

Welcome to a Special Session on the ADA Amendments Act Final Regulations



Sponsored by the ADA National Network

**The Session is Scheduled to begin at 2:00pm Eastern Time
We will be testing sound quality periodically**

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Welcome from the



THE ADA NATIONAL NETWORK PROVIDES INFORMATION, GUIDANCE AND TRAINING ON THE AMERICANS WITH DISABILITIES ACT (ADA), TAILORED TO MEET THE NEEDS OF BUSINESS, GOVERNMENT AND INDIVIDUALS AT LOCAL, REGIONAL AND NATIONAL LEVELS.

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The ADA Amendments Act of 2008 (ADAAA): EEOC's Final Regulations



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ADA Amendments Act of 2008



- Statute went into effect on January 1, 2009
- Statute not retroactive
- All provisions of the Amendments Act apply to the Rehabilitation Act

EEOC Regulations [29 C.F.R. Part 1630]



- Published in the Federal Register on March 25, 2011
- Effective Date: May 24, 2011
- Regulations closely track the statute
- Also published revisions to interpretive Appendix that was issued with original regulations
- Only revised those portions of regulations and Appendix affected by ADAAA

Why Did Congress Amend the ADA?



- Congress intended the ADA definition of disability to be construed broadly but courts were finding too many people outside the ADA's protections
- Congress wanted to make it much easier for persons with a wide range of impairments to establish disability without much analysis

Definition of "Disability" [Sec.1630.2(g)]



- First 2 definitions remains the same:
 - A physical or mental impairment that substantially limits a major life activity;
 - A record of such an impairment;
- Congress changed the meanings of key terms used in these two definitions
- Regarded as having a disability has been completely rewritten; new approach

How Definition of “Disability” Changes



- Provides illustrative list of major life activities that includes for the first time “major bodily functions”
- Specifically rejects high standards used by EEOC and Supreme Court to define a “substantial limitation”
- Positive effects of mitigating measures (other than ordinary eyeglasses or contact lenses) **cannot** be considered in determining “disability”

How Definition of “Disability” Changes (cont.)



- Impairment can be substantially limiting even if **episodic** or in **remission**
- “Regarded as” definition rewritten and expanded
- **Remember: Goal of all of these changes is to broaden definition and make it much easier/quicker to find disability without a demanding analysis**

Impairment [Sec. 1630.2(h)]



- Statute made no changes to definition of a “physical or mental impairment”
- EEOC regulations make a small change to definition in original ADA regulations by adding the immune and circulatory systems as examples of “body systems” that may be affected by an impairment

Major Life Activities [Sec. 1630.2(i)]



- Statute and EEOC regulations provide two non-exhaustive lists of major life activities
- First list of major life activities should look familiar because most of these activities are ones previously recognized by EEOC and most courts
 - Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working

Major Bodily Functions



- **New** category of major life activities
- **Purpose:** To make it easier to establish disability for certain impairments
- Individual can show substantial limitation (or record of) in just one major life activity from either category
- Regulations include all of the examples of major bodily functions found in the statute and include some additional examples

Major Bodily Functions (cont.)



- Functions of the immune system, special sense organs and skin, normal cell growth, digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, reproductive
- Also includes operation of an individual organ within a body system, such as the operation of a kidney, liver, or pancreas

Substantially Limits



- Finding of disability under the first prong requires a showing that a person is substantially limited in performing a major life activity as compared to most people in the general population
- Regulations establish “rules of construction” on how to analyze whether an individual’s impairment substantially limits a major life activity

Substantially Limits: Rules of Construction [Sec. 1630.2(j)(1)]



- Impairment need not prevent or severely or significantly limit a major life activity to be considered “substantially limiting”
- Substantial limitation shall be construed broadly in favor of expansive coverage (i.e., if it’s a close call you should consider it to be a disability)
- Determination of substantial limitation still requires an individualized assessment
- But regulations clear that not all impairments will be disabilities

Substantially Limits: Rules of Construction (cont.)

- Determination of disability should not require extensive analysis
- Rather, an employer's primary focus should be on a person's qualifications for a job or a request for reasonable accommodation and a court's primary focus should be on whether discrimination occurred

Substantially Limits: Rules of Construction (cont.)

- No minimum duration requirement: impairment lasting fewer than six months may be substantially limiting
- Scientific, medical, or statistical evidence may be used to establish substantial limitation if appropriate, but often will be unnecessary
- Individual need only be substantially limited in one major life activity (either list) to have a disability

Rules of Construction: Mitigating Measures



- The ameliorative effects of any mitigating measure used by an individual **MUST BE IGNORED** (with one exception) in determining if the person is substantially limited in performing a major life activity (including a major bodily function)
- Mitigating measure: eliminate or reduce the symptoms or impact of an impairment

Mitigating Measures (cont.)



- If an individual uses a mitigating measure to eliminate, control, or lessen the impact/symptoms of an impairment, disability is determined based on extent of limitations prior to using the mitigating measure, or on assessing what would happen if the person stopped using the mitigating measure

Mitigating Measures (cont.) [Sec. 1630.2(j)(5)]

- medication, medical supplies, equipment, or appliances, low-vision devices, prosthetics (including limbs and devices), hearing aids and cochlear implants or other implantable hearing devices, mobility devices, oxygen therapy equipment and supplies
- use of assistive technology
- reasonable accommodations

Mitigating Measures (cont.) [Sec. 1630.2(j)(5)]

- learned behavioral or adaptive neurological modifications (e.g., for monocular vision, learning disabilities)
- psychotherapy, behavioral therapy, physical therapy

Mitigating Measures Exception



- “Ordinary Eyeglasses or Contact Lenses”
 - “Shall” take these into account in determining “disability”
 - Definition: “lenses that are intended to fully correct visual acuity or to eliminate refractive error”
 - Distinguished from the mitigating measure of “low vision devices” which are defined as “devices that magnify, enhance, or otherwise augment a visual image”

Rules of Construction: Impairments that are Episodic or In Remission



- Will be disabilities if substantially limit a major life activity **WHEN ACTIVE**
- Episodic: impairments that may not affect a person 24/7 but which periodically flare up: epilepsy, hypertension, asthma, diabetes, major depressive disorder, bipolar disorder, schizophrenia
- In Remission: Cancers

Substantial Limitation: Condition, Manner, or Duration [Sec.1630.2(j)(4)]

- Regulations retain these factors as concepts to consider, if relevant, in determining if a substantial limitation exists
- May consider difficulty, effort or length of time required to perform major life activity; pain; total amount of time major life activity may be performed; the way an impairment affects the operation of a major bodily function

Impairments That Will Virtually Always Be Found To Be Substantially Limiting

[Sec. 1630.2(j)(3)(ii)]

- Regulations emphasize that individualized assessment still required
- But, for certain impairments, this individualized assessment will virtually always result in a finding of disability due to the inherent nature of these conditions AND the extensive changes Congress made to the definition of disability

Impairments That Easily Should Be Found To Be Substantially Limiting [Sec. 163.2(j)(3)(iii)]

- Deafness
- Blindness
- Mobility impairments requiring use of a wheelchair
- Intellectual disability (mental retardation)
- Partially or completely missing limbs
- Autism
- Cancer
- Cerebral palsy
- Diabetes
- Epilepsy
- HIV infection
- Multiple sclerosis
- Muscular dystrophy
- Major depressive disorder
- Bipolar disorder
- Post-traumatic stress disorder
- Obsessive-compulsive disorder
- Schizophrenia

“Record of” a Disability [Sec. 1630.2(k)]

- 2nd definition of disability
- All of the changes reviewed for 1st definition (e.g., disregarding ameliorative effects of mitigating measures) would be applied to a “record of” situation
- probably much less likely to need this definition for coverage given expansion of 1st and 3rd definitions of disability

“Regarded As” Having a Disability [Sec. 1630.2(I)]

- This definition of disability completely new
- Covers anyone subjected to an action “prohibited by this Act” because of an actual or perceived physical or mental impairment
- Actions include: hiring, demotion, promotion, termination, discipline, annual evaluation, compensation

“Regarded as” (cont.)

- Regarded as coverage **NO LONGER** requires a showing that an employer believed the impairment substantially limited a major life activity
- Only two elements:
 - Employer took employment action
 - Because of an individual’s actual or perceived impairment

“Regarded as” (cont.)



- Employer can challenge a claim it regarded person as having a disability by showing that the impairment at issue is BOTH transitory and minor
- Regarded as coverage cannot be based on a transitory and minor impairment
- Transitory: Lasting 6 months or less
- Whether impairment is transitory and minor based on objective evidence

“Regarded as” (cont.)



- Notice how easy it is to regard a person as having a disability
- If a supervisor or manager or HR official takes a personnel action and bases it on an individual's medical condition then there is “regarded as” coverage (except if impairment is both transitory and minor)

“Regarded as” (cont.)



- Regarding person as having a disability does not mean employer violated the ADA (this was also true under the old ADA definition of disability)
- Only establishes coverage
- If employer can show its employment action taken for lawful reasons, then no discrimination
- But, just because employer has a legitimate reason for its actions does not defeat a claim that employer regarded person as having a disability

Other ADAAA Changes



- Employers using uncorrected vision standards as a qualification standard for certain jobs must show that they are job-related and consistent with business necessity [Sec. 1630.10(b)]
- In the general prohibition of discrimination, the phrase “**discriminate on the basis of a disability**” replaces “discriminate against a qualified individual with a disability because of the disability of such individual”

Other Changes (cont.)



- Individual covered **ONLY** under the “regarded as” definition is not eligible for reasonable accommodation
 - Must be covered under other two definitions of disability
- Individuals cannot file an ADA claim stating that they were denied something because they **LACKED** a disability [Sec. 1630.4(b)]
 - E.g., non-disabled person cannot claim an ADA violation because he was denied a reasonable accommodation or not hired

Implications



- When accommodation is requested, employers may still ask for documentation to substantiate existence of non-obvious disability, but content of documentation will be different from, and often less extensive than, pre-ADAAA documentation
- In many instances, documentation may no longer be necessary at all
- Primary focus should be on understanding **NEED** for accommodation

Implications (cont.)



- Employers should be prepared to defend qualification standards that exclude individuals based on impairments, since most individuals affected by such standards will meet the “regarded as” definition of disability (i.e., impairments at issue unlikely to be both transitory and minor)

Questions?

You May Type and Submit questions in the Chat Area Text Box or press Control-M and enter text in the Chat Area

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