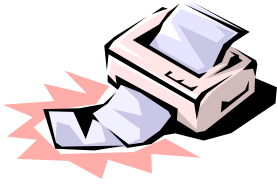


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**ADAAA Regulations (Finally!) Posted for Public Comment**

*By Attorney Emily L. Ruhsam*



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Alec J. Beck  
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Emily L. Ruhsam  
Douglas P. Seaton  
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Corie J. Tarara  
Scott A. Becker,  
of counsel  
Robert L. Grossman,  
of counsel

7300 Metro Blvd, #500  
Minneapolis, MN 55439  
Tel 952.896.1700  
Fax 952.896.1704  
www.seatonlaw.com

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Effective January 2, 2009, the Americans with Disabilities Act Amendments Act of 2008 (“ADAAA”) broadened the definition of disability by extending coverage to individuals to the “maximum extent” permitted by the terms of the Americans with Disabilities Act of 1990 (“ADA”), and new regulations will soon give the ADAAA new “teeth” in every employee hiring, assignment, accommodation, promotion and disciplinary decision. Under the ADAAA, an individual seeking ADA protection can more easily establish that he or she has a qualified disability. The Equal Opportunity Employment Commission (“EEOC” or “Commission”) has promulgated new interpretative regulations under the ADAAA which will likely take effect within the next few months.

A Summary of Key Provisions of the ADAAA

Although the ADA’s basic definition of “disability” (an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment) remained unchanged under the ADAAA, the interpretation of the statutory terms has been redefined and expanded, essentially to overturn a number of Supreme Court decisions which limited the impact of the ADA to extremely serious conditions not susceptible to amelioration. Specifically, the statutory language of the ADAAA required that the following steps be taken:

- (1) the EEOC revise that portion of its regulations defining the term “substantially limits;”
- (2) the definition of “major life activities” be expanded by including two non-exhaustive lists:
  - (a) activities that the EEOC has recognized (e.g., walking), as well as activities that EEOC has not specifically recognized (e.g., reading, bending, and communicating); and
  - (b) major bodily functions (e.g., “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions”);
- (3) mitigating measures other than “ordinary eyeglasses or contact lenses” shall not be considered in assessing whether an individual has a disability;
- (4) clarified that an impairment that is episodic or in remission is a disability if it substantially limits a major life activity when active;

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(5) changed the definition of “regarded as disabled” so that it no longer requires a showing that the employer perceived the individual to be substantially limited in a major life activity, and instead says that an applicant or employee is “regarded as” disabled if he or she is subject to an action prohibited by the ADA (e.g., failure to hire or termination) based on an impairment that is not transitory and minor; and

(6) provided that individuals covered only under the “regarded as disabled” prong are not entitled to reasonable accommodation (one of the few positive changes for employers).

### The ADAAA Regulations

On September 16, 2009, nearly one year after the ADAAA was signed into law, the EEOC’s proposed revisions to its employment regulations on the ADAAA were finally approved by the Office of Management and Budget and posted for public comment. The proposed regulations do not add much to what employers already knew about the ADAAA (that the focus has shifted from determining whether an individual is disabled to determining whether the employer engaged in the “interactive process” and, if so, whether the requested accommodation would be an “undue burden” on the employer, and whether job-relevant objective standards for hiring and performance, uniformly applied, have or have not been met by a disabled applicant or employee). The proposed regulations do, however, attempt to define the term “substantially limits” by adding that, “the comparison of an individual’s limitation to the ability of most people in the general population often may be made using a common-sense standard, without resorting to scientific or medical evidence.”

Additionally, the proposed regulations added the following three categories as “Examples of Impairments”:

(1) **Examples of Impairments that Will Consistently Meet the Definition of Disability** (e.g., autism, cancer, cerebral palsy, diabetes, epilepsy, HIV/AIDS, multiple sclerosis and muscular dystrophy, major depression, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder and schizophrenia);

(2) **Examples of Impairments that May Be Disabling for Some Individuals But Not For Others** (e.g., asthma, high blood pressure, learning disabilities, certain back or leg impairments, certain psychiatric impairments such as panic disorder, anxiety disorder or some forms of non-major depression, carpal tunnel syndrome and hyperthyroidism);

(3) **Examples of Impairments That Are Usually Not Disabilities** (temporary non-chronic impairments of short duration with little or no residual effects such as the common cold, seasonal or common influenza, a sprained joint, minor and non-chronic gastrointestinal disorders, or a broken bone that is expected to heal completely).

These regulations, if finalized, will require employer action to reinforce the physical and mental requirements of job descriptions, to adopt lawful applicant screening, job-related tests, and physical examinations when appropriate, to implement productivity and/or profitability standards for positions and to take other actions to establish or reinforce “objective” measures of applicants’ qualifications and employees’ continued performance, so that hiring, assignment, promotion and termination decisions can be defended against ADA and related claims.

The Commission is accepting public comments on the proposed regulations through November 23, 2009. After reviewing the public comments, the Commission is expected to issue the final regulations. For more information on the comment process, please visit the EEOC website at [www.eeoc.gov](http://www.eeoc.gov). If you have any questions about the new ADAAA regulations or would like a free initial consultation on any disability-related issue or any other employment or labor issue, please contact the author of this LawFax at [eruh.sam@seatonlaw.com](mailto:eruh.sam@seatonlaw.com) or any attorney at our firm at (952) 896-1700.

### **Join us for the Center of the American Experiment’s 2009 Fall Briefing with Steve Forbes**

On November 17, 2009, the Center of the American Experiment, Minnesota’s own pro-free enterprise and responsible public policy “think tank,” will hold its annual Fall Briefing with special guest Steve Forbes.

The event will be held at Orchestra Hall in downtown Minneapolis with a reception from 6:00-7:15 p.m. and the keynote address from 7:30-9:00 p.m. We have reserved a row for our guests, as we have done for prior Center events for many years, and hope you can join some of our lawyers and other clients for this exciting evening.

Please let me know as soon as possible if you would like to attend. As usual, we will accept your individual RSVP confirmation on a “first response” basis. Please contact Sue Nesheim at our office at 952-896-1700 or email us at [firm@seatonlaw.com](mailto:firm@seatonlaw.com) if you are interested. We hope you will be able to join us.