

Key Points:

- **Make sure policies reference law**
- **Experts say some conditions will always qualify as disabilities**
- **Test case could involve 'semi-temporary' condition**

Pending EEOC regulations, look at ADAAA before assessing disability

By Melissa Turley, **cyber FEDS®** Washington Bureau

WASHINGTON -- The Equal Employment Opportunity Commission's proposed rules provide some indication about how the commission wants to define disability under the ADA Amendments Act. But the regulations are far from being set in stone and experts still recommend you sit tight until the regulations become permanent, so long as your policies comply with the ADAAA.

The EEOC's Chris Kuczynski said the proposed regulations say the following conditions should be considered substantially limiting each time an individualized analysis is applied to them: autism, cancer, cerebral palsy, diabetes, epilepsy, HIV and AIDS, multiple sclerosis, muscular dystrophy, major depression, bipolar disorder, post-traumatic stress disorder, and schizophrenia.

Does this mean that pending final regulations, a condition like diabetes is always considered to be a disability? The Federal Employment Law Training Group's Ernest Hadley thinks so. He said that diabetes is substantially limiting by definition under the law, as it limits individuals from performing a natural bodily function.

The 'law of the land'

Agencies should no longer analyze impairments by their condition, manner and duration, he said, because the law no longer requires that type of scrutiny.

"We do not, as of today, look at the old analysis," he said. "Whether or not the commission has regulations, the ADAAA took effect Jan. 1 and is the law of the land."

Hadley points out that the law requires that the condition be "substantially limiting" to warrant coverage. Moreover, if an individual is alleging disability discrimination, he must prove the discrimination was based on his condition.

"Let's face reality -- some conditions never had an individualized inquiry even under the old ADA regulations," he said. "If someone was blind since birth, what individualized analysis did you have to do?"

Advocacy Inc.'s Brian East agreed. He said the condition, manner and duration analysis, "at least as handled by the courts in the past, is inconsistent with the new law." Although the statute doesn't list disabilities, the legislative history does. Given the medical aspects of the conditions cited by the EEOC and the ADAAA's statutory rules of construction, the conditions cited are always going to satisfy the standard, he said.

A possible test case?

But the HR Policy Association's Michael Peterson claims that Congress never intended to eliminate the individualized assessment of disability.

Peterson said condition, manner and duration of an impairment will inevitably come up as the courts analyze the new law. He predicts the "test case" for defining disability will deal with a "semi-temporary condition -- the condition itself is relatively severe although may not last very long," he said.

Moreover, not all conditions listed by the EEOC should qualify as disabilities, Peterson said. For example, a person who

experiences a growth on their skin every two years is technically considered to be an individual with cancer although she gets it removed once it becomes big enough. Peterson said he doesn't think this situation would qualify the individual as disabled.

Also see:

- [ADA Amendments Act Roundup](#)
- [ADAAA regs would substantially broaden definition of disability](#) (06/17/09)
- [Quick Start Guide: ADA Amendments Act](#)
- [Expert opinions on the ADA Amendments Act](#)

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