

ADAAA Regulations Alert

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The EEOC has finalized regulations interpreting the 2008 Americans with Disabilities Act Amendments Act. Effective January 1, 2009, the ADAAA significantly expanded the phrase "disability" under the Americans with Disabilities Act (ADA). The regulations make clear that coverage should be construed broadly.

These regulations will lead to more liability for employers. For example, the regulations identify examples of impairments that will "virtually always" be disabilities: deafness, blindness, mental retardation, missing limbs, mobility impairments, autism, cancer, diabetes, HIV infection, epilepsy, cerebral palsy, multiple sclerosis and muscular dystrophy, bipolar disorder, obsessive-compulsive disorder, schizophrenia, post-traumatic stress disorder, and major depressive disorder. This list may make class actions more attractive to plaintiffs' lawyers. Previously, winning certification of ADA class actions was difficult because each individual needed to prove he was substantially limited by the impairment at issue. Now, pointing to this regulation, individuals who suffer from the same impairment might argue they are all presumed disabled, and thereby win class certification.

The ADAAA and the final regulations define three approaches to proving "disability." First, individuals with a physical or mental impairment that substantially limits one or more major life activities are disabled. The new regulations include two new body systems that can be affected by "impairments": the immune and circulatory systems. The regulations add that the operation of "major bodily functions" is now a major life activity, including the digestive, bladder, brain, and reproductive functions, among others. Perhaps most importantly, impairments that are episodic or in remission meet the definition of disability as long as they would substantially limit a major life activity when active. Examples include epilepsy, hypertension, and asthma. Likewise, impairments are to be considered in their non-mitigated state—that is, without regard to whether the impairment could be mitigated by, for example, a hearing aid or medication. The sole exception for this is ordinary vision impairments correctable with eyeglasses or contact lenses.

Under the second approach, a person who does not presently have a substantially limiting impairment is protected by the ADA if she has a "record of disability"—that is, had a disability in the past or was once misclassified as having a disability.

Under the third approach, a person is protected if the employer "regards" the individual as having an impairment, unless the impairment is transitory and minor (viewed objectively). The requirement of the original ADA that the employer believe the impairment (or perceived impairment) substantially limited a major life activity has been eliminated. The question now is simply whether the employer treated the individual as if she had a nontransitory and non-minor physical or mental ailment.