lawyersusaonline.com
Lawyers USA
DOLAN MEDIA COMPANY
April 2011

EEOC Issues Final Regulations for ADA Amendments Act

By Correy Stephenson
Staff writer

After more than a year of waiting for employment lawyers, the Equal Employment Opportunity Commission has released its final regulations addressing the Americans with Disabilities Amendments Act.


William E. Hannum III

The Act took effect Jan. 1, 2009, and the EEOC issued proposed regulations in September 2009.

The Act instructed employers to broadly construe the definition of "disability" to the maximum extent under the law, and changed the focus in disability disputes from whether a disability existed to whether employers made reasonable accommodations and engaged in the interactive process.

The EEOC's final regulations – which take effect 60 days from their publication on March 25 in the Federal Register – reinforce that mandate, said employment lawyer William E. Hannum, a partner at Schwartz Hannum in Andover, Mass.

Employers should now "treat everything as a disability, and focus on accommodations and the interactive process," he advised.

Frank Alvarez, a partner in the White Plains, N.Y. office of employment firm Jackson Lewis, said management lawyers should brace themselves for a continued increase in disability litigation, and a new focus on whether an employer's accommodations were reasonable.

"Before the ADAAA, very few cases proceeded past a motion for summary judgment," Alvarez said. But with a broad construction of what constitutes a disability under the Act, plaintiffs have a lower burden of proof, he said, and the potential to recover high levels of damages, including attorney fees.

"The EEOC's own statistics show that in the last fiscal year there was a 17 percent increase in ADA charges," Alvarez said. "That's the tip of the iceberg."

Alan Thayer, a partner at the Innovative Law Group in Eugene, Ore., said the ADAAA regulations have two implications for lawyers.

"First, they need to warn their clients and help them develop policies, practices and solutions before they face the litigation stage," he said. "And lawyers who are employers with 15 or more employees – or whatever their state employment law threshold is – need to be concerned as well."

Final regs

The regulations provide guidance on several changes in the ADA Amendments Act:

- ***'Virtually always' a disability.***

In general, the final regulations create two categories of disabilities: impairments that will "virtually always" result in a finding of a disability, and those that may sometimes be a disability but not always, Alvarez said.

While the final regs emphasize that an individualized assessment is always required for each employee or applicant, the message to employers is clear.

For impairments on the list, "employers are going to have a steep hill to climb if they want to argue that someone with one of the conditions on the list is not disabled," Hannum said.

Conditions on the list include cancer, HIV infection, multiple sclerosis, autism, diabetes, post-traumatic stress disorder and bipolar disorder, among others.

- ***'Regarded-as' claims.***

The category of "regarded-as" disability claims was expanded under the Act, and the regs illustrate this by focusing not on what the employer believed about the nature of the individual's impairment, but on how the individual was treated.

An individual can make a "regarded-as" claim if an employer takes a prohibited action based on an individual's impairment or an impairment the employer believes the individual has, unless the impairment is transitory and minor.

While the regs define transitory as six months or less, Alvarez said, they do not define "minor." This creates "the potential

for even broader coverage under 'regarded-as' than many people expected," he said.

In a question-and-answer guide accompanying the final regs, the EEOC uses the example of an employee fired for bipolar disorder. An employer could not assert that it believed the impairment was transitory and minor, the agency explained, because bipolar disorder is not objectively transitory and minor.

• Mitigating measures, episodic impairments and major life activity.

Prior to the Act, employers could consider whether "mitigating measures" (such as hearing aids or medication) could be considered when evaluating whether an employee had a disability.

The regulations change that by banning such consideration, with one exception – eyeglasses or contact lenses, Thayer said.

Episodic impairments (such as asthma or cancer in remission) are considered disabilities under the regs if they would be substantially limiting when the impairment is active.

The regulations also clarify that "major bodily functions" are included in the term "major life activities." Specifically, functions of the immune system and brain, and neurological and endocrine functions are all covered.

Sharpen employment practices

When the final regulations take effect, employers should "be prepared to conduct an individualized assessment with all injured and ill employees," Alvarez said.

Managers and supervisors should be trained on the final regulations, with instruction on handling requests for accommodation and getting medical information from the employee's doctor, and employers should update job descriptions, reflecting the essential functions of each position, said Alvarez.

"It's really incumbent upon an employer to sharpen all of its employment practices from hiring to firing," Thayer said.

Most importantly, employers need to document their employment decisions.

"It doesn't need to be as formal as a progressive discipline policy, with verbal and written warnings and super-secret probations," he said. "It can be as simple as a spiral notebook, where you date the page and have the supervisor keep a log and write down the day's events."

Instead of making a general statement to an employee that she doesn't show up for work, an employer can point to the notebook and say she was absent this number of days, late so many days and left early on this number of days, Thayer explained.

Multiple attempts at accommodation may help protect employers, Hannum noted.

For example, if an employee gets injured, an employer might first offer a leave of absence, and then bring the employee back to work part-time on a light duty schedule, followed by a full-time schedule while still on light duty.

After that, an employer might consider "talking about changing the job description or the equipment the employee uses," Hannum said. "When litigating disability discrimination cases, I like to be able to say that the employer did more than one thing to accommodate the employee."

The ADA Amendments Act and regulations may also offer an incentive to smaller employers to consider staying small, Thayer said.

"The ADA kicks in when an employer has 15 employees," he said. "I would find it difficult to recommend to a client that they expand their work force beyond that number."

Questions or comments
can be directed to the writer at:
correy.stephenson@lawyersusaonline.com