

## Comprehensive Summary of the Final Regulations to the ADA Amendments Act

On March 25, 2011, the **U.S. Equal Employment Opportunity Commission (EEOC)** published final regulations implementing the **ADA Amendments Act of 2008 (ADAAA)**, a statute that now greatly expands the number of employees and applicants who will be considered “disabled.” The final regulations fundamentally change the manner in which an employer must treat and manage employees with medical conditions in the workplace, since it now will be much easier for individuals to establish that they are disabled. This Comprehensive Summary provides an overview of some of the key provisions in the final ADAAA regulations to help employers better understand the key changes in the law and adopt strategies to minimize liability.

### Background

As originally enacted, the **Americans with Disabilities Act (ADA)** defines an individual with a disability as a person who has a physical or mental impairment that “substantially limits” one or more “major life activities.” Individuals may also be covered under the ADA if they have a “record of” a disability or are “regarded as” disabled. Since the ADA took effect, the Supreme Court and lower federal courts have construed the definition of disability in a relatively narrow fashion. On September 25, 2008, President Bush signed the ADAAA into law. Although the ADAAA retains the same definition of “disability” under the original Act, it makes sweeping changes to the manner in which these terms are to be construed.

In short, the ADAAA and its final regulations now shift the focus of virtually every situation that implicates the ADA. Before the amendments, the interpretation of the ADA largely focused on whether an individual was substantially limited in a major life activity and, therefore, disabled under the ADA. Under the ADAAA’s broader construction, the focus is not directed toward the actual definition of disability, but rather on discrimination and reasonable accommodation. Given the ADA’s new statutory framework and new regulations that stretch the statute even further, employers should be prepared now more than ever before to respond to accommodation requests, make accommodations where necessary, and take precautions to avoid discriminatory decisions involving employees and applicants with medical conditions.

A copy of the final regulations can be found [here](#). The **EEOC** also has issued a [guidance sheet](#) and a [fact sheet](#) to aid employers in understanding the final regulations.

The final regulations address key issues, which are covered in this executive summary.

- Will certain impairments always be considered “disabilities”?
- What constitutes a “major life activity”?
- What does it mean to be “substantially limited” in a major life activity?
- To what extent are temporary or episodic impairments considered disabilities?
- How do “mitigating measures” affect the analysis of whether an individual is disabled?
- What does it mean for an employee to be “regarded as” disabled?

### Broad Construction of the Definition of “Disability”

Taking its lead from the ADAAA, the final regulations provide that the definition of “disability” should be “broadly” construed “to the maximum extent permitted by the terms of the ADA.” (The message from Congress and the EEOC to employers could not be any clearer: *Stop focusing on whether an individual is disabled and focus*

*instead on reasonable accommodation.*) Although the final regulations track the definition of “disability,” a term which remained intact, the regulations clarify that there is a shift in focus to whether employers have complied with their obligations and whether discrimination occurred, as opposed to whether an individual meets the definition of a “disability.”

## ***Certain impairments “virtually always” covered***

Further illustrating the point, in spite of the ADAAA’s (and the final regulations’) rejection of the notion of a “per se” disability, the final regulations take the extraordinary step of listing certain impairments that “will, as a factual matter, virtually always be found to impose a substantial limitation on a major life activity.” The EEOC suggests that these assessments should be “particularly simple and straightforward” (tellingly, the title of the subsection is “Predictable Assessments”). These impairments include:

- Deafness
- Blindness
- Intellectual disability (formerly known as mental retardation)
- 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
- Schizophrenia

This list includes many conditions that often were not substantially limiting impairments under the pre-ADAAA. Nevertheless, the list tends to undermine the EEOC’s long-held position that an “individualized assessment” should be conducted to determine whether an impairment is indeed a disability.

Notably, the final regulations removed a section from the proposed regulations that listed certain impairments that “may be disabling for some individuals but not for others,” such as asthma, back/leg impairment, carpal tunnel syndrome, high blood pressure, psychiatric impairment (less severe than major depression) and learning disability. In light of the expansive sweep of the final regulations, however, plaintiffs with impairments like these, as well as others, likely will not face a difficult task in convincing a court that they are disabled.

## **Less Demanding Standard for “Substantially Limits”?**

To be disabled, one must have an impairment that “substantially limits” a major life activity. Under the pre-ADAAA, employers often questioned the extent to which an impairment must “substantially limit” before an individual is considered disabled. Unfortunately for employers, the EEOC declined to quantify the term “substantially limits” in the final ADAAA regulations, explaining that “a new definition would...lead to greater focus and intensity of attention on the threshold issue of coverage than intended by Congress.” As such, the final regulations offer employers little concrete guidance in identifying the threshold at which an impairment qualifies as “substantially limiting,” aside from the presumption that it must be a lower threshold than previously adopted by the U.S. Supreme Court in its decisions leading up to passage of the ADAAA.

Instead, the regulations provide “nine rules of construction” to be applied in determining whether an impairment “substantially limits” a major life activity. Most of the rules come directly from the language of the ADAAA, but several have been added by the EEOC:

1. “The term ‘substantially limits’ shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. ‘Substantially limits’ is not meant to be a demanding standard.”
2. The determination of whether an impairment is “substantially limiting” should be made by comparing the ability of an individual to the general population. The impairment does not need to “prevent, or significantly or severely restrict” the performance of a major life activity in order to be substantially limiting.
3. In all ADA cases, the focus should be on whether the employer has complied with its statutory obligations, since the “threshold issue” of substantially limits should not require extensive analysis.
4. “The determination requires an ‘individualized assessment,’ but the assessment should be done by requiring “a degree of functional limitation that is lower than the standard for ‘substantially limits’ applied prior to the ADAAA.”
5. Comparing an individual’s performance of a major life activity to the general population should not generally require scientific, medical or statistical analysis.
6. The determination should be made without regard to the “ameliorative effects of mitigating measures” other than ordinary contact lenses and eyeglasses.
7. “An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”
8. An impairment need not limit more than one major life activity.
9. The effects of an impairment lasting or expecting to last fewer than six months can be “substantially limiting.”

### The Effect of Condition, Manner and Duration

Commenting further on the “substantially limits” prong, the final regulations explain that, to determine whether an individual is “substantially limited” in a major life activity, it may be useful to consider the condition under or the manner in which an individual performs a major life activity; the duration of time it takes the individual to the activity as compared to most people in the general population; and the difficulty, effort, pain or amount of time required to perform the activity.

For example, under the new regulations, it does not matter whether an individual with a learning disability can read and write like the majority of people in the general population. The regulations focus instead on how difficult it was for the individual to reach the level of literacy, (*i.e.*, how long it took and the conditions which the individual had to overcome). As a result, an individual may be substantially limited in a major life activity even if he or she can perform the activity at the same level as the general population, if it took more time, effort or work to become proficient compared to most people in the general population.

### The Interpretation of “Major Life Activities” is Expanded Further

To be disabled under the law, one must have a physical or mental impairment that “substantially limits” one or more “major life activities”. When determining whether an individual is substantially limited in a major life activity, according to the final regulations and EEOC’s interpretive guidance provide, the process should “not demand extensive analysis” and “usually will not require scientific, medical or statistical analysis.”

Notably, the final regulations expand an already “non-exhaustive” list of what may be deemed major life activities to include eating, sleeping, standing, lifting, bending, reading, concentrating, thinking and communicating. The final regulations also include additional examples of major life activities, such as sitting, reaching and interacting with others. When determining other examples of major life activities, the final regulations expressly reject the **pre-ADAAA** interpretation that the activity must be of “central importance

to daily life,” a rule which expressly rejects the Supreme Court’s ruling in *Toyota Motor Manufacturing v. Williams*. In effect, an activity no longer is required to be of “central importance.”

In a significant departure from the past, the ADAAA and final regulations expand the definition of “major life activities” to include the “operation of major bodily functions,” such as the immune system and normal cell growth, and neurological, bowel, bladder, circulatory and reproductive functions. The final regulations list several additional functions, such as cardiovascular, lymphatic and musculoskeletal, and specify that the operation of a major bodily function includes the operation of an individual organ within the body (such as the liver or heart). The appendix to the final regulations provides several examples of impairments that affect major bodily functions, e.g., cancer affects normal cell growth; diabetes affects functions of the pancreas and endocrine system; and rheumatoid arthritis affects musculoskeletal functions.

## Work as a “major life activity”

The regulations also breathe new life into the “major life activity” of working. Under the pre- ADAAA, a plaintiff’s claim that he or she was substantially limited in the major life activity of work almost always was dismissed by the court, largely because the employee was unable to show that the impairment substantially limited the employee’s ability to perform a “broad range” of jobs. The final regulations maintain this requirement but lower the employee’s burden, claiming that this previous standard was “overly strict.” Under the new regulations, if an individual’s job requires heavy lifting but the employee cannot lift heavy items and cannot perform the job or other jobs that require heavy lifting, then the employee is substantially limited in performing the class of jobs that require heavy lifting. Is this shift in the rule all for naught? As the final regulations point out, an impairment that substantially limits working will in most situations also substantially limit another major life activity.

## Other Significant Regulatory Changes

### Nearly All “Mitigating Measures” Are No Longer Considered

Under prior Supreme Court and federal appellate court precedent, employers were allowed to consider “mitigating measures” in determining whether an individual’s impairment substantially limits a major life activity under the ADA. For example, if an individual used a hearing aid or cochlear implant due to a hearing impairment, it typically was not considered a disability because the individual was not substantially limited in the major life activity of hearing. Because of the mitigating measure (*i.e.*, the hearing aid), they could hear perfectly well. Under the new regulations, however, employers are no longer allowed to consider such measures. As a result, employers will be required to analyze each individual’s impairment in its *unmitigated* state. Thus, the individual with a hearing aid would likely be substantially limited in hearing because we are obligated now to consider them without the use of a hearing aid.

The final regulations do provide one important exception: employers are permitted to consider the ameliorative effects of using ordinary eyeglasses or contact lenses. The term “ordinary eyeglasses or contact lenses” is defined as lenses that are intended to fully correct visual acuity or to eliminate refractive error. For example, an individual with severe myopia whose visual acuity is fully corrected is not substantially limited in seeing because the ameliorative effect of the lenses must be considered. Similarly, eyeglasses or contact lenses that are the wrong or outdated prescription may nevertheless be “ordinary” if there is evidence that a proper prescription would fully correct visual acuity or eliminate refractive error.

*What is also important to note is that* both the ameliorative and non-ameliorative effects of mitigating measures, as well as the individual’s use or non-use of such measures (e.g., taking or refusing to take medication, even though prescribed by a physician) can be considered when determining whether the employee is a “qualified” individual with a disability or whether the employee poses a direct threat to safety; however, it will not affect whether the individual meets the definition of being disabled.

## Temporary and Episodic Impairments May Constitute disabilities

Under the final regulations, short-term impairments and chronic impairments with short-term symptoms *may* be considered disabilities. In the past, many courts declined to extend ADA coverage to individuals whose impairments were substantially limiting for only a short or limited period of time. The new regulations reject this reasoning and prescribe that the duration of an impairment or symptom should not be dispositive in determining whether an individual is disabled.

### *Temporary and Short-Term Impairments*

Clearly, one of the most significant changes to the final regulations is the EEOC's decision to reject the long-held view that temporary impairments are not substantially limiting. The EEOC previously took the position that the duration or expected duration of an impairment should be considered in determining whether the impairment is disabling. That no longer appears to be the case. The final regulations ambiguously state that "an impairment lasting or expected to last fewer than six months *can* be substantially limiting." (Emphasis added). When this language was first proposed, many commenters expressed that the new language would create confusion as to *how long* an employer's impairment must last or be expected to last in order to impose ADA obligations on the employer. (Further complicating matters, the regulations state that an employee who is regarded as having a "transitory and minor" impairment that is expected to heal shortly is not considered disabled. Thus, it is conceivable that individual with a temporary impairment, such as a broken hand, may be disabled because the impairment substantially limits a major life activity, but may not be "regarded as" disabled for purposes of the Act.)

In response to these concerns, the EEOC opined that specifying a durational minimum for a disability would impose a more stringent standard than what Congress required. In fact, the final regulations go even further than the proposed regulations on this point. In the proposed rules, the EEOC identified a category of temporary non-chronic impairments that usually would not be considered a disability—for example, the common cold, seasonal influenza, a sprained joint, minor and non-chronic gastrointestinal disorders, a broken bone expected to heal completely, appendicitis and seasonal allergies. The EEOC deleted this category in the final regulations, explaining that the provision caused confusion and was too limiting.

The EEOC's position on the issue of temporary impairments is debatable. It is not clear that Congress intended to extend ADA coverage to short-lived impairments. Moreover, it is still likely that certain impairments of short duration which are expected to heal quickly, such as a common cold or a sprained ankle, will not be considered disabilities. However, the regulations make clear that employers must consider all impairments, even short term ones, on a case-by-case basis.

### *Episodic Impairments*

Under the ADAAA and the final regulations, an episodic impairment or impairment in remission is a disability if the impairment would substantially limit a major life activity when active. This means that an individual with a serious chronic condition such as epilepsy or cancer could be considered disabled under the Act even if that person rarely or never experiences symptoms that would impact their employment. The regulations provide specific examples of impairments that may be episodic in nature, including epilepsy, cancer, multiple sclerosis, hypertension, diabetes, asthma, major depressive disorder, bipolar disorder and schizophrenia.

The Act's express inclusion of episodic impairments presents some practical challenges for employers. Many episodic impairments are unpredictable in their effects on the individual. For example, an employee diagnosed with asthma may not experience an attack for several months. However, the fact that an asthma attack could limit a major life activity may require the employer to provide a reasonable accommodation. The same is true for progressive impairments, such as Parkinson's or Alzheimer's Disease. Many Parkinson's and Alzheimer's patients do not experience any symptoms in the early stages of the disease. Nevertheless, the fact that an individual could at some point in the future experience symptoms that would substantially limit a major life activity likely would render the person disabled even before the condition worsens and (practically speaking) substantially limits a major life activity.

## “Regarded As” Individuals Need Only Prove Perception of an “Impairment”

Under the original ADA as interpreted by the courts, an individual was “regarded as” disabled only when the employer perceived the individual to have an impairment that “substantially limited” him or her in a major life activity. Under the final regulations, the same individual seeking to bring a “regarded as” claim need not prove that the employer believed the individual to have an impairment that substantially limits a major life activity, but merely that the employer perceived the employee as having an “impairment,” and based an employment decision on that perception.

Under the ADAAA, an individual subjected to a prohibited action (e.g., failure to hire, denial of promotion, termination or harassment) because of an actual or perceived impairment will meet the “regarded as” definition of disability whether or not the impairment “substantially limits” a major life activity *unless* the impairment is both transitory and minor. The ADAAA further clarifies that a person who is “regarded as” disabled is not entitled to a reasonable accommodation unless the person also fits within one of the other two prongs of the definition of “disability.”

Notably, the final regulations specify that the “regarded as” prong should be the primary means of establishing coverage in ADA cases that do not involve reasonable accommodation, and that consideration of coverage under the first and second prongs will generally not be necessary except in situations where an individual needs a reasonable accommodation.

The final regulations further clarify that establishing that an individual is “regarded as having such an impairment” does not, by itself, establish liability. Thus, even where an individual proves that an employer made a decision on the basis of an actual or perceived impairment, the employee must still show that he was “qualified” for the position in question in order to establish an ADA violation (i.e., he can perform the essential job functions of the position with or without a reasonable accommodation). The employer may also utilize any otherwise available statutory defenses. For example, an employer may still defend a decision to refuse to hire an applicant on the grounds that the individual would pose a “direct threat” to health and safety due to the nature of his impairment.

The proposed regulations originally identified several concrete examples of “transitory and minor” impairments that would not be sufficient to meet the “regarded as” prong of the statute, such as a broken bone that is expected to heal normally or a sprained wrist that was expected to heal in three weeks. Unfortunately, these concrete examples were omitted from in the final regulations, leaving employers without clear guidance as to what constitutes a “transitory and minor” impairment. Instead the appendix to the final regulations stress only that the inquiry as to whether an impairment is “transitory and minor” is an objective standard and provides these examples:

For example, an employer who terminates an employee whom it believes has bipolar disorder cannot take advantage of this exception by asserting that it believed the employee’s impairment was transitory and minor, since bipolar disorder is not objectively transitory and minor. At the same time, an employer that terminated an employee with an objectively “transitory and minor” hand wound, mistakenly believing it to be symptomatic of HIV infection, will nevertheless have “regarded” the employee as an individual with a disability, since the covered entity took a prohibited employment action based on a perceived impairment (HIV infection) that is not “transitory and minor.”

Notably, the final regulations give no example of an impairment that EEOC *would* find to be “transitory and minor” under this standard.

### ***What about an employee’s symptoms?***

In a nod to employers, the final regulations *do not* include a provision contained in the proposed regulations providing that actions taken because of an impairment’s *symptoms* (or because of the use of mitigating measures) constitute actions taken because of an impairment under the “regarded as” prong. Employer commentary pointed out that this proposed standard could create liability for an employer when, for example, disciplining an employee for violating a workplace rule, even where the violation resulted from a symptom of an

underlying impairment of which the employer was unaware. This would have resulted in a clear departure from the EEOC's existing policy guidance and court decisions, which recognize, among other things, that an employer may discipline an employee for job related misconduct resulting from a disability if the rule or expectation at issue is job related and consistent with business necessity. EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, EEOC Notice No. 915.002 Mar. 25, 1997 <http://www.eeoc.gov/policy/docs/psych.html>. The preamble to the Final Regulations states that this prior Guidance remains in effect, at least for now.

## How Do Employers Respond to the New Regulations?

One might ask whether any employee is considered disabled under these new regulations. Clearly, the ADAAA and its final regulations change how employers respond to and manage employees with medical conditions and who request accommodations in the workplace. At a minimum, we suggest employers take the following approach to the "new" ADA.

- **The range of impairments that may substantially limit a major life activity has widened considerably.** Although not every impairment will constitute a disability, the analysis of whether an impairment "substantially limits" a major life activity will not be the focus of a court's inquiry. In light of this change in emphasis, employers should not focus on whether an employee is actually "disabled;" rather, they should focus on insuring that they are in compliance with the statute. Therefore, as an initial matter, employers should review and revise workplace reasonable accommodation policies to ensure employees are aware of the policies and to make clear the lines of communication as to accommodations in the workplace. Similarly, employers should maintain processes for identifying, evaluating, documenting and providing reasonable accommodations as required.
- **Employers should be proactive about engaging in an interactive process with employees who have an impairment.** In doing so, they should identify which among their personnel will be responsible for addressing issues of accommodation, and actually engage in an interactive process when an individual makes a request for assistance in the workplace. An employer's best tactic in defending an ADA lawsuit is to demonstrate that it made good faith efforts to accommodate an employee, rather than questioning or challenging the employee's medical condition. Thus, the interactive process above must become the norm.
- **Review all job descriptions to ensure they specifically and accurately describe the essential functions of the job.** Notably, under the new definition of a "regarded as" disability, any decision that relies in whole or in part on any perceived or actual physical impairment will be subject to scrutiny under the ADAAA. It is now more important than ever to insure that any physical or mental job requirements are truly necessary. Employers should insure that all anti-harassment policies explicitly prohibit harassment based on disability, or perceived or actual physical or mental impairments. Potential liability for disability-related harassment claims has increased because offensive statements that relate in any way to a mental or physical impairment may give rise to liability, regardless of whether the alleged victim actually suffered from an impairment or was otherwise disabled. For example, an employee who calls a co-worker "psycho" or "retarded" could potentially create an actionable hostile work environment under the ADA even if the co-worker has no mental health history and has an above-average IQ.
- **Properly and contemporaneously document employment decisions** involving an employee who is an individual with a disability or has a record of a disability.
- **Analyze pre- and post-employment testing and screening** (including language contained in employment applications) to ensure they are job-related and consistent with business necessity.
- **Train supervisors and managers as to the broad coverage of the ADAAA and their responsibilities**

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**under the new Act.** At a minimum, the focus of training should include: 1) how they identify requests for workplace modifications; and 2) who they partner with in Human Resources as to the “interactive process” regarding modifications.

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