



The Water Cooler

Bricker & Eckler LLP's Human Resources Advisory

SUMMER 2011

New Regulations Help Explain the New Americans with Disabilities Act Amendments Act

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The Equal Employment Opportunity Commission (EEOC) recently issued its long-awaited final regulations interpreting the 2009 Americans with Disabilities Act Amendments Act (ADAAA). The final regulations went into effect on May 24, 2011, and adopt “rules of construction” to outline predictable and consistent standards of interpreting the ADAAA in several significant areas, including: (1) the definition of major life activities; (2) impairments that will virtually always be treated as disabilities; (3) consideration of mitigating factors, episodic/dormant conditions, and minor/transitory conditions; and (4) individual coverage under the “regarded as” prong.

The new regulations implement the Americans with Disabilities Act amendments, which aimed to negate U.S. Supreme Court decisions that interpreted disability too narrowly. The amendments will most certainly increase the number of individuals who qualify as disabled, and will also result in more workers requesting a reasonable accommodation.

Major life activities

The ADAAA continues to define “disability” as an impairment that “substantially limits one or more major life activities of an individual.” In turn, a “major life activity” is defined to include (without limitation) caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working.

The final regulations expand the definition of a major life activity to include sitting, reaching and interacting with others. In addition, the regulations also include “major bodily function” as a new category of “major life activity.” This category includes normal cell growth and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal and reproductive functions. Examples of major bodily functions include kidney disease,

cancer, diabetes, epilepsy, sickle cell anemia and rheumatoid arthritis.

It is important to note that these lists are illustrative in nature and nonexhaustive. Thus, the fact that a particular life activity or major bodily function is not listed does not necessarily exclude some other activity or function from the definition of “major life activity.” The analysis of what constitutes “major” must not be interpreted strictly, nor create a demanding standard for determining disability.

List of disabilities

The final regulations also include a list of impairments that will “virtually always” meet the definition of a disability, including autism, intellectual disability (formerly mental retardation), deafness, blindness, partially or completely missing limbs, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, major depression, bipolar disorder, post-traumatic stress disorder and schizophrenia.

Mitigating factors

The regulations instruct employers to evaluate potential disabilities without taking into account “mitigating factors,” including medications used to control conditions. If the person’s condition would qualify without those aids, employers should consider them to have a protected disability. Eyeglasses and contact lenses are the only exceptions.

Episodic or dormant conditions

Employees with conditions that are episodic or dormant must be evaluated based on the condition in its active state. For example, an employee in remission from cancer must be evaluated as though his or her cancer is active.

Minor and transitory conditions

The regulations make clear that impairments lasting less than six months may be deemed “substantially

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limiting” under the definition of disability. Thus, employers must provide reasonable accommodation for a condition, albeit temporary, that is sufficiently limiting enough to be deemed a “disability” under the ADAAA.

“Regarded as” disabled

The ADAAA continues to define as disabled someone who is “regarded as” having a disability, even though that person may not have an actual impairment that substantially limits one or more major life activities. The regulations make it easier for an individual to establish disability under the “regarded as” prong as long as the condition is not minor and transitory. The focus is now on how the individual is treated rather than on what the employer believed. Whether an individual’s impairment “substantially limits” a major life activity is not relevant when the individual is claiming to have been “regarded as” disabled.

It is anticipated that the ADAAA and the new regulations will increase the number of EEOC charges and lawsuits filed. In fact, this prediction is already proving true as the number of disability claims received by the EEOC increased 30 percent from 2008 to 2010, a number that had remained steady for the previous 10 years.

Employers would be well-served to review employee handbooks and company policies to ensure that they comply with the new regulations. The ADAAA and its final regulations encourage employers to stop engaging in an extensive analysis on what is a disability and focus instead on providing reasonable accommodations to individuals who are otherwise qualified to perform the essential functions of their job.

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Pointers for Employing Teen Workers



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You may be familiar with the saying “If you want teens to keep their feet on the ground, put some responsibility on their shoulders.” Employing minors can be a great business decision, but employers must adhere to the restrictions imposed on the employment of teens by the federal Fair Labor Standards Act (FLSA) and Ohio law. Ohio and federal law generally define a “minor” as any individual under the age of 18.

Basic Requirements

- **Work Permit:** Generally, every minor age 14–17 must have a work permit. During summer months when school is *not* in session, however, a 16- or 17-year-old minor is not required to obtain a work permit, but the employer must maintain proof of the minor’s age and a signed statement from a parent/guardian consenting to the proposed employment.
- **Wage Agreement:** Employers must have a written agreement with the minor as to the wages or compensation to be paid for each day, month or year or per piece for work performed.
- **Rest Period:** Minors must be given a rest period of at least 30 minutes when working more than 5 consecutive hours.
- **Time Records:** Employers must keep a written record, such as a time book, showing the minor’s actual starting and stopping time of each period of work or rest. These records must be kept for two years.

- **Postings:** The State of Ohio Minor Labor Laws poster must be posted in a conspicuous place frequented by minors together with a complete listing of all minors employed at the particular establishment.

Summer Hours

Restrictions on a minor’s work hours when school is *not* in session during the summer months (June 1 to September 1) differ by age category:

- **Minors 14 and 15:** May not perform work before 7:00 a.m. or after 9:00 p.m. and may not work more than 8 hours per day or 40 hours per week. The only exception to the 40-hours-per-week limit is for employment incidental to bona fide programs of vocational cooperative training, work-study or other work-oriented programs with educational purposes.
- **Minors 16 and 17:** Face *no* restrictions on the starting and ending time and *no* restrictions on the number of hours worked per day or per week.

Occupational Restrictions

Due to the dangerous nature of particular types of jobs, minors are restricted from performing certain types of work. Such restrictions include:

- **All Minors:** Prohibited from operating power-driven bakery machines or woodworking machines (including saws). Minors may not

distribute or use fertilizers or insecticides and may not work in roofing operations. All minors are generally prohibited from driving a motor vehicle on public roads or highways in the course of their employment. An employer may permit a 17-year-old employee to drive on public roads/highways in the course of work if the “incidental and occasional” driving exemption under the FLSA applies. But even this exemption is subject to the additional restrictions under the Teen Drive for Employment Act of 1988 (*i.e.*, daylight hours only, clean driving record, and no urgent time-sensitive deliveries).

- **Minors 14 and 15:** Prohibited from additional hazardous occupations, including all manufacturing jobs, working in freezers or meat coolers, loading or unloading delivery trucks, and all warehouse and construction work except clerical jobs. Door-to-door sales activities are prohibited unless very specific criteria are met. Under fed-

eral regulations, minors under the age of 16 may not cook on a grill that has an open flame and may not use cooking devices or clean equipment when the surface is hotter than 100° F.

- **Minors Under 14:** Federal law prohibits employment of minors under age 14, with very limited exceptions (*i.e.*, newspaper delivery, actors and performers).

Teen-aged employees can be valuable contributors to an organization. Employers must be mindful of the restrictions imposed by the FLSA and Ohio law. Local laws should also be checked to learn of any additional restrictions imposed. Employers should adhere to the most restrictive law if a contradiction exists between the applicable federal, state and/or local law addressing the employment of minors.

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Required Notices for Group Health Plans: A Checklist



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Most group health plans are required under applicable federal law to supply certain notices to plan participants. These notices are required to be delivered in person, mailed via first class mail, or delivered by electronic media in accordance with the guidelines established by the Internal Revenue Service and Department of Labor. The following is a checklist of the required notices:

- **COBRA Notices:** (i) Initial Notice: Must be distributed when group health-plan coverage begins. (ii) Qualifying Event Notice: Must be provided to COBRA Qualified Beneficiary generally within 44 days after the date on which the qualifying event occurred, or if later, the date of loss of coverage. (iii) Notice of Unavailability: Must be provided within 14 days of notice of qualifying event. (iv) Notice of Early Termination of COBRA Coverage: Must be provided as soon as practicable after decision to terminate coverage. (v) Notice of Conversion Rights: If applicable, must be provided within 180 days of the expiration of the maximum COBRA coverage period.
- **Certificate of Creditable Coverage:** Must be provided automatically upon losing group health-plan coverage, becoming eligible for

COBRA coverage and when COBRA coverage ceases. An individual may also request a Certificate of Creditable Coverage free of charge anytime prior to losing coverage and within 24 months of losing coverage.

- **General Notice of Preexisting Condition Exclusion:** This is a notice describing the group health plan's preexisting condition exclusion and how prior creditable coverage can reduce the preexisting condition period. The notice must be provided as part of any written application materials distribute for enrollment.
- **Individual Notice of Period of Preexisting Condition Exclusion:** Notice that a specific preexisting condition exclusion period applies to an individual upon consideration of creditable coverage evidence and an explanation of appeal procedures to be followed if the individual disputes the plan's determination. Must be provided to individual as soon as possible following the determination of creditable coverage.
- **Wellness Program Disclosure:** Notice given by any group health plan offering a wellness program that requires individuals to meet a standard related to a health factor in order to obtain a reward. The notice must disclose the availability

- of a reasonable alternative standard. Must be provided in all plan materials that describe the terms of the wellness program.
- **HIPAA Special Enrollment Notice:** Notice describing the group health plan's special enrollment rights including the right to special enroll within 30 days of the loss of other coverage, or as a result of marriage, birth of a child, adoption or placement for adoption. Must be provided at or before the time an employee is initially offered the opportunity to enroll in the group health plan.
 - **Women's Health and Cancer Rights Act Notice:** Notice describing required benefits for mastectomy-related reconstructive surgery, prostheses and treatment of physical complications of mastectomy. Notice must be furnished annually and upon enrollment.
 - **Summary of Material Reduction in Covered Services or Benefits:** Describes material reductions in covered services or benefits. Must be provided within 60 days of adoption of material reduction in group health-plan services or benefits.
 - **Medicare Part D Notice:** This notice provides participants with information as to whether the prescription drug coverage under the employer's group health plan is credible with Medicare Part D. This notice must be provided in five circumstances, but will be deemed to satisfy these five circumstances if it is provided annually and upon hire.
 - **CHIPRA Notice:** This notice is required to be provided annually by employers that maintain a group health plan in a state that provides premium assistance under Medicaid or CHIP. Required to be sent before the beginning of each plan year.
 - **Grandfathered Status*:** If a group health plan is taking the position that it is grandfathered, the group health plan must include the model notice language on all materials pertaining to the group health plan.
 - **Lifetime Limit*:** Individuals who lost coverage under the group health plan due to meeting the annual limit of benefit set forth in the plan were to be provided a notice as part of their open enrollment rights. Must be provided by the first day of the first plan year beginning on or after September 23, 2010.
 - **Dependent Age 26*:** Dependents who lost coverage under a group health plan due to meeting the age restrictions were to be provided a notice as part of their open enrollment rights. Must be provided by the first day of the first plan year beginning on or after September 23, 2010.
 - **Summary of Material Modifications to SPD:** Must provide employees with 60-day prior notice of material changes to group health plan.
 - **Notice of Cancellation of Coverage*:** Individuals must be provided with prior notice of cancellation of coverage.
 - **Notice of Patient Protection Provisions*:** If the group health plan is not grandfathered and offered previously restricted patient protections, participants must be provided with notice of the right to choose a primary care provider or pediatrician, and notified of the right to obtain obstetrical or gynecological care without prior authorization.
 - **External Review Notice*:** If the group health plan is not grandfathered, you must provide participants with a description of the new external review process.
 - **Internal Adverse Benefit Determination Notice*:** If the group health plan is not grandfathered, notice must be provided at both the initial claim and appeal level. This notice adds new detail to the explanation of benefits already required under DOL claims procedures.
 - **Preliminary Review Notice for External Review*:** If the group health plan is not grandfathered, you must provide notice to participants filing an external review claim that states whether the participant is eligible for external review.
 - **Notice of Final External Review Decision*:** If the group health plan is not grandfathered, an external review organization must provide notice describing the outcome of any external review.
 - **HIPAA Privacy Practices Statement:** This notice is required to be provided every three years.

**Denotes a notice required by Health Care Reform.*

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Notices Ohio Employers are Required to Post



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The following is a checklist of the employment law notices that most Ohio employers are required to post under applicable Ohio and federal law. You should post each of these notices in a conspicuous place where other employee notices are generally posted.

- Equal Employment Opportunity is the Law
- Employee Rights Under the Fair Labor Standards Act—Federal Minimum Wage*
- Employee Rights for Workers with Disabilities/Special Minimum Wage Poster+
 - Required if you employ workers with disabilities under special minimum wage certificates
- Job Safety and Health: It's the Law*
 - You must also post OSHA citations at or near the worksite involved until the violation
- Notice Employee Polygraph Protection Act*
- Employee Rights and Responsibilities Under the Family and Medical Leave Act of 1993*
- Your Rights Under USERRA*
 - Employers must notify employees of their rights under USERRA, which may be done by posting this notice.
- Know Your Rights—Equal Employment Opportunity is the Law—Ohio Civil Rights*
- State of Ohio Minimum Wage*
- State of Ohio Minor Labor Laws*
 - Required in every factory, workshop or office, if any, where employees under age 18 are permitted to work.
- No Smoking*
 - Post at each building entrance
- Certificate of Premium Payment
 - Certificate is furnished by the Ohio Bureau of Workers' Compensation to employer upon payment of premium or approval of self-insured status. Employers may photocopy these certificates for posting at multiple locations.
- OSHA's Form 300 Log of Work-Related Injuries and Illnesses **
 - Required to be posted from 2/1–4/30 by employers with at least 10 employees, who are subject to OSHA's recordkeeping requirements.
- Weapons Ban Notice ++
 - If you seek to enforce a policy banning firearms on your property, you should post signs in conspicuous locations regarding the ban.

Sources

- * <http://jfs.ohio.gov/civilrights/>
- ** www.osha.gov
- + www.dol.gov

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