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What Do the Revised Americans with Disabilities Act Regulations Mean for CAAs?

By Allison Ma'luf, Esq., CAPLAW

If you are still wondering how to interpret and apply the 2008 amendments to Title I of the Americans with Disabilities Act of 1990 (ADA) – guidance has finally arrived! The Equal Employment Opportunity Commission (EEOC) recently adopted amendments to the ADA regulations, including an updated interpretive appendix, which became effective on May 24, 2011.

The 2008 amendments to the ADA were enacted in response to several U.S. Supreme Court decisions that applied the ADA in a narrow and restrictive manner. Rejecting the Court's approach, the 2008 amendments

clarified that the ADA favors broad coverage to make it easier for individuals seeking protection under the ADA to establish that they have a disability. The amended regulations and appendix expand on the broad interpretation of the definition of disability set forth in the 2008 amendments, support the EEOC's desire to follow the original intent of the ADA, and make disability determinations a less extensive and demanding analysis.

(Continued on page 8)

May Employees Lend a Helping Hand?

By Anita Lichtblau, Esq., CAPLAW

So you have a big fundraising dinner in two weeks and some staff volunteered to help "off the clock"? Sounds great, doesn't it? Staff volunteers will really help cut costs, right? Wait a minute; not so fast. Asking staff to volunteer, or even accepting their offers to volunteer, for Community Action Agency (CAA) events or activities without pay may violate wage and hour laws. Before allowing staff to volunteer, make sure you understand the rules and that you apply them consistently. Otherwise, your CAA may risk U.S. Department of Labor (DOL) penalties, state enforcement actions, and even private lawsuits by employees.

Staff volunteers are only a problem for employers if the volunteers are non-exempt employees, i.e. employees who are not classified as exempt under federal and state wage and hour laws. According to the federal Fair Labor Standards Act, (FLSA), non-exempt employees must be paid for every "hour worked" and paid time and a half for hours worked over 40 in one week. "Hours worked" includes any activities in which employees are directed, required (directly or indirectly), or coerced to participate. On the other hand, exempt employees are not paid based on the number of hours they work. If they are properly classified under the FLSA rules, they can volunteer after hours without additional pay.

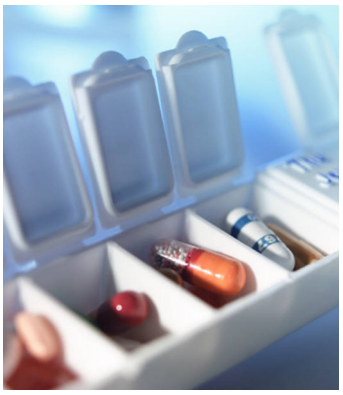
(Continued on page 10)

ADA Regulations *(continued from cover)*

Title I of the ADA prohibits private and public employers with 15 or more employees from discriminating against individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment. An employer is required to make a reasonable accommodation for the known disability of an employee if doing so would not impose an "undue hardship" on the operation of the employer's business. This article provides CAAs with a brief overview of the most relevant revisions to the regulations and interpretive guidance and offers practical approaches and steps for ensuring compliance.

Definition of Disability

Neither the 2008 amendments nor the amended regulations changed the ADA's definition of disability. Rather, both clarify the interpretations and application of the term. The three basic parts of the definition remain the same. They state that an individual suffers from a disability if s/he: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment. The regulations clarify the definition by referring to each part as follows: the first prong is "actual disability"; the second prong is "record of" a disability; and the third prong is "regarded as" disabled.[1] Examples of the three prongs may now be found in the interpretive appendix.[2]



Major Life Activities

To establish disability under the first and second prongs, an employee must show that his/her impairment substantially limits a "major life activity" or that s/he has a record of an impairment that substantially limited a major life activity. The 2008 amendments expanded the list of "major life activities" to include a list of "major bodily functions." The EEOC's preamble to the regulations stresses that the list of "major bodily functions" added by the 2008 amendments is not an exhaustive one. The final regulations also added sitting, reaching and interacting with others to the list of major life activities.[3]

The regulations clarify that the previously applied U.S. Supreme Court standard for determining if an activity qualifies as a major life activity – that it be of "central importance to most people's daily lives" – no longer applies. Rather, now the regulations instruct employers ***not*** to interpret the term "major" strictly and avoid creating a demanding standard for a disability.[4] Even though the regulations do not offer an explicit standard for determining major life activities, the interpretive appendix offers guidance by giving examples such as lifting as a major life activity, regardless of whether an individual who claims to be substantially limited in lifting is actually performing lifting activities that are of central importance to the individual's daily life.[5]

Substantially Limits

Rules of Construction

To establish a disability under the first and second prongs, an employee must also show that the disability "substantially limits" a major life activity or that there is a record of the disability substantially limiting a major life activity. The regulations restructure this analysis and now list nine rules of construction based on the 2008 amendments.

The nine rules address the following concepts:

- Construing the requirement broadly in favor of expansive coverage and not as a demanding standard;
- Comparing an individual who is substantially limited to most people in the general population without necessarily relying on scientific, medical or statistical analysis;
- Focusing on the organization's compliance with its obligations;
- Conducting individualized assessments that interpret and apply "substantially limits" to require a degree of functional limitation that is lower than the stricter standard applied prior to the 2008 amendments;
- Making a disability determination without regard to mitigating measures other than ordinary eyeglasses or contacts;
- Understanding that an impairment which is episodic or in remission is a disability if it would substantially limit a major life activity when active; and
- Requiring that only ***one*** major life activity be substantially limited.[6]

The appendix to the regulations offers guidance on how to apply the nine rules. For instance, the appendix gives the following example of how to compare an individual

who is substantially limited to most people: "the ability of an individual with an amputated limb to perform a major life activity is compared to other people in the general population, not to other amputees." The appendix also offers examples of mitigating measures that should be disregarded. For instance, someone who began taking medication for hypertension before experiencing substantial limitations related to the impairment would still be considered an individual with a disability if, without the medication, he or she would be substantially limited in functions of the cardiovascular or circulatory system. Moreover, the appendix points out that the determination of whether an individual's impairment substantially limits a major life activity is unaffected by the individual choosing to forgo mitigating measures. For example, if an individual decides not to use a hearing aid to correct a hearing impairment, the individual is still considered substantially limited in the major life activity of hearing. However, the fact that an employee opts to not wear a hearing aid may be relevant to an assessment of whether the employee can perform the essential functions of the job, with or without an accommodation, and/or whether the employee poses a direct threat to health or safety.[7]

Predictable Assessments

The revised regulations also establish that some impairments will, given their inherent nature, virtually always be found to impose a substantial limitation and, as a result, the necessary individualized assessment should be simple and straightforward. Examples of these impairments and the major life activity impaired by them are in the regulations and include:

- Deafness
- Blindness
- Intellectual disability (mental retardation)
- Partial or complete absence of limbs
- Mobility impairments requiring use of a wheelchair
- Autism
- Cancer
- Cerebral palsy
- Diabetes
- Epilepsy
- HIV/AIDS
- Muscular dystrophy
- Multiple sclerosis
- Major depressive disorder
- Bipolar disorder
- Post-traumatic stress disorder
- Obsessive compulsive disorder
- Schizophrenia [8]

The regulations also replaced the section describing certain impairments that may not meet the definition for being substantially limiting, such as the common cold, with an affirmative statement in both the regulations and the appendix that "not every impairment will constitute a disability."[9]

Substantially Limited "in Working"

One major life activity that is no longer singled out is if someone is substantially limited "in working." The explanation of this activity has been moved from the regulations to the appendix. Rather than attempting to articulate a new "type of work" standard, the EEOC retained its original analysis in the appendix which explains that, in most instances, an individual with a disability will be able to establish coverage by showing substantial limitation of a major life activity other than working because impairments that substantially limit a person's ability to work usually substantially limit one or more other major life activities. Moreover, the appendix explains that in the rare cases where an individual has a need to demonstrate that an impairment substantially limits him or her in working, the individual can do so

"The regulations include the terms 'condition, manner or duration' as concepts that may be relevant in certain cases to show how an individual is substantially limited."

by showing that the impairment substantially limits his or her ability to perform a class of jobs or broad range of jobs in various classes as compared to most people having comparable training, skills, and abilities. The example given is if a person whose job requires heavy lifting develops a disability that prevents him or her from lifting more than fifty pounds and, consequently, from performing not only his/her existing job but also other jobs that would similarly require heavy lifting, that person would be substantially limited in working because he or she is substantially limited in performing the class of jobs that require heavy lifting.[10]

Condition, Manner or Duration Analysis

The regulations include the terms "condition, manner or duration" as concepts that may be relevant in certain cases to show how an individual is substantially limited.

(Continued on page 10)

ADA Regulations *(continued from page 9)*

The regulations explain that "condition, manner or duration" may identify the difficulty or effort required to perform a major life activity, pain experienced when performing the activity, the length of time the activity can be performed and the way that an impairment affects the operation of a major bodily function. For example, the condition or manner in which someone with coronary artery disease performs the major life activity of walking would be substantially limited if the individual experiences shortness of breath and fatigue when walking distances that most people could walk without these effects. Moreover, a person whose back or leg impairment precludes him/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.[11]

"Regarded As" Prong

An employee receives protection under the third prong if the employer takes an adverse action (e.g., demoting, terminating, failing to hire) against him or her because the employer regards the individual as having a disability, either real or perceived. The regulations clarify that the question of whether an individual is substantially limited in a major life activity is not relevant to coverage under the "regarded as" prong. Rather an individual seeking coverage under the "regarded as" prong must only prove that s/he has an impairment or was perceived by the employer to have an impairment and that the employer discriminated against him/her because of the impairment.[12]

The regulations explain that an available defense to the "regarded as" prong is for the employer to show that the impairment is "transitory and minor."[13] The appendix, rather than the regulations, now includes examples illustrating the application of the transitory and minor exception. Additionally, the regulations specifically state that if an individual falls within the "regarded as" prong, the individual is not entitled to a reasonable accommodation; s/he is only entitled to protection from discrimination.[14]

Employer Action Steps

The regulations and appendix clarify that employers should expend less energy on determining if a disability exists and spend more time considering options for reasonable accommodations.

To this end, we recommend employers do the following:

- Be prepared to accept more impairments as disabilities and to propose more flexible and creative options for reasonable accommodations
- Train supervisors and human resources personnel on the new rules and how to work with employees who may have a disability, including how to handle requests for reasonable accommodations
- Ensure that your organization's procedures for hiring, termination, promotion, evaluation, etc. are not based on any criteria that could be viewed as discriminating against someone because of an actual or perceived disability.

The revised regulations and interpretive appendix with the EEOC's preamble discussing them is available at *http://www.gpo.gov/fdsys/pkg/FR-2011-03-25/pdf/2011-6056.pdf*.

(See end notes on page 19)

Volunteers *(continued from cover)*

Thus, the crucial question for employers is what time spent by non-exempt employees is considered "hours worked"? The FLSA and court cases applying that law interpret "hours worked" very broadly. The FLSA regulations state that:

> *Time spent in work for public or charitable purposes at the employer's request, or under his direction or control, or while the employee is required to be on the premises, is working time. However, time spent voluntarily in such activities outside of the employee's normal working hours is not hours worked.*[1]

To summarize the requirements of this regulation and the interpretation of it by DOL, a non-exempt employee of a nonprofit CAA may only "volunteer" (i.e. work without pay) for the CAA if ***all*** of the following are true:

- The time spent is outside the employee's normal work hours;
- The activity is not similar to the employee's normal job responsibilities;
- The employee is undertaking the activity completely voluntarily, and not at the employer's request or as a result of direct or indirect coercion;

A sampling of agendas for a high level finance committee includes:

- Develop key guidelines and assumptions before budget planning begins.
- Analyze trends in income sources.
- Discuss changes in types and reliability of income.
- Hold in-depth discussions of factors that will influence budgets for the next three years.
- Review and discuss the organization's financial policies. Are these policies adequate in light of the organization's size, complexity, and life-cycle stage? This review requires more than applying simplistic "best practices" from another organization.
- Evaluate the pros and cons of buying vs. leasing a new facility and the impact on cash flow, capital campaign needs, depreciation, and costs of ownership.

A more engaged finance committee will require a different role for the CFO or finance director - one that may not be as easy as working with a more perfunctory committee. The payoff in the quality of review, understanding, and financial governance will be worth it. For the committee to work well, the finance committee chair and CEO or CFO need to invest time in planning meetings, setting goals and expectations for the committee, and preparing good information for discussion. These activities will help inform board members when it comes time for them to make the final financial decisions.

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End Notes

Revised Americans with Disabilities Act Regulations

1. 1. 29 C.F.R. § 1630.2(g).
2. Appendix to Part 1630—Interpretive Guidance on Title I of the Americans With Disabilities Act.
3. 29 C.F.R. § 1630.2(i).
4. 29 C.F.R. § 1630.2(i)(2).
5. Appendix to Part 1630—Interpretive Guidance on Title I of the Americans With Disabilities Act.
6. 29 C.F.R. § 1630.2(j)(1).
7. Appendix to Part 1630—Interpretive Guidance on Title I of the Americans With Disabilities Act.
8. 29 C.F.R. § 1630.2(j)(3).
9. 29 C.F.R. § 1630.2(j)(1)(ii).
10. Appendix to Part 1630—Interpretive Guidance on Title I of the Americans With Disabilities Act.
11. 29 C.F.R. § 1630.2(j)(4).
12. 29 C.F.R. § 1630.2(g)(3).
13. 29 C.F.R. § 1630.2(j)(1)(ix).
14. 29 C.F.R. § 1630.2(g)(3).

May Employees Lend a Helping Hand?

1. 29 C.F.R. § 785.44.
2. *See* U.S. Department of Labor ("DOL") Wage and Hour Division Opinion Letter (Sep. 30, 1999) and DOL Wage and Hour Field Operations Handbook §10b03(c).
3. 29 U.S.C. § 203(e)(4)(A)(i). 29 C.F.R. §§ 553.101 and 553.103.
4. *Brooklyn Savings Bank v. O'Neill*, 324 U.S. 697, 707 (1945).
5. *See* DOL Wage and Hour Division Opinion Letter No. FLSA2006-4 (January 27, 2006).

DAB Disallowance

1. Complete decision can be found at *http://www.hhs.gov/dab/decisions/dabdecisions/dab2333.pdf*.
2. See 45 C.F.R. § 74.42.
3. HHS Grants Policy Statement, page ii and Section I-3.
4. HHS Grants Policy Statement, Section II-7.
5. See 2 C.F.R. Part 230, Att. B, ¶ 37.b.8 stating that the allowability of consultant fees depends on a number of factors including the "[a]dequacy of the contractual agreement of the services (e.g., description of the services, estimate of time required, rate of compensation, and termination provisions)."
6. See 2 C.F.R. Part 230, Att. B, ¶ 37.1.
7. See 45 C.F.R. § 74.25(c)(7).
8. See 2 C.F.R. Part 230, Att. B, ¶ 8.m.13.

DAB Grant Termination

1. Complete decision can be found at *http://www.hhs.gov/dab/decisions/dabdecisions/dab2351.pdf*.
2. 42 U.S.C. § 9836A(e)(1)(C).
3. 45 C.F.R. § 1304.60(f).
4. *Babyland Family Services, Inc.*, DAB No. 21209, at 21 (2007).
5. See 42 U.S.C. § 9836A(f)(1).
6. See 42 U.S.C. § 9836A(c)(4)(A).
7. 45 C.F.R. § 1304.60(b).
8. 45 C.F.R. § 1303.14(f)(1).

Make Good Use of the Treasurer & Finance Committee

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Robinson, Bridget, "Financial Stability: An Impossible Dream?", Nonprofit World, Vol. 15, No. 3. Ruiz, Rosemarie, "Are You Fulfilling Your Financial Trust?", Nonprofit World, Vol. 17. No. 1.

These resources are available at *www.snpo.org/members*. Also see Learning Institute programs on-line: Board Governance (*www.snpo.org/li*).

Helping Boards be Respoinsible Fiscal Stewards

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