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Special Report for HR Professionals

October 2, 2009
Number 513

The Management Advantage, Inc., PO Box 3708, Walnut Creek, CA 94598
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NEW EEOC REGULATIONS ON ADA PROPOSED

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It has been a year since the *ADA Amendments Act of 2008* was signed by President Bush. It became effective on January 1, 2009.

The *ADA Amendments Act of 2008* was created by Congress because Congress disagreed with interpretations of the *Americans With Disabilities Act of 1990* (ADA) that had been made by the U.S. Supreme Court since inception of the law. Specifically, Congress thought the Court rulings were interpreting the definition of "disability" in too narrow a fashion. Congress wanted the definition to be more broad.

So Congress directed the Equal Employment Opportunity Commission (EEOC) to rewrite its guidelines and make them consistent with the new broader definition of disability. That is why, on September 23, 2009, the EEOC published in the Federal Register its Notice of Proposed Rulemaking for the new guidelines.

Under the new guidelines, a non-exhaustive list of impairments that will consistently meet the definition of disability will include: deafness, blindness, intellectual disability, partially or completely missing limbs, mobility impairments requiring the use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV or AIDS, multiple sclerosis, muscular dystrophy, major depression, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder and schizophrenia. Other impairments, such as back pain, leg pain, asthma, and learning disabilities may be disabilities under the law for some individuals but not for others. Impairments that are usually not disabilities include the common cold, season or common influenza, a sprained joint, minor or non-chronic gastrointestinal disorders, or a broken bone that is expected to heal completely.

To be eligible under the regulation proposal for employment disability job accommodation, the disability must impair one or more of life's major activities. Those major life activities will now include major bodily functions, that most people in the general population can perform with little or no difficulty. They also include sitting, reaching, interacting with others,

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and the proper functioning of body systems including hemic, lymphatic, musculoskeletal, special sense organs and skin, genitourinary, and cardiovascular.

Employers are now responsible for making job accommodations for more disability conditions. EEOC regulations are being updated to reflect that need.

A major change in the disability accommodation requirement is in the work areas that people are being judged to be qualified to perform with or without accommodation. Up to now, guidelines said that “substantially limits the major life activity of working” applied to a “class” or “broad range” of jobs. From now on, impairment will be judged based on “type of work” being performed. And, there will no longer be a need to provide job accommodation to individuals the employer “regards as” disabled. Only people with actual disability or a record of disability will be eligible for job accommodation. Employers should be aware that workers will no longer be required to show that the employer believed an impairment was substantially limiting.

A “type of work” may include jobs such as commercial truck driving (i.e., driving motor vehicles), assembly line jobs, food service jobs, clerical jobs, or law enforcement jobs. A “type of work” may also be determined by reference to job-related requirements, such as: Jobs requiring repetitive bending, reaching or manual tasks; jobs requiring frequent or heavy lifting; and jobs requiring prolonged sitting or standing. The EEOC says, “...the concept of ‘type of work’ provides a more straightforward approach to determining whether someone is substantially limited in working.”

Anyone who is illegally using drugs currently would be excluded from the definition of “disabled individual.” However, if the employee has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully, or is currently participating in a rehabilitation program, that employee would be considered “disabled” under the law and EEOC’s new guidelines.

HR professionals should be aware that the new proposed regulation will not change definitions for terms previously created in the ADA. Those include “qualified,” “direct threat,” “reasonable accommodation,” and “undue hardship.” Those terms will mean the same things after these new regulations are implemented as they have meant all along. As pointed out earlier, the definition of “disability” is changing...becoming more encompassing.

The proposed regulation will be open for public comment for 60 days following the September 23rd posting. After that period of time, the EEOC will compile and consider all of the comments that were submitted. It will make revisions to the proposal as it believes are required based on the comments received. Once finalized, the regulation will be submitted to the Office of Management and Budget for approval and then it will be published as a final regulation in the Federal Register.

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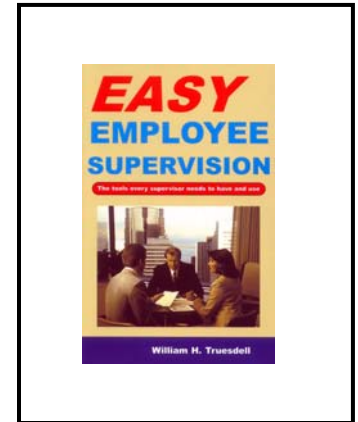
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If you would like a copy of the PDF file containing the Federal Register posting of this proposed regulation, go to <http://edocket.access.gpo.gov/2009/pdf/E9-22840.pdf>

There is additional information available in the form of a Q&A document compiled by the EEOC to help explain the new regulation and how things will be changing from the way the ADA was originally interpreted. There are 28 questions on the list and they are:

1. Does the ADAAA apply to discriminatory acts that occurred prior to January 1, 2009?
2. What is the purpose of the ADAAA?
3. Do all of the changes in the ADAAA apply to provisions of the *Rehabilitation Act* prohibiting discrimination by federal agencies, federal contractors, and recipients of federal financial assistance?
4. How does the ADAAA define "disability?"
5. What are "major life activities?"
6. When does an impairment "substantially limit" a major life activity?
7. What are mitigating measures?
8. May the effects of mitigating measures be considered when determining whether someone has a disability?
9. Does the rule concerning mitigating measures apply to people whose vision is corrected with eyeglasses or contact lenses?
10. Can the negative effects of a mitigating measure be taken into account in determining if an individual meets the definition of "disability?"
11. Can the positive or negative effects of mitigating measures be considered when assessing whether someone is entitled to reasonable accommodation or poses a direct threat?
12. Can impairments that are episodic or in remission be considered disabilities?

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13. Are there impairments that will consistently meet the definition of disability?
14. What does the NPRM say about how to determine if someone is substantially limited in working?
15. What impairments would generally not be considered substantially limiting (i.e., would not meet the first or second definitions of disability)?
16. Does the ADA still exclude from coverage a person who is illegally using drugs?
17. Did the ADAAA affect any of the ADA's other exclusions from the definition of "disability?"
18. Is pregnancy a disability under the ADAAA?
19. When does an individual have a "record of" a disability?
20. What does it mean for an employer to "regard" an individual as having a disability?
21. Would an employer regard an individual as having a disability if it took a prohibited employment action based on mitigating measures used for, of the symptoms of, an impairment?
22. Will an employer that asks if an employee needs a reasonable accommodation be regarding the employee as having a disability?

And six more... Find them all at

http://www.eeoc.gov/policy/docs/qanda_adaaa_nprm.html

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