

New ADA regulations nearing implementation

On September 26, 2009 the Equal Employment Opportunity Commission (EEOC) issued a notice of proposed rulemaking in order to bring the agency's regulations into alignment with the Americans with Disabilities Act Amendments (ADAA) that became effective last January.

The terms of the ADAA overturned judicial decisions narrowly defining the term *disability*. The Act also evidenced Congressional intent to eliminate the extensive analysis required of parties in attempting to define a *disability*. The new regulations have been drafted to carry out these terms. Employers should prepare for the eventual enactment of regulations that will change their policies and practices in at least two significant areas as follows.

1. The definition of what constitutes a disability has been broadened. While the new regulations continue to apply the three part ADA definition of a disability to encompass physical or mental impairments that substantially limit one or more major life activities, a record of such an impairment, or being regarded as disabled, they provide a different and more expansive explanation of the terms *substantial limitation and major life activity*.

- The proposed regulations measure substantial limitation by comparison with the functioning of most people in the general population and do not require that the impairment actually prevent, or significantly restrict the individual from performing a major life activity. Mitigating measures like medications are ignored in determining whether an impairment is substantially limiting. Only the ameliorative effect of eyeglasses and contact lenses may be considered.

Episodic impairments substantially limit a major life activity when active. Temporary, non-chronic impairments of short duration with little or no residual effects, such as colds or the flu, generally will not substantially limit a major life activity. The EEOC points out, however, that an impairment may be substantially limiting even if it lasts less than 6 months.

- Major life activities have been reclassified to include major bodily functions, such as functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, circulatory, respiratory, endocrine, hemic, lymphatic, musculoskeletal, special sense organs and skin, genitourinary, and cardiovascular systems, and reproductive functions.

- These activities also include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, sitting, reaching, interacting with others, and working. The agency also points out an individual with a disability will usually be substantially limited in another major life activity, therefore generally making it unnecessary to consider whether the individual is substantially limited in working.

2. The proposed regulations provide a list of impairments that will consistently meet the definition of disability. The original text of the ADA and implementing regulations specifically excluded a laundry list of conditions that may be considered disabilities. Instead, the previous law required a complex and fact specific analysis encompassing technical legal and medical information that was nearly impossible for the employer community to apply. The new regulations will provide a non-exhaustive list of disabilities to include autism, cancer, cerebral palsy, diabetes, epilepsy, HIV/AIDS, multiple sclerosis, major depression, schizophrenia, and mobility impairments requiring use of a wheelchair.

Following publication of the proposed regulations, the EEOC took comments through November 23, 2009. The agency is currently evaluating the comments received both in written form and at Town Hall sessions held in four cities last fall. Once that process is completed, we can expect the final regulations will be released. In the meantime, employers may obtain further detail from the EEOC's *Questions and Answers on the Notice of Proposed Rulemaking for the ADA Amendments Act of 2008*.

Our members will also receive an update as soon as the new regulations are issued and reviewed.

– Ann Allen, Associated Industries, Chief In-house Counsel