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HEALTH CARE *QUARTERLY* REPORT

Proposed rule changes to ADA likely to complicate hiring

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Since 1992, the Americans with Disabilities Act (ADA) has assisted individuals with disabilities to participate fully as productive employees in the United States, by prohibiting employment discrimination against qualified individuals with disabilities. The ADA also requires employers to provide reasonable accommodations if a person who is disabled needs such in order to apply for a job, perform a job, or enjoy benefits equal to those that employers offer to non-disabled employees.

To encourage employment of qualified persons with disabilities, the Internal Revenue Code (IRC) includes several provisions aimed at making employment of qualified people with disabilities more financially attractive to employers. These provisions include small business tax credits, work opportunity tax credits and architectural/transportation tax deductions.

But how does the ADA actually accomplish its mission? To understand how the ADA works, we must begin with a definition.

Under the ADA, a person is "disabled" if that individual:

- Has a physical or mental impairment that substantially limits one or more of his/her major life activities;
- Has a record of such an impairment; or
- Is regarded as having such an impairment.

ADA amended

In 2008, Congress and President Bush amended the ADA to expand the definition of the term "disability." Now a federal government agency, the Equal Employment Opportunity Commission (EEOC), which is responsible for interpreting and enforcing the ADA, has published a Notice of Proposed Rulemaking to implement the 2008 amendments to the ADA. The proposed changes were published in the Federal Register last September, and the comment period ended in late November.

According to the EEOC's Notice, the EEOC expects to define the word "disability" in the amended ADA to 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/AIDS; multiple sclerosis; muscular dystrophy; major depression; bipolar disorder; post-traumatic stress disorder; obsessive-compulsive disorder; and schizophrenia.

The EEOC's proposed new regulations also add a list of impairments that maybe "substantially limiting" and therefore covered by the amended ADA. These impairments include asthma, high blood pressure, back and leg impairments, learning disabilities, panic or anxiety disorders, some forms of depression, carpal tunnel syndrome, and hyperthyroidism.

Temporary, non-chronic impairments of short duration, with little or no residual effects that usually will not substantially limit a major life activity, such as common cold, seasonal or common influenza, a sprained joint, minor and non-chronic gastrointestinal disorders, a broken bone that is expected to heal completely, appendicitis, and seasonal allergies will, however, remain uncovered by the amended ADA.

Under the amended ADA, no one may take into account mitigating measures, such as medicine or equipment, that eliminate or reduce the symptoms or impact of an impairment, in determining if an impairment "substantially limits" a major life activity.

But an impairment that is "substantially limiting" will be covered by the amended ADA under the EEOC's proposed rules even if the impairment lasts or is expected to last fewer than six months, such as a 20-pound lifting restriction lasting several months.

The amended ADA still excludes from coverage, under the EEOC's proposed new regulations, these conditions: transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity, disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal use of drugs.

There are other changes from the original ADA. Most importantly, under the amended ADA, no one may take into account mitigating measures, such as medicine or equipment, that eliminate or reduce the symptoms or impact of an impairment, in determining if an impairment "substantially limits" a major life activity. Thus, for example, a person who uses a hearing aid to hear normally is nevertheless a disabled person under the amended ADA.

Of course, being "disabled" is insufficient by itself to confer upon an individual the protections of the amended ADA. In addition to being "disabled," an applicant or employee must also be "qualified" to work in a sought position.

The EEOC defined a "qualified individual with a disability" under the original ADA as an individual with a disability who meets the skill, experience, education and other job-related requirements of a position held or desired, and who, with or without reasonable accommodation, can perform the essential functions of a job.

No evidence

COMMENTARY

There is no evidence that the EEOC is going to change its definition of a "qualified individual" under the amended ADA.

But damage to non-disabled individuals' job prospects may be done by the EEOC's proposed new definitions of the term "disability" under the amended ADA. Here's why:

The stated goal of the original ADA was to provide equal access and equal employment opportunities to qualified individuals with disabilities. The goal of the original ADA was not to prefer qualified disabled applicants over qualified non-disabled individuals, but instead to level the employment playing field. The practical effect of the EEOC's proposed broader definitions of a "disability" under the amended ADA, EEOC's lists of resources, and IRC tax advantages for hiring and promoting individuals with disabilities, however, may be to confer an unfair economic advantage upon a growing number of individuals whom the EEOC deems disabled under the amended ADA.

Suppose, for example, that an employee who fits the EEOC's proposed newly expanded definition of a disability under the amended ADA also meets the skill, experience, education, and other job-related requirements of an available position, can perform the essential functions of the job, and answers an advertisement seeking applicants to fill an available position. Other applicants to fill the same position are also qualified to perform the duties of the position but are not disabled.

Suppose further that the advertising employer prefers an applicant who is qualified but not suffering from a disabling condition as defined by the EEOC, and that the employer hires or promotes the non-disabled applicant. The qualified applicant who is disabled, and frustrated by the employer's decision, may file an employment discrimination Charge against the employer with the EEOC.

If the disabled applicant does file a Charge, the EEOC will want to know from the employer why the employer selected the non-disabled applicant to fill the advertised vacant position. EEOC may point out to the employer the economic benefits offered by the federal government to employers who hire or promote qualified disabled individuals. EEOC may also ask the employer, if it employs 100 or more employees, to produce its EEO-1 statements that identify the number of disabled individuals whom the employer employs.

Business justification

Put differently, the EEOC will require the employer to offer sound business justification for hiring a non-disabled applicant for a position despite the economic advantages of hiring a disabled applicant that are offered by the federal government.

Is it fair to non-disabled qualified applicants that the amended ADA and IRC tilt the scales of employment opportunity in favor of qualified individuals who are "disabled," or that the EEOC requires employers to change their employment policies to favor disabled individuals over non-disabled employees? Of course not.

Suppose, too, that the employer does not have an obviously financially sound business justification for having hired a non-disabled applicant. Perhaps the employer preferred an applicant who graduated from a particular school or obtained a certain type of experience.

Does the employer wish its business hunches or reasonable preferences in hiring or promotion to be subjected to second-guessing by a bureaucrat from the EEOC? Again, of course not. The employer will want to avoid government scrutiny of its business practices if at all possible.

Here is the EEOC's preferred solution to the employer's dilemma: The employer should hire a qualified applicant whom the EEOC considers disabled under the amended ADA, and accept the federal government's offer of financial assistance. A "disabled" applicant or employee is the EEOC's core customer, after all.

Employers have additional legal incentives under the amended ADA to hire qualified disabled applicants over non-disabled qualified applicants. While the amended ADA prohibits discrimination against qualified individuals who are disabled, the amended ADA does not protect from discrimination an individual who is denied an employment opportunity because that individual is not disabled. It is legal to discriminate against non-disabled individuals on account of their non-disability.

In other words, to avoid government agency investigation, civil court litigation and judicial review of its employment decision-making, employers may choose a qualified disabled applicant for a position over a non-disabled applicant who is as or more qualified for a position as the qualified disabled applicant. Smaller employers may be hard-pressed financially to justify not hiring or promoting someone with a disability over an equally or more qualified person without a disability.

The bottom line is this: Employers, beware of new rules interpreting the amended ADA that have been proposed by the EEOC. It may soon be easier for numerous individuals who enjoy the protections of the amended ADA to demand to be hired or promoted over non-disabled applicants for the same advertised positions. Employers must prepare now to respond, or more ADA employment discrimination lawsuits against politically incorrect or unaware employers are sure to follow.

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