The Americans with Disabilities Act (ADA): Proposed Employment Regulations

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September 28, 2010

Congressional Research Service
7-....
www.crs.gov
R40875

CRS Report for Congress
Prepared for Members and Committees of Congress

Summary

The Americans with Disabilities Act (ADA) is a broad civil rights act prohibiting discrimination against individuals with disabilities. As stated in the act, its purpose is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." In 2008, Congress enacted the ADA Amendments Act (ADAAA), P.L. 110-325, to address Supreme Court decisions which interpreted the definition of disability narrowly. On September 23, 2009, the Equal Employment Opportunity Commission (EEOC) issued proposed regulations under the ADA Amendments Act. Comments on the proposed regulations must be submitted on or before November 23, 2009.

The ADA Amendments Act, which states that the definition of disability shall be construed broadly and which specifically rejects portions of the EEOC's ADA regulations, necessitated regulatory changes. The major changes made to the regulations include specific examples of impairments that will consistently meet the definition of disability, changes in the definition of the term "substantially limits," and expansion of the definition of "major life activity" including changes to the concept of the major life activity of working. The EEOC also amended its interpretative guidance for Title I of the ADA.

Contents

Contacts

Introduction

The Americans with Disabilities Act (ADA)[1] is a broad civil rights act prohibiting discrimination against individuals with disabilities. As stated in the act, its purpose is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[2] In 2008, Congress enacted the ADA Amendments Act (ADAAA), P.L. 110-325, to address Supreme Court decisions which interpreted the definition of disability narrowly.[3] On September 23, 2009, the Equal Employment Opportunity Commission (EEOC) issued proposed regulations under the ADA Amendments Act. Comments on the proposed regulations must be submitted on or before November 23, 2009.[4]

The ADA Amendments Act Definition of Disability

Prior to a discussion of the proposed regulations, it is helpful to briefly examine the new statutory definition of disability. The ADAAA defines the term disability with respect to an individual as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment (as described in paragraph (3))."[5] Although this is essentially the same statutory language as was in the original ADA, P.L. 110-325 contains new rules of construction regarding the definition of disability, which provide that

- the definition of disability shall be construed in favor of broad coverage to the maximum extent permitted by the terms of the act;
- the term "substantially limits" shall be interpreted consistently with the findings and purposes of the ADA Amendments Act;
- an impairment that substantially limits one major life activity need not limit other major life activities to be considered a disability;
- an impairment that is episodic or in remission is a disability if it would have substantially limited a major life activity when active; and

[1] 42 U.S.C. §§12101 et seq. For a more detailed discussion of the ADA, see CRS Report 98-921, *The Americans with Disabilities Act (ADA): Statutory Language and Recent Issues*, by (name redacted).

[2] 42 U.S.C. §12101(b)(1).

[3] *Sutton v. United Air Lines, Inc*., 527 U.S. 471 (1999); *Murphy v. United Parcel Service*, Inc., 527 U.S. 516 (1999); *Kirkingburg v. Albertson's Inc*., 527 U.S. 555 (1999); *Toyota Motor Manufacturing v. Williams*, 534 U.S. 184 (2002). For a more detailed discussion of the ADA Amendments Act see CRS Report RL34691, *The ADA Amendments Act: P.L. 110-325*, by (name redacted).

[4] 74 FED. REG. 48431 (September 23, 2009). On July 26, 2010, the 20th anniversary of the passage of the ADA, the Department of Justice issued final rules amending the existing regulations under ADA title II (prohibiting discrimination against individuals with disabilities by state and local governments) and ADA title III (prohibiting discrimination against individuals with disabilities by places of public accommodations). The regulations were published in the Federal Register on September 15, 2010. 75 FED. REG. 56164 (September 15, 2010). For a discussion of these regulations see CRS Report R41376, *The Americans with Disabilities Act (ADA): Final Rule Amending Title II and Title III Regulations*, by (name redacted).

[5] P.L. 110-325, §4(a), amending 42 U.S.C. §12102(3).

- the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures, except that the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered.[6]

EEOC Proposed Regulations

Overview

The ADA Amendments Act, which states that the definition of disability shall be construed broadly,[7] and which specifically rejects portions of the EEOC's ADA regulations,[8] necessitated regulatory changes. The major changes made to the regulations include specific examples of impairments that will consistently meet the definition of disability, changes in the definition of the term "substantially limits," and expansion of the definition of "major life activity" including changes to the concept of the major life activity of working. The EEOC also amended its interpretative guidance for Title I of the ADA.[9]

Examples of Impairments

The ADA definition of disability is a functional definition, not a categorical definition. The EEOC's proposed regulatory definition reiterates the statutory definition[10] and provides guidance on its interpretation.[11] Noting that "disability is determined based on an individualized assessment," the EEOC provides examples of impairments that will consistently meet the definition of disability,[12] and examples of impairments that may be disabling for some individuals but not for others.[13] The EEOC notes that these lists are illustrative, and other types of impairments that are not listed may consistently meet the definition of disability.[14] Examples are also provided of impairments that are usually not disabilities.[15]

EEOC states that the following listed impairments will consistently meet the definition of disability: autism, cancer, cerebral palsy, diabetes, epilepsy, HIV or AIDS, multiple sclerosis and muscular dystrophy, major depression, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia.[16] The EEOC examples of impairments that may be disabling for some individuals but not for others include the following: asthma, high blood

[6] Low vision devices are not included in the ordinary eyeglasses and contact lens exception.

[7] 42 U.S.C. §12102(4)(A).

[8] 42 U.S.C. §12101 note.

[9] 74 FED. REG. 48444 (September 23, 2009).

[10] Proposed Section 29 C.F.R. §1630.2(j)(5); 74 FED. REG. 48441 (September 23, 2009).

[11] 74 FED. REG. 48444 (September 23, 2009).

[12] Proposed Section 29 C.F.R. §1630.2(j)(5); 74 FED. REG. 48441 (September 23, 2009).

[13] Proposed Section 29 C.F.R. §1630.2(j)(6); 74 FED. REG. 48442 (September 23, 2009).

[14] Proposed Section 29 C.F.R. §1630.2(j)(5); 74 FED. REG. 48441 (September 23, 2009); Proposed Section 29 C.F.R. §1630.2(j)(6); 74 FED. REG. 48442 (September 23, 2009).

[15] Proposed Section 29 C.F.R. §1630.2(j)(8); 74 FED. REG. 48443 (September 23, 2009).

[16] Proposed Section 29 C.F.R. §1630.2(j); 74 FED. REG. 48441 (September 23, 2009).

pressure, learning disabilities, back or leg impairments, carpal tunnel syndrome, and hyperthyroidism.[17] "Temporary, non-chronic impairments of short duration with little or no residual effects (such as the common cold, seasonal or common influenza, a sprained joint, minor and not-chronic gastrointestinal disorders, or a broken bone that is expected to heal completely) usually will not substantially limit a major life activity."[18]

EEOC's listing of specific impairments that "will consistently meet the definition of disability" could arguably be seen as contrary to the ADA's statutory definition. One commentator contends that this may mean that an employer would have no argument against coverage of the listed disabilities and, therefore, this approach is contrary to the ADA's individualized assessment approach.[19] However, the EEOC appendix to the proposed regulations notes that, under the ADA, disability is determined based on an individualized assessment, and that the proposed regulation "recognizes, and offers examples to illustrate, that characteristics associated with some types of impairments allow an individualized assessment to be conducted quickly and easily, and will consistently render those impairments disabilities."[20]

It is also interesting to note that in its list of conditions that will usually not substantially limit a major life activity, the EEOC included seasonal or common influenza. It did not discuss whether pandemic influenza would be covered. However, in separate guidance, the EEOC found that H1N1, as currently experienced, would not be interpreted as a disability.[21]

Substantially Limits a Major Life Impairment

The ADA Amendments Act states that the purposes of the legislation are to carry out the ADA's objectives of the elimination of discrimination and the provision of "'clear, strong, consistent, enforceable standards addressing discrimination' by reinstating a broad scope of protection available under the ADA." P.L. 110-325 rejects the Supreme Court's holdings that mitigating measures are to be used in making a determination of whether an impairment substantially limits a major life activity as well as holdings defining the "substantially limits" requirements. The substantially limits requirements of *Toyota Motor Manufacturing v. Williams*,[22] as well as the existing EEOC regulations defining substantially limits as "significantly restricted," are specifically rejected in the new law.[23]

The current EEOC regulations state that three factors should be considered in determining whether an individual is substantially limited in a major life activity: the nature and severity of the impairment, the duration or expected duration of the impairment, and the permanent or long-term impact of the impairment.[24] The proposed regulations do not contain these factors. They

[17] Proposed Section 29 C.F.R. §1630.2(j)(6); 74 FED. REG. 48442 (September 23, 2009).

[18] Proposed Section 29 C.F.R. §1630.2(j)(8); 74 FED. REG. 48443 (September 23, 2009).

[19] "Experts Discuss EEOC's Proposed ADAAA Regulations," http://www.hrtools.com/article.aspx?id=14160&ekfxmen_noscript=1&ekfxmensel=e0fa05764_31_39.

[20] 74 FED. REG. 48447 (September 23, 2009).

[21] http://www.eeoc.gov/facts/pandemic_flu.html. For a more detailed discussion of this issue see CRS Report R40866, *The Americans with Disabilities Act (ADA): Employment Issues and the 2009 Influenza Pandemic*, by (name reda cted).

[22] 534 U.S. 184 (2002).

[23] 42 U.S.C. §12101 note.

[24] 29 C.F.R. §1630.2(j) (2009).

state that 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 a disability."[25] The Senate Managers' Statement for the ADAAA discussed the meaning of substantially limited and, after quoting from the committee report for the original 1990 ADA, stated, "We particularly believe that this test, which articulated an analysis that considered whether a person's activities are limited in condition, duration and manner, is a useful one."[26] It could be argued that the EEOC's proposed regulations do not conform with congressional intent. The EEOC, in its proposed appendix to the proposed regulations, notes that the Senate Managers' Report does make reference to the "condition, duration and manner" analysis, but argues that congressional intent to override the Supreme Court's *Toyota* decision is best served by an elimination of this analysis.[27]

The House debate contains a colloquy between Representatives Pete Stark and George Miller on the subject of the meaning of "substantially limits" in the context of learning, reading, writing, thinking, or speaking. The colloquy finds that an individual who has performed well academically may still be considered an individual with a disability. Representative Stark stated the following:

> Specific learning disabilities, such as dyslexia, are neurologically based impairments that substantially limit the way these individuals perform major life activities, like reading or learning, or the time it takes to perform such activities often referred to as the condition, manner, or duration. This legislation will reestablish coverage for these individuals by ensuring that the definition of this disability is broadly construed and the determination does not consider the use of mitigating measures.[28]

The EEOC's proposed regulations echo this colloquy, specifically stating the following:

> 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 achieved a high level of academic success, such as graduating from college. The determination of whether an individual has a disability does not depend on what an individual is able to do in spite of an impairment.[29]

Major Life Activities

The ADA Amendments Act specifically lists examples of major life activities including caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. The act also states that a major life activity includes the operation of a major bodily function.[30] The House Judiciary Committee report indicates that "this clarification was needed to

[25] EEOC Proposed Regulations, to be codified at 29 C.F.R. § 1630.2(j)(1); 74 FED. REG. 48440 (September 23, 2009).

[26] 154 CONG. REC. S. 8346 (September 11, 2008).

[27] 74 FED. REG. 48446 (September 23, 2009).

[28] 154 CONG. REC. H. 8291 (September 17, 2008).

[29] EEOC Proposed Regulations, to be codified at 29 C.F.R. § 1630.2(j)(6)(C); 74 FED. REG. 48442 (September 23, 2009).

[30] 42 U.S.C §12102(2).

ensure that the impact of an impairment on the operation of major bodily functions is not overlooked or wrongly dismissed as falling outside the definition of 'major life activities' under the ADA."[31] There had been judicial decisions which found that certain bodily functions had not been covered by the definition of disability. For example, in *Furnish v. SVI Sys., Inc.*[32] the Seventh circuit held that an individual with cirrhosis of the liver due to infection with Hepatitis B was not an individual with a disability because liver function was not "integral to one's daily existence."

The proposed EEOC regulations echo the statutory listing of major life activities and add sitting, reaching, and interacting with others, noting that this list is illustrative, not exhaustive.[33] The House Education and Labor Committee report provided examples for major life activities that were not included in the statutory language, and included reaching and interacting with others. The House report also included examples not in the proposed regulations: writing, engaging in sexual activities, drinking, chewing, swallowing, and applying fine motor coordination.[34]

The Major Life Activity of Working

The ADA Amendments Act includes working as an example of a major life activity.[35] What it means to be substantially limited in the major life activity of working is also addressed by the EEOC's proposed regulations. The EEOC notes that usually an individual with a disability will be substantially limited in another major life activity so that it would be unnecessary to determine whether the individual was substantially limited regarding working. However, where that is not the case, the EEOC proposes that "[a]n impairment substantially limits the major life activity of working if it substantially limits an individual's ability to perform, or to meet the qualifications for, the type of work at issue."[36] The EEOC also states that this interpretation is to be construed broadly and should "not demand extensive analysis."[37] "Type of work" is described in the EEOC's proposed appendix as including "the job the individual has been performing or for which he is applying, and jobs that have qualifications or job-related requirements which the individuals would be substantially limited in performing as a result of the impairment."[38]

Prior to the enactment of the ADAAA, some courts had required a statistical analysis of the availability of certain jobs in order to determine whether an individual was substantially limited in the major life activity of working.[39] The EEOC states that this statistical analysis will no longer be needed.[40] Using the proposed "type of work" standard, the EEOC envisions courts using evidence from the individual regarding his or her educational and vocational background and the

[31] H.Rept. 110-730, Part 2, at 16 (2008).

[32] 270 F.3d 445 (7th Cir. 2001).

[33] EEOC Proposed Regulations, to be codified at 29 C.F.R. § 1630.2(i)(1); 74 FED. REG. 48440 (September 23, 2009).

[34] H.Rept. 110-730, Part 1, at 11 (2008).

[35] 42 U.S.C §12102(2).

[36] EEOC Proposed Regulations, to be codified at 29 C.F.R. § 1630.2(j)(7); 74 FED. REG. 48442 (September 23, 2009).

[37] *Id.*

[38] 74 FED. REG. 48447 (September 23, 2009).

[39] See e.g., *Duncan v. WMATA*, 240 F.3d 1110 (D.C. Cir. 2001).

[40] 74 FED. REG. 48448 (September 23, 2009).

limitations of the impairment. Generally, the EEOC would not consider necessary expert testimony concerning the types of jobs in which an individual is substantially limited.[41]

As discussed, the terms "class of jobs" and "broad range of jobs in various classes," which are in the existing regulations, are eliminated in the proposed regulation in favor of the term "type of work." The EEOC describes this change as "more straightforward and easier to understand" as well as being consistent with congressional intent for broad coverage. [42] However, this change has been described as "the most problematic issue arising from the EEOC's proposed regulations" since it is not predicated on specific statutory language or legislative history.[43] It could be argued, as EEOC notes, that the change is consistent with congressional intent that the focus of an ADA case should be on whether discrimination has occurred, not on whether the individual has met the definition of disability.[44] Such a change in the regulations could have a significant effect on judicial determinations.

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[41] *Id.*

[42] *Id.*

[43] "Experts Discuss EEOC's Proposed ADAAA Regulations," http://www.hrtools.com/article.aspx?id=14160&ekfxmen_noscript=1&ekfxmensel=e0fa05764_31_39.

[44] 74 FED. REG. 48448 (September 23, 2009).