

EEOC ISSUES PROPOSED REGULATIONS TO IMPLEMENT ADA AMENDMENTS ACT OF 2008

On September 23, 2009, the U.S. Equal Employment Opportunity Commission (“EEOC”) issued proposed regulations which would revise its existing regulations and interpretive guidance under the Americans with Disabilities Act (“ADA”) to implement the ADA Amendments Act of 2008 (“Amendments Act”). (The proposed regulations are available at <http://edocket.access.gpo.gov/2009/pdf/E9-22840.pdf>). While the Amendments Act retains the basic definition of “disability” in the ADA, *i.e.*, a physical or mental impairment that substantially limits a major life activity, a record of such an impairment, or being regarded as having such an impairment, it changes the way that this statutory term should be interpreted in several ways. The proposed regulations are intended to implement these changes in favor of broad coverage. The following is a summary of some of the key provisions in the proposed regulations:

- Sets forth non-exhaustive lists of specific impairments that will consistently meet the definition of a disability; that may be a disability for some individuals, but not for others, depending on the stage of the impairment, the presence of other impairments, or any number of other factors; and that will usually not constitute disabilities.
- Clarifies that “major life activities” are those basic activities, including major bodily functions, that most people in the general population can perform with little or no difficulty and adds a non-exhaustive list of the same.
- Revises the definition of “substantially limits” by providing that a limitation need not “significantly” or “severely” restrict a major life activity in order to meet the standard.
- Eliminates the requirement that an employer perceive an individual to be substantially limited in a major life activity to be “regarded as” disabled; instead, provides that an applicant or employee who is subject to an action prohibited by the ADA because of an actual or perceived impairment will meet the “regarded as” definition of disability, unless the impairment is both transitory and minor.
- Prohibits the ameliorative effects of mitigating measures, with the exception of ordinary eyeglasses or contact lenses, from being considered in determining whether an impairment substantially limits a major life activity. Makes clear that an individual who, because of the use of medication or other mitigating measures, has experienced no or only minor limitations related to an impairment may still be disabled if there is evidence that in the absence of mitigating measures the impairment would be substantially limiting.
- States that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active and lists examples of such impairments.
- Provides that a prohibited action based on an actual or perceived impairment includes, but is not limited to, an action based on a symptom of such an impairment or based on medication or any other mitigating measure used for an impairment.

Overall, the impact of the Amendments Act and the proposed regulations is to make it easier for an individual to establish that he or she has a disability within the meaning of the ADA and is entitled to the ADA’s protections. There also is an explicit direction that the focus of any ADA case should be on whether or not discrimination occurred, not on whether the employee or applicant is “disabled.” We are continuing to review the proposed regulations and formulating our comments for the EEOC related to the same. If you have any questions about the proposed regulations or comments you would like for us to convey to the EEOC, please contact a member of Koley Jessen's Employment, Labor and Benefits Group.

REMINDER: EMPLOYMENT SYMPOSIUM - NOVEMBER 5, 2009

There is still time to sign up! Please RSVP to Sarah Glenn at sarah.glenn@koleyjessen.com or (402) 343-3772.

The Koley Jessen Employment, Labor and Benefits Group:

Margaret C. Hershiser

402.343.3711

margaret.hershiser@koleyjessen.com

Julie A. Schultz

402.343.3766

julie.schultz@koleyjessen.com

Leilani M. Harbeck

402.343.3767

leilani.harbeck@koleyjessen.com

Joan M. Cannon

402.343.3753

joan.cannon@koleyjessen.com

Richard D. Vroman

402.343.3810

richard.vroman@koleyjessen.com

Ryan J. Sevcik

402.343.3859

ryan.sevcik@koleyjessen.com