



**LEGISLATIVE AFFAIRS UPDATE**



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**PROPOSED ADA REGULATIONS ISSUED  
BY THE EEOC**

**LATEST DEVELOPMENTS**

**YOUR VOICE IN THE PROPOSED ADA  
REGULATIONS  
IS NEEDED NOW!**

*By Roz Schaffer*

Members may access the published EEOC Proposed Regulations at:  
<http://edocket.access.gpo.gov/2009/pdf/E9-22840.pdf>

On September 23<sup>rd</sup>, the Equal Employment Opportunity Commission (EEOC) published a Notice of Proposed Rulemaking (NPRM) in the Federal Register, following through on the requirements to do so as set forth in the ADA Amendments Act of 2008 (ADAAA).

Comments on the provisions of the Interim Final Rule are due no later than November 23, 2009. Submissions may be made electronically:

While retaining the basic definition of a disability as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment, the proposed regulations provide an interpretation of these terms.

<http://www.regulations.gov>.

Comments may also be made using regular, express or overnight mail:

This interpretation is explained in the Appendix to the NPRM "that the holdings in a series of U.S. Supreme Court and lower court decisions had failed to fulfill Congress's expectation that the definition of disability under the ADA would be interpreted consistently with the broad interpretation of the term "handicapped" under section 504 of the Rehabilitation Act of 1973 and with the broad view of the "regarded as" prong of the definition of "disability, as first enunciated by the Supreme Court in *Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273 (1987). Pursuant to the 2008 amendments, the definition of disability in this part shall be construed in favor of broad coverage to the maximum extent permitted by the terms of the ADA,

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Faxed comments will also be accepted as long as they limited to six or fewer pages and may be sent to 202-663-4114. This is not a toll-free number.

and the determination of whether an individual has a disability should not demand extensive analysis.”

Accordingly, the proposed rule provides for the following:

- Provides that the definition of “disability” shall be interpreted broadly:
  - Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine; or
  - 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.

The EEOC categorizes impairments into those that automatically meet the definition of a disability: deafness; blindness; intellectual disability; completely or partially missing limbs; mobility impairments that require the use of a wheelchair; autism; cancer; cerebral palsy; diabetes; epilepsy; HIV or AIDS; multiple sclerosis and muscular dystrophy; major depression; bi-polar disorder; post-traumatic stress disorder; obsessive-compulsive disorder; and schizophrenia.

Impairments that may sometimes meet the definition include: asthma; high blood pressure; learning disability; panic disorder; hyperthyroidism, carpal tunnel syndrome; or certain types of mental impairments such as panic or anxiety disorders. These require more analysis to determine whether or not they substantially limit an individual in performing of a major life activity. Again, as stated in the proposed regulations, the standards for determining whether such an impairment has been shown to be a disability are intended to be construed in favor of broad coverage, and should not demand an extensive analysis.

Impairments that are not regarded as disabilities include temporary non-chronic impairments of a short duration with little or no residual effects such as a common cold.

- Revises that portion of the regulations defining the term “substantially limits” as directed in the ADAAA by providing that a limitation need not “significantly” or “severely” restrict a major life activity in order to meet the standard, and by deleting reference to the terms “condition, manner, or duration” under which a major life activity is performed, in order to effectuate Congress’s clear instruction that “substantially limits” is not to be misconstrued to require the “level of limitation, and the intensity of focus” applied by the Supreme Court;
- Expands the definition of “major life activities” through two non-exhaustive lists:
  - The first list includes activities such as 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, some of which the EEOC previously identified in regulations and sub-regulatory guidance, and some of which Congress additionally included in the ADAAA;
  - The second non-exhaustive list includes major bodily functions, such as 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, many of which were included by Congress in the ADAAA, and some of which have been added by the EEOC as further illustrative examples, such as kidney disease, cancer, epilepsy, sickle cell disease, rheumatoid arthritis, lymphedema, HIV and AIDS;
- Provides that mitigating measures other than “ordinary eyeglasses or contact lenses” shall not be considered in assessing whether an individual has a “disability”;
- Provides that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active, such as multiple sclerosis, asthma,

cancer, hypertension, seizure disorders and psychiatric impairments such as depression, bi-polar disorder and PTSD;

- Provides that the definition of “regarded as” is changed so that it no longer requires a showing that the employer perceived the individual to be substantially limited in a major life activity, and instead provides that an applicant or employee who is subjected to an action prohibited by the ADA (e.g., failure to hire, denial of promotion, or termination) because of an actual or perceived impairment will meet the “regarded as” definition of disability, unless the impairment is both transitory and minor.

Transitory is defined as lasting or expected to last for six months or less such as a sprained ankle. However, all impairments that last or are expected to last for six months or less are not necessarily transitory. As examples of transitory and minor impairments that do not establish disability under the law, the EEOC cites an applicant who is not hired for a data entry position because they have a sprained wrist and can't type for three weeks or the case of an employee who is placed on involuntary leave for a few weeks due to a broken leg. However, an applicant who is believed to have carpal tunnel syndrome who is not hired for an assembly line position meets the definition of disabled because the condition is not transitory and minor.

The EEOC also cites an example of an employer who withdraws a conditional offer of employment because the post-offer pre-employment medical examination reveals that the applicant takes anti-seizure medication as having regarded the applicant as an individual with a disability. However, the applicant would still need to establish that he is otherwise qualified for the position, and the employer could still raise any applicable defenses, for example that the applicant posed a direct threat to health or safety based on the best available objective medical evidence and an individualized assessment of the risk, if any, posed by the particular applicant, or that excluding individuals who take anti-seizure medication from the position at issue is *required* by another federal law;

- The proposed rule provides that actions based on an impairment include actions based on symptoms of an impairment or

based on medication or any other mitigating measure used for such an impairment and the EEOC invites public comment on this point. Two examples are cited: 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; and an employer that refuses to hire someone with a facial tic regards the individual as having a disability, even if the employer does not know that the facial tic is caused by Tourette's Syndrome;

- Provides that individuals covered only under the “regarded as” prong are not entitled to reasonable accommodation; and,
- Provides that qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision shall not be used unless shown to be job related for the position in question and consistent with business necessity.

The EEOC also states that nothing in these regulations should be interpreted to provide the basis for a claim that an individual without a disability was subject to discrimination because of his lack of disability, including a claim that an individual with a disability was granted an accommodation that was denied to an individual without a disability.

The EEOC plans to issue a new or revised small business handbook as part of revisions made to all of the ADA publications, which include enforcement guidance and technical assistance documents, such as “The ADA: A Primer for Small Business,” <http://www.eeoc.gov/ada/adahandbook.html>.

The proposed rule does not include reporting requirements and imposes no new recordkeeping requirements. Employers may, however, need to update policies, handbooks, procedures and training to comply with the regulations when finalized.

After consideration of the comments submitted during the 60 day comment period, the EEOC will issue final regulations that will include an effective date on which they will be implemented.