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EEOC Issues Final Rules on Disabilities Act Amendments

Question

What is new under the EEOC's recent regulations under the disabilities law?

Answer:

Quite a lot, actually.

We all have a legally recognized disability. Well, that's an exaggeration, but only a little. The Equal Employment Opportunity Commission recently issued final rules interpreting the Americans with Disabilities Act Amendments Act of 2008, effective May 24, 2011. The regulations follow the ADA's

objective to broaden coverage of the Act. The regulations also clearly change the normal focus from whether an employee has a disability as defined in the statute to whether the employer has satisfied its obligation to accommodate a disability.

The actual statutory definition of disability is the same as it was under the Americans with Disabilities Act: (1) a physical or mental impairment which substantially limits one or more major life activities, (2) a record of such an impairment, or (3) being regarded as having such an impairment. The ADA, however, indicates that "substantial limitation" is not intended to be a demanding standard.

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Question

We need you to settle a dispute among the staff in our commercial lending department concerning the collateral descriptions to be used in our security agreements and financing statements (UCC-1s). Our loan review officer, who is quite experienced but new to our bank, insists the descriptive language needs to be the same in both documents and suggests that any variance between them may invalidate our security interest. Our senior lenders strongly disagree with this approach and indicate duplication of the collateral narrative between the two documents is not required in most cases. Who is correct?

Answer

Your lenders are correct, although misunderstanding on this particular issue is not uncommon. In general, the problem arises from the difference in function between a security agreement and the UCC-1. The security agreement is a contract that spells out the legal relationship between the parties and identifies the collateral that secures the loan. Section 9-108 of Article 9 requires the collateral to be "reasonably identified," which can be

accomplished by "specific listing, category or type" as defined in the UCC. As a result, the collateral narrative in a security agreement will usually be detailed and specific so as to accurately reflect the assets being made available to the lender in the event of default.

On the other hand, the UCC-1 is not a contract but merely a public notice designed to notify third parties of a possible claim by a secured party against certain assets of a debtor. Due to this unique notice-function, Section



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9-504 of the UCC, which applies to financing statements, takes a different approach to collateral identification. It specifically provides that a collateral description in a UCC-1 "sufficiently indicates" what it covers if it complies with Section 9-108, as mentioned above, or simply refers to "all assets" or "all personal property" of the debtor. As a result, the collateral narrative in a UCC-1 may be a super-generic, such as "All assets of the Debtor" or "All personal property of the Debtor" — if that is supported by the terms of the underlying Security Agreement(s).

This super-generic (all-asset) approach to UCC-1 descriptions

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Major life activities include, but are not limited to:

1. 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; and
2. The operation of a major bodily function, including functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes the operation of an individual organ within a body system.

In the past, it was generally accepted that the determination of whether a particular condition constituted a legal disability required an “individualized assessment.” Under the new regulations, however, the EEOC lists a number of conditions that will “virtually always” constitute a disability. Such conditions include cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, major depressive disorder, bipolar disorder, obsessive compulsive disorder, schizophrenia and autism. In addition, the regulations specify that an impairment that lasts for any duration may be a covered disability. Thus, episodic conditions and even conditions actually in remission may be a disability if they would be disabilities when active. Guidance to the regulations include a non-exhaustive list of such conditions, including epilepsy, cancer, post traumatic stress order, hypertension, diabetes, asthma, major depressive disorder, bipolar disorder, schizophrenia and multiple sclerosis.

The new regulations follow provisions of the ADAAA, which make clear that whether an impairment substantially limits a major life activity is determined without considering whether the “disability” can be overcome by mitigating measures, for example, medication. The sole exception to this concept is for conditions that can be mitigated by use of ordinary eye glasses or contact lenses.

An individual who, because of the use of a mitigating measure, has experienced no limitations or only minor limitations related to the impairment, may still be an individual

with a disability, where there is evidence that the individual’s impairment would be substantially limiting in the absence of an effective mitigating measure. For example, someone who began taking medication for hypertension before experiencing substantial limitations related to the impairment would still be an individual with a disability if, without the medication, he or she would now be substantially limited in functions of the cardiovascular or circulatory system.

The determination of whether or not an individual’s impairment substantially limits a major life activity is unaffected by whether the individual chooses to forgo mitigating measures. For individuals who do not use a mitigating measure (including, for example, medication or reasonable accommodation that could alleviate the effects of an impairment), the availability of such measures has no bearing on whether the impairment substantially limits a major life activity.

The regulations also provide greater protection for individuals who are “regarded as” disabled. Such an individual is protected if the employer has a perception that he or she has an impairment, regardless of whether that impairment is perceived as an actual disability. Note that employers need not reasonably accommodate an employee with a “regarded as” disability, although they must accommodate employees with an actual disability or a “record of a disability,” unless such accommodation would be an undue burden.

The ADAAA sought to grant greater protection of the individuals with disabilities and to reverse a series of restrictive Supreme Court decisions. The new EEOC regulations implementing the ADAAA arguably go even further. There is no question that employers should interpret the concept of “disability” broadly and should assume that many more conditions now may be considered a legal disability. The EEOC obviously intends that employers should spend less time worrying about whether a condition constitutes a disability and instead focus on reasonable accommodation policies and procedures. **IB**

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is a significant change resulting from the adoption of RA-9. This change was made in response to the increased use of blanket liens

in transactions involving multiple Security Agreements with only one filing. Although it has been in effect for 10 years, it has not been widely utilized, but “all assets” filings are becoming more prevalent. It should be noted that an “all assets” filing is not applicable to a purchase-money

transaction (usually equipment) where the collateral being financed must be described specifically in both documents. In practice, the collateral for these loans is readily identifiable and the loan documents are usually prepared at the same time — facilitating identical descriptions. **IB**