

# *The NEW ADA and the EEOC*

by

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Without a doubt, one of the biggest changes in Employment Law in the 21<sup>st</sup> century was the complete overhaul that occurred under the 2008 ADAAA. In 2011, the EEOC came out with its new regulations. To say the least, these new regulations were quite shocking.

The EEOC makes it very clear that the goal of the ADAAA and the new regulations are to make it easier for employees to qualify for coverage under the ADA. The following is the EEOC's new point of view on the issue of covering employees under the ADA right from the new regulations and its preamble.

## **A. §1630.1 Purpose, applicability, and construction.**

(4) **Broad coverage.** **The primary purpose of the ADAAA is to make it easier for people with disabilities to obtain protection under the ADA.** Consistent with the Amendments Act's purpose of reinstating a broad scope of protection under the ADA, **the definition of "disability" in this part shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA.** The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability. **The question of whether an individual meets the definition of disability under this part should not demand extensive analysis.**

(j) *Substantially limits*—

(1) *Rules of construction.* The following rules of construction apply when determining whether an impairment substantially limits an individual in a major life activity:

(i) **The term "substantially limits" shall be construed broadly in favor of expansive coverage,** to the maximum extent permitted by the terms of the ADA. "Substantially limits" is not meant to be a demanding standard.

(ii) An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as **compared to most people in the general population. An impairment need not**

**prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting.** Nonetheless, not every impairment will constitute a disability within the meaning of this section.

(iii) The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, **not whether an individual's impairment substantially limits a major life activity.** Accordingly, the threshold issue of whether an impairment “substantially limits” a major life activity should not demand extensive analysis.

(iv) **The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term “substantially limits” shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for “substantially limits” applied prior to the ADAAA.**

(vii) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(ix) The six-month “transitory” part of the “transitory and minor” exception to “regarded as” coverage in §1630.15(f) does not apply to the definition of “disability” under paragraphs (g)(1)(i) (the “actual disability” prong) or (g)(1)(ii) (the “record of” prong) of this section. **The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section.**

(3) *Predictable assessments*—(i) The principles set forth in paragraphs (j)(1)(i) through (ix) of this section are intended to provide for more generous coverage and application of the ADA's prohibition on discrimination through a framework that is predictable, consistent, and workable for all individuals and entities with rights and responsibilities under the ADA as amended.

(iii) For example, applying the principles set forth in paragraphs (j)(1)(i) through (ix) of this section, **it should easily be concluded that the following types of impairments will, at a minimum, substantially limit the major life activities indicated:** 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; Human Immunodeficiency Virus (HIV) infection substantially limits immune function; multiple sclerosis substantially limits neurological function; muscular dystrophy substantially limits neurological function; and **major depressive disorder, bipolar disorder,** post-traumatic stress disorder, obsessive compulsive disorder, and

schizophrenia substantially limit brain function. The types of impairments described in this section may substantially limit additional major life activities not explicitly listed above.

### **Appendix to Part 1630—Interpretive Guidance on Title I of the Americans With Disabilities Act**

In Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002), the U.S. Supreme Court held that the terms **“substantially” and “major” in the definition of disability “need to be interpreted strictly to create a demanding standard for qualifying as disabled” under the ADA**, and that to be substantially limited in performing a major life activity under the ADA, “an individual must have an impairment that **prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives.**”

After the Court’s decision in Toyota, lower courts used a very demanding standard for qualifying as being disabled that more often found that an individual's impairment did not constitute a disability. As a result, in too many cases, courts would never reach the question whether discrimination had occurred because they found the person not to be disabled under the ADA.

Congress concluded that these U.S. Supreme Court rulings imposed a greater degree of limitation and expressed a higher standard than it had originally intended, and coupled with the EEOC's 1991 ADA regulations which had defined the term “substantially limits” as “significantly restricted,” **unduly precluded many individuals from being covered under the ADA.**

Consequently, Congress amended the ADA with the Americans with Disabilities Act Amendments Act of 2008. The ADAAA was signed into law on September 25, 2008, and became effective on January 1, 2009.

The express purposes of the ADAAA are, among other things:

(4) To reject the standards enunciated by the Supreme Court in *Toyota* that the terms “substantially” and “major” in the definition of disability under the ADA “need to be interpreted strictly to create a demanding standard for qualifying as disabled,” **and that to be substantially limited in performing a major life activity under the ADA “an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives”;** **(REJECTED BY THE NEW REGULATIONS)**

(5) To convey congressional intent that the standard created by the Supreme Court in *Toyota* for “substantially limits,” and applied by lower courts in numerous decisions, **has created an inappropriately high level of limitation necessary to obtain coverage under the ADA;**

Accordingly, the regulations provide that in determining other examples of major life activities, the term “**major**” **shall not be interpreted strictly to create a demanding standard for disability**. The regulations also reject the notion that to be substantially limited in performing a major life activity, an individual must have an impairment that prevents or severely restricts the individual from doing “activities that are of central importance to most people's daily lives.”

Of course, impairments may substantially limit a variety of other major life activities in addition to those listed in the regulation. **For example, major depressive disorder may substantially limit major life activities such as thinking, concentrating, sleeping, and interacting with others.**

### **WHAT DOES THIS MEAN TO HUMAN RESOURCES?**

Clearly, the focus of the EEOC today is to grant ADA coverage to employees ... and then have employers focus on how they can “Reasonably Accommodate” those disabled employees. Employers should be prepared to accept the fact that the EEOC has adopted these more “generous” regulations, so MANY more employees will be classified as “disabled” under the ADA today than before 2011.

Today, the EEOC’s focus is on “Reasonable Accommodation.” Consequently, employers must now clearly identify the Essential Functions of their jobs, the Interactive Process and the various parameters of determining what constitutes a “Reasonable Accommodation” and what does not.

### **Notice: Legal Advice Disclaimer**

**The purpose of these materials is not to act as legal advice but is intended to provide human resource professionals and their managers with a general overview of some of the more important employment and labor laws affecting their departments. The facts of each instance vary to the point that such a brief overview could not possibly be used in place of the advice of legal counsel.**

**Also, every situation tends to be factually different depending on the circumstances involved, which requires a specific application of the law.**

**Additionally, employment and labor laws are in a constant state of change by way of either court decisions or the legislature.**

**Therefore, whenever such issues arise, the advice of an attorney should be sought.**

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Scott Warrick specializes in working with organizations to *prevent* employment law problems from happening while improving employee relations. Scott uses his unique background of **LAW** and **HUMAN RESOURCES** to help organizations get where they want to go.

**Scott's academic background and awards include:**

- Capital University College of Law (Class Valedictorian (1st out of 233))
- Master of Labor & Human Resources and B.A. in Organizational Communication: The Ohio State University
- The Human Resource Association of Central Ohio's Linda Kerns Award for Outstanding Creativity in the Field of Human Resource Management and the Ohio State Human Resource Council's David Prize for Creativity in Human Resource Management

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