

# Akerman Practice Update

LABOR & EMPLOYMENT

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## EEOC Issues Proposed Regulations to Implement the ADA Amendments Act of 2008

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On September 23, 2009, one year after President Bush signed the ADA Amendments Act of 2008 (“ADAAA”) into law, the U.S. Equal Employment Opportunity Commission (“EEOC”) published proposed regulations aimed at implementing the ADAAA. See Regulations to Implement the Equal Employment Provisions of the Americans With Disabilities Act, As Amended, 74 Fed. Reg. 48,431 (September 23, 2009) (to be codified at 29 C.F.R. pt. 1630). The intended effects of the ADAAA and the proposed regulations are to “make it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the ADA” and to shift the focus in ADA cases from a determination of whether a “disability” exists to whether an individual was subjected to discriminatory conduct.

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Most significantly, the proposed regulations:

- Provide that the definition of “disability” shall be “interpreted broadly.”
- Revise the definition of “substantially limits,” “by providing that a limitation need not ‘significantly’ or ‘severely’ restrict a major life activity in order to meet the standard.”
- Expand the definition of “major life activities” via two “non-exhaustive” lists:
  - One which includes “activities such as caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing,

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- sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working;” and
- One which includes “major bodily functions, such as functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions.”
- Provide “that mitigating measures other than ‘ordinary eyeglasses or contact lenses’ shall not be considered in assessing whether an individual has a disability.”
- Provide that “an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”
- Revise the definition of “regarded as” such that “it no longer requires a showing that the employer perceived the individual to be substantially limited in a major life activity, and instead provides that an applicant or employee who is subjected to an action prohibited by the ADA . . . because of an actual or perceived impairment will meet the ‘regarded as’ definition of disability, unless the impairment is both transitory and minor.”
- Provide that “individuals covered under the ‘regarded as’ prong are not entitled to reasonable accommodation.”
- Provide that “actions based on an impairment include actions based on symptoms of an impairment.”
- Provide that “qualification standards, employment tests, or other selection criteria based on an individual’s uncorrected vision shall not be used unless shown to be job-related.”

The EEOC has published a useful question and answer guide which explains and addresses the impact of the ADAAA and the proposed regulations. That guide can be found on the EEOC’s website, [www.eeoc.gov](http://www.eeoc.gov).

Generally speaking, the impact of the ADAAA and the proposed regulations on employers will be that a greater number of their employees will have conditions which meet the definition of “disability” under the ADA. However, whether those employees will require and/or be entitled to a reasonable accommodation, remains to be seen. In considering the economic impact of

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expanding the umbrella of protection provided by the ADA, the EEOC noted that many of the individuals who have conditions which fall within the expanded definition of “disability” will likely have limitations which do not require extensive accommodation. Further, not all individuals who request accommodations will be entitled to the accommodation requested because “they do not need the accommodation requested, there is no reasonable accommodation that can be provided absent undue hardship, or they would not be ‘qualified’ or would pose a ‘direct threat to safety, even with an accommodation.’” Whether an employee meets the definition of “disability” under the ADA and whether he or she is entitled to the accommodation requested will continue to require a case by case analysis.

Written comments to the proposed regulations must be submitted to the EEOC on or before November 23, 2009. Thereafter, the EEOC will evaluate the comments received, make revisions in response to those comments, and submit the proposed final regulations for approval by the Office of Management and Budget. A further Practice Update will be issued at that time.

Melissa Zinkil is a Labor & Employment attorney in the firm’s West Palm Beach office. She focuses her practice on litigating labor and employment and complex commercial disputes in both state and federal court.

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