



Accommodation and Compliance Series

The ADA Amendments Act of 2008

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A service of the U.S. Department of Labor's Office of Disability Employment Policy

Preface

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JAN Bulletin:
This document is subject to frequent updates.

BACKGROUND

On January 1, 2009, the Americans with Disabilities Act (ADA) of 2008 went into effect, making some major changes to the way the definition of disability has been 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 1st. We do not yet have any regulations nor do we have any court interpretation; all we currently have are the words of the Amendments Act and its legislative history. With that said, let's take a look at what we know so far.

The Equal Employment Opportunity Commission (EEOC) has voted to approve a Notice of Proposed Rulemaking (NPRM) to conform its ADA regulations to the Amendments Act of 2008. The NPRM was just published in the Federal Register on September 23, 2009. Relevant documents are available on the JAN Website at:

<http://www.jan.wvu.edu/links/adalinks.htm> and the EEOC Website at: http://www.eeoc.gov/ada/amendments_notice.html.

What does this mean? These are not the final regulations. There will be a 60 day public comment period, commencing on September 23, 2009. Once comments are received they will be reviewed by the EEOC and final regulations will be published in the Federal Register. Any changes will be posted on the JAN Website.

OVERALL PURPOSE

According to Congress, the ADA Amendments Act 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 Amendments Act Congress fixed the definition of disability to cover more people and as a result, prevent more discrimination. That means that once the Act went into effect, the question of who has a disability is no longer the main focus; instead, the focus is on whether discrimination occurred.



DEFINITION OF DISABILITY

1. New Definition. Basic Three-Part Definition Will Stay 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 such an impairment."

The Amendments Act 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.

2. Substantially Limits. Will Not Be As High a Standard

Definition: None Yet, EEOC Writing Regulations.

In the Amendments Act, Congress expressly gave the Equal Employment Opportunity Commission (EEOC) the authority to revise its regulations regarding the definition of substantially limits to make them consistent with the Act's purpose. 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. The EEOC is working on the revisions, which will be available on the EEOC and JAN Websites when final. However, it is not a quick process to revise regulations so we do not expect them to be available in the immediate future.

In the meantime, we have to go with what is available. We know that the substantially limited standard is not supposed to be as hard to meet and that more people are suppose to be covered, but what else do we know?

3. Mitigating Measures. Will Not Be Considered.

Definition: Mitigating Measures, Things Such As:

"(I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

- (II) use of assistive technology;
- (III) reasonable accommodations or auxiliary aids or services; or
- (IV) learned behavioral or adaptive neurological modifications.

Except:

- (ii) 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."

Another thing we know is that 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 Amendments Act 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 Amendments Act states that we ignore the *ameliorative* (i.e., beneficial) effects of mitigating measures; if the mitigating measure itself causes any limitations, then those *will* be considered.

Now we know:

- the substantially limits standard is not as high as it was; and
- when considering whether a person is substantially limited, we ignore the beneficial effects of any mitigating measures (except ordinary eyeglasses and contact lens) the person uses.

4. Major Life Activities. Will Be Expanded to Include Bodily Functions

Definition: Major Life Activities

"(A) In general.—For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing,



eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

(B) Major bodily functions.—For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."

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 Amendments Act 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 we will consider what his limitations would be without his insulin and because endocrine system function is definitely considered a major life activity as of January 1, 2009.

Another thing the Amendments Act states is that an impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

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.

Now we know:

- the substantially limits standard is not as high a standard as it was;
- when considering whether a person is substantially limited, we ignore the beneficial effects of any mitigating measures (except ordinary eyeglasses and contact lens) the person uses; and
- when considering whether a person is substantially limited in a major life activity, we can consider bodily functions as well as other major life activities, and having one major life activity substantially limited is enough.

5. 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. Congress addressed this in the Amendments Act by stating that "an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."

For example, a person with Crohn's disease who has periodic flareups that require hospitalization will likely be covered under the first part of the new definition of disability because we will consider what his limitations are during his flareups and because bowel function is definitely considered a major life activity as of January 1, 2009.

Now we know:

- the substantially limits standard is not as high as it was;
- when considering whether a person is substantially limited, we ignore the beneficial effects of any mitigating measures (except ordinary eyeglasses and contact lens) the person uses;
- when considering whether a person is substantially limited in a major life activity, we can consider bodily functions as well as other major life activities, and having one major life activity substantially limited is enough; and
- when considering whether a person whose condition is episodic or in remission is substantially limited in a major life activity, we consider the person's limitations as they are when the condition is in an active state.

6. Regarded As. Will Be Very Broad, With 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 Amendments Act 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.

Now we know:

- the substantially limits standard is not as high as it was;
- when considering whether a person is substantially limited, we ignore the beneficial effects of any mitigating measures (except ordinary eyeglasses and contact lens) the person uses.
- when considering whether a person is substantially limited in a major life activity, we can consider bodily functions as well as other major life activities, and having one major life activity substantially limited is enough;
- when considering whether a person whose condition is episodic or in remission is substantially limited in a major life activity, we consider the person's limitations as they are when the condition is in an active state; and
- regarded as is very broad, does not require individuals to meet the substantially-limited-in-a-major-life-activity standard, but does not include impairments that are transitory *and* minor.

REASONABLE ACCOMMODATION

The Amendments Act 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.

One thing to keep in mind regarding a request for reasonable accommodation is that the accommodation does not have to be tied to the substantially limited major life activity that established that the employee has a disability. For example, a person with cancer may establish that she has a disability because she is substantially limited in normal cell growth, which is listed as a major life activity under the "bodily functions" category in the Amendments Act. However, her accommodation request is related to fatigue and nausea resulting from her medical treatment. Once the employee establishes that she has a disability, then the employer must consider providing accommodations for any limitations she has as a result of her impairment, not just the limitation that established her disability.

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 production standards as an accommodation.

The EEOC has many publications to help employers understand reasonable accommodation under the ADA and Rehabilitation Act:

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

Practical Advice for Drafting and Implementing Reasonable Accommodation Procedures under Executive Order 13164 at http://www.eeoc.gov/federal/implementing_accommodation.html

PRACTICAL TIPS

What can employers do now? Even though the EEOC regulations are not available yet, there are some practical things that employers can do now:

1. Review job descriptions, qualification standards, and accommodation procedures.

The ADA does not require employers to hire unqualified applicants with disabilities nor does it require employers to retain employees who can no longer perform the essential functions of their jobs because of a disability. However, the ADA does prohibit



employers from: using unnecessary qualification standards to weed out applicants with disabilities, relying on inaccurate job descriptions to determine that an employee with a disability can no longer perform her job, and failing to provide reasonable accommodations absent undue hardship. Therefore, it is important for employers to review their job descriptions, qualification standards, and accommodation procedures to make sure they comply with the ADA.

This is where JAN can help. JAN provides one-on-one, free consultation about all aspect of workplace accommodations. For more information about JAN services, visit the JAN Website at <http://www.jan.wvu.edu>. JAN also offers several publications for employers.

Job Descriptions at <http://www.jan.wvu.edu/media/JobDescriptions.html>

Five Practical Tips for Providing and Maintaining Effective Job Accommodations at <http://www.jan.wvu.edu/media/FivePracticalTips.doc>

Five Practical Tips Webcast at <http://www.jan.wvu.edu/training/library/htm>

Employers' Practical Guide to Reasonable Accommodation under the Americans with Disabilities Act (ADA) at <http://www.jan.wvu.edu/ERguide>

2. Focus on performance and conduct.

As mentioned previously, the Amendments Act broadens the definition of disability and places the focus on the actions of 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's 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>

3. 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.

4. Document actions and decisions.

Because the focus of the ADA will shift 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

- EEOC Meeting of June 17, 2009 - Notice of Proposed Rulemaking Implementing the ADA Amendments Act of 2008 at <http://www.eeoc.gov/abouteeoc/meetings/6-17-09/transcript.html>
- EEOC Announcement of the NPRM at http://www.eeoc.gov/ada/amendments_notice.html
- Volume 7, Issue 3, Third Quarter, 2009 - ADA Update at <http://www.jan.wvu.edu/ENews/2009/ENews-V7-I3.htm#1>



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