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ALERT

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BROADENING THE REACH OF THE ADA

Effective May 24, 2011, The Equal Employment Opportunity Commission ("EEOC") has issued its final Rules and Regulations ("Regulations") implementing the Americans with Disabilities Amendments Act of 2008 ("ADAA"). Employers need to understand how the ADAA, as interpreted by the Regulations, changes their rights and obligations under the Americans with Disabilities Act ("ADA").

New Constructions and Added Obligations of Employers

Prior to the ADAA, numerous court decisions had noted that the determination of whether an employee had a disability was a fact-intensive, individualized inquiry. Two persons could have the same medical condition; one might have been "disabled" for purposes of the ADA and the other not, depending on the specifics of their individual circumstances. Prior to the ADAA, whether an employee could claim to be "disabled" turned on whether or not the physical or mental condition at issue "substantially limited" a major life activity *for that employee*.

The ADAA and the Regulations change this legal standard. The Regulations assert that whether an individual is "substantially limited in a major life activity "should not demand extensive analysis." The Regulations state that a limitation need not "significantly" or "severely" restrict a major life activity in order to satisfy the "substantially limits" requirement. In addition, the Regulations expand the definition of "major life activities" to modify or even overturn the impact of judicial decisions that had limited the ability of employees to come within the coverage of the ADA.

The Regulations also make clear that employees with temporary physical or mental conditions may now be "disabled." The Regulations state that "[t]he effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section."

The Regulations list various conditions that "in virtually all cases" meet the definition of disability. The list includes autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia. Commentators have noted how dramatically this new approach differs from earlier interpretations of the ADA that eschewed categorical, "per se" rules to determine whether an employee was disabled in favor of an individualized assessment as to whether a particular individual had a disability.

The Regulations reaffirm the pre-ADAA rule that even employees without a disability may nonetheless be protected under the ADAA if they are "regarded as" being disabled by their employers. The "regarded as" analysis now permits an employee to claim that s/he is disabled even if the "regarded as" impairment is not a disability. The Regulations explain that an applicant or an employee who is subjected to a prohibited action (e.g., failure to hire, denial of a promotion, or termination) because of an actual or perceived impairment will meet the "regarded as" definition of disability unless the impairment is both "transitory and minor." In a victory of sorts for employers, the Regulations do not impose a duty to reasonably accommodate an

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employee who only comes within the coverage because s/he is "regarded as" disabled by the employer and does not, in fact, have a disability.

Strategic Implications for Employers: The Reasonable Accommodation Defense

More often than ever before, employers' best tactics in defending ADA lawsuits will be to demonstrate good faith efforts to accommodate employees, rather than challenging the employee's ability to bring an ADA claim based on the employee's medical condition. Put bluntly, the Regulations make it more difficult for employers to prevail in court (or before administrative agencies like the EEOC) on the issue of whether employees are disabled. Thus, employers are likely to focus their litigation defense efforts on proving that they offered reasonable accommodations. The "reasonable accommodation" analysis has both procedural and substantive aspects to it.

Procedurally, employers will want to argue that they proactively followed the "interactive process" when the employee requested an accommodation. Employers should consider steps that demonstrate their good faith participation in this process, and develop a favorable record in connection with individual "reasonable accommodation" requests. Developing an appropriate record places added importance on choosing good managers to accept responsibility for these issues and providing them with the appropriate resources and training.

Policy Implications for Employers

Employers should review their disability discrimination policies and practices, paying attention to the whether they are still appropriate given their obligations under the ADAA and the Regulations. To the extent that employer policies rely on terms that now have new meanings, such as "disability," "substantially limits," "major life activities," and "regarded as," these policies may need to be reviewed.

New York employers should also note that while the ADAA and the Regulations bring the ADA closer to the requirements of New York State and New York City disability laws, distinctions remain. It is worth recalling that the New York City Civil Rights Restoration Act of 2005 worked substantial revisions to New York City disability law. The ADAA and the Regulations provide New York employers with another opportunity to revisit this complicated and rapidly changing area of employment law.

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Employers must understand their exposure under the ADA, including their expanded exposure under the ADAA and the Regulations. There are steps employers can take to reduce that exposure. MH&H can assist you in understanding and addressing these issues, including reviewing your discrimination and reasonable accommodation policies.

This Alert was written by A. Jonathan Trafimow.

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