

Know the Score on ADA

Don't strike out against curveballs in new Americans with Disabilities rules.

High energy costs, tight credit and historic natural disasters are fastballs thrown at businesses this summer. Now, businesses also have to adjust their approach to disabled employees and customers because of new federal disability regulations.

Pre-game Routine

Employers with at least 15 employees have been subject to the Americans with Disabilities Act (ADA) of 1990 since its enactment. Title I of the ADA prohibited employment discrimination against qualified individuals with disabilities and required reasonable accommodations unless there was an undue hardship. The ADA Amendments Act of 2008 (ADAAA) went into effect on January 1, 2009, and expanded the strike zone of disability protections in a number of ways.

Under the new protections, for the ADA to apply to an employment decision, an individual still must have an actual disability, a record of a disability or be regarded as disabled. The ADAAA, however, expressly overruled a number of U.S. Supreme Court decisions and provided new rules of construction for the definition of disability.

First, the ADAAA specifically requires a broad interpretation of the definition of disability. Second, an episodic condition is now a disability if it is substantially limiting when it is in an active state. This means that conditions such as diabetes or epilepsy will qualify as a "disability" even if the condition is in remission or controlled by medication. Third, an employer can no longer consider the effects of mitigating measures (except eyeglasses and corrective lenses).

Batter Up: EEOC Regulations Issued

The final rules for the ADAAA were published in the Federal Register on March 25, 2011. Like the increase in home

runs from a juiced-up baseball, the new EEOC regulations will increase the number of people considered disabled. The regulations and other helpful materials are posted on the EEOC's website at www.eeoc.gov. A few of the highlights include:

- » As before, an actual disability is defined as a physical or mental impairment that substantially limits a major life activity. The term "major life activity" now will include the functions of the immune system, circulatory system and digestive system, as well as seeing, hearing, performing manual tasks, eating, thinking, concentrating, reading, learning, communicating, caring for oneself and working.
- » The regulations make the call on the term "substantially limits," clarifying that one major life activity need not limit other major life activities and that it is enough if the individual has a substantial limitation compared to most people in the general public. More importantly, a deep bench of conditions (including epilepsy, diabetes, multiple sclerosis, PTSD, etc.) that were previously often found not to be disabilities are expressly mentioned as those that should now easily qualify.
- » The regulations also expand the definition of "regarded as" disabled by prohibiting actions based on the employer's perception that the person or employee is disabled, without regard to "whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity."

Some rules have not changed. For example, pregnancy and the current use of illegal drugs are not protected conditions. And,

as before, an employer may have a defense to a disability claim if the accommodation sought is unreasonable or would cause an undue burden, or if an individual poses a direct threat.

The new rules apply to all titles of the ADA, not just the employment provisions. Businesses may need to consider the new definitions in regards to the Title III public accommodation provisions, which customers or vendors could point to for protection.

The new EEOC regulations will increase the number of people considered disabled.

Two-Strike Approach: Protecting Your Business

The new regulations likely will result in more requests for reasonable accommodation. A company's duty to provide reasonable accommodation to disabled individuals has not changed. However, like a

batter down to his last strike, shorten your swing and avoid a strike out by taking a few simple protective measures, including:

- » Review all job postings and descriptions to be sure they take into account the expanded definitions. Do not rely on prior interpretations about particular conditions that may now be invalid.
- » Update all disability, leave, absence, attendance and accommodation policies. These may be under increased scrutiny in light of the new regulations.
- » Be patient and look for a good pitch. Complying with increased federal regulations is no fun, but swinging wildly in frustration rarely works out well. ■



Patrick M. Gavin is a partner at Husch Blackwell LLP who has been recognized as a Missouri Super Lawyer in Labor and Employment. He proactively counsels and trains employers regarding a variety of employment issues.

(816) 329-4717 //

patrick.gavin@huschblackwell.com