

JAN

Job Accommodation Network

Practical Solutions • Workplace Success

Accommodation and Compliance Series

The ADA Amendments Act of 2008

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Preface

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JAN Bulletin: ADAAA

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I. BACKGROUND

On January 1, 2009, the Americans with Disabilities Act Amendments Act (ADAAA) of 2008 went into effect, making some major changes to the way the definition of disability was interpreted in the past. The changes apply to both the ADA and the Rehabilitation Act. Very few people argue that these changes were not needed – the courts had interpreted the definition of disability so narrowly that hardly anyone could meet it – but the challenge now is understanding what the changes are and who is covered as of January 1, 2009.

In the ADAAA, Congress expressly gave the Equal Employment Opportunity Commission (EEOC) the authority to revise its regulations regarding the definition of disability to make them consistent with the Act's purpose. On March 25, 2011, the EEOC issued long-awaited final regulations. These regulations apply to title I of the ADA and section 501 of the Rehabilitation Act. These are effective as of May 24, 2011.

The following provides an overview of the changes made to the definition of disability under the ADAAA and the regulations and accompanying interpretive guidance (appendix).

II. OVERALL PURPOSE

According to Congress, the ADAAA was passed "to carry out the ADA's objectives of providing 'a clear and comprehensive national mandate for the elimination of discrimination' by reinstating a broad scope of protection to be available under the ADA." In other words, the purpose of the original ADA was to eliminate discrimination. However, if hardly anyone was covered, then hardly anyone was actually being protected from discrimination. So, in the ADAAA, Congress fixed the definition of disability to cover more people and as a result, prevent more discrimination. That means that employers should no longer be focusing so much on who has a disability, but instead should be focusing on making accommodations and avoiding discrimination.

III. DEFINITION OF DISABILITY

A. Basic Three-Part Definition Is the Same

Definition: Disability.

(1) Disability.—The term "disability" means, with respect to an individual—

(A) A physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) A record of such an impairment; or

(C) Being regarded as having an impairment.

The ADAAA did not change the actual definition of disability – the definition is exactly the same as it was. What *did* change is the meaning of some of the words used in the definition and the way those words are to be applied to individuals.

B. Definition of Impairment is the Same

Definition: Impairment

(1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as an intellectual disability (formerly termed “mental retardation”), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

The ADAAA did not change the definition of impairment, but the ADAAA regulations *did* add references to the immune system and the circulatory system because both are mentioned in the definition of “major bodily functions” and the EEOC wanted to be consistent.

The term “impairment” does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight, or muscle tone that are within “normal” range and are not the result of a physiological disorder; characteristic predisposition to illness or disease; pregnancy; common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder; or environmental, cultural, or economic disadvantages such as poverty, lack of education, or a prison record.

C. Major Life Activities Expanded to Include Bodily Functions

Definition: Major Life Activities

Major life activities include, but are not limited to:

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; and

The operation of a major bodily function, including functions of the immune system, special sense organs and skin; normal cell growth; and digestive,

genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes the operation of an individual organ within a body system.

In the past, there was some debate over what activities were considered "major life activities" for ADA purposes, but one of the most confusing issues was whether someone with a medical condition that only affected internal functions would be covered. Conditions such as gastrointestinal disorders, cancer, sleep disorders, and heart disease often only affect bodily functions without producing any outward limitations and courts grappled with whether bodily functions were classified as major life activities. Now Congress has cleared up the confusion by specifically stating in the ADAAA that bodily functions are indeed major life activities.

For example, a person with insulin-dependent diabetes will most likely be covered under the first part of the new definition of disability because endocrine system function is definitely considered a major life activity as of January 1, 2009.

Note that the lists provided in the definition of major life activity are not exhaustive; they are just examples of some of the activities that can be considered.

D. Substantially Limits, Nine Rules to Follow

Definition: No Specific Definition, Follow Nine Rules of Construction.

In the ADAAA, Congress expressly directed the EEOC to revise its regulations regarding the definition of substantially limits. In the past, the EEOC regulations had defined substantially limits as "significantly restricted," but Congress told the EEOC, that is too high a standard – go back and make it an easier standard to meet. In the final regulations, the EEOC did not specifically define substantially limits, but instead provided guidance referred to as "rules of construction."

The following rules of construction come from the EEOC's final regulations, which are linked from http://www.eeoc.gov/laws/statutes/adaaa_info.cfm.

1. A Lot More Individuals Will Be Substantially Limited

The term "substantially limits" shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. "Substantially limits" is not meant to be a demanding standard.

2. Comparison is to Most People in the General Population

An impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population.

An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting.

The comparison to most people in the general population continues to mean a comparison to other people in the general population, not a comparison to those similarly situated. For example, the ability of an individual with an amputated limb to perform a major life activity is compared to other people in the general population, not to other amputees.

3. Assessing Whether Individual is Substantially Limited Should Be Quick

The primary focus under the ADA now should be whether employers have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity. Accordingly, determining whether an impairment substantially limits a major life activity should be done quickly and should not demand extensive analysis.

4. Disability is Still Determined on a Case-By-Case Basis

The determination of whether an impairment substantially limits a major life activity still requires an individualized assessment. However, in making this assessment, substantially limits should be considered a much lower standard than it was prior to the ADAAA. Even with this lower standard, not every impairment will constitute a disability.

5. Scientific, Medical, or Statistical Evidence Usually Not Required

The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis. Nothing prohibits the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate.

6. Mitigating Measures Will Not Be Considered

Definition: Mitigating Measures, Things Such As:

(i) Medication, medical supplies, equipment, or appliances, low-vision devices (defined as devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aid(s) and cochlear implant(s) or other implantable hearing devices, mobility devices, and oxygen therapy equipment and supplies;

(ii) Use of assistive technology;

(iii) Reasonable accommodations or “auxiliary aids or services,”

(iv) Learned behavioral or adaptive neurological modifications; or

(v) Psychotherapy, behavioral therapy, or physical therapy.

Except:

The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity."

When determining whether a person is substantially limited in a major life activity, we ignore the beneficial effects of mitigating measures except ordinary eyeglasses or contact lens. In the past, the U.S. Supreme Court held the opposite, that you do not ignore mitigating measures. This holding resulted in a lot of people not being covered by the ADA - people with conditions such as epilepsy, diabetes, and mental illness, who controlled their symptoms through measures like medication, good diet, and regular sleep. Prior to the Supreme Court holding, few people questioned whether individuals with these types of conditions had disabilities, but after the holding it was clear that many of them did not, at least not under the ADA definition. The ADAAA rejected the Supreme Court's holding regarding the use of mitigating measures.

For example, a person with epilepsy who takes medication to control her seizures will most likely be covered under the first part of the new definition of disability because we will consider what her limitations would be without her medication.

And note that the ADAAA states that the ameliorative (i.e., beneficial) effects of mitigating measures are ignored; if the mitigating measure itself causes any limitations, then those will be considered.

Evidence showing that an impairment would be substantially limiting without mitigating measures could include evidence of limitations that a person experienced prior to using a mitigating measure, evidence concerning the expected course of a particular disorder absent mitigating measures, or readily available and reliable information of other types.

7. Episodic or in Remission, Limitations Will Be Considered As if Active

In the past, a person whose condition was in remission or whose limitations came and went might not have been covered by the ADA, depending on how long that person's limitations were in an active state. This meant that a person with, for example, mental illness, might not be entitled to accommodations in the workplace when his condition was active because he did not meet the ADA's definition of disability.

Now the fact that the periods during which an episodic impairment is active and substantially limits a major life activity may be brief or occur infrequently is no longer relevant to determining whether the impairment substantially limits a major life activity. For example, a person with post-traumatic stress disorder who experiences intermittent flashbacks to traumatic events is substantially limited in brain function and thinking.

Other examples of conditions that may be episodic or go into remission include epilepsy, multiple sclerosis, cancer, hypertension, diabetes, asthma, major depressive disorder, bipolar disorder, and schizophrenia.

8. Only One Major Life Activity Needs to be Substantially Limited

The ADAAA states that an impairment need only substantially limit one major life activity to be considered a disability under the ADA. For example, an individual with diabetes is substantially limited in endocrine function and thus an individual with a disability under the first prong of the definition. He need not also show that he is substantially limited in eating to qualify for coverage under the first prong. An individual whose normal cell growth is substantially limited due to lung cancer need not also show that she is substantially limited in breathing or respiratory function. And an individual with HIV infection is substantially limited in the function of the immune system, and therefore is an individual with a disability without regard to whether his or her HIV infection substantially limits him or her in reproduction.

9. Six Month Time Frame Does Not Apply

The six-month “transitory” part of the “transitory and minor” exception to “regarded as” coverage does not apply to the “actual disability” prong or the “record of” prong. The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section.

For example, if an individual has a back impairment that results in a 20-pound lifting restriction that lasts for several months, he is substantially limited in the major life activity of lifting, and therefore covered under the first prong of the definition of disability. At the same time, “[t]he duration of an impairment is one factor that is relevant in determining whether the impairment substantially limits a major life activity. Impairments that last only for a short period of time are typically not covered, although they may be covered if sufficiently severe.”

E. Predictable Assessments

Putting all this together, the individualized assessment of some kinds of impairments will virtually always result in a determination of disability. The following impairments are examples from the regulations of impairments that should be easily found to be substantial limiting a major life activity:

- Deafness substantially limits hearing.
- Blindness substantially limits seeing.

- An intellectual disability (formerly mental retardation) substantially limits brain function.
- Partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function.
- Autism substantially limits brain function.
- Cancer substantially limits normal cell growth.
- Cerebral palsy substantially limits brain function.
- Diabetes substantially limits endocrine function.
- Epilepsy substantially limits neurological function.
- Human Immunodeficiency Virus (HIV) infection substantially limits immune function.
- Multiple sclerosis substantially limits neurological function.
- Muscular dystrophy substantially limits neurological function.
- Major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia substantially limit brain function.

F. Condition, Manner, or Duration

For conditions that are not so obviously disabilities, the EEOC regulations state that in determining whether an individual is substantially limited in a major life activity, it may be useful in appropriate cases to consider, as compared to most people in the general population, the condition under which the individual performs the major life activity; the manner in which the individual performs the major life activity; and/or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity. However, the regulations no longer include the additional list of “substantial limitation” factors contained in the previous version of the regulations (i.e., the nature and severity of the impairment, duration or expected duration of the impairment, and actual or expected permanent or long-term impact of or resulting from the impairment).

Consideration of facts such as condition, manner, or duration may include, among other things, consideration of the difficulty, effort, or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; and/or the way an impairment affects the operation of a major bodily function.

G. Record of a Disability

An individual has a record of a disability if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities. The terms “substantially limits” and “major life activity” under the record of prong of the definition of disability are the same terms used in the “actual disability” prong as described in C and D above.

An individual with a record of a substantially limiting impairment may be entitled, absent undue hardship, to a reasonable accommodation if needed and related to the past disability. For example, an employee with an impairment that previously limited, but no longer substantially limits, a major life activity may need leave or a schedule change to permit him or her to attend follow-up or “monitoring” appointments with a health care provider.

H. Regarded As Is Very Broad, No Substantially Limits Requirement

Definition: Regarded As.

"(A) An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

(B) Regarded as does not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less."

The ADAAA makes regarded as coverage under the ADA very broad. To be covered, an individual only has to establish that an employer discriminated against him because of a medical condition, whether he actually has one or the employer just thought he did. He does not have to meet the substantially-limited-in-a-major-life activity standard. One exception under regarded as is that impairments that are transitory (lasting or expected to last 6 months or less) *and* minor, are not covered. Arguably, impairments that are transitory or minor, but not both, will be covered.

For example, if an employer denies employment to a job applicant solely because the applicant has had back problems in the past, without looking at whether he can safely perform the job, the applicant will most likely be covered under the regarded as part of the definition.

Congress broadened coverage under the regarded as part of the definition to help address the prejudice, antiquated attitudes, and the failure to remove societal and institutional barriers that still exist.

IV. REASONABLE ACCOMMODATION

The ADAAA did not change the definition of reasonable accommodation. However, the Act does clarify that only individuals who meet the first (actual disability) and second (record of a disability) parts of the definition are entitled to accommodations; individuals who only meet the third part (regarded as) are not entitled to accommodations. Even though the definition did not change, it is clear that with a broader definition of disability, more focus will be placed on providing reasonable accommodations.

Another thing to keep in mind is the flexibility built into the reasonable accommodation obligation under the ADA. For example:

- employers can choose among effective accommodation options and do not always have to provide the requested accommodation,
- employers do not have to provide accommodations that pose an undue hardship,
- employers do not have to provide as reasonable accommodation personal use items needed in accomplishing daily activities both on and off the job,
- employers do not have to make an accommodation for an individual who is not otherwise qualified for a position, and
- employers do not have to remove essential functions, create new jobs, or lower productions standards as an accommodation.

For more information, see Reasonable Accommodation and Undue Hardship under the ADA at <http://www.eeoc.gov/policy/docs/accommodation.html>

V. PRACTICAL TIPS

What does all this mean to employers? The following are some practical tips for applying the ADAAA in the workplace:

A. Get Past the Definition of Disability

First and foremost, with the new, broader definition of disability, employers should no longer be spending a lot of time analyzing whether employees meet the definition of disability. Employers can still require medical documentation when an employee requests an accommodation and the disability and/or need for accommodation are not obvious, but the documentation related to determining whether someone has a disability should not be extensive. Instead, the focus should be on the accommodation, whether it is reasonable, whether it can be provided without an undue hardship, and whether there are other accommodations that can be considered.

B. Do Not Confuse the Definition of Disability and Accommodation

Remember that the definition of disability is an impairment that substantially limits at least one major life activity and the ADAAA has a list of things that are considered major life activities. This list includes things like sleeping; reproducing; eating; normal cell growth; and digestive, bowel, and bladder functioning. These major life activities are not normally things that employers relate to the workplace or job performance so the question many employers have is whether they have any obligation to accommodate employees who are substantially limited in any of these activities. The answer is yes.

And here is why. Once an employer establishes that an employee is substantially limited in *any* major life activity, then the employer has established that the employee has a disability and is entitled to an accommodation for *any* limitations associated with the disability. The accommodation does not have to be for the limitation that established disability, it can be for any limitation associated with the disability, whether substantial or not.

For example, an employee has breast cancer and establishes that she has a disability by showing that she is substantially limited in the major life activity of normal cell growth. However, she needs an accommodation related to typing because she has some swelling in her right arm because of the treatment she is receiving for her cancer. Even though she is not substantially limited in the use of her arm and hand, she is still entitled to an accommodation for typing because the limitation is related to her disability.

C. Make Decisions That Are Job-Related and Consistent with Business Necessity

As mentioned previously, the ADAAA broadens the definition of disability and places the focus on the actions taken by employers. One problem employers can have is making assumptions or comments about employees' medical conditions, which could lead employees to believe that decisions were made on the basis of their real or perceived disabilities, even if that is not the case. To help avoid this problem, employers should focus on any performance or conduct problems that employees have and apply their policies in a uniform manner rather than assuming that a medical problem or disability is contributing to or causing the problem. In general, it is the employee's responsibility to let the employer know that a conduct or performance problem is disability-related and to request an accommodation to overcome the problem so there is usually no reason for an employer to bring up medical issues first.

For more information, see *The ADA: Applying Performance and Conduct Standards to Employees with Disabilities* at <http://www.eeoc.gov/facts/performance-conduct.html>

Also, when making decisions such as who to hire or promote, focus on qualifications for the job, not on perceptions about someone's disability or need for accommodation.

D. Train Frontline Supervisors and Managers

No amount of preparation will be effective unless employers train their frontline managers and supervisors because the frontline usually has the most contact with employees on a day to day basis. If nothing else, employers should train their frontline to refrain from mentioning medical conditions unless relevant, to recognize accommodation requests, and to remember who to contact for assistance (many employers, as part of their accommodation procedures, appoint a responsible person to handle accommodation requests, keep confidential medical information, and help avoid discriminatory employment decisions).

Another important reason to train frontline supervisors and managers is to help reduce retaliation claims. The frontline needs to understand that making negative or derogatory remarks in response to an accommodation request can be considered retaliation.

E. Document Actions and Decisions

Because the focus of the ADA has shifted away from the definition of disability and toward whether employers complied with their obligations, documentation of actions and decisions can be very important if an employee alleges discrimination. In the past, many such allegations were never looked at because the employee could not meet the narrow definition of disability. Now, especially with the broad coverage under the regarded as part of the definition, most cases will hinge on whether an employer discriminated. Therefore, employers should keep accurate records because it can be difficult to remember what happened without good recordkeeping and written records are generally considered more reliable than memory alone.

Another important aspect of documentation is effective communication with employees. Many problems occur because employers do not let employees know, for example, how their performance needs to improve, the status of their accommodation requests, or why an accommodation request was denied. Employees need to be informed so they can have the opportunity to address performance problems or suggest alternative accommodation options.

Additional Resources

For more information about the ADA, see EEOC guidance at http://www.eeoc.gov/laws/statutes/adaaa_info.cfm

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