

Questions and Answers for Small Businesses: The Final Rule Implementing the ADA Amendments Act of 2008

The ADA Amendments Act of 2008 (ADAAA) was enacted on September 25, 2008, and became effective on January 1, 2009. This law made a number of significant changes to the definition of “disability.” It also directed the U.S. Equal Employment Opportunity Commission (EEOC) to amend its ADA regulations to reflect the changes made by the ADAAA. The final regulations were published in the Federal Register on March 25, 2011.

The ADAAA did not change the basic legal requirement that employers must not discriminate against individuals with disabilities who are qualified for a job, with or without reasonable accommodation. The questions and answers below provide information on what has changed because of the ADAAA, what in the law remains the same, and some tips for complying with the law as amended. For general information on how the ADA’s employment provisions apply to small businesses, you may consult “The ADA: A Primer for Small Business” at www.eeoc.gov/facts/adahandbook.html.

1. What is the purpose of the ADAAA?

Among the purposes of the ADAAA is reinstatement of a “broad scope of protection” by expanding the definition of the term “disability.” Congress found that persons with many types of impairments – including epilepsy, diabetes, multiple sclerosis, major depression, and bipolar disorder – had been unable to bring ADA claims because they were found not to meet the ADA’s definition of “disability.” Yet, Congress thought that individuals with these and other impairments should be covered. As a result of the ADAAA and EEOC’s regulations, it will be much easier for individuals seeking the law’s protection to demonstrate that they meet the definition of “disability.”

2. Must all small businesses comply with the ADAAA and these regulations?

No. These regulations apply to all private employers with 15 or more employees. State or local laws, however, may apply to smaller employers. Additionally, the ADAAA’s changes to the definition of disability would apply to employers who are federal contractors or subcontractors subject to Section 503 of the Rehabilitation Act and to employers who receive federal financial assistance under Section 504 of the Rehabilitation Act, regardless of the number of employees they have. Finally, although these regulations do not apply to the employment practices of businesses with fewer than 15 employees, such businesses, if they are considered places of public accommodation, are required to comply with the ADAAA’s changes to the definition of disability under Title III of the ADA with respect to the goods and services they provide to the public.

3. Does the ADAAA apply to discriminatory acts that occurred prior to January 1, 2009?

No. The ADAAA does not apply retroactively. For example, the ADAAA would not apply to a situation in which an employer allegedly failed to hire, terminated, or denied a reasonable accommodation to someone with a disability in December 2008, even if the person did not file a charge with the EEOC until after January 1, 2009. The original ADA definition of disability would be applied to such a charge. However, the ADAAA would apply to denials of reasonable accommodation where a request was made (or an earlier request was renewed) or to other alleged discriminatory acts that occurred on or after January 1, 2009.

4. How do the ADAAA and the EEOC regulations define “disability?”

The ADAAA and the regulations define “disability” as:

- a physical or mental impairment that substantially limits one or more major life activities (sometimes referred to in the regulations as an “actual disability”), or
- a record of a physical or mental impairment that substantially limited a major life activity (“record of”), or
- when an employer takes an action prohibited by the ADA because of an actual or perceived impairment that is not both transitory and minor (“regarded as”).

We will address each of these definitions (sometimes called the three “prongs” of the definition) of disability.

PRONG 1: AN “ACTUAL DISABILITY”

5. How do the regulations define the term “physical or mental impairment”?

Basically, an impairment is a physical or mental disorder, illness, or condition. Like EEOC’s original ADA regulations and interpretive guidance (sometimes called the Appendix to the regulations), the revised regulations and appendix distinguish between impairments and ordinary personality traits, such as irritability, poor judgment, or chronic lateness, that are unrelated to a physical or mental impairment.

The revised regulations define “physical or mental impairment” as 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, and endocrine. They also cover any mental

or psychological disorder, such as intellectual disability (formerly termed mental retardation), organic brain syndrome, emotional or mental illness, and specific learning disabilities. This is basically the same definition that was included in the original ADA regulations.

6. What are “major life activities?”

The regulations provide a non-exhaustive list of examples of major life activities: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working.

The regulations also state that major life activities include the operation of *major bodily functions*, including functions of the immune system, special sense organs and skin, normal cell growth, digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The regulations also state that major bodily functions include the operation of an individual organ within a body system (e.g., the operation of the kidney, liver, or pancreas).

As a result of the ADAAA’s recognition of major bodily functions as major life activities, it will be easier to find that individuals with certain types of impairments have a disability.

7. How much does an impairment have to limit someone to be considered a disability?

An individual must be substantially limited in performing a major life activity as compared to most people in the general population. However, Congress lowered the threshold for establishing a substantial limitation from the standards established by courts and in the original ADA regulations. An impairment no longer has to prevent or severely or significantly restrict a major life activity to be considered “substantially limiting.”

Congress directed that the term “substantially limits” be construed broadly in favor of expansive coverage, although not all impairments will constitute a disability. Furthermore, under the ADAAA and the EEOC’s regulations, the question of whether an impairment is a disability should not demand an extensive analysis.

8. Do the regulations require that an impairment last a particular length of time to be considered substantially limiting?

No. Even a short-term impairment may be a disability if it is substantially limiting.

9. What kinds of facts might be relevant in determining whether an impairment substantially limits a major life activity?

The regulations state that the *condition, manner, or duration* (where duration refers to the length of time it takes to perform a major life activity or the amount of time the activity can be performed) under which a major life activity can be performed may be considered if relevant in certain cases in determining whether the impairment is a disability. But, with respect to many impairments, including those that should easily be concluded to be disabilities (see Question 16), it may be unnecessary to use these concepts to determine whether the impairment substantially limits a major life activity. Assessment of the *condition, manner, or duration* may include consideration of the difficulty, effort, or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; and/or the way an impairment affects the operation of a major bodily function.

10. Can an impairment that does not affect someone all the time be considered a disability?

Yes. The ADAAA and the regulations specifically state that an impairment that is “episodic or in remission” (*i.e.*, the impairment’s limitations are not present all the time) meets the definition of disability if it would substantially limit a major life activity when active. This means that even if the effects of an impairment occur briefly or infrequently, the impairment could still be a disability.

Examples of impairments that may be episodic include epilepsy, hypertension, asthma, diabetes, major depressive disorder, bipolar disorder, and schizophrenia. An impairment such as cancer that is in remission but that may possibly return in a substantially limiting form will also be a disability under the ADAAA and the regulations.

11. If someone takes medication or uses some kind of a device, like a hearing aid, to lessen the effects of an impairment, may that be considered in determining whether the person has a disability?

No, except for ordinary eyeglasses or contact lenses (see Question 12). The ADAAA and the regulations require that the positive effects from an individual’s use of one or more “mitigating measures” be ignored in determining if an impairment substantially limits a major life activity. Instead, the determination of disability must focus on whether the individual *would be* substantially limited in performing a major life activity *without* the mitigating measure. This may mean focusing on the extent of limitations prior to use of a mitigating measure or on what would happen if the individual ceased using it.

The ADAAA and the regulations provide a non-exhaustive list of examples of mitigating measures. They include medication, medical equipment and devices, prosthetic limbs, low vision devices (*e.g.*, devices that magnify a visual image), hearing aids, mobility devices, oxygen therapy equipment, use of assistive technology, reasonable

accommodations, learned behavioral or adaptive neurological modifications, psychotherapy, behavioral therapy, and physical therapy.

12. Does the rule concerning mitigating measures apply to people whose vision is corrected with ordinary eyeglasses or contact lenses?

No. “Ordinary eyeglasses or contact lenses” – defined in the ADAAA and the regulations as lenses that are “intended to fully correct visual acuity or to eliminate refractive error” – must be considered when determining whether someone has a disability. For example, a person who wears ordinary eyeglasses to correct a routine vision impairment is not, for that reason, a person with a disability under the ADA. However, the ADAAA and the regulations do allow even individuals with fully corrected vision to challenge uncorrected vision standards that exclude them from jobs. An employer must be able to show that the challenged standard is job-related and consistent with business necessity.

13. May the positive or negative effects of mitigating measures be considered when assessing whether someone is entitled to “reasonable accommodation” or poses a “direct threat?”

Yes. The ADAAA’s prohibition on assessing the positive effects of mitigating measures applies only to the determination of whether an individual meets the definition of “disability.” Other determinations – including the need for a reasonable accommodation and whether an individual poses a direct threat (a significant risk of substantial harm to self or others) – can take into account both the positive and negative effects of a mitigating measure. The negative effects of mitigating measures may include side effects or burdens that using a mitigating measure might impose. For example, someone with diabetes may need breaks to take insulin and monitor blood sugar levels, and someone with kidney disease may need a modified work schedule to receive dialysis treatments. On the other hand, if an individual with a disability uses a mitigating measure that results in no negative effects and eliminates the need for a reasonable accommodation, an employer will have no obligation to provide one. For example, an employee with epilepsy may no longer need permission for unscheduled breaks as a reasonable accommodation after switching to a different medication that completely controls seizures.

14. May an employer require that an individual use a mitigating measure?

No. An employer cannot require an individual to use a mitigating measure. However, failure to use a mitigating measure may affect whether an individual is qualified for a particular job or poses a direct threat.

15. Do the ADA and EEOC's regulations still require that an individualized assessment be done to determine whether an impairment is a disability?

Yes. However, certain impairments, due to their inherent nature and the extensive changes Congress made to the definitions of "major life activities" and "substantially limits," will virtually always be disabilities. For these impairments, the individualized assessment should be particularly simple and straightforward.

16. Do the regulations give any examples of specific impairments that will easily be concluded to substantially limit a major life activity?

Yes. The regulations identify specific types of impairments that should easily be concluded to be disabilities and examples of major life activities (including major bodily functions) that the impairments substantially limit. The impairments include: deafness, blindness, intellectual disability (formerly known as mental retardation), partially or completely missing limbs, mobility impairments requiring use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder, and schizophrenia.

17. Is pregnancy a disability under the ADA?

No. Pregnancy is not an impairment and therefore cannot be a disability. Certain impairments resulting from pregnancy (e.g., gestational diabetes), however, may be considered a disability if they substantially limit a major life activity or if they meet one of the other two definitions of disability discussed below.

PRONG 2: A RECORD OF A DISABILITY

18. When does an individual have a "record of" a disability?

An individual who does not currently have a substantially limiting impairment but who had one *in the past* meets this definition of "disability." An individual also can meet the "record of" definition of disability if she was once misclassified as having a substantially limiting impairment (e.g., someone erroneously deemed to have had a learning disability but who did not).

All of the changes to the first definition of disability discussed in the questions above – including the expanded list of major life activities, the lower threshold for finding a substantial limitation, the clarification that episodic impairments or those in remission may be disabilities, and the requirement to disregard the positive effects of mitigating measures – will apply to evaluating whether an individual meets the "record of" definition of disability.

PRONG 3: REGARDING AN INDIVIDUAL AS HAVING A DISABILITY

19. What does it mean for an employer to “regard” an individual as having a disability?

Under the ADAAA and the regulations, an employer “regards” an individual as having a disability if it takes an action prohibited by the ADA (e.g., failure to hire, termination, or demotion) based on an individual’s impairment or on an impairment the employer believes the individual has, unless the impairment is both transitory (lasting or expected to last for six months or less) and minor. This new formulation of “regarded as” having a disability is different from, and is easier to meet, than the previous standard.

The regulations state that an employer may challenge a claim under the “regarded as” prong by showing that the impairment in question, whether actual or perceived, is both transitory and minor. In other words, whether the impairment in question is transitory and minor is a defense available to employers. However, an employer may not defeat a claim by asserting it believed an impairment was transitory and minor when objectively this is not the case. For example, an employer who fires an employee because he has bipolar disorder cannot assert that it believed the impairment was transitory and minor because bipolar disorder is not objectively transitory and minor.

20. If an employer regards an individual as having a disability, does that automatically mean the employer has discriminated against the individual?

No. The fact that an employer’s action may have been based on an impairment does not necessarily mean that the employer engaged in unlawful discrimination. For example, an individual still needs to be qualified for the job he or she holds or desires. Additionally, in some instances, an employer may have a defense to an action taken on the basis of an impairment, such as where a particular individual would pose a direct threat or where the employer’s action was required by another federal law (e.g., a law that prohibits individuals with certain impairments from holding certain kinds of jobs). As under current law, an employer will be held liable only when the employee proves that the employer engaged in unlawful discrimination under the ADA.

OTHER ISSUES ADDRESSED BY THE ADAAA

21. Does an individual have to establish coverage under a particular definition of disability to be eligible for a reasonable accommodation?

Yes. Individuals must meet either the “actual” or “record of” definitions of disability to be eligible for a reasonable accommodation. Individuals who *only* meet the “regarded as” definition are not entitled to receive reasonable accommodation. Of course, coverage under the “actual” or “record of” definitions does not, alone, entitle a person to a reasonable accommodation. An individual must be able to show that the actual disability, or past disability, requires a reasonable accommodation.

22. May a non-disabled individual bring an ADA claim of discrimination for being denied an employment opportunity or a reasonable accommodation because of lack of a disability?

No. The ADA does not protect an individual who is denied an employment opportunity or a reasonable accommodation because she does not have a disability.

WHAT THE ADAAA DOES NOT CHANGE

23. May a business still refuse to hire or terminate someone because he or she is currently engaging in the illegal use of drugs?

Yes. The ADAAA did not make changes to the part of the ADA that excludes from coverage a person who currently engages in the illegal use of drugs when an employer acts on the basis of such use. However, the ADA also still says that a person who no longer engages in the illegal use of drugs may be an individual with a disability if he:

- has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully, or
- is participating in a supervised rehabilitation program (e.g., Alcoholics Anonymous or Narcotics Anonymous).

24. Does an individual with a disability still have to be qualified for a job? And may small businesses still hire the most qualified person?

Yes. The ADAAA does not change the requirement that an individual with a disability be “qualified” for a job. An individual is qualified for a job if he can meet a job’s general requirements -- e.g., skills, education, experience -- and can perform the essential job duties, with or without reasonable accommodation.

Additionally, although an employer may not refuse to hire a person with a disability for discriminatory reasons (e.g., because she needs a reasonable accommodation), it may still hire the best qualified person for a job.

25. Do any of the ADAAA’s changes affect workers’ compensation laws or Federal and State disability benefit programs?

No. The ADAAA and the regulations specifically state that changes to the ADA do not alter the standards for determining eligibility for benefits under State workers’ compensation laws or under Federal and State disability benefit programs.

26. Has the process for providing reasonable accommodation changed as a result of the ADAAA and the EEOC's regulations?

No. Generally, a person with a disability still has to make a request for an accommodation, and an interactive process between the person with a disability and the employer may still be necessary to determine an appropriate accommodation. As part of this process, an employer may still ask for reasonable documentation showing a disability and a need for a reasonable accommodation where the disability and need for accommodation are not obvious or already known. However, since the definition of disability has been broadened, documentation may focus less on whether the person has a disability and more on the need for an accommodation. Finally, an employer is not required to provide an accommodation that would cause the employer an "undue hardship," meaning significant expense or difficulty. For more information on reasonable accommodation, consult the EEOC's Guidance on Reasonable Accommodation and Undue Hardship, www.eeoc.gov/policy/docs/accommodation.html.

27. Does a small business have to employ someone with a disability who poses a health or safety risk?

An employer does not have to employ a person who poses a "direct threat," meaning significant risk of substantial harm to the health or safety of the individual or others. However, this is a stringent standard requiring an individualized assessment of the risks posed by a specific person with a disability in a particular job. An employer cannot rely on generalized information about a disability, or on myths, fears, or stereotypes about a disability when excluding someone on the basis of health or safety concerns.

TIPS FOR COMPLIANCE WITH THE ADAAA

28. What can small businesses do to make sure they comply with the ADAAA and the EEOC's regulations?

As a result of the ADAAA's expansion of the definition of disability, there are a number of things small businesses can do to make sure they comply with the ADA and these regulations.

- Review the wide array of resources on EEOC's website. Most of these resources are written in a user-friendly question-and-answer format. Some, like "The ADA: A Primer for Small Business," www.eeoc.gov/facts/adahandbook.html, are intended specifically for small businesses. EEOC will be revising portions of many of these documents to reflect changes resulting from the ADAAA. When EEOC updates a particular document, we will note this on our website and explain what changes were made. All of these documents currently contain notices about the ADAAA indicating that some of the material in the documents may no longer reflect the law. It should be noted that because the ADAAA focused almost exclusively on changing the definition of "disability," content in

these documents unrelated to the definition of “disability” remains unaffected by the ADAAA and these regulations. Therefore, small businesses can continue to rely on these parts of the documents as reflecting current law.

- Review any policies that may address disability or otherwise affect individuals with disabilities (e.g., leave policies and policies for providing reasonable accommodations) to ensure they comply with the ADA and ADAAA.

For more information about the ADA, please visit our website, or contact our Small Business Liaisons who can provide confidential assistance with ADA compliance in specific workplace situations.

EEOC website: www.eeoc.gov

To find the Small Business Liaison nearest you, go to

www.eeoc.gov/employers/contacts.cfm

For more information about reasonable accommodations, contact the Job Accommodation Network. JAN provides free, expert, and confidential guidance on workplace accommodations.

JAN website: www.askjan.org

800-526-7234 (Voice) and 877-781-9403 (TTY)