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BULLETIN

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DISABILITY FOR ALL OR EVERYONE IS DISABLED

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In late March, the Equal Employment Opportunity Commission ("EEOC") published regulations implementing the 2008 amendments to the Americans with Disabilities Act. These regulations will become effective May 24, 2011. The net effect of these regulations is that probably every employee at some point in time during their working career will be considered to be "disabled" within the meaning of the Act. The amendments and the regulations sweep aside a number of court cases that had been decided during the period from 1991 to 2006. These cases by and large provided a common sense approach to disability in the workplace. A bit of history is in order.

After passage of the original Americans with Disabilities Act in 1991, the EEOC sought to engraft rather expansive regulations for the implementation of the Act. Over a period of years, courts construed the Act much more narrowly than did the EEOC. Given the changes and make-up of Congress as a result of the 2006 elections, legislation to overturn several of these court decisions was introduced and ultimately became the basis for the ADA Amendments Act of 2008 ("ADAAA" or" Amendments Act"). The EEOC, being like most governmental agencies, has reacted with a fury. The regulations not only expand employee rights through a remarkable expansion of the definition of disability and other standards but also subordinate the disability standard as not to be interpreted so as to create a "demanding standard for disability." As the regulations say, 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." CFR Sec. 1630.1(c)(4). (Emphasis supplied).

Given the expansive nature of these regulations, one would seriously wonder if the scope of the Act is now shifted by regulation (not by law) to making sure that the workplace is cleansed from any potential "discriminatory environment" and not focused on individuals with disabilities. The regulations seem to be more of an aspirational nature than an objective standard. The difficulties that employers are going to have in compliance matters will be substantial if not monumental.

The last straw apparently for Congress and the EEOC were the Supreme Court cases of Sutton v. United Airlines 527 US 471 (1999) and Toyota Manufacturing, KY. Inc. v. Williams 534 US 184 (2002) and other lower court cases which essentially required a finding of employee disability before the Act came into play. These cases also set a standard that a determination of whether or not an impairment substantially limits a major life activity is to be determined considering the ameliorating effects of mitigating measures such as medicine. For example, if insulin can control diabetes or medication can control blood pressure, then the employee may not be considered to be disabled for coverage under the Act.

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Before launching into a discussion of specific regulations, it should be noted that the practical effect of the amendments and regulations is to create additional weapons in the arsenal of employees, unions and employment attorneys to allege discrimination against a company as a result of an adverse employment action taken against an employee. In addition to the myriad of discrimination charges now available, it will be very easy for an employee to contend that he/she was discriminated against by the employer by reason of their disability. Plaintiff attorneys typically allege that employees are discriminated against because of a disability so that the employer does not need to incur additional cost and expense in providing the employee with more expensive health insurance. These regulations also change the burden of proof. Pre-reg it was up to the employee to show that the employee had a disability but could still perform the major functions of the job as reasonably required by the employer per the job description. Post-reg it is up to the employer to prove that the employee has a disability and cannot substantially perform the job duties with reasonable accommodation. This total change in the burden of proof is going to make it more costly and probably less effective for employers to challenge disability claims even though the employer may have a meritorious defense. The employer will still have a defense that an impairment is "transitory and minor," with the effects of an impairment lasting or expected to last fewer than six months. However, for example prior to the regs a hysterectomy was considered to be transitory in nature and the courts determined it did not fall under the Act since the employee was expected to recover. Now, however, as will be seen in a moment, a hysterectomy affects the reproductive system which would now create a disability. Several times throughout the text of the regulation, the EEOC makes it clear that the term "disability" is to be broadly construed in favor of expansive coverage to the maximum extent allowable and that the determination of disability "need not be the subject of rigorous examination". The reader can draw their own conclusion about whether disability is really important in the regulatory scheme of things or whether or not it is simply now a subordinated term.

The evisceration of the old Act and the referenced court cases begins with expansive changes in definitions. Physical or mental impairment that substantially limits one or more major life activities now includes any physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more body systems. Examples are neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, urinary, immune circulatory, hematic, 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. That pretty much covers the waterfront.

The definition of major life activities has also been expanded: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, alerting, reading, concentrating, thinking, communicating, interacting with others, and working. Interacting with others is interesting, as is concentrating and thinking. The operation of a major bodily function not only includes functions or different systems, such as immune systems, special sense organs, and skin, normal cell growth, digestive, urinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hematic, lymphatic, musculoskeletal, and reproductive functions, but also includes the operation of an individual organ within a body system. Hence, the hysterectomy example above. Question as to whether or not removal of a gall bladder, the most frequent surgery in the United States, would render someone disabled since it's an individual organ within the digestive system and sometimes results in chronic stomach difficulties, depending upon the individual's fat intake. If you are reading this article, it might be worthwhile to take a moment and let the mind wander into all sorts of interesting scenarios or combinations. For example, would an employee suffer disability harassment at the hands of other employees if he were teased for having Viagra around? Certainly under these expansive definitions, erectile dysfunction is a condition of the reproductive function, hence some court is going to say that the employee is disabled.

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Continuing on down Lewis Carroll Lane, the regs go on to state that a major life activity is not determined by whether or not it is of "central import to daily life". The regs further state that "substantial limits" shall be construed broadly in favor of expansive coverage and is "not meant to be a demanding standard". "An impairment need not prevent or significantly or severely restrict the individual from performing a major life activity in order to be considered substantially limiting". The standard in the reg is about whether the limitation of an individual to perform a major activity "as compared to most people in the general population". One might assert that with these broad standards, most older people of the general population are probably disabled. Once again, the regulation states "the primary object of attention in cases brought under the ADA should be whether covered entities (almost all employers) have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity". The regs then degrade the issue of substantial limits to a major life activity, stating that a determination "should not demand extensive analysis". Specifically the regs say that substantial limits should not be construed as applied under the old Americans with Disability Act. The comparison of an individual's performance of a major life activity to performance of the same major life activity by most people in the general population usually will not require "scientific, medical or statistical analysis". One is left to wonder whether mere antidotal observations will suffice. Specifically the regs say that the determination is to be made without regard to the ameliorative effects of mitigating measures other than ordinary eyeglasses or contact lenses. Essentially this means that an individual can work 80 hours per week and be highly productive; however they are still disabled. Go figure! Also, any impairment that is episodic or in remission is a disability if when active it would affect a major life activity. It is also acceptable that only one major life activity need be affected in order to qualify. Consideration must be given to the "difficulty, effort or time required to perform a major life activity; pain experience when performing a major life activity; the length of time a major life activity can be performed and/or the way an impairment affects the operation of a major bodily function". Also, negative side effects of medications or burdens associated with particular treatment may be considered in determining whether the individual's impairment substantially limits a major life activity.

Two prongs "record of" or "regarded as" a disability also are substantially enhanced for the benefit of the employee. "The focus is on how a major life activity is substantially limited and not on what outcomes an individual can achieve". For example, a mildly dyslexic individual can be a Rhodes Scholar but may still be disabled because of "additional time or effort he or she must spend to read, write, or learn compared to most people in the general population". Again, whether or not an individual has a record of a disability is given broad construction and the regs caution "should not demand extensive analysis". Again, the comparison is to most people in the general population.

In terms of an individual being regarded as having an impairment, again the definition is broadened to an almost asinine standard "if the individual is subjected to a prohibited action because of actual perceived physical or mental impairment, whether or not that impairment substantially limits or is perceived to substantially limit a major life activity". The notion of "perceived" is interesting.

Under the regulation, defenses are pretty much restricted to those conditions that are "transitory and minor," therefore the employer must undergo an analysis of whether or not the condition is both transitory and minor, although the regulations do not give any assistance as to minor other than stating "as lasting or expected to last six months or less".

The Appendix to Part 1630 CFR Vol. 7617003 et seq. gives the reader a glimpse into the mindset of the bureaucratic structure. The regulations are so biased that the notes go on to assert that the use of the term "Americans" in the title is "not intended to imply that the ADA only applies to United States' citizens. Rather the ADA protects all qualified individuals with disabilities regardless of their citizenship status or nationality from discrimination by a covered entity". Arguably this covers persons in the United States illegally. It will be interesting to see the first case involving an illegal alien terrorist with a bad back.

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The notes also cite specific cases that should be overruled. In U.S. v. Happy Time Day Care, the note states the court struggled to analyze whether the impact of HIV infections substantially limit various major life activities to a five-year old child. Now that five-year old child is covered. Also in Gonzales v. National Board of Medical Examiners, 225 F 3rd 620 (6th, Circuit 2000), the court found that a high achieving academician who was diagnosed with a learning disability was not substantially limited since the individual had achieved a significant level of academic success. Now under these regulations, that individual will be disabled. Refusing to hire applicants with scarred skin will violate the Act, as the employee would be regarded as having a disability. Misdiagnosed employees could still qualify under the Act as being disabled as having a record of such a disability even though they do not actually have a disability.

Taken in totality, the amendments and the resulting regulations drafted by an anti-employer Department of Labor clearly show that employers must have a heightened awareness of the important part that disability plays in the employment decision making process. Hoards of plaintiffs' lawyers undoubtedly are "licking their chops" in anticipation of windfall actions, decisions and settlements. It will be incumbent upon those of us advising businesses to exercise care, discretion and good judgment in giving such advice. It is going to be more important than ever that clients be drilled about contacting counsel when any adverse employment action is considered against any employee who regularly hiccups at work. Considering the expansive nature of these new regulations, almost everyone will be disabled if for no other reason than the ravages of age. Documentation of violations of existing work rules and codes of conduct will be extraordinarily important. This gets back to the fundamentals of employer defense "records, records and more records". The employer will be deemed to be guilty until the employer proves itself innocent. This, coupled with the other hyper-expansive nature of the regulations, will make for difficult times ahead.

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