broad interpretation of disability under the statute. The EEOC’s NPRM reflects this congressional mandate and shifts the focus of the statute from analyzing whether someone is disabled to whether the individual can perform the job requirements with or without reasonable accommodation. For many employers, this will make compliance with the ADA much easier. With many types of medical impairments, an employer no longer will need to conduct an individualized analysis to determine whether an employee diagnosed with the impairment satisfies the ADA definition of disability.

¹⁶ Proposed 29 C.F.R. § 1630.2(j)(3)(i).

¹⁷ Proposed 29 C.F.R. § 1630.2(j)(3)(ii).

¹⁸ Proposed 29 C.F.R. § 1630.2(j)(3).

¹⁹ Proposed 29 C.F.R. § 1630.2(l)(1).

²⁰ Proposed 29 C.F.R. § 1630.2(l)(3).

²¹ Proposed 29 C.F.R. § 1630.9(e).

If an employee is diagnosed with diabetes, for example, that employee will be deemed disabled under the NPRM's *per se* approach. The same will be true for an employee diagnosed with MS or bipolar disorder.

Nonetheless, despite its simplicity and ease of application, the EEOC's decision to go forward with a *per se* approach to certain disabling conditions may be seen as a rejection of the individualized analysis that had been the hallmark of the original ADA. Although it had the opportunity, Congress did not set forth a list of *per se* disabilities in the ADA Amendments Act. This *per se* approach is one that the EEOC, on its own, has adopted.

Likewise, the EEOC's proposal to abandon the concepts of a "class" or "broad range of jobs" when analyzing whether someone is substantially limited in working and, instead, to focus on the "type of work," is not rooted in the statutory language of the ADA or the ADAAA. Accordingly, this is another aspect of the EEOC's NPRM that is likely to be controversial and engender substantial public comment.

Public Comments

Written comments on the EEOC's NPRM may be submitted to the Commission by mail at 131 M Street, N.E., Suite 4NW08R, Room 6NE03F, Washington, D.C.

20507, or by e-mail at <http://www.regulations.gov>. Written comments of six or fewer pages also may be submitted by fax to (202) 663-4114. The deadline for submitting comments is November 23, 2009. Under the regulatory procedures, the EEOC will consider the comments it receives and, after reviewing them, issue a final rule.

Because the ADAAA took effect on January 1, 2009, the EEOC is under some pressure to issue regulations implementing the new statute as soon as the regulatory process will permit. Thus, although it always is difficult to predict when a federal agency will act, it is likely that the Commission will issue final regulations some time early next year.

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