PUBLICATION

ADA Amendments Act – EEOC Comments on Proposed Rules

July 28, 2009

Last September, President George Bush signed the ADA Amendments Act (ADAAA) of 2008, which requires courts to interpret the ADA broadly when determining whether an individual has been discriminated against because of a disability. On June 17, 2009, the Equal Employment Opportunity Commission (EEOC) voted in favor of revising its rules to conform to the ADAAA. These amendments, as well as the proposed rules, will make it easier for individuals seeking protection under the ADA to establish that they have a disability. The changes to the rules, approved by the EEOC in a 2-1 vote, must now be reviewed by other federal agencies, including the Department of Transportation, the Justice Department and the Office of Management and Budget.

The ADAAA effectively overturned four U.S. Supreme Court rulings that had narrowed coverage under the ADA, and it made clear that "disability" and "substantially limits" as well as other key statutory terms must be broadly construed. As the proposed rules emphasize, the focus in ADA cases should be on whether discrimination has occurred and not on whether an individual meets the definition of "disability." The ADAAA retains the same basic three-part definition of "disability": namely, a physical or mental impairment that substantially limits one or more life activities; a record of such an impairment; or being regarded as having such an impairment. The difference between the ADA as it existed prior to January 1, 2009, and the ADAAA centers on how those terms are interpreted.

Christopher Kuczynski, EEOC assistant legal counsel and director of the Office of Legal Counsel's ADA policy division, presented the proposed rules on June 17, 2009. Kuczynski said the proposals include "numerous examples" of how to apply the new definition of disability and that "greater specificity" will increase the likelihood that courts will defer to the EEOC regulations. The proposals include five rules of construction and examples for three of them. The first emphasizes that the definition of "substantially limited" should be construed broadly to the maximum extent allowable under the ADA, and the determination as to whether someone who has a disability should generally not demand an extensive analysis.

The second rule provides that an individual whose impairment substantially limits a major life activity need not also demonstrate a limitation in the ability to perform "activities of central importance to daily life." The third states that an impairment that substantially limits one major life activity need not limit other major life activities to be considered substantially limiting. For example, a person with diabetes whose endocrine function is substantially limited need not also show that he is substantially limited in any other major life activity. The fourth rule says that comparison of an individual's limitation to that of most people in the general population often may be made using a common-sense analysis without resorting to scientific or medical evidence. Finally, to address the confusion of transitory and minor exception to the "regarded as" definition of disability, the fifth rule makes it clear that impairments that last fewer than six months may still be substantially limiting, because requiring that an impairment last for six months or more may impose a stricter standard, rather than the broader standard that the ADAAA requires.

Consistent with the ADAAA's plain language, the rules state that the beneficial effects of mitigating measures, other than ordinary eyeglasses or contact lenses, should not be considered in determining whether an impairment is substantially limiting. For example, a person with diabetes who requires the use of insulin or a person with a seizure disorder who requires medication may have a disability if it would substantially limit a

major life activity without a mitigating measure, even when the individual has not experienced limitations or has experienced minor limitations resulting from the impairment. A non-exhaustive list of such mitigating measures, such as medication, medical supplies and equipment, prosthetics, hearing aids, implantable hearing devices, oxygen therapy, assistive technologies, as well as behavioral or adaptive neurological modifications, ai included in the rules. Consistent with the plain language of the ADAAA, impairments that are "episodic or in remission" are disabilities if they would be substantially limiting when active.

Significantly, the proposed rule identifies certain impairments that "will obviously be substantially limiting," such as cancer, diabetes, HIV/AIDS, major depression and post-traumatic stress disorder. Kuczynski reasoned that this approach is supported by the legislative history because these conditions virtually always substantially limit "major bodily functions." Accordingly, the proposed rules may undermine the "individualized assessment" of conditions and instead create "per se" disabilities under the ADAAA.

The rules also address the major life activity of working. Finding that courts have struggled with defining when individuals might be substantially limited in the major life activity of working, the rule proposed a more "straightforward analysis," according to Kuczynski. Instead of demonstrating an inability to perform a "range or class of jobs," a person can show their condition renders them unable to perform a "type of work," such as commercial truck driver, assembly line work, clerical work or law enforcement. Critics assert that Congress never intended the EEOC to change the "range or class of jobs" with respect to working, and therefore, the EEOC has overstepped its direction from Congress.

The proposed rules are not yet available to the public, and it remains to be seen if they remain intact when they are eventually published for comment. However, it is apparent even now that the ADAAA will make it easier for individuals to assert claims under the ADA, and that employers will need to be cognizant that they engage in a more thorough assessment when considering actions that may impact an applicant or an existing employee.

Baker Donelson stands ready to assist you with these and all other labor and employment-related challenges. For assistance, please contact your Baker Donelson attorney or any of our nearly 70 Labor & Employment attorneys in the Firm's Labor & Employment Department, located in *Birmingham, Alabama*; *Atlanta, Georgia*; *Baton Rouge*, *Mandeville* and *New Orleans, Louisiana*; *Jackson, Mississippi*; and *Chattanooga*, *Johnson City*, *Knoxville*, *Memphis* and *Nashville, Tennessee*.

Baker Donelson gives you what boutique labor and employment firms can't: a set of attorneys who are not only dedicated to the practice of labor and employment issues, but who can reach into an integrated and experienced team of professionals to assist you in every other aspect of your legal business needs. We set ourselves apart by valuing your entire company. And when it comes to your company's most valuable asset - your employees - we're committed to counseling with and advocating for you every step of the way.

Baker Donelson hosts breakfast briefings, roundtables and seminars that may be of interest to you. For more information, please click here.