

The ADA Amendments Act of 2008 (ADAAA) and Disability- Related Inquiries/Medical Examinations

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Definition of “Disability”

[Sec. 1630.2(g)]

- First 2 definitions remains the same:
 - A physical or mental impairment that substantially limits a major life activity;
 - A record of such an impairment;
- Congress changed the meanings of key terms used in these two definitions
- Regarded as having a disability has been completely rewritten; new approach
- **Key to Understanding the ADAAA: Intent to Broaden the Definition of Disability and Make it Much Easier/Quicker to Find a Disability Without Having a Lengthy or Demanding Analysis**

Major Life Activities Now Include *Major Bodily Functions*

- New category of major life activities
- Will make it much easier for individuals with many different types of impairments to establish disability
- Examples: functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, reproductive
- hemic, lymphatic, musculoskeletal, special sense organs and skin, genitourinary, cardiovascular
- Also includes operation of an individual organ within a body system, such as the operation of a kidney, liver, or pancreas

Substantially Limits: Rules of Construction [Sec. 1630.2(j)(1)]

- Impairment need not *prevent* or *severely* or *significantly* limit a major life activity to be considered “substantially limiting”
- No minimum duration required to establish substantial limitation
- Construe broadly (i.e., if it’s a close call, it’s a disability)
- Should not generally require extensive analysis

Rules of Construction: Mitigating Measures

- The ameliorative effects of any mitigating measure used by an individual **MUST BE IGNORED** (with one exception) in determining if the person is substantially limited in performing a major life activity (including a major bodily function)
- Mitigating measure: eliminate or reduce the symptoms or impact of an impairment

Rules of Construction: Impairments that are *Episodic or In Remission*

- Will be disabilities if substantially limit a major life activity **WHEN ACTIVE**
- Episodic: impairments that may not affect a person 24/7 but which periodically flare up: epilepsy, hypertension, asthma, diabetes, major depressive disorder, bipolar disorder, schizophrenia
- In Remission: Cancers

Impairments That Easily Should Be Found To Be Substantially Limiting [Sec. 1630.2(j)(3)(iii)]

Deafness, blindness, mobility impairments requiring use of a wheelchair, intellectual disability (mental retardation), partially or completely missing limbs, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder, schizophrenia

Regarded As = Disability

- Individual covered ONLY under the “regarded as” definition is not eligible for reasonable accommodation
 - Must be covered under one of the other two definitions of disability to be eligible for a reasonable accommodation
 - This means that there is no point in considering this definition of disability where individual needs a reasonable accommodation

“Regarded as” (cont.)

- Regarded as coverage NO LONGER requires a showing that an employer believed the impairment substantially limited a major life activity
- Only two elements:
 - Employer took employment action
 - Because of an individual’s actual or perceived impairment

“Regarded as” (cont.)

- Employer can challenge a claim it regarded person as having a disability by showing that the impairment at issue is **BOTH** transitory and minor
- Regarded as coverage cannot be based on a transitory and minor impairment
- Transitory: Lasting 6 months or less
- Whether impairment is transitory and minor based on objective evidence

Implications of the ADAAA

- Critical to educate supervisors and managers who may receive and act on requests for reasonable accommodation that the definition of disability is much broader now and therefore more employees will inevitably be eligible for accommodations (or at least consideration about receiving accommodation)

Implications of the ADAAA (cont.)

- When accommodation is requested, employers may still ask for documentation to substantiate existence of non-obvious disability, but content of documentation will be different from, and often less extensive than, pre-ADAAA documentation
- In many instances, documentation may no longer be necessary at all (other than substantiating existence of the impairment)
- Primary focus should be on understanding **NEED** for accommodation

Disability-Related Inquiries and Medical Examinations

- Rules Different Depending on Phase of Employment
 - Pre-Offer
 - Post-Offer
 - Employment
- “Disability-Related”: Question likely to elicit information about a disability
 - Greater the number of possible answers, less likely to be considered “disability-related” and therefore subject to these rules

Phase 1: Pre-Offer

- General Rule: Employers prohibited from asking disability-related questions or requiring applicants to undergo a medical examination
- Limited Exceptions: Employers may ask about
 - need for reasonable accommodation related to the application process or job performance
 - disability as part of affirmative action
 - ability to perform major life activities but only if specifically about ability to perform a job function (e.g., standing to be a greeter; sitting at a reception area all day)

Phase 1: Pre-Offer Questions About Alcohol and Drug Use

- General question about alcohol consumption permissible (focusing just on use)
- Questions about frequency/amount of alcohol consumption not permissible
- Questions about current *lawful* use of drugs not permissible if likely to reveal a disability (remember, more disabilities with the ADAAA)
 - Ok to ask if applicants use aspirin but illegal to ask if applicants use Prozac

Phase 1: Pre-Offer Questions About Drug Use (cont.)

- Questions about *current illegal* use of drugs permissible, whether inquiring generally or trying to establish frequency/amount of use
- Questions about *past illegal use* of drugs permissible (focusing just on use)
- Questions about frequency/amount of *past illegal* use of drugs not permissible (addiction is a disability if person not engaging in current illegal use of drugs)

Phase 1: Pre-Offer

- Employers may require applicants to take a drug test if purpose is to detect use of illegal drugs

Phase 2: Post-Offer

- After bona fide job offer, but before person starts work, employer may require applicant to answer disability-related questions or to take a medical examination if all people hired for this job required to do so (no singling out someone with an obvious disability)
- However, can request additional information from a specific individual if medically related to previously obtained information
- Questions/medical examination do *not* have to be job-related

Phase 2: Post-Offer

- Bona fide job offer: With limited exceptions, all non-medical inquiries should have been completed
- Limited exceptions, e.g.,
 - Contacting current employer for a reference

Phase 2: Post-Offer

- Information can be shared with hiring officials if needed to make final hiring decision
- Revoking the job offer permissible if employer can show that the reason is job-related and consistent with business necessity
 - Inability to perform one or more essential functions, with or without reasonable accommodation, or poses direct threat that cannot be lessened with a reasonable accommodation

Phase 3: Employment

- Any disability-related inquiry or medical examination must be *job-related and consistent with business necessity*
- Generally, this means an employer must have a reasonable belief, based on objective evidence, that a specific employee **may** be having problems performing the job or posing a direct threat because of a medical condition

Confidentiality

- All medical information, no matter how obtained, becomes confidential and employer must safeguard it
- Irrelevant whether individual has an ADA disability; this provision protects medical information about non-disabled individuals as well
- Information kept separate
- Permissible disclosures are very limited