

# The ADA Amendments Act of 2008 (ADAAA): EEOC's Final Regulations

Applying Common Sense and Making it Work

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## ADA Amendments Act of 2008

- Statute went into effect on January 1, 2009
- Statute is not retroactive
- All provisions of the Amendments Act apply to the Rehabilitation Act of 1973
  - The definition of disability in the ADA was taken from the Rehabilitation Act

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## EEOC Regulations

- Published in the Federal Register on March 25, 2011
- Effective Date: May 24, 2011
- Regulations closely track the statute
- In addition, published revisions to the interpretive Appendix that was issued with original regulations (1991)
- Only revised those portions of regulations and Appendix that were affected by the ADAAA

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## Definition of “Disability”

- First 2 definitions remains the same:
  - A physical or mental impairment that substantially limits a major life activity;
  - A record of such an impairment;
- Congress changed the meanings of key terms used in these two definitions
- 3<sup>rd</sup> Prong – “Regarded as having a disability” has been completely rewritten; new approach

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## How Definition of “Disability” Changes

- Provides illustrative list of major life activities that includes for the first time “major bodily functions”
- Specifically rejects high standards used by EEOC and Supreme Court to define a “substantial limitation”
- Positive effects of mitigating measures (other than ordinary eyeglasses or contact lenses) **cannot** be considered in determining “disability”

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## How Definition of “Disability” Changes (cont.)

- Impairment can be substantially limiting even if **episodic or in remission**
- “Regarded as” definition rewritten and expanded
- **Remember: Goal of all of these changes is to broaden definition and make it much easier/quicker to find disability without a demanding analysis**

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## Defining Impairment

- Statute made no changes to definition of a “physical or mental impairment”
- EEOC regulations make a small change to definition in original ADA regulations by adding the immune and circulatory systems as examples of “body systems” that may be affected by an impairment

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## Major Life Activities

- Statute and EEOC regulations provide two non-exhaustive lists of major life activities
- First list of major life activities should look familiar because most of these activities are ones previously recognized by EEOC and most courts
  - Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working

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## Major Bodily Functions

- A **new** category of major life activities
- **Purpose:** To make it easier to establish disability for certain impairments
- Individual can show substantial limitation (or record of) in just one major life activity from either category
- Regulations include all of the examples of major bodily functions found in the statute and include some **additional** examples

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## Major Bodily Functions (cont.)

- **Functions of the:**
  - Immune system
  - Special sense organs and skin
  - Normal cell growth
  - Digestive
  - Genitourinary
  - Bowel & bladder
  - Neurological
  - Brain
- Respiratory
- Circulatory
- Cardiovascular
- Endocrine
- Hemic
- Lymphatic
- Musculoskeletal
- Reproductive

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## Major Bodily Functions (cont.)

- Also includes operation of an individual organ within a body system
  - i.e. operation of a kidney, liver, or pancreas

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## Substantially Limits

- Finding of disability under the first prong requires a showing that a person is substantially limited in performing a major life activity as compared to **most people** in the general population
- Regulations establish “rules of construction” on how to analyze whether an individual’s impairment substantially limits a major life activity

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## Substantially Limits: Rules of Construction

- Impairment need not prevent or severely or significantly limit a major life activity to be considered “substantially limiting”
- Substantial limitation shall be construed broadly in favor of expansive coverage
  - i.e., if it’s a close call you should consider it to be a disability
- Determination of substantial limitation still requires an individualized assessment
- Regulations make it clear that not all impairments will be disabilities

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## Substantially Limits: Rules of Construction (cont.)

- Determination of disability should not require extensive analysis
- EEOC Advises:
  - Employer primary focus should be on: A person’s qualifications for a job or a request for reasonable accommodation
  - Court’s primary focus should be on: Whether any discrimination has occurred

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## Substantially Limits: Rules of Construction (cont.)

- No minimum duration requirement: impairment lasting fewer than six months may be substantially limiting
- Scientific, medical, or statistical evidence may be used to establish substantial limitation if appropriate, but often will be unnecessary
- Individual need only be substantially limited in one major life activity (either list) to have a disability

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## Substantial Limitation: Condition, Manner, or Duration

- Considerations in determining if a substantial limitation exists
- These include:
  - difficulty, effort or length of time required to perform major life activity
  - pain;
  - total amount of time major life activity may be performed;
  - the way an impairment affects the operation of a major bodily function

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## Impairments That Will Virtually Always Be Found To Be Substantially Limiting

- Regulations emphasize that an individualized assessment is still required
- Recognizes that for certain impairments, this individualized assessment will virtually always result in a finding of disability due to the inherent nature of these conditions AND the extensive changes Congress made to the definition of disability

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## Impairments That Easily Should Be Found To Be Substantially Limiting

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|--|--|
| <ul style="list-style-type: none"> <li>• Deafness</li> <li>• Blindness</li> <li>• Mobility impairments requiring use of a wheelchair</li> <li>• Intellectual disability (mental retardation)</li> <li>• Partially or completely missing limbs</li> <li>• Autism</li> <li>• Cancer</li> <li>• Cerebral palsy</li> </ul> | <ul style="list-style-type: none"> <li>• Diabetes</li> <li>• Epilepsy</li> <li>• HIV infection</li> <li>• Multiple sclerosis</li> <li>• Muscular dystrophy</li> <li>• Major depressive disorder</li> <li>• Bipolar disorder</li> <li>• Post-traumatic stress disorder</li> <li>• Obsessive-compulsive disorder</li> <li>• Schizophrenia</li> </ul> |
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## “Regarded As” Having a Disability

- This definition of disability completely new
- Covers anyone subjected to an action “prohibited by this Act” because of an actual or perceived physical or mental impairment
- Actions include: hiring, demotion, promotion, termination, discipline, annual evaluation, compensation

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## “Regarded as” (cont.)

- Regarded as coverage **NO LONGER** requires a showing that an employer believed the impairment substantially limited a major life activity
- Two elements to consider:
  - Employer took a negative employment action
  - The action was based on an individual’s actual or perceived impairment

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## “Regarded as” (cont.)

- Employer’s can challenge a claim that they regarded a person as having a disability by:
  - showing that the impairment at issue is BOTH transitory and minor
- **New Term: Transitory**
  - Definition: Condition lasting 6 months or less
- “Regarded as” coverage cannot be based on a transitory and minor impairment
  - Whether an impairment is transitory and minor must be based on objective evidence

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## “Regarded as” (cont.)

- **Example:**
  - If a supervisor or manager or HR official takes a personnel action and bases it on an individual’s medical condition then there is “regarded as” coverage (except if impairment is both transitory and minor)

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## “Regarded as” (cont.)

- Regarding a person as having a disability does not mean an employer violated the ADA
  - This is unchanged from the original ADA definition of disability
- If an employer can show its employment action was taken for lawful reasons, then there was no discrimination
- Even if the employer has a legitimate reason for its actions there may still be a valid claim that the employer regarded the person as having a disability

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## Other ADAAA Changes

- Employers using uncorrected vision standards as a qualification standard for certain jobs must show that they are job-related and consistent with business necessity
- In the general prohibition of discrimination, the phrase “**discriminate on the basis of a disability**” replaces “discriminate against a qualified individual with a disability because of the disability of such individual”

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## Other Changes (cont.)

- An individual covered **ONLY** under the “regarded as” definition is not eligible for a reasonable accommodation
  - Only required under the 1<sup>st</sup> prong of the definition of disability
- Individuals cannot file an ADA claim stating that they were denied something because they **LACKED** a disability
  - i.e. A non-disabled person cannot claim an ADA violation because he was denied a reasonable accommodation or was not hired

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## Documentation of Disability

- Employers may still ask for documentation to substantiate existence of a non-obvious disability, but the content of documentation will be different from, and often less extensive than, pre-ADAAA documentation
  - In many instances, documentation may no longer be necessary at all
- The primary focus should be on understanding the **NEED** for an accommodation
  - How does the limitation impact the ability to perform the job task(s)

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## Impact on Qualification Standards

- Employers should be prepared to defend qualification standards that exclude individuals based on impairments, since most individuals affected by such standards will meet the “regarded as” definition of disability
  - i.e., impairments at issue are unlikely to be both transitory and minor

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## Employment and the ADA Resources

- Equal Employment Opportunity Comm.
  - 800-669-4000
  - <http://www.eeoc.gov>
- Job Accommodation Network:
  - 800-526-7234
  - <http://askjan.org>
- ODEP (DOL Office Disability Policy)
  - 202-376-6200
  - [www.dol.gov/dol/odep/](http://www.dol.gov/dol/odep/)

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## Have Questions?



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