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LABOR AND EMPLOYMENT LAW UPDATE: EEOC PROPOSES REGULATIONS IMPLEMENTING THE ADA AMENDMENTS ACT OF 2008

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On September 23, the Equal Employment Opportunity Commission (“EEOC”) proposed new regulations implementing the Americans with Disabilities Act Amendments Act of 2008 (“the Act”). Both the Act, which overturned two prior Supreme Court decisions, and the proposed regulations, if finalized, shift the focus from whether an individual has a disability to whether an employer has complied with its ADA obligations. **Employers should note how the Act and these proposed regulations, depending on their final form, may impact their policies, practices and procedures and take appropriate reactive measures.**

NOTEWORTHY REVISIONS

Broadly, the proposed regulations, mirroring the Act, clarify and reiterate individuals covered by the ADA, revise the ADA’s definition of

remission that substantially limit a major life activity when active.

Specifically, the following key elements in the EEOC's proposed regulations present potential concerns for employers:

- A requirement that “disability” be broadly interpreted
- The definition of “substantially limits” will require a lower threshold by providing that a limitation need not “significantly” or “severely” restrict a major life activity
- An impairment that is episodic or in remission will be considered a disability if it would substantially limit a major life activity when active (e.g., epilepsy, multiple sclerosis, asthma or cancer)
- The ameliorative effects of mitigating measures such as medication, prosthetics and mobility devices (but not ordinary eye glasses or contact lenses) shall not be considered in assessing whether an individual has a “disability.” In other words, an individual who, because of medication, has experienced no limitations related to an impairment nevertheless could have a disability if the impairment would be substantially limiting without the medication.
- The definition of “regarded as” will no longer require a showing that the employer perceived the individual to be substantially limited in a major life activity. Instead, 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.
- Individuals covered only under the “regarded as” prong of the “disability” definition will not be entitled to reasonable accommodations
- Qualifications standards, employment tests or other selection criteria based on an individual's uncorrected vision shall not be used unless shown to be job-related for the specific position and consistent with business necessity
- The regulations further list impairments that will consistently meet the definition of disability (e.g., deafness, blindness, missing limbs, autism, cancer, cerebral palsy or diabetes) and those that may be disabilities for some but not others (e.g., asthma, high blood pressure, learning disabilities or carpal tunnel syndrome)
- As in the Act, the regulations include two non-exhaustive lists of major life activities: the first listing daily activities (e.g., seeing, hearing, eating, sleeping or walking), and the second listing major bodily functions (e.g., functions of the immune system and normal cell growth)

IMPACTS ON EMPLOYERS?

The EEOC anticipates employers will incur some, but – by its analysis – not “significant” costs to implement changes that may be brought about by its proposed regulations. **Certainly, employers should audit their policies, practices and procedures to maximize compliance with the Act.** To the extent an employer has not begun auditing its policies, practices and procedures following the Act’s January 1 effective date, it should begin that process as soon as practicable and monitor the finalization process of these proposed regulations.

Primarily, any implementation-related costs may concern revisions of affected policies, practices and procedures, and retraining of personnel. For example, covered employers who changed their internal policies and procedures in response to previous Supreme Court ADA-related decisions may need to update those policies, practices and procedures to reflect the now-broader definition of “disability” and train their personnel to insure appropriate compliance with the proposed regulations, once finalized. Additionally, to the extent that the proposed regulations may increase the number of requests for accommodations, there may be additional costs associated with processing these requests and providing additional appropriate accommodations.

On the other hand, the proposed regulations do not impose any additional reporting or recordkeeping requirements on employers. Moreover, the EEOC expects to prepare a small business handbook and to revise all ADA publications to further assist employers.

STATUS OF PROPOSED REGULATIONS

The public may now submit comments to the EEOC concerning the proposed regulations. At the end of 60 days, **which began on September 23**, the EEOC will evaluate submitted comments and possibly revise the proposed regulations in response. The EEOC will then submit its proposed final regulations to the Office of Management and Budget pursuant to Executive Order 12866. The proposed final regulations will be coordinated with other federal agencies before being published in the Federal Register.

FOR MORE INFORMATION

If you have any questions about these proposed regulations or how they might impact you, please contact your current legal advisor or a member of the Polsinelli Shughart Labor and Employment Law practice group.

The Labor and Employment practice group will provide these e-Alerts as developments warrant to keep you informed.

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