

## EEOC Issues Proposed ADAAA Regulations

The ADA Amendments Act (ADAAA), which took effect January 1, 2009, superseded nearly two decades of disability discrimination jurisprudence. This was no accident--Congress, unhappy with the restrictive standards promulgated by the Equal Employment Opportunity Commission (EEOC) and those applied by courts, significantly increased the number of persons protected by the Americans with Disabilities Act (ADA) by expanding, legislatively, the definition of "disability." On September 23, 2009, the EEOC published proposed new regulations on par with Congressional intent.

Although most of the proposed regulations were expected and/or mandated by the ADAAA, the changes are nonetheless significant. In particular, the proposed regulations confirm that an impairment may qualify as "substantially limiting" even where it does not "significantly or severely restrict" the performance of any major life activity. Additionally, an individual's impairment is to be considered regardless of whether such impairment is episodic or in remission. An individual's use of mitigating measures (e.g., medications, prosthetics, etc.) is irrelevant to the determination of whether that individual has a disability, although mitigating measures may be considered in the interactive process (to determine whether and how an individual's disability may be accommodated) and/or when performing a direct threat analysis. The EEOC also confirmed that discrimination based on an individual's use of mitigating measures violates the ADA.

The proposed regulations further clarify that reasonable accommodations are not available to individuals who are only "regarded as" individuals with disabilities. The hand that giveth, however, also taketh away--the definition of "regarded as" has been revised to no longer require a showing that the employer perceived the individual to be substantially limited in any major life activity. Instead, discrimination based on *any* actual or perceived impairment, unless such impairment is *both* transitory and minor, will meet the "regarded as" definition of disability.

Also included are two expanded, nonexhaustive lists of major life activities and bodily functions, some of which the EEOC previously identified in regulations and sub-regulatory guidance, and some of which Congress included in the ADAAA. Written comments on the EEOC's proposed rulemaking must be submitted on or before November 23, 2009.

The ADAAA and EEOC's proposed regulations have altered significantly the landscape of disability discrimination law. Because it is critical that employers are positioned to address emerging issues under the ADAAA and the EEOC's proposed regulations, employers should again review their policies and procedures regarding ADA issues such as the interactive process and reasonable accommodations, and provide necessary training/retraining to their management employees.

*If you have any questions regarding this E-Flash, the ADA, the ADAAA, or the EEOC's proposed regulations, or to discuss employee training programs available, please contact Post & Schell, P.C. Labor and Employment Attorney Darren Creasy. Darren can be reached at 215-587-6632 or [dcreasy@postschell.com](mailto:dcreasy@postschell.com).*

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