

# AMERICANS WITH DISABILITIES ACT IN 2009 AND BEYOND

Presented by:

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# What's new under the ADA?

- I. The Americans with Disabilities Act Amendments Act of 2008 (ADAAA)
- II. Proposed regulations out by the EEOC
- III. EEOC exhibiting renewed interest in filing ADA cases



# What employers are covered by the ADA?

“ . . . a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person . . . ”  
..

## ∅ Excludes:

- ∅ The United States or a corporation wholly owned by the U.S.,
- ∅ an Indian Tribe, or
- ∅ a bona fide private membership club exempt from taxation



# Who is protected by the ADA?

A qualified individual with a disability.

In other words, an individual with a disability who, with or without a reasonable accommodation, can perform the essential functions of the position at issue



# What is a disability?

- ∅ A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- ∅ A record of such an impairment; or
- ∅ Being regarded as having such an impairment.



# What types of claims may be brought?

- Discrimination
- Retaliation
- Failure to reasonably accommodate
- Violations of specific provisions of the law (e.g., performing medical examinations which are not job-related and consistent with business necessity)



# The Americans with Disabilities Act Amendment Act of 2009



# The ADAAA changed the focus.

The definition of disability shall be construed in favor of broad coverage of individuals “to the maximum extent permitted by the terms of this Act.”



# What did the ADAAA change?

Congress defined “major life activities” as including, but 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



# But wait, there's more . . .

Major life activity also includes the operation of major bodily functions, including but not limited to:

- Functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions



# Rules of Construction

The term “substantially limits” shall be interpreted consistently with the ADAAA.

- “ An impairment need only limit one major life activity to qualify
- “ An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active
- “ The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures



# What *e/*lse did the ADAAA Change?

Congress defined the “being regarded” prong

- “ An individual meets the requirement if the individual establishes that he has been subjected to an action prohibited under the ADA because of an actual or perceived physical or mental impairment *whether or not the impairment limits or is perceived to limit a major life activity*
- “ This shall not apply to impairments that are transitory and minor



# The ADAAA throws a bone to the employer.

- The Amendments clarify that you cannot sue for reverse discrimination
- The Amendments clarify that no reasonable accommodation is required for an individual who is “regarded as” an individual with a disability




# Proposed Regulations by the EEOC



# Theme of Proposed Regulations

The focus in an ADA case should be on whether discrimination occurred, not on whether an individual meets the definition of “disability.”

The term “substantially limits” shall be construed in favor of broad coverage of individuals to the maximum extent permitted and should not require extensive analysis.



# Impairments which will consistently meet definition of disability – not exhaustive

- Deafness
- Blindness
- Intellectual disability (fka mental retardation)
- Partially or completely missing limbs
- Mobility impairments
- Autism
- Cancer
- Cerebral palsy
- Diabetes
- Epilepsy
- HIV or Aids
- Multiple Sclerosis and Muscular Dystrophy
- Major depressive disorder, bipolar disorder, PTSD, OC disorder, schizophrenia.



# Impairments that are usually NOT disabilities

- Common cold
- Seasonal or common influenza
- Sprained joint
- Minor and non-chronic GI disorders
- Broken bone expected to heal completely



# Examples

Someone with a 20-pound lifting restriction that is not of short-term duration who cannot also show that he is unable to perform activities of daily living that require lifting.

- Proves individual is substantially limited in the major activity of lifting



## Examples (cont.)

An individual whose endocrine system is substantially limited due to diabetes who cannot also show that he is substantially limited in eating or any other major life activity.

Ⓟ Proves he is substantially limited in a major life activity.



## Examples (cont.)

An individual whose normal cell growth is substantially limited due to cancer who cannot also show that he is substantially limited in working or any other major life activity.

⦿ Individual is substantially limited in a major life activity.



## Examples (cont.)

An individual with carpal tunnel syndrome who is substantially limited in performing manual tasks compared to most people, as indicated by the amount of pain experienced when writing or using a computer keyboard or the length of time for which such manual tasks can be performed, is an individual with a disability.

≈ Individual with a disability. This will require analysis.



## Examples (cont.)

An individual with a learning disability who is substantially limited in reading, learning, thinking, or concentrating compared to most people, as indicated by the speed or ease with which he can read, the time and effort required for him to learn, or the difficulty he experiences in concentrating or thinking, is an individual with a disability . . .

- Even if he has graduated from college, for example, as the determination does not depend upon what an individual can do in spite of the impairment.



# Examples (cont.)

A permanent impairment that

- does not substantially limit an individual's ability to lift as compared to the general population, but
- does substantially limit the ability to perform his job which requires frequent heavy lifting

p Substantially limited in the major life activity of working, even if he is also able to work other job that do not require lifting.



## Examples (cont.)

An employee with a facial tic, cause of which is unknown.

▫ An employer that refuses to hire someone with a facial tick “regards” the individual as having a disability, even if the employer does not know the facial tic is caused by Tourette’s Syndrome.



## Examples (cont.)

An individual taking anti-seizure medication applies as a driver.

↳ an individual who is not hired for a driving job because he takes anti-seizure medication is “regarded as” having a disability, even if the employer is unaware of the reason the employee is taking the medication.



# The Focus of the EEOC's Enforcement Efforts



# The EEOC has been very busy.

- ∅ August 10
  - ∅ EEOC opinion letter re health risk assessment
- ∅ August 27
  - ∅ EEOC v. UPS re medical leave policy
- ∅ August 31
  - ∅ EEOC v. Product Fabricators re prescription drug reporting policy
- ∅ September 29
  - ∅ EEOC settlement with Sears re return to work policy



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