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SUBJECT: Changes to the Rehabilitation Act

As of January 1, the definition of an individual with a "disability" as defined under both the Rehabilitation Act and the Americans with Disabilities Act (ADA) has been significantly expanded. This is due to the passage of the ADA Amendments Act (ADAAA) that sets new standards for determining disability status. Managers, supervisors, and the Reasonable Accommodation Committees (RACs) need to be aware of the extent of the changes in the ADAAA so they can assess requests for reasonable accommodation in accordance with these new standards.

Although the Equal Employment Opportunity Commission (EEOC) will issue regulations implementing these new provisions, the regulations are not yet published. Nonetheless, employers must still comply with the law. Consequently, we are providing you with the attached synopsis of the changes in the law so that you are fully informed about the new standards and for use as a guide in making reasonable accommodation decisions.

As a part of the reasonable accommodation process, RACs first evaluate through an interactive process whether applicants or employees are persons with covered disabilities. When a RAC finds that an individual does not have a covered disability, the RAC advises the manager of its recommendation. The manager is required to decide whether he/she agrees with the committee's findings. The manager then advises the person of his/her decision.

With the ADAAA, more individuals will have covered disabilities and the RAC will need to engage them in the interactive process that includes determination of essential functions, identifying abilities and limitations, and determining reasonableness of accommodations.

Although there is nothing in the statute or its legislative history which indicates that the ADAAA is retroactive, an individual who is currently before the RAC and ultimately files an Equal Employment Opportunity (EEO) complaint will almost certainly have his or her EEO claim heard after the ADAAA goes into effect. Therefore, cases now pending before the RACs should be evaluated under the new standards, as should any request for reasonable accommodation that arises from now on. If a RAC is unsure whether a person has a covered disability, the RAC should contact the appropriate field law office to obtain guidance in determining the person's status.

Please share this information with your RAC and others who are involved in the Reasonable Accommodation process.

Mangala P. Gandhi

Mangala P. Gandhi
Manager
Selection, Evaluation, and Recognition

Attachment

475 L'ENFANT PLAZA, SW
WASHINGTON DC 20260-4427
WWW.USPS.COM

SYNOPSIS OF CHANGES TO REHABILITATION ACT BY ADA AMENDMENTS ACT (ADAAA)

Broad Coverage Intended: A New Definition for a "Substantially Limiting" Impairment

The primary purpose of the amended law was to broaden the universe of individuals who qualify as disabled under the Act. The Act states, for example, that it aims to eliminate disability discrimination by "reinstating a broad scope of protection to be available under the ADA." To carry out this intention, the Act specifically overturned long-standing case law defining a substantial limitation as one that "prevents or severely restricts" performance of a major life activity. That standard, says Congress, was "too high." Instead, the term "substantially limits" must be interpreted consistently with the broad remedial purpose of the Act and the focus should now be on whether employers have complied with their obligations under the law.

Notably, the Act does not define exactly what "substantially limits" means. Rather, that responsibility falls upon the EEOC who is charged with rewriting the ADA regulations to define that term "to provide a broad scope of protection." Consequently, in view of the Act's clear mandate, we can expect that the inquiry whether a disability exists will be far simpler and less involved than in the past. Indeed, Congress states that the inquiry "should not demand extensive analysis."

The Act also institutes a number of other significant changes which provide guidance in how employers are to assess a disability. These changes are discussed below.

Major Life Activities

The Act now defines major life activities. They are:

> Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

The Act specifies that this list is not meant to be exhaustive, thereby opening the door to those who wish to make the case that other activities should be included. Moreover, Congress also included "the operation of a major bodily function" as a major life activity. The Act lists functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. Again, this list is nonexhaustive.

Mitigating Measures

In another notable break from the past, the Act forbids consideration of mitigating measures in assessing whether a disability exists. This means employers cannot consider the mitigating effects of medication, hearing aids, cochlear implants, prosthetics, equipment, assistive technology, or "learned behavioral or adoptive neurological modifications." The sole survivor of this sweeping edict is "ordinary eyeglasses" or contact lenses. Employers are still allowed to consider their effect on determining whether an impairment substantially limits a major life activity.

On a practical level, this modification will extend protection to employees suffering from diabetes, hypertension, cancer, amblyopia, and other conditions that can be managed through treatment and medication.

Impairments that are Episodic or in Remission

The Act states that "[a]n impairment which is episodic or in remission is a disability if it would substantially limit a major life activity when active."

Like the mitigating measures provision, this too is targeted to bring a potentially large group of individuals within the protection of the law. Under ADAAA, employees with seizure disorders, allergies, bipolar disorder, depression, and other chronic conditions prone to flare-ups can seek accommodation in the workplace.

Regarded as Disabled

In a radical departure from prior law, the Act amends what it means to regard an individual as being disabled. Previously, employees had to show that their employer regarded their impairment as one that substantially limited a major life activity. This often meant that individuals had to show that the employer regarded them as incapable of performing a broad range of jobs, not just the job they held or desired. Under ADAAA, however, an individual can meet the requirements of a "regarded as" claim simply by showing that he or she was subjected to an adverse action prohibited by the Rehabilitation Act because of an actual or perceived impairment. It does not matter whether that impairment actually limits a major life activity or is perceived to limit a major life activity. Consequently, it will be far easier for individuals to assert claims under this prong of the Rehabilitation Act.

However, there are two important qualifiers to this otherwise broad revision. First, regarded as claims cannot be based upon "transitory and minor" impairments. The Act defines a transitory impairment as one with an actual or expected duration of 6 months or less. At the very least, this ensures that employees will not bring claims of discrimination based upon a broken leg or case of flu. Second, the Act states that no reasonable accommodation is required for an individual who is regarded as disabled, but who does not actually have a disability. While this may help offset the number of individuals who would otherwise bring such claims, it is unlikely to make a significant dent in those numbers given how broadly the term "disability" is now defined.

Other Notable Statutory Changes

Findings and Purposes: In keeping with the congressional intent that the ADA provide broad protection, the Act strikes key language from the "Findings and purpose" section of the ADA at 42 U.S.C. §12101(a). It amends paragraph (1) which states that "some 43,000,000 Americans have one or more physical or mental disabilities…" In its stead, is a general statement condemning disability discrimination and this statement does not reference any numbers of individuals. A more telling change is the wholesale deletion of paragraph (7) which states that "individuals with disabilities are a discrete and insular minority…" Given that this is no longer consistent with Congress' view that a disability be broadly construed, it is not surprising that it was eliminated.

Discrimination: 42 U.S.C. §12112(a) sets forth the general rule that "no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual…" That provision will now read: "no covered entity shall discriminate against a qualified individual *on the basis of disability*." A similar change was made to the term "discriminate" in subpart (b) of this same section. This brings the ADA and Rehabilitation Act in line with other civil rights laws to cover discrimination on the basis of the individual's protected status. The goal is to focus attention on the merits of the alleged discriminatory conduct, rather than on the individual's impairment.

Qualification Standards: The Act adds a new section to the "Defenses" provision of 42 U.S.C. §12113, entitled "Qualification Standards and Tests Related to Uncorrected Vision." It provides, in pertinent part, that employers can not use qualification standards, employment tests, or other selection criteria "based on an individual's uncorrected vision unless the standards, test, or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and consistent with business necessity." Essentially, this amendment serves simply to codify established case law.