

HANDOUT

DESCRIPTION AND ANALYSIS OF EEOC'S FINAL REGULATION IMPLEMENTING THE ADA AMENDMENTS ACT OF 2008

**PRESENTED BY
ROBERT "BOBBY" SILVERSTEIN, J.D.
POWERS PYLES SUTTER & VERVILLE, PC
Bobby.Silverstein@PPSV.com**

April 2011

INTRODUCTION

- ✓ On July 26, 1990, the Americans with Disabilities Act (ADA) was signed into law.
- ✓ The ADA is a civil rights statute.
- ✓ The ADA provides a clear and comprehensive national mandate for the elimination of disability-based discrimination and provides clear, strong, consistent, enforceable standards addressing discrimination.
- ✓ The ADA was modeled on Section 504 of the Rehabilitation Act of 1973, which prohibits recipients of federal financial assistance from engaging in discrimination against qualified individuals with disabilities on the basis of disability.
- ✓ Consistent with Section 504, Congress intended that the focus of the ADA should be on whether a covered entity (e.g., employer, state or local government, public accommodation, college or university) engaged in discrimination on the basis of disability; not require an extensive analysis regarding whether the individual was protected by the Act (i.e., whether the individual has a disability).
- ✓ A series of Supreme Court decisions:
 - Restricted the broad scope of coverage under the ADA.
 - Interpreted the ADA strictly to create a demanding standard and extensive proof to qualify as a person with a disability protected by the law.
 - Created a perverse catch 22 situation where an individual was not disabled enough to enjoy protection against discrimination under the ADA **but** too disabled to enjoy the opportunity to work or enjoy the privileges available to nondisabled individuals.
 - Diminished the right to challenge disability-based discrimination.
- ✓ A broad-based coalition of stakeholders, including representatives of the business and disability communities, and policymakers from both sides of the aisle and both houses of Congress, agreed to work together to restore protections under the ADA.
- ✓ On September 25, 2008 the ADA Amendments Act of 2008 (ADAAA) was signed into law. [Public Law 110-325] The law went into effect on January 1, 2009.

- ✓ On September 23, 2009, the EEOC published in the Federal Register a Notice of Proposed Rulemaking Implementing the ADAAA. [74 FR 48431] In response, more than 600 comments were received and reviewed by EEOC.
- ✓ On March 25, 2011, the EEOC published in the Federal Register Final Regulations Implementing the ADAAA. [76 FR 16978] An Appendix to the Final Regulations includes EEOC's Interpretative Guidance. The final regulations become effective on May 24, 2011.

STRUCTURE OF THE PRESENTATION

- ✓ Purposes of the ADAAA
- ✓ Definition of Disability
 - In General
 - Prong 1 Actual Disability
 - Prong 2 Record of a Disability
 - Prong 3 Regarded as Having a Disability
- ✓ Application of Standards under the ADA, as Amended by the ADAAA, to Individuals with Learning Disabilities
- ✓ Modifications to the Structure of the ADA, as Amended by the ADAAA
- ✓ Other Provisions of the ADA, Including Discrimination and Defenses, Not Affected by the ADAAA
- ✓ Conforming Amendments to Other Civil Rights Laws
- ✓ Final Thoughts

PURPOSES OF THE ADAAA

The purposes of the ADAAA are to:

- ✓ Reinstates the broad scope of protection under the ADA by making it easier for an individual to establish he or she has a disability, thereby obtaining protection against

discrimination under the ADA. No extensive documentation required to show protected by the law.

- ✓ Move the focus of the law from the threshold issue of whether the individual has a disability to the primary issue of whether the individual has been subjected to discrimination on the basis of disability.
- ✓ Reaffirm that although the definition of disability is broad, only those individuals who are qualified and can prove discrimination are entitled to relief.

The ADAAA accomplishes these purposes by:

- ✓ Retaining the existing definition of the term “disability” but clarifying key words and phrases and including construction clauses to better reflect original congressional intent.
- ✓ Changing the structure of the ADA to focus on whether a covered entity has engaged in discrimination on the basis of disability rather than on whether the individual has a disability.
- ✓ Including conforming amendments regarding the definition of the term “disability” used for purposes of Title V of the Rehabilitation Act of 1973 (Section 503—affirmative action by government contractors and Section 504 nondiscrimination by recipients of federal aid).

DEFINITION OF DISABILITY, IN GENERAL

- ✓ The ADAAA retains without amendment the existing definition of the term “disability” but changes in several ways how key words and phrases in the definition are construed.
- ✓ The term “disability” means, with respect to an individual—
 - ❖ A physical or mental impairment that substantially limits one or more major life activities of such individual (Prong 1);
 - ❖ A record of such an impairment (Prong 2); or
 - ❖ Being regarded as having such an impairment (Prong 3).

DEFINITION OF DISABILITY--PRONG 1 (ACTUAL IMPAIRMENT)

In General:

- ✓ Whether an individual has a physical or mental impairment that substantially limits or more major life activities (actual impairment) shall be construed broadly to the maximum extent permitted by the ADA and should not demand extensive analysis.
- ✓ An individual with an actual impairment may be entitled, absent undue hardship, to a reasonable accommodation if needed and related to the disability.

Key Components:

- ✓ Physical or mental impairment
- ✓ Substantially limits
- ✓ Major life activities

Physical or Mental Impairment

- ✓ Prior to the enactment of the ADAAA, the ADA did not include a definition of the phrase “physical or mental impairment.”
- ✓ The ADAAA legislation does not add a definition of the phrase to the ADA statute.
- ✓ According to congressional intent, the current definitions of the term used by federal agencies should not change.
- ✓ The EEOC regulation includes in the definition of the term “physical or mental impairment) the following non-exhaustive list:
 - Any physiological disorder or condition,
 - Cosmetic disfigurement, or
 - Anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, endocrine, or

- Any mental or psychological disorder, such as an intellectual disability (formerly mental retardation), organic brain syndrome, emotional or mental illness, and specific learning disabilities.
- ✓ The Interpretative Guidance accompanying the EEOC regulation explains that the term “physical or mental impairment” does not include:
 - Physical characteristics such as eye color hair color, left-handedness or height, weight, or muscle tone that are within the “normal” range and are not the result of a physiological disorder.
 - Common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder.
 - Environmental, cultural, or economic disadvantages such as poverty, lack of education, or a prison record are not impairments.
- ✓ The Interpretative Guidance also explains that pregnancy is not an impairment. However, a pregnancy-related impairment that substantially limits a major life activity is a disability under prong 1 of the definition. Alternatively, a pregnancy-related impairment may constitute a disability under prong 2 (record of) or may be covered under prong 3 (regarded as) if it is the basis for a prohibited employment action and is not “transitory and minor.”

Major Life Activities

- ✓ The term “major” shall not be interpreted strictly to create a demanding standard for disability.
- ✓ Whether an activity is a “major life activity” is not determined by reference to whether it is of “central importance to daily life.”
 - Example: Someone with an impairment resulting in a 20-ound lifting restriction that lasts or is expected to last for several months is substantially limited in the major life activity of lifting, and need not also show that he or she is unable to perform activities of daily living that require lifting in order to be considered substantially limited in lifting.
- ✓ The ADA and the EEOC regulations provide an illustrative (non-exhaustive) list of major life activities, including:
 - Bending

- Breathing
- Caring for oneself
- Communicating
- Concentrating
- Eating
- Hearing
- Interacting with others
- Learning
- Lifting
- Performing manual tasks
- Reaching
- Reading
- Seeing
- Sitting
- Sleeping
- Speaking
- Standing
- Thinking
- Walking
- Working

- ✓ Consistent with the overall purpose of the ADAAA to provide for more expansive coverage and make it easier for individuals to show that they are eligible for ADA's protections, the ADAAA defines "major life activities" to include the operation of "**major bodily functions**" in order to better address chronic impairments that can be substantially limiting.

- ✓ A non-exhaustive list of "major bodily functions" includes:

- Functions of the immune system
- Special sense organs and skin
- Normal cell growth
- Digestive functions
- Genitourinary functions
- Bowel functions
- Bladder functions
- Neurological functions
- Brain functions
- Respiratory functions
- Circulatory functions

- Cardiovascular functions
 - Endocrine functions
 - Hemic functions
 - Lymphatic functions
 - Musculoskeletal functions
 - Reproductive functions
- ✓ The operation of a major bodily function may include the operation of an individual organ within a body function. This would include kidney, liver, pancreas, or other organs.

Substantially Limits

- ✓ Nine (9) “**rules of construction**” are delineated in the regulations to help interpret whether a physical or mental impairment “substantially limits” a major life activity.
- ✓ These “rules of construction” are designed 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.

Substantially Limits—#1 Rule of Construction

- ✓ The term “substantially limits” must be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA.
- ✓ The term “substantially limits” is not meant to be a demanding standard.

Substantially Limits—#2 Rule of Construction

- ✓ Impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population.
[See Rule of Construction #5 regarding evidence needed]
- ✓ An impairment need not “prevent or significantly or severely restrict” the individual from performing a major life activity. Nonetheless, not every impairment will constitute a disability.

Substantially Limits—#3 Rule of Construction

- ✓ Determining whether an impairment “substantially limits” a major life activity should not be the primary object of attention.

- ✓ The threshold issue of whether an individual’s impairment substantially limits a major life activity should not demand extensive analysis.
- ✓ The focus of attention should be on whether the covered entity complied with their legal obligation not to discriminate.

Substantially Limits—#4 Rule of Construction

- ✓ An individualized assessment is required.
- ✓ However, a lower standard should be used than previously applied.
- ✓ Reject the notion that “substantially limits” should be interpreted strictly to create a demanding standard.

Substantially Limits—#5 Rule of Construction

- ✓ The comparison to “most people in the general population (Rule #2) usually will not require scientific, medical, or statistical analysis.
- ✓ However, nothing prohibits the presentation of such analysis where appropriate.

Substantially Limits—#6 Rule of Construction

- ✓ The determination of whether impairment substantially limits a major life activity must be made without regard to the ameliorative effects of mitigating measures.
- ✓ However, the ameliorative effects of ordinary eyeglasses or contact lenses must be considered in making such a determination.
- ✓ The determination of whether or not an individual’s impairment substantially limits a major life activity is unaffected by whether the individual chooses to forgo mitigating measures. However, the use or non-use of mitigating measures and any consequences thereof may be relevant in determining whether the individual is qualified or poses a direct threat to safety.
- ✓ Examples (non-exhaustive list) of mitigating measures include:

- Medication, medical supplies, equipment or appliances, prosthetics, low-vision devices (other than ordinary eyeglasses and contact lenses) hearing aids, cochlear implants, mobility devices, and oxygen therapy equipment and supplies;
- Use of assistive technology;
- Reasonable accommodations or auxiliary aids and services;
- Learned behavior or adaptive neurological modifications; and
- Psychotherapy, behavioral therapy, or physical therapy.

Substantially Limits—#7 Rule of Construction

- ✓ An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
- ✓ Examples (non-exhaustive list) of impairments that may be episodic include epilepsy, diabetes, hypertension, asthma, post traumatic stress disorder, major depressive disorder, bipolar disorder and schizophrenia.

Substantially Limits—#8 Rule of Construction

An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.

- ✓ Example: An individual with diabetes is substantially limited in endocrine function and thus is an individual with a disability under the first prong. The individual need not also show that he/she is limited in eating to qualify for coverage under the first prong.
- ✓ Example: An individual with HIV infection is substantially limited in the function of the immune system and therefore is an individual with a disability. The individual need not also show that he/she is limited in reproduction.

Substantially Limits—#9 Rule of Construction

- ✓ The six month “transitory” part of the “transitory and minor” exception to “regarded as” coverage (prong 3) does not apply under prong 1.
- ✓ The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting.
- ✓ Impairments that last only for short period to time are typically not covered, although they may be covered if sufficiently severe.

Substantially Limits—Predictable Assessments

- ✓ Disability is determined based on an individualized assessment. There is no “per se” disability.
- ✓ HOWEVER, the individualized assessment of certain impairments will VIRTUALLY ALWAYS result in a determination of disability. The INHERENT NATURE of these types of medical conditions will in VIRTUALLY ALL CASES give rise to a substantial limitation of a major life activity.
- ✓ Applying the nine rules of construction, it should be easily concluded that the following types of impairments will, at a minimum, substantially limit the major activities listed:
 - Deafness substantially limits hearing
 - Blindness substantially limits seeing
 - An intellectual disability (formerly termed mental retardation) substantially limits brain function
 - Partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function
 - Autism substantially limits brain function
 - Cancer substantially limits normal cell growth
 - Cerebral Palsy substantially limits brain function
 - Diabetes substantially limits endocrine function
 - Epilepsy substantially limits neurological function
 - HIV infection substantially limits immune function
 - Multiple sclerosis substantially limits neurological function
 - Muscular dystrophy substantially limits neurological function
 - Major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia substantially limit brain function.

Condition, Manner, or Duration

- ✓ Facts, such as the condition, manner, or duration of an individual’s performance of a major life activity may be useful in determining whether an impairment results in a substantial limitation.
- ✓ Example: The condition or manner under which a person with an amputated hand performs manual tasks will likely be more cumbersome than the way that someone with two hands would perform the same tasks.

- ✓ Example: An individual whose impairment causes pain or fatigue that most people would not experience when performing that major life activity may be substantially limited.
- ✓ Example: The condition or manner under which someone with coronary artery disease performs the major life activity of walking would be substantially limiting if the individual experiences shortness of breath and fatigue when walking distances that most people could walk without experiencing such efforts.
- ✓ Example: A person whose back or leg impairment precludes him or her from standing for more than two hours without significant pain would be substantially limited in standing, since most people can stand for more than two hours without significant pain.

PRONG 2: RECORD OF SUCH AN IMPAIRMENT

- ✓ An individual has a record of a disability if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.
- ✓ Determination should be construed broadly to the maximum extent permitted by the ADA and should not demand extensive analysis.
- ✓ An individual with a record of impairment may be entitled, absent undue hardship, to a **reasonable accommodation** if needed and related to the past disability.
- ✓ Example: An individual whose cancer may be in remission may need leave or a schedule change to permit him or her to attend follow-up or “monitoring” appointments with a health care provider.

PRONG 3 REGARDED AS HAVING SUCH AN IMPAIRMENT

In General

- ✓ The “regarded as” prong of the definition of disability is designed to allow individuals to establish coverage by showing that they were treated adversely because of an impairment without having to establish the covered entity’s beliefs concerning the severity of the impairment.
- ✓ An individual is “regarded as having such an impairment” if the individual is subjected to a prohibited action (e.g., refusal to hire, demotion, termination) because of an actual or perceived physical or mental impairment.

- ✓ It is not necessary for an individual to demonstrate that a covered entity perceived the individual as substantially limited in the ability to perform one or more major life activities in order to be covered under prong 3. In short, to qualify for coverage under prong 3, the individual is not subject to any functional test—whether an individual’s impairment substantially limits a major life activity is not relevant to coverage under prong 3.
- ✓ Establishing that an individual is “regarded as having such an impairment” does not by itself establish liability. Liability is established only when an individual proves that a covered entity discriminated on the basis of disability and there are no legitimate defenses (e.g., the individual poses a direct to coworkers).
- ✓ A covered entity is not required to provide a reasonable accommodation to an individual who meets the definition of disability solely under the “regarded as” prong.
- ✓ Example: If an employer refused to hire an applicant because of a skin graft scars, the employer has regarded the applicant as an individual with a disability.
- ✓ Example: If an employer terminates an employee because he has cancer, the employer has regarded the employee as an individual with a disability.
- ✓ Example: An employer who terminates an employee with angina from a manufacturing job that requires the employee to work around machinery, believing that the employee will pose a safety risk to himself or others if he were suddenly lose consciousness, has regarded the individual as disabled. Whether the employer has a defense (for example, that he employee poses a direct threat to himself or others) is a separate inquiry.

Defense to Claims Based on Transitory and Minor Impairments Under the “Regarded as” Prong.

- ✓ It may be a defense to a charge of discrimination by an individual claiming coverage under the “regarded as” prong of the definition of disability that the impairment is or perceived as “transitory” (having an actual or expected duration of six months or less) and “minor.”
- ✓ This defense should be construed narrowly.

- ✓ The relevant inquiry is whether the actual or perceived impairment on which the employer's action was based is objectively transitory and minor, not whether the employer claims it subjectively believed the impairment was transitory and minor.
- ✓ Example: An employer who terminates an employee whom it believes has bipolar disorder cannot take advantage of this exception by asserting that it believed the employee's impairment was transitory and minor.
- ✓ Example: An employer that terminated an employee with an objectively "transitory and minor" hand wound, mistakenly believing it to be symptomatic of HIV infection, will nevertheless have "regarded" the employee as an individual with a disability since the covered entity took a prohibited employment action based on a perceived impairment (HIV infection) that is not transitory and minor.

Summary Analysis Regarding the Use of the Three Prongs for Coverage Determinations

- ✓ Where an individual is not challenging a covered entity's failure to make reasonable accommodations and does not require a reasonable accommodation, it is generally unnecessary to proceed under prong 1 (actual disability) or prong 2 (record of), which require a showing that a physical or mental impairment substantially limits one or more major life activities. or has a record of such an impairment.
- ✓ In these cases, the evaluation of coverage can be made solely under prong 3 (regarded as), which does not require a showing of an impairment that substantially limits one or more major life activities or has a record of such an impairment.
- ✓ An individual may choose, however, to proceed under prong 1 or prong 2, regardless of whether the individual is challenging a covered entity's failure to make reasonable accommodations or requires a reasonable accommodation.

APPLICATION OF STANDARDS UNDER ADA, AS AMENDED BY ADAAM, TO INDIVIDUALS WITH LEARNING DISABILITIES

- ✓ In determining whether an individual has a disability under prong 1 (actual disability) or prong 2 (record of), the focus is on how a major life activity is substantially limited, and not on what outcomes an individual can achieve.
- ✓ Example: Someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time and effort he or she must spend to read, write, or

learn compared to most people in the general population. As Congress emphasized in passing the ADAAA, “when considering the condition, manner, or duration in which an individual with a specific learning disability performs a major life activity, it is critical to reject the assumption that an individual who has performed well academically cannot be substantially limited in activities such as learning, reading, writing, thinking or speaking.”

- ✓ Examples of mitigating measures include “learned behavioral or adaptive neurological modifications.”
- ✓ Comparisons to “most people in the general population” does not mean that disability cannot be shown where an impairment, such as a learning disability, is clinically diagnosed based in part on a disparity between an individual’s aptitude and that individual’s actual versus expected achievement, taking into account the person’s chronological age, measured intelligence, and age-appropriate education.
- ✓ The comparison to “most people in the general population” means a comparison to other people in the general population, not a comparison to those similarly situated. Individuals diagnosed with dyslexia or other learning disabilities will typically be substantially limited in performing activities such as learning, reading, and thinking when compared to most people in the general population, particularly when the ameliorative effects of mitigating measures, including therapies, learned behavioral or adaptive neurological medications, assistive devices (e.g., audio recordings, screen reading devices, voice activated software) studying longer, or receiving more time to take a test, are disregarded as required under the ADAAA.

MODIFICATIONS TO THE STRUCTURE OF THE ADA, AS AMENDED BY ADAAA

- ✓ Under the ADA, prior to the ADAAA, it was unlawful for a covered entity to discriminate against a qualified individual with a disability on the basis of disability. Under the ADA, as amended by the ADAAA, it is unlawful for a covered entity to discriminate on the basis of disability against a qualified individual. The changes to the regulation reflect changes made by the ADAAA, which are intended to make the primary focus of an ADA inquiry whether discrimination occurred, not whether an individual meets the definition of “disability.” However, an individual must still establish that he or she is qualified for the job in question.
- ✓ A covered entity is required, absent undue hardship, to provide a reasonable accommodation to an otherwise qualified individual who meets the definition of disability under prong 1 (actual disability) or prong 2 (record of disability) but not

required to provide a reasonable accommodation to an individual who meets the definition of disability solely under prong 3 (regarded as).

- ✓ Nothing in the ADA, as amended, provides a basis for a claim that an individual without a disability was subject to discrimination because of his or her lack of disability, including a claim that an individual with a disability was granted an accommodation denied to an individual without a disability (reverse discrimination).

OTHER PROVISIONS OF THE ADA, INCLUDING DISCRIMINATION AND DEFENSES, NOT AFFECTED BY THE ADAAA

- ✓ No changes to the nondiscrimination provisions of the ADA, such as:
 - Utilization of qualification standards, employment tests, criteria, or methods of administration that have a discriminatory effect.
 - Not making reasonable accommodations [other than limiting obligation to individuals with disabilities under prong 1 (actual disability) and prong 2 (record of)].
 - Use of unlawful pre-employment inquiries.
 - Failure to maintain medical records on separate forms and treat as confidential.
- ✓ No change to current defenses:
 - Demonstration that accommodation would impose undue hardship.
 - Qualification standards, tests, or selection criteria are shown to be job-related and consistent with business necessity.
 - Individual may not pose a direct threat to the health or safety of self or others in the workplace.
 - Fundamental alteration defense—“nothing in this Act [ADAAA] alters the provisions [in the ADA] specifying that reasonable modifications in policies, practices, and procedures shall be required, unless an entity can demonstrate that making such modifications in policies, practices, and procedures, including academic requirements in postsecondary education, would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations involved.”
 - Note: Added a new defense under prong 3 regarding “transitory and minor” impairments.
- ✓ Nothing in the Act [ADAAA] alters standards for determining eligibility for benefits under state worker’s compensation laws or under state and federal disability benefits programs.

CONFORMING AMENDMENTS TO OTHER CIVIL RIGHTS STATUTES

- ✓ ADAAA specifies that the meaning given the term “disability” under the ADA shall be used for purpose of defining the term “disability” under Title V of the Rehabilitation Act of 1973, as amended.
- ✓ This means that the definition of “disability” under the ADA, as amended by the ADAAA, applies for purposes of Section 503 of the Rehabilitation Act (affirmative action by government contractors).

FINAL THOUGHTS FOR COVERED ENTITIES

- ✓ Treat all individuals with dignity and respect.
- ✓ Recognize that the definition of disability for purposes of coverage and protection is broad but only qualified individuals who can prove discrimination are entitled to relief.
- ✓ Review and revise (if necessary) policies, practices, and methods of administration that ensure effective and meaningful opportunity for all, including individuals with disabilities.
- ✓ Develop disability expertise.
- ✓ Document decisions.
- ✓ Train and retrain staff.