

THE ADA AMENDMENTS ACT REGULATIONS

Understanding the EEOC Regulations

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PURPOSE OF THE REGULATIONS

- ◉ The purpose of the regulations is to implement title I of the Americans with Disabilities Act (ADA). 29 C.F.R. §1630.1(a) Everything starts with *Congress*.
- ◉ The focus of Congress: “The primary object of attention in cases brought under the ADA should **be whether covered entities have complied with their obligations** and whether discrimination has occurred, *not* whether the individual meets the definition of disability. The question of whether an individual meets the definition of disability under this part ***should not demand extensive analysis.***” 29 C.F.R. §16301.4

FIRST TWO PRONGS OF COVERAGE

“Disability” means -

- (i) A physical or mental impairment that **substantially limits** one or more of the **major life activities** of such individual; (the ‘actual disability” prong) [or]
- (ii) A record of such an impairment (the “record of” prong)

29 C.F.R. §1630.2(g)(1)(i) and (ii)

BUT REMEMBER CONGRESS' GOAL:

“The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations. . . The question of whether an individual meets the definition of disability under this part *should not demand extensive analysis.*”

29 C.F.R. §16301.4 (“Broad Coverage”)

HOW DID CONGRESS DO THAT?

- ◉ . . . given that Congress used the exact *same* words in the definition of disability, for purposes of prong one, that existed before??
- ◉ Congress did it through a series of RULES OF CONSTRUCTION for interpreting the term “substantially limits.”
- ◉ And Congress also did it by changing the interpretation of “major life activities.”

EEOC REGULATIONS FOLLOW THAT LEAD

- ◉ The regulations pull out 9 RULES OF CONSTRUCTION that are derived **directly** from the statute and legislative history.
- ◉ The regulations explain how these rules of construction **work *together*** to create the result that Congress wanted - an **easier and more streamlined analysis** that results in **more people being covered under the law.**

SOME THINGS ARE THE SAME . . .

A physical impairment is:

- ◉ 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. 29 CFR §1630.2(h)(1)

SOME THINGS ARE THE SAME . . .

A mental impairment is:

- ◉ 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.

29 CFR §1630.2(h)(2)

MAJOR LIFE ACTIVITIES

Include, but are not limited to:

(i) 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

29 CFR §1630.2(i)(1)(i)

RULES FOR MAJOR LIFE ACTIVITIES

- ◉ In determining other examples of major life activities (MLAs), the term “major” shall not be interpreted strictly to create a demanding standard for disability. 29 CFR §1630.2(i)(2)
- ◉ Whether an activity is a “major life activity” is not determined by reference to whether it is of “central importance to daily life.”
29 CFR §1630.2(i)(2)
- ◉ But the key change is the addition of **Major Bodily Functions** to major life activities.

MAJOR BODILY FUNCTIONS

Major life activities include, but are not limited to:

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.

29 CFR §1630.2(i)(1)(ii)

“SUBSTANTIALLY LIMITS”

- ◉ There are nine rules of construction.
- ◉ These are the rules that Congress adopted to make it easier to establish coverage under the first prong of the definition.
- ◉ None of the rules provides a definition of the term “substantially limits.” Rather, the rules mostly tell us what the term “substantially limits” will NOT require.

29 CFR §1630.2(j)(1)(i)-(ix)

RULES #1 THROUGH #3

- ◉ “Substantially limits” is to be construed broadly and is not meant to be a demanding standard.
- ◉ The comparison is to “most people;” the impairment need not prevent or severely restrict a major life activity; but not every impairment is a disability.
- ◉ The primary object is whether discrimination occurred; whether an impairment substantially limits a major life activity should not demand extensive analysis.

29 CFR §1630.2(j)(1)(i)-(iii)

RULES #4 AND #5

- ◉ An individualized assessment remains for the coverage analysis, but a lower degree of functional limitation applies.
- ◉ Scientific, medical or statistical evidence is usually not required, but may be used where appropriate.

29 CFR §1630.2(j)(1)(iv)-(v)

RULE #6

- ◉ The determination of whether an impairment substantially limits a major life activity shall be made **without regard to the ameliorative effects of mitigating measures.**

29 CFR §1630.2(j)(1)(vi)

MITIGATING MEASURES INCLUDE

- ◉ Medication
- ◉ Medical equipment
- ◉ Low-vision devices (but not ordinary eyeglasses or lenses)
- ◉ Prosthetics
- ◉ Hearing aids and cochlear implants
- ◉ Mobility devices
- ◉ Oxygen therapy equipment
- ◉ Assistive technology
- ◉ Learned behavioral or adaptive neurological modifications
- ◉ Psychotherapy, behavioral therapy, or physical therapy

KEY -- This is a *non-exhaustive* list.
The point is not to take into account anything that *mitigates* the impact of the impairment.

EYEGASSES EXCEPTION

- ◉ The ameliorative effects of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity. 29 CFR §1630.2(j)(1)(vi)
- ◉ But -- a covered entity cannot have a *qualification standard* based on an individual's uncorrected vision unless that standard is job related for the position in question and is consistent with business necessity. 29 CFR §1630.10(b)

RULE #7

- ⦿ An impairment that is episodic or in remission is a disability if it **would substantially limit a major life activity when active.**

29 CFR §1630.2(j)(1)(vii)

RULES #8 AND #9

- ⦿ An impairment has to substantially limit only **one major life activity, not more than one.**
- ⦿ An impairment that is **temporary** - e.g., one that will last or expect to last fewer than six months -- **can be** substantially limiting.

29 CFR §1630.2(j)(1)(viii)-(ix)

PREDICTABLE ASSESSMENTS

“The principles set forth in paragraphs (j)(1) (i) through (ix) of this section [**the 9 rules of construction**] are intended to provide for more **generous coverage** and application of the ADA’s prohibition on discrimination **through a framework that is predictable, consistent, and workable** for all individuals and entities with rights and responsibilities under the ADA, as amended.”

29 CFR §1630.2(j)(3)(i)

PREDICTABLE ASSESSMENTS . . . “VIRTUALLY ALWAYS” COVERED

Applying the [9 rules of construction], the individualized assessment of some types of impairments will, in virtually all cases, result in a determination of coverage under the “actual disability” prong.

Given their inherent nature, these types of impairments will, as a factual matter, virtually always be found to impose a substantial limitation on a major life activity.

Therefore, with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward.

29 CFR §1630.2(j)(3)(ii)

PREDICTABLE ASSESSMENTS . . . “SHOULD EASILY BE CONCLUDED”

- ◉ **For example, applying the principles set forth in paragraphs (j)(1)(i) through (ix) of this section [the 9 rules of construction], it should easily be concluded that the following types of impairments will, at a minimum, substantially limit the major life activities indicated:**

29 CFR §1630.2(j)(3)(iii)

PREDICTABLE ASSESSMENTS (CONT.)

- ◉ **deafness** substantially limits hearing;
- ◉ **blindness** substantially limits seeing;
- ◉ an **intellectual disability** (formerly termed mental retardation) substantially limits brain function;
- ◉ **partially or completely missing limbs or mobility impairments** requiring the use of a wheelchair substantially limit musculoskeletal function

29 CFR §1630.2(j)(3)(iii)

PREDICTABLE ASSESSMENTS (CONT.)

- ◉ **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;

PREDICTABLE ASSESSMENTS (CONT.)

- ◉ major depressive disorder,
- ◉ bipolar disorder,
- ◉ post-traumatic stress disorder,
- ◉ obsessive compulsive disorder, and
- ◉ schizophrenia

substantially limit brain function.

29 CFR §1630.2(j)(3)(iii)

IMPAIRMENTS ON A SPECTRUM

- ◉ Some impairments will, as a factual matter, *not* fall into the category of impairments described above.
- ◉ With regard to these impairments in particular, a “condition, manner or duration” framework can be helpful.
- ◉ For example, one may consider the difficulty, effort, or time required to perform a major life activity; the pain experienced when performing a major life activity; or the length of time a major life activity can be performed.

29 CFR §1630.2(j)(4)(i)-(ii)

CONDITION, MANNER OR DURATION

- ◉ The focus is on *how* a major life activity is substantially limited, and not on what *outcomes* an individual can achieve.
- ◉ For example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the *additional time or effort* he or she must spend to read, write, or learn compared to most people in the general population.
- ◉ You do not need to do a “condition, manner, duration” analysis for everything! (This is primarily for impairments on the spectrum.)

MAJOR LIFE ACTIVITY . . . LIMITED IN “WORKING”

Being substantially limited in performing one specific job does not make a person substantially limited in working.

But if a person is substantially limited in a **class of jobs**, that person is covered under the first prong.

A class of jobs can be determined by reference to the **nature of the work** that an individual is limited in performing (e.g., clerical jobs) or by reference to **job-related requirements** (e.g., a requirement for heavy lifting or prolonged standing.)

For example, a person who can lift 20 pounds but cannot lift 50 pounds may not be substantially limited in lifting - but **IS** substantially limited in the class of jobs requiring heavy lifting. That gives the person a chance to ask for a reasonable accommodation.

PRONG TWO—RECORD OF

- ◉ An individual will be considered to have a **record of a disability** if the individual has a history of an impairment that substantially limited one or more major life activities when compared to most people in the general population, or was misclassified as having had such an impairment.
- ◉ In determining whether an impairment substantially limited a major life activity, **the 9 principles articulated in paragraph (j) of this section apply.**

29 CFR §1630.2(k)(2)

REASONABLE ACCOMMODATION

- ◉ Individuals covered under prong two 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.

29 CFR §1630.2(k)(3)

THIRD PRONG- “REGARDED AS”

Disability means --

(iii) Being regarded as having such an impairment as described in paragraph (l) of this section. **This means that the individual has been subjected to an action prohibited by the ADA as amended because of an actual or perceived impairment that is not both “transitory and minor.”**

、 29 C.F.R. §1630.2(g)(1)(iii)

WHEN THIRD PRONG COVERAGE SHOULD BE USED

- ◉ When reasonable accommodation is not at issue!
- ◉ If an individual is using the third prong, the words “substantially limit” and “major life activity” are NOT RELEVANT.

ACTION IS KEY UNDER 3RD PRONG!

- ◉ If a covered entity takes an action “prohibited by the ADA” on the basis of an applicant’s, employee’s, or union member’s “physical or mental impairment” (and that impairment is not BOTH transitory and minor), that is sufficient to establish coverage under the third prong.
- ◉ Ordinarily no need to get into the *perception* that an employer, a union, or an employment agency may have had about an individual.
- ◉ Perception is relevant only if the action is taken based on a perceived impairment.

“TRANSITORY AND MINOR”

- ⊙ Impairments that are BOTH transitory and minor are excluded from coverage under the third prong.
- ⊙ Transitory means - lasting less than six months.
- ⊙ Minor means - *minor*!
- ⊙ An **impairment** that may last for 6 months or less, **but is not minor, IS covered.**
- ⊙ An **impairment** that is minor, **but will last for more than 6 months, IS covered.**

29 CFR §1630.15(f)

THIS IS AN OBJECTIVE STANDARD DEFENSE

- ◉ A covered entity can ***defend*** against a charge of discrimination under the third prong by showing that an actual impairment is **objectively** transitory and minor or that a perceived impairment would objectively be transitory and minor if it were real.
- ◉ A covered entity's **subjective belief** is irrelevant. For example, an individual with clinical depression would be covered under the third prong, even if an employer subjectively believed that clinical depression is transitory and minor.

29 CFR §1630.15(f)

THE THIRD PRONG REQUIRES A PROHIBITED ACTION

Prohibited actions include:

- ⦿ refusal to hire
- ⦿ demotion
- ⦿ placement on involuntary leave
- ⦿ termination
- ⦿ exclusion for failure to meet a qualification standard
- ⦿ harassment
- ⦿ denial of any other term, condition, or privilege of employment. 29 CFR §1630.2(l)(1)

PROHIBITED ACTIONS (FULL LIST)

A covered entity may not discriminate in:

- ◉ (i) Recruitment, advertising, and job application procedures;
- ◉ (ii) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;
- ◉ (iii) Rates of pay or any other form of compensation and changes in compensation;
- ◉ (iv) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;
- ◉ (v) Leaves of absence, sick leave, or any other leave;

PROHIBITED ACTIONS (FULL LIST)

A covered entity may not discriminate in:

- ◉ (vi) Fringe benefits;
- ◉ (vii) Selection and financial support for training and selection for leaves of absence to pursue training;
- ◉ (viii) Activities sponsored by a covered entity, including social and recreational programs; and
- ◉ (ix) Any other term, condition, or privilege of employment.

29 CFR §1630.4

- ◉ **Also - qualification standards:** A covered entity may not use qualification standards that screen out individuals with disabilities, on the basis of disability . . . ***unless*** the qualification standard is job related for the position in question and consistent with business necessity.

29 CFR §1630.10(a)

BUT NOT - REASONABLE ACCOMMODATIONS!

- ◉ It is also a prohibited action under the ADA to deny an individual with a disability a reasonable accommodation.
- ◉ But that protection DOES NOT EXTEND to a person covered solely under the third prong.

THE THIRD PRONG REQUIRES CAUSATION

- ◉ First, there needs to be a prohibited employment action under the ADA.
- ◉ Second, there needs to be a *causal* relationship *between* the physical and mental *impairment* (that is not transitory and minor) and the *prohibited employment action*.
- ◉ You need some reason to believe that the covered entity took the discriminatory action *because of* the individual's physical or mental impairment.

“REGARDED AS” FRAMEWORK

- ◉ An individual can establish **coverage** under the third prong (if a covered entity takes a prohibited action against the individual because of an actual or perceived impairment), **even if** the entity asserts or ultimately establishes a *defense* to such action.
- ◉ Conversely, an individual can establish **coverage** under the third prong, but still not prove a **violation** of the ADA if the covered entity has a *legitimate non-discriminatory reason* for having taken the adverse action based on the impairment.

29 CFR §1630.2(l)(2)-(3)

OVERALL REGULATION TAKE-AWAYS

- ⦿ Congress wanted to stop the focus on coverage by the courts - and to get courts to move more quickly to the *merits* of a case.
- ⦿ When reasonable accommodation is at issue, there will need to be some individualized analysis of coverage - because the impairment has to substantially limit a major life activity.
- ⦿ But the combination of **three changes** in the law should make this analysis easier and more predictable . . .

OVERALL TAKE-AWAYS (CONT.)

- ◉ The three major changes: 1) major bodily functions are major life activities; 2) mitigating measures are not considered; and 3) episodic and in-remission impairments are considered in their active states.
- ◉ Given those changes, there are a number of impairments that will virtually always be disabilities.
- ◉ The final regulations provide examples of a number of impairments that should easily be concluded to be disabilities, thus streamlining the process.

OVERALL TAKE-AWAYS (CONT.)

- ◉ For impairments not in the “predictable assessments” category, the “condition, manner and duration” framework can be helpful.
- ◉ The fact that “substantially limits” is a lower standard than prior to the ADAAA should be helpful.
- ◉ People will be covered under the major life activity of “working” only when they really need to be covered under that category.

OVERALL TAKE-AWAYS (CONT.)

- ◎ The “impairment-only” standard of the third prong achieves the goal of getting to the merits of a case very quickly because all impairments are covered (other than transitory and minor ones) and the KEY issue is precisely whether a prohibited employment action was taken *because of* the impairment.

THE FUTURE

- ⦿ Employers, employment agencies and unions should all be seeking refresher courses on **reasonable accommodation**.
- ⦿ The EEOC needs to provide effective guidance on reasonable accommodation.
- ⦿ We should expect to see an increase in accommodation requests around scheduling and leave.

HELPFUL LINKS

- ◉ For links to the ADAAA, the final regulations, and some Question & Answer Documents from the EEOC, go to

http://www.eeoc.gov/laws/statutes/adaaa_info.cfm

- ◉ For historical info on the ADAAA, go to

<http://www.law.georgetown.edu/archiveada/>