BAIRD HOLM LLP
ATTORNEYS AT LAW

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Allison D. Balus, Editor

Practical and preventive information for managing your workplace

EEOC Releases Proposed ADA Amendments Act Regulations

Last week, the Equal Employment Opportunity Commission (EEOC) released its long-awaited proposed regulations on the ADA Amendments Act of 2008. These regulations are open for public comment for the next 60 days. After that comment period, the EEOC will issue final regulations and provide an effective date on which they will be implemented.

On the whole, the regulations provide few surprises, as most of the information mirrors what was already included in the original Act. For instance, the regulations reiterate that the definition of "disability" shall be interpreted broadly, and clarifies that the inquiry in discrimination charges and lawsuits should be whether discrimination occurred, not whether an impairment arises to the level of a "disability."

What is a "Disability?"

While the regulations do not substantively change the definition of "disability," they instead expand upon how employers (and courts) assess whether an impairment "substantially limits" a "major life activity." Specifically, the regulations state that a limitation need not "significantly" or "severely" restrict a major life activity, as previously stated by Supreme Court precedent. Furthermore, a "major life activity" is something that "most people in the general population can perform with little or no difficulty." The regulations then provide an expanded, but non-exhaustive, list of major life activities in which an individual may be "substantially limited."

Notably, with respect to the major life activity of "working" (the activity which many plaintiffs previously relied on prior to the ADAAA when attempting to prove they suffered from a "disability"), an impairment substantially limits the major life activity of working if it substantially limits an individual's ability to perform, or to meet the qualifications for, the *type of work at issue*. The "type of work at issue" includes the job the individual has been doing or the job for which the individual has applied, as well as jobs with similar qualifications or job-related requirements that the impairment would substantially limit the individual from doing. The prior rule stated that an individual was substantially limited in working if he/she was precluded from a broad range or a class of jobs.

The regulations further provide that when assessing whether an impairment is substantially limiting, mitigating measures other than "ordinary eyeglasses or contact lenses shall *not* be considered." The regulations give the following examples:

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- An individual who is taking a psychiatric medication for depression, insulin for diabetes, or anti-seizure medication for a seizure disorder has a disability if there is evidence that the mental impairment, the diabetes, or the seizure disorder, if left untreated, would substantially limit a major life activity.

- An individual who uses hearing aids, a cochlear implant, or a telephone audio device due to a hearing impairment is an individual with a disability where, without the benefit of the mitigating measure, he/she would be substantially limited in the major life activity of hearing or any other major life activity.

The regulations further provide that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

List of "Disabilities"

The EEOC also provides the following list of impairments that, according to the EEOC, will meet the definition of a "disability":

- Autism
- Cancer
- Cerebral palsy
- Diabetes
- Epilepsy
- HIV or AIDS
- Multiple sclerosis and muscular dystrophy
- Major depression, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, or schizophrenia

In addition, the EEOC provides examples of impairments that *may* substantially limit an individual in a major life activity, but that shall require more analysis. They are:

- Asthma
- High blood pressure
- Learning disability
- Leg or back impairment
- Panic disorder, anxiety disorder, or some forms of depression other than major depression
- Carpal tunnel syndrome
- Hyperthyroidism

The regulations nevertheless clarify that temporary, non-chronic impairments of short duration with little or no residual effects (such as the common cold, seasonal or common influenza, a sprained joint, minor or non-chronic gastrointestinal disorders, or a broken bone that is expected to heal completely) usually will not substantially limit a major life activity.

"Regarded as" Disabled

The definition of "regarded as" is changed so that it no longer requires a showing that the employer perceived the individual to be substantially limited in a major life activity, and instead provides that an applicant or employee who is subjected to an action prohibited by the ADA (e.g., failure to hire, denial of promotion, or termination) because of an actual or perceived *impairment* will meet the "regarded as" definition of disability, unless the impairment is both transitory and minor. In other words, the employer need not perceive the individual to suffer from a "disability," but merely an impairment. With that said, the regulations clarify that individuals covered by the "regarded as" prong are not entitled to reasonable accommodation.

Qualification Standards

Finally, the regulations state that qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision shall not be used unless shown to be job-related for the position in question and consistent with business necessity.

What Should Employers Do Now?

These new regulations reflect an increased focus on disability claims and requests for accommodations. Employers should therefore review their current policies on non-discrimination and reasonable accommodation, and ensure their supervisors understand those new obligations, as employers will likely see more and more employees claiming they are disabled under the ADAAA in the coming years.

Kelli P. Lieurance

The regulations further provide that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

Final Reminder on E-Verify Mandates for Employers

As we have reported in past issues, certain employers may be required to register for and begin verifying their employees under the E-Verify Program sponsored by the Department of Homeland Security. Earlier this year, Nebraska joined a number of other states that have passed laws requiring use of the E-Verify Program for certain employers. In addition, federal regulation now requires the use of the E-Verify Program for certain federal contractors. The deadline for registering for E-Verifiy is October 1. If you are unsure as to whether you will be required to register, read the following summary for additional guidance.

Nebraska's LB 403: Verification Requirements for Public Employers and Contractors

Effective October 1, 2009, Nebraska law requires verification of lawful presence in the United States for certain public benefits and verification of employment eligibility for certain "public" employers and certain tax incentive programs.

Under the new law, all public employers and all public contractors and/or their subcontractors must verify the employment authorization of all new employees. A public contractor is defined as "any contractor or his or her subcontractor who is awarded a contract by a public employer for the physical performance of services within the State of Nebraska." As a result, as a condition of contracting with a Nebraska public employer, contractors and subcontractors must verify the employment eligibility of all new employees physically providing services within the state through a federal immigration verification. Moreover, any contract between a contractor and a public employer must include a provision requiring the contractor to do so. Currently, this would mandate the use of the E-Verify Program.

If you are a public employer, you will need to register with the Department of Homeland Security and sign-up as an E-Verify employer before October. This process includes:

- signing a Memorandum of Understanding with DHS and the Social Security Administration that requires you to provide and post certain notices;
- allowing DHS and SSA to make periodic visits to review E-Verify-related records (including Form I-9s and other employment records) and interview employees;
- reporting to DHS when you decide to employ someone despite a non-confirmation.

E-Verify Use by Federal Contractors

Under the Federal Acquisition Regulation governing contracts by federal agencies, including those for American Recovery and Reinvestment Act funds, federal contactors who are awarded contracts on or after September 8, 2009, may be required to register for and use E-Verify to receive and retain such contract. Contracts impacted are those in which the prime contract has a period of performance longer than 120 days, possesses a value above $100,000, and contains an E-Verify clause requiring the contractor to use E-Verify as a condition of the contract. Subcontractors may also be subject to the requirement if the subcontract is for services or construction with a value above $3,000 and the prime contract contains the E-Verify clause. Contracts awarded before September 8th that do not contain the E-Verify clause will not trigger the requirement, except for indefinite delivery/indefinite quantity contracts that are modified on or after September 8th to include the clause. According to USCIS guidance, the government contracting official will determine if the contract will include the E-Verify clause. Employers should contact the agency with whom the contract has

Under the new law, all public employers and all public contractors and/or their subcontractors must verify the employment authorization of all new employees.

been signed with any questions (or the prime contractor, if the employer is a subcontractor).

If a federal contractor is subject to the E-Verify requirement, there will be a limited amount of time (within 30 days of the contract award date) for the company to register for E-Verify and, once registered, to begin submitting inquiries. Inquiries must be submitted for not only new hires, but also any existing employee assigned to work directly on the contract, unless the employee is otherwise exempt from the E-Verify verification requirement (such as employees holding certain security clearances) or from the Form I-9 verification process (such as employees hired before November 6, 1986 and continuously employed since such date).

If you have any questions about whether your business is subject to either of the E-Verify mandates discussed above and or how to prepare for the requirements of the program before registering as an E-Verify employer, contact an attorney. There are a number of items an employer should carefully consider and steps to complete before signing up for the E-Verify Program, including, but not limited to the status of the company's existing Form I-9s and internal procedures for the use of the Program.

Amy Erlbacher-Anderson

USCIS Extends Validity of Form I-9

On August 27th, the United States Citizenship and Immigration Service (USCIS) announced the issuance of a new version of Form I-9, Employment Eligibility Verification Form, which will be valid through August 31, 2012. No substantive changes have been made to the Form I-9; and employers may use both the current version of the Form, which has a revision date of 08/07/09, or the prior version, which has a revision date of 02/02/09 in the bottom right corner. The February version of the Form has been required for use by all employers since April 3, 2009. If you are not yet using either version of Form I-9, you should begin to do so as soon as possible and will need to correct any forms completed between April and the present. You can access a copy of the Form, free of charge, on the USCIS website at www.uscis.gov.

Amy Erlbacher-Anderson

Pandemic Preparation and Response Checklist

As the H1N1 influenza spreads across the nation, employers face unique challenges as they seek to ensure business continuity, while maintaining a safe work environment. According to the Centers for Disease Control and Prevention (CDC) it is impossible to predict with any certainty the severity and extent of illness that may result from the H1N1 virus during the 2009-2010 flu season. Consequently, planning for pandemic influenza, like any emergency, becomes even more critical. To assist you in your efforts, Baird Holm LLP provides you with a checklist on the following pages. It outlines the general steps employers should take to prepare for pandemic flu, as well as best practices for preparing for any such emergency.

Kelli P. Lieurance
Scott S. Moore

If a federal contractor is subject to the E-Verify requirement, there will be a limited amount of time (within 30 days of the contract award date) for the company to register for E-Verify and, once registered, to begin submitting inquiries.

Step 1: Plan for the impact of a pandemic on your business:

Completed	In Progress	Not Started	Task
☐	☐	☐	Identify a pandemic coordinator with defined roles and responsibilities for preparedness and response planning. For unionized workforces, the planning process should include input from labor representatives.
☐	☐	☐	Prepare a pandemic team to consult with the coordinator. Make sure the team consists of representatives from all areas of the organization (e.g., HR, Safety, IT, etc.).
☐	☐	☐	Ensure the pandemic coordinator/team is educated about relevant legal obligations (e.g., ADA, OSHA, FMLA, workers' compensation, NLRA, etc.).
☐	☐	☐	Identify essential employees and other critical factors (e.g. raw materials, suppliers, sub-contractor services/ products, and logistics) required to maintain business operations by location and function during a pandemic.
☐	☐	☐	Train and prepare ancillary workforce (e.g. contractors, employees in other job titles/descriptions, retirees) to ensure continuity of basic operations.
☐	☐	☐	Develop and plan for scenarios likely to result in an increase or decrease in demand for your products and/or services during a pandemic (e.g. effect of restriction on mass gatherings, need for hygiene supplies).
☐	☐	☐	Determine potential impact of a pandemic on company business financials using multiple possible scenarios that affect different product lines and/or production sites.
☐	☐	☐	Determine potential impact of a pandemic on business-related domestic and international travel (e.g. quarantines, border closures).
☐	☐	☐	Find up-to-date, reliable pandemic information from community public health, emergency management, and other sources and make sustainable links.
☐	☐	☐	Establish an emergency communications plan and revise periodically. This plan includes identification of key contacts (with back-ups), chain of communications (including suppliers and customers), and processes for tracking and communicating business and employee status.
☐	☐	☐	Implement an exercise/drill to test your plan, and revise periodically.

Step 2: Plan for the impact of a pandemic on your employees and customers:

Completed	In Progress	Not Started	Task
☐	☐	☐	Forecast and allow for employee absences during a pandemic due to factors such as personal illness, family member illness, community containment measures and quarantines, school and/or business closures, and public transportation closures.
☐	☐	☐	Implement guidelines to modify the frequency and type of face-to-face contact (e.g. hand-shaking, seating in meetings, office layout, shared workstations) among employees and between employees and customers (refer to CDC recommendations).
☐	☐	☐	Evaluate employee access to and availability of healthcare services during a pandemic, and improve services as needed.
☐	☐	☐	Identify employees and key customers with special needs, and incorporate the requirements of such persons into your preparedness plan.

Step 3: Establish policies to be implemented during a pandemic:

Completed	In Progress	Not Started	Task
☐	☐	☐	Establish policies using a two-phase approach to account for varying levels of severity of influenza: • *Phase 1:* Isolated cases and/or relatively mild-moderate symptoms; no school/transportation closures. • *Phase 2:* Increased prevalence and/or severity; school/transportation closures.
☐	☐	☐	Establish liberal policies for employee compensation and attendance that are non-putative, including policies on when a previously ill person is no longer infectious and can return to work after illness.
☐	☐	☐	Establish policies for flexible worksite (e.g. telecommuting) and flexible work hours (e.g. staggered shifts).
☐	☐	☐	Establish policies for preventing influenza spread at the worksite (e.g. promoting respiratory hygiene/cough etiquette, and prompt exclusion of people with influenza symptoms).
☐	☐	☐	Establish policies for employees who have been exposed to pandemic influenza, are suspected to be ill, or become ill at the worksite (e.g. infection control response, immediate mandatory sick leave).

Completed	In Progress	Not Started	Task
☐	☐	☐	Establish policies for restricting travel to affected geographic areas (consider both domestic and international sites), evacuating employees working in or near an affected area when an outbreak begins, and guidance for employees returning from affected areas (refer to CDC travel recommendations).
☐	☐	☐	Set up authorities, triggers, and procedures for activating and terminating the company's response plan, altering business operations (e.g. shutting down operations in affected areas), and transferring business knowledge to key employees.

Step 4: Allocate resources to protect your employees and customers during a pandemic:

Completed	In Progress	Not Started	Task
☐	☐	☐	Provide sufficient and accessible infection control supplies (e.g., hand-hygiene products, tissues and receptacles for their disposal) in all business locations.
☐	☐	☐	Enhance communications and information technology infrastructures as needed to support employee telecommuting and remote customer access.
☐	☐	☐	Ensure availability of medical consultation and advice for emergency response.

Step 5: Communicate to and educate your employees:

Completed	In Progress	Not Started	Task
☐	☐	☐	Stay apprised of latest developments from official sources such as www.pandemicflu.gov and www.cdc.gov/h1n1flu.
☐	☐	☐	Develop and disseminate programs and materials covering pandemic fundamentals (e.g. signs and symptoms of influenza, modes of transmission), personal and family protection and response strategies (e.g. hand hygiene, coughing/sneezing etiquette, contingency plans).
☐	☐	☐	Anticipate employee fear and anxiety, rumors and misinformation and plan communications accordingly.

Completed	In Progress	Not Started	Task
☐	☐	☐	Ensure that communications are culturally and linguistically appropriate.
☐	☐	☐	Disseminate information to employees about your pandemic preparedness and response plan.
☐	☐	☐	Develop platforms (e.g. hotlines, dedicated websites) for communicating pandemic status and actions to employees, vendors, suppliers, and customers inside and outside the worksite in a consistent and timely way, including redundancies in the emergency contact system.
☐	☐	☐	Identify community sources for timely and accurate pandemic information (domestic and international) and resources for obtaining counter-measures (e.g. vaccines and antivirals).

Step 6: Coordinate with external organizations and help your community:

Completed	In Progress	Not Started	Task
☐	☐	☐	Collaborate with insurers, health plans, and major local healthcare facilities to share your pandemic plans and understand their capabilities and plans.
☐	☐	☐	Collaborate with federal, state, and local public health agencies and/or emergency responders to participate in their planning processes, share your pandemic plans, and understand their capabilities and plans.
☐	☐	☐	Communicate with local and/or state public health agencies and/or emergency responders about the assets and/or services your business could contribute to the community.
☐	☐	☐	Share best practices with other businesses in your communities, chambers of commerce, and associations to improve community response efforts.

Nebraska LB 551: New Health Plan Dependent Eligibility Status

On January 1, 2010, a bill recently passed in the Nebraska legislature and approved by the Governor will go into effect and alter the potential dependent status of a dependent participant in a health plan. Similar to an Iowa law passed in 2008 raising the dependent age to 25, Nebraska LB 551 will require any fully-insured group, individual, PPO, and HMO insurance policy and any self-funded employee benefit plan (to the extent not preempted by federal law) that provides coverage to children to provide the option to the insured to continue coverage for a covered child who would otherwise be terminated for (1) attaining the age which exceeds the specified age at which coverage ceases pursuant to the plan, (2) loss of full-time student status, or (3) ceasing to be a dependent.

The new law would extend the eligible dependent child's coverage to the end of the month in which the child (1) marries, (2) ceases to be a resident of Nebraska (unless a full-time student); (3) receives coverage under another health benefit plan; or (4) attains 30 years of age. The health plan may also require a written election from the insured child and an additional premium for the child. However, such premium shall not exceed the amount the health benefit plan would receive for an identical individual for a single adult insured.

It would be prudent to discuss with your insurance provider the course of action for existing health insurance contracts and future health insurance contracts. You may also wish to review your plan documents to determine if a change to your eligibility and dependent provisions is needed.

Of final note, this additional available coverage to child dependents may be a taxable event to those individuals. Federal tax law provides that an individual is only a dependent up until the age of 24. Beyond age 24, any coverage provided to an individual may be a taxable event and could cause the Plan to be required to provide documentation such as a Form 1099 to that individual.

Adam L. Cockerill

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BAIRD HOLM LLP
ATTORNEYS AT LAW

LABOR, EMPLOYMENT AND EMPLOYEE BENEFITS LAW OR RELATED SERVICES

Jill Robb Ackerman (1)
Allison D. Balus (6)
Kirk S. Blecha (1)
Gary N. Clatterbuck
Adam L. Cockerill (1)
Steven D. Davidson (2)
Alison A. Dempsey (1)
Amy L. Erlbacher-Anderson
Heidi A. Guttau-Fox (1)
Christopher R. Hedican (5)
David J. Kramer
Kelli P. Lieurance (1)
Lindsay K. Lundholm (1)
Scott P. Moore (4)
Scott S. Moore (3)
R.J. (Randy) Stevenson (1)
Quinn H. Vandenberg (7)

All attorneys are admitted to practice in Nebraska unless otherwise noted.
(1) Also admitted to practice in Iowa
(2) Also admitted to practice in Missouri
(3) Also admitted to practice in Iowa and Colorado
(4) Also admitted to practice in Iowa and Missouri
(5) Also admitted to practice in Iowa, Kansas, Missouri, Wyoming, Montana and South Dakota
(6) Also admitted to practice in Virginia and the District of Columbia
(7) Also admitted to practice in Massachusetts

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BAIRD HOLM
1500 Woodmen Tower
1700 Farnam St
Omaha, NE 68102
402.344.0500
402.344.0588
www.bairdholm.com