

## **Questions and Answers on the Notice of Proposed Rulemaking for 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.” Congress directed EEOC to amend its ADA regulation to reflect the changes made by the ADAAA, which is why EEOC has approved a Notice of Proposed Rulemaking (NPRM). The NPRM was published in the Federal Register on September 23, 2009.

The NPRM proposes changes both to the ADA regulation itself and to the Interpretive Guidance (also known as the Appendix) that was published at the same time as the original ADA regulation. The Appendix provides further explanation on how the regulation should be interpreted.

Answers to some of the questions below provide citations to specific sections of the proposed regulation and the corresponding section of the proposed Appendix (29 C.F.R. section 1630), or to portions of the current ADA regulation that have not changed as a result of the ADAAA. These citations permit you to see where particular issues are addressed in the proposed regulation or clarify what parts of the current regulation are unaffected by the proposed regulation.

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

No. The ADAAA does not apply retroactively. So, 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 accommodations where a request was made, or an earlier request was renewed, on or after January 1, 2009.

### **2. What is the purpose of the ADAAA?**

The ADAAA states that its purpose is “to reinstate 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, intellectual disabilities (formerly called mental retardation), 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 and revised the ADA accordingly. Congress explicitly

rejected certain Supreme Court interpretations of the term “disability” and a portion of the EEOC regulation that it found had inappropriately narrowed the definition of disability. As a result of the ADAAA, it will be much easier for individuals seeking the law’s protection to demonstrate that they meet the definition of “disability,” and far more ADA cases will focus on whether discrimination actually occurred.

**3. Do all of the changes in the ADAAA apply to provisions of the Rehabilitation Act prohibiting discrimination by federal agencies, federal contractors, and recipients of federal financial assistance?**

Yes. The ADAAA specifically states that all of its changes also apply under sections 501 (federal employment), 503 (federal contractors), and 504 (recipients of federal financial assistance and services and programs of federal agencies) of the Rehabilitation Act. Similarly, the changes to the definition of disability apply to all of the ADA’s titles, including Title II (programs and activities of State and local government entities) and Title III (private entities that are considered places of public accommodation). A few provisions of the ADAAA affect only the employment provisions of the ADA and the Rehabilitation Act (e.g., a provision that requires employers to show that qualification standards based on uncorrected vision are job-related and consistent with business necessity).

**4. How does the ADAAA define “disability”?**

The ADAAA defines a disability as:

1. a physical or mental impairment that substantially limits a major life activity; or
2. a record of a physical or mental impairment that substantially limited a major life activity; or
3. when an entity (e.g., an employer) takes an action prohibited by the ADA based on an actual or perceived impairment.

In the questions below, we address each of these three definitions and changes the ADAAA makes to some of the key terms they use.

**5. What are “major life activities”?**

They are basic activities that most people in the general population can perform with little or no difficulty. The ADAAA provides a non-exhaustive list of examples of major life activities. Many are drawn from the 1991 ADA regulation and subsequent EEOC guidances, or from ADA and Rehabilitation Act court cases. Examples of major life activities include 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. Three of these examples – sitting, reaching, and interacting with others – are not specifically included in the ADAAA’s non-exhaustive list of major life activities, but are included in the proposed regulation.

The ADAAA also says that major life activities include the operation of major bodily functions, including functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, circulatory, respiratory, endocrine, and reproductive functions. The proposed ADA regulation adds several other examples -- hemic, lymphatic, musculoskeletal, special sense organs and skin, genitourinary, and cardiovascular. The purpose of adding major bodily functions to the list of major life activities is to make it easier to find that individuals with certain types of impairments have a disability. For example, cancer affects the major bodily function of normal cell growth and diabetes affects the major bodily function of the endocrine system. (See proposed regulation section 1630.2(i) and its corresponding Appendix section.)

To meet one of the first two definitions of “disability,” an individual must either have an impairment that substantially limits performance of one major life activity or have a record of an impairment that substantially limited one major life activity. It does not matter if the major life activity is from the first list (such as hearing or lifting) or the new list of major bodily functions. It is possible in many situations that an individual will be substantially limited (or have a record of such a limitation) in more than one major life activity.

#### **6. *When does an impairment “substantially limit” a major life activity?***

To have a disability (or to have a record of a disability) an individual must be substantially limited in performing a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual in performing a major life activity to be considered “substantially limiting.” All of these tests of substantial limitation were deemed by Congress to be too demanding. Rather, determination of whether an individual is experiencing a substantial limitation in performing a major life activity is a common-sense assessment based on comparing an individual’s ability to perform a specific major life activity (which could be a major bodily function) with that of most people in the general population. However, the proposed regulation says that temporary, non-chronic impairments of short duration with little or no residual effects usually will not be considered disabilities. (See proposed regulation section 1630.2(j) and its corresponding Appendix section.)

#### **7. *What are mitigating measures?***

Mitigating measures eliminate or reduce the symptoms or impact of an impairment. The ADAAA provides a non-exhaustive list of examples of mitigating measures, which EEOC has included in the proposed regulation. They include medication, medical equipment and devices, prosthetic limbs, low vision devices (e.g., devices that magnify a visual image), reasonable accommodations, and even behavioral modifications. In addition, the EEOC’s proposed regulation includes as another example of a mitigating measure surgical interventions that do not permanently eliminate an impairment.

**8. May the effects of mitigating measures be considered when determining whether someone has a disability?**

The ADAAA directs 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. In other words, if a mitigating measure eliminates or reduces the symptoms or impact of an impairment, that fact cannot be used in determining if a person meets the definition of disability. 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.

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

No. "Ordinary eyeglasses or contact lenses" – defined in the ADAAA and the proposed regulation as lenses that are "intended to fully correct visual acuity or eliminate refractive error" – are considered when determining whether someone has a disability. (See proposed regulation section 1630.2(j)(3) and corresponding Appendix section 1630.2(j).)

**10. Can the negative effects of a mitigating measure be taken into account in determining if an individual meets the definition of "disability"?**

Yes. The ADAAA allows consideration of the negative effects from use of a mitigating measure in determining if a disability exists. For example, the side effects that an individual experiences from use of medication for hypertension may be considered in determining whether the individual is substantially limited in a major life activity.

**11. Can 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." All other determinations – including the need for a reasonable accommodation and whether an individual poses a direct threat – can take into account the positive and negative effects of a mitigating measure. For example, if an individual with a disability uses a mitigating measure which eliminates the need for a reasonable accommodation, then an employer will have no obligation to provide one.

**12. Can impairments that are episodic or in remission be considered disabilities?**

Yes. The ADAAA and the proposed regulation specifically state that an impairment that is episodic or in remission meets the definition of disability if it would substantially limit a major life activity when active. This means that chronic impairments with symptoms or

effects that are episodic rather than present all the time can be a disability even if the symptoms or effects would only substantially limit a major life activity when the impairment is active. The proposed regulation says that examples of impairments that are episodic include epilepsy, hypertension, multiple sclerosis, asthma, diabetes, major depression, bipolar disorder, and schizophrenia.

Similarly, if an impairment such as cancer is in remission, but there is a possibility that it could return in a substantially limiting form, then under the ADAAA this would meet the definition of “disability.” (See proposed regulation section 1630.2(j)(4) and corresponding Appendix section 1630.2(j).)

### ***13. Are there impairments that will consistently meet the definition of disability?***

Yes. The proposed regulation says that some impairments due to certain characteristics associated with them will consistently meet the definition of disability when analyzed in light of the ADAAA’s directives that:

- the term “disability” shall be construed broadly
- an impairment’s substantial limitation on a major bodily function is sufficient to constitute a disability
- the ameliorative effects of mitigating measures (other than ordinary eyeglasses or contact lenses) shall be disregarded
- impairments that are episodic or in remission are disabilities if they would be substantially limiting when active

The proposed regulation identifies the following as examples of impairments that consistently will meet the definition of “disability”: deafness, blindness, intellectual disability (formerly known as mental retardation), partially or completely missing limbs, mobility impairments requiring use of a wheelchair (a mitigating measure), 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 individualized assessment of whether a substantial limitation exists can be done very quickly and easily with respect to these types of impairments, and will consistently result in a finding of disability. This is not an exhaustive list of examples, which means that impairments not listed in the proposed regulation could still consistently meet the definition of disability.

The proposed regulation also provides examples of impairments that may be substantially limiting for some individuals but not for others. These types of impairments, which include asthma, back and leg impairments, and learning disabilities, may require somewhat more analysis to determine whether they are substantially limiting for a particular individual than those impairments that consistently meet the definition of “disability,” although the level of analysis required still should not be extensive. (See proposed regulation sections 1630.2(j)(5) and (6), and corresponding Appendix section 1630.2(j).)

**14. What does the NPRM say about how to determine if someone is substantially limited in working?**

An individual with a disability will usually be substantially limited in another major life activity, therefore generally making it unnecessary to consider whether the individual is substantially limited in working. However, there may be situations in which an impairment substantially limits a person's ability to meet certain job-related requirements, even though it does not impose substantial limitations outside the workplace. The proposed regulation says that an impairment substantially limits the major life activity of working when it substantially limits an individual's ability to perform, or to meet the qualifications for, a "type of work."

The concept of a "type of work" replaces the concepts of a "class" or "broad range" of jobs from the 1991 ADA regulation. A type of work may include jobs such as commercial truck driving (i.e., driving those types of trucks specifically regulated by the U.S. Department of Transportation as commercial motor vehicles), assembly line jobs, food service jobs, clerical jobs, or law enforcement jobs. A type of work may also be determined by reference to job-related requirements, such as: jobs requiring repetitive bending, reaching or manual tasks; jobs requiring frequent or heavy lifting; and jobs requiring prolonged sitting or standing. The Commission believes the concept of a "type of work" provides a more straightforward approach to determining whether someone is substantially limited in working.

**15. What impairments would generally not be considered substantially limiting (i.e., would not meet the first or second definitions of disability)?**

The EEOC's proposed regulation provides several examples of temporary, non-chronic impairments of short duration with little or no residual effects that are usually not disabilities, including (but not limited to) the common cold, seasonal or common influenza, a sprained joint, minor and non-chronic gastrointestinal disorders, or a broken bone that is expected to heal completely. The appendix to the proposed regulation also states that appendicitis and seasonal allergies that do not substantially limit a person's major life activities even when active are not disabilities. Additionally, the fact that an impairment is permanent or of long duration or chronic in nature would not automatically make it a disability if it otherwise does not substantially limit a major life activity. (See proposed regulation section 1630.2(j)(8) and corresponding Appendix section 1630.2(j).)

**16. Does the ADA still exclude from coverage a person who is illegally using drugs?**

Yes. The ADA still excludes from coverage a person who currently engages in the illegal use of drugs. However, the ADAAA also did not change the ADA regulation that

a person who no longer engages in the illegal use of drugs could meet the definition of “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 or narcotics anonymous). (See current regulation section 1630.3(a)-(b).)

**17. Did the ADAAA affect any of the ADA’s other exclusions from the definition of “disability”?**

No. The ADA still excludes from coverage 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. (See current regulation section 1630.3(d).)

**18. Is pregnancy a disability under the ADAAA?**

No. Pregnancy is not an impairment and therefore cannot be a disability. (See current Appendix section 1630.2(h).) Certain impairments resulting from pregnancy, however, may be disabilities if they substantially limit a major life activity.

**19. When does an individual have a “record of” a disability?**

An individual generally meets the “record of” definition of disability when in the past, although not currently, she had an impairment that substantially limited her in performing one or more major life activities. An individual also can meet the “record of” definition of disability if she was once misclassified as having a substantially limiting impairment. All of the changes to the first definition of disability discussed in the questions above – 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, the directive to disregard the positive effects of mitigating measures – will apply to evaluating whether an individual meets the “record of” definition of disability.

The proposed regulation clarifies the point that coverage under the “record of” prong of the definition of “disability” does not depend on whether an employer relied on a record (e.g., medical, vocational, or other records that list the person as having a disability) in making an employment decision. An employer’s knowledge of an individual’s past substantially limiting impairment relates to whether the employer engaged in discrimination, not to whether an individual is covered. (See proposed regulation section 1630.2(k) and corresponding Appendix section.)

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

Under the ADAAA, an employer “regards” an individual as having a disability if it takes an action prohibited by the ADA (e.g., discriminatory 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 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 the original ADA formulation. No longer does one have to show that the employer believed the impairment (or perceived impairment) substantially limited performance of a major life activity.

The fact that an action may have been based on an impairment, however, does not necessarily mean that an employer has 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 based on another federal law (e.g., a law that prohibits individuals with certain impairments from holding certain kinds of jobs). In addition, employers have no obligation to provide reasonable accommodation to an individual who only meets the “regarded as” definition of disability, and not one of the other two definitions. (See proposed regulation sections 1630.2(f) and 1630.2(o)(4), and corresponding Appendix sections.)

**21. Would an employer regard an individual as having a disability if it took a prohibited employment action based on mitigating measures used for, or the symptoms of, an impairment?**

Yes. The proposed regulation states that “regarded as” coverage can apply if an employer takes a prohibited employment action based on an individual’s use of a mitigating measure for, or the symptoms of, an impairment, even if the employer is unaware of the underlying impairment. For example, an employer that refuses to hire someone because he takes anti-seizure medication regards the individual as having a disability, even if the employer does not know the impairment for which the medication is being used. An employer who does not hire someone because of a facial tic has regarded the individual as having a disability even if the employer does not know that the tic is caused by Tourette’s Syndrome.

**22. Will an employer that asks if an employee needs a reasonable accommodation be regarding the employee as having a disability?**

No. Coverage under the “regarded as” prong is triggered only by actions prohibited by the ADA. Asking if an employee who appears to be having difficulty performing a job because of an impairment needs a reasonable accommodation would not violate the ADA. Similarly, asking an employee for medical information as part of the reasonable accommodation “interactive process” is permitted where the disability and/or the need



for accommodation is not obvious and would not trigger “regarded as” coverage. Nor will an employer regard an individual as having a disability if it seeks medical information to determine whether someone poses a direct threat, as long as the employer’s request is founded on a reasonable belief, based on objective evidence, that the individual may pose a direct threat.

**23. What do the ADAAA and the proposed regulation say about qualification standards based on uncorrected vision?**

The ADAAA and the proposed regulation require that an employer show that a challenged qualification standard based on uncorrected vision is job-related and consistent with business necessity regardless of whether the person challenging the standard has a disability. The Appendix points out that most individuals who are screened out of a job because they cannot meet an uncorrected vision standard will meet the “regarded as” definition of “disability.” (See proposed regulation section 1630.10(b) and its corresponding Appendix section.)

**24. Does the ADAAA change the definitions of “qualified,” “direct threat,” “reasonable accommodation,” and “undue hardship,” or does it change who has the burden of proof in demonstrating any of these requirements?**

No. Most of the ADAAA’s changes only affect the definition of “disability.” None of the key ADA terms listed above, or the burdens of proof applicable to each one, have changed. The only change affecting the reasonable accommodation obligation is that an employer does not have to provide one to an individual who only meets the “regarded as” definition of disability.

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

No. The ADAAA and the proposed regulation specifically state that none of its changes alter the standards for determining eligibility for benefits under State workers’ compensation laws or under Federal and State disability benefit programs. (See proposed regulation section 1630.1(c)(3) and its corresponding Appendix section.)

**26. Can 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. (See proposed regulation section 1630.4(b) and its corresponding Appendix section.)

***27. Will the EEOC be updating all of the ADA-related publications on its website to be consistent with the ADAAA proposed regulation?***

No. The proposed regulation may undergo changes as a result of the public comment period so it would be premature for EEOC to make changes to its ADA publications at this time. After EEOC issues a final regulation, it will update all of its ADA-related publications to ensure they are consistent with the changes made by the final ADAAA regulation. All ADA and Rehabilitation Act-related documents on EEOC's website will clearly state when changes are made. Currently, all of these documents contain notices about the ADAAA indicating that some of the material in the documents may no longer reflect the law.

However, most of the EEOC's documents (or most of the content in a particular document) are still correct, because almost all of the ADAAA's changes affect only the definition of disability. Therefore, EEOC's guidances and fact sheets addressing other issues – including the meaning of qualified, essential functions, reasonable accommodation, and direct threat – do not need to be changed.

***28. What happens once the proposed regulation has been published in the Federal Register?***

There is a 60-day period in which the public may submit comments to EEOC about the proposed regulation. At the end of this period, EEOC will evaluate all of the comments and make revisions in response to those comments. A proposed final regulation will then be sent to the Office of Management and Budget pursuant to Executive Order 12866. As part of this process, the proposed final regulation will be coordinated with certain federal agencies before a final regulation is published in the Federal Register.