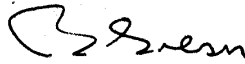


Date: November 30, 2011

Code: TECHNICAL LETTER
HR/EEO 2011-05

To: Human Resources Officers
Equal Employment Opportunity Directors

From: Bruce Gibson 
Senior Director
Systemwide Equal Opportunity/Whistleblower Compliance

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Systemwide Equal Opportunity/Whistleblower Compliance

Subject: ADA Amendments Act of 2008 – EEOC 2011 Final Implementing Regulations

Overview

Audience: Campus designees responsible for human resources policies, employment nondiscrimination policies, or ADA compliance

Action Items: Review and implement new regulations

Affected Employee Groups/Units: All CSU employees and job applicants

Summary

Federal regulations to implement the ADA Amendments Act of 2008 (ADAAA) were recently issued. This technical letter provides a summary of the federal regulations and information on the interplay between federal law and California law with regard to disability discrimination.

Background

The ADA Amendments Act of 2008 (ADAAA) made a number of changes to the Americans with Disabilities Act, effective January 1, 2009. On May 24, 2011, final implementing regulations, which were issued by the Equal Employment Opportunity Commission (EEOC) to reflect these changes, became effective.

Discussion of Changes

In general, the changes make it easier for an individual to establish he or she has a “disability”. To this extent, the implementing regulations specify rules of construction to use when determining if an individual has a “disability.” The following is partial list of the rules of construction:

- An impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population; this usually will not require scientific, medical, or statistical analysis;

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- An impairment does not need to prevent or severely or significantly restrict a major life activity to be considered "substantially limiting;"
- The determination as to whether an individual has an impairment that "substantially limits" should not require extensive analysis;
- The determination whether an impairment "substantially limits" a major life activity will be made without regard to the ameliorative effects of mitigating measures, except ordinary eyeglasses or contact lenses;
- An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active;
- The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting.

An important change involves individuals who want to establish they have a disability because their employer regards them as having a disability. Such an individual no longer must prove that the employer perceives/believes he/she has an impairment that substantially limits a major life activity. Rather, the individual only needs to prove the employer subjected him/her to an ADA-prohibited action (e.g., refusal to hire, demotion, termination) because of an impairment, whether or not that impairment actually substantially limits, or is perceived by the employer to substantially limit, a major life activity of the individual.

For detailed information on the ADAAA and its implementing regulations, you should review the following attachments to this technical letter:

- Fact Sheet on the EEOC's Final Regulations Implementing the ADAAA (Attachment A)
- Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008 (Attachment B)

Effect on the CSU: Interplay of FEHA and ADA

As an employer in California, the CSU is governed not only by federal laws on disability discrimination, but also by state law on the subject (the Fair Employment and Housing Act (FEHA)). It has long been recognized that FEHA is more protective of individuals with disabilities than the ADA. However, with the recent changes introduced by the ADAAA that tend to broaden the scope of coverage of the federal law, the federal law is now more analogous to FEHA than was the case previously.

Even after the enactment of the ADAAA, one difference that remains between federal and state laws is important to note. Under federal law, an individual who establishes he/she has a disability solely because he/she is regarded as having a disability can raise claims of disability discrimination (e.g., failure to hire or promote, termination, harassment, retaliation), but he/she cannot raise a claim of failure to provide reasonable accommodation. The ADAAA specifically states individuals covered under only the "regarded as" definition are not entitled to reasonable accommodation. In contrast, under FEHA and California case law, an individual "regarded as" having an impairment that limits a major life activity can raise a claim of failure to provide reasonable accommodation even though he/she actually has no such impairment.

To see the similarities and differences among the major provisions of the ADA, ADAAA, and FEHA, you should consult "Comparison of the ADA, the ADA Amendments Act & the FEHA" (Attachment C).

Questions may be directed to Ellen Bui at (562) 951-4427, ebui@calstate.edu. This technical letter is also available on the Human Resources Management's Web site at: <http://www.calstate.edu/HRAdm/memos.shtml>.

Attachments

EN/BG/eb



U.S. Equal Employment Opportunity Commission

Fact Sheet on the EEOC's Final Regulations Implementing the ADAAA

The ADA Amendments Act of 2008 (ADAAA) was enacted on September 25, 2008, and became effective on January 1, 2009. The law made a number of significant changes to the definition of "disability" under the Americans with Disabilities Act (ADA). It also directed the U.S. Equal Employment Opportunity Commission (EEOC) to amend its ADA regulations to reflect the changes made by the ADAAA. The EEOC issued a Notice of Proposed Rulemaking (NPRM) on September 23, 2009. The [final regulations](#) were approved by a bipartisan vote and were published in the Federal Register on March 25, 2011.

In enacting the ADAAA, Congress made it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the statute. Congress overturned several Supreme Court decisions that Congress believed had interpreted the definition of "disability" too narrowly, resulting in a denial of protection for many individuals with impairments such as cancer, diabetes, and epilepsy. The ADAAA states that the definition of disability should be interpreted in favor of broad coverage of individuals.

The EEOC regulations implement the ADAAA -- in particular, Congress's mandate that the definition of disability be construed broadly. Following the ADAAA, the regulations keep the ADA's definition of the term "disability" as a physical or mental impairment that substantially limits one or more major life activities; a record (or past history) of such an impairment; or being regarded as having a disability. But the regulations implement the significant changes that Congress made regarding how those terms should be interpreted.

The regulations implement Congress's intent to set forth predictable, consistent, and workable standards by adopting "rules of construction" to use when determining if an individual is substantially limited in performing a major life activity. These rules of construction are derived directly from the statute and legislative history and include the following:

- **The term "substantially limits" requires a lower degree of functional limitation than the standard previously applied by the courts.** An impairment does not need to prevent or severely or significantly restrict a major life activity to be considered "substantially limiting." Nonetheless, not every impairment will constitute a disability.
- **The term "substantially limits" is to be construed broadly** in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA.
- The determination of whether an impairment substantially limits a major life activity **requires an individualized assessment**, as was true prior to the ADAAA.
- With one exception ("ordinary eyeglasses or contact lenses"), the determination of whether an impairment substantially limits a major life activity shall be made **without regard to the ameliorative effects of mitigating measures**, such as medication or hearing aids.
- **An impairment that is episodic or in remission is a disability** if it would substantially limit a major life activity when active.
- In keeping with Congress's direction that the primary focus of the ADA is on whether discrimination occurred, **the determination of disability should not require extensive analysis.**

As required by the ADAAA, the regulations also make it easier for individuals to establish coverage under the "regarded as" part of the definition of "disability." As a result of court interpretations, it had become difficult for individuals to establish coverage under the "regarded as" prong. Under the ADAAA, the focus for establishing coverage is on how a person has been treated because of a physical or mental impairment (that is not transitory and minor), rather than on what an employer may have believed about the nature of the person's impairment.

The regulations clarify, however, that an individual must be covered under the first prong ("actual disability") or second prong ("record of disability") in order to qualify for a reasonable accommodation. The regulations clarify that it is generally not necessary to proceed under the first or second prong if an individual is not challenging an employer's failure to provide a reasonable accommodation.

The final regulations differ from the NPRM in a number of ways. The final regulations modify or remove language that groups representing employer or disability interests had found confusing or had interpreted in a manner not intended by the EEOC. For example:

- Instead of providing a list of impairments that would "consistently," "sometimes," or "usually not" be disabilities (as had been done in the NPRM), the final regulations provide the nine rules of construction to guide the analysis and explain that by applying those principles, **there will be some impairments that virtually always constitute a disability.** The regulations also provide examples of impairments that should easily be concluded to be disabilities, **including epilepsy, diabetes, cancer, HIV infection, and bipolar disorder.**
- **Language in the NPRM describing how to demonstrate that an individual is substantially limited in "working" has been deleted from the final regulations and moved to the appendix** (consistent with how other major life activities are addressed). The final regulations also retain the existing familiar language of "class or broad range of jobs" rather than introducing a new term, and they provide examples of individuals who could be considered substantially limited in working.
- **The final regulations retain the concepts of "condition, manner, or duration"** that the NPRM had proposed to delete and explain that while consideration of these factors may be unnecessary to determine whether an impairment substantially limits a major life activity, they may be relevant in certain cases.

The Commission has released two Question-and-Answer documents about the regulations to aid the public and employers -- including small business -- in understanding the law and new regulations. The ADAAA regulations and accompanying Question and Answer documents are available on the EEOC website at www.eeoc.gov.



U.S. Equal Employment Opportunity Commission

Questions and Answers on the Final Rule Implementing 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.” It also directed the U.S. Equal Employment Opportunity Commission (EEOC) to amend its ADA regulations to reflect the changes made by the ADAAA. The [final regulations were published in the Federal Register](#) on March 25, 2011.

The EEOC is making changes to both the Title I ADA regulations and to the Interpretive Guidance (also known as the Appendix) that was published with the original ADA regulations. The Appendix provides further explanation on how the regulations should be interpreted.

The questions and answers below provide information on the changes made to the regulations as a result of the ADAAA and identify certain regulations that remain the same. The answers below also note where the final regulations differ from what appeared in the Notice of Proposed Rulemaking (NPRM) that was published September 23, 2009. Finally, answers to certain questions provide citations to specific sections of the final regulations and the corresponding section of the Appendix (29 C.F.R. section 1630).

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

No. The ADAAA does not apply retroactively. For example, the ADAAA would not apply to a situation in which an employer, union, or employment agency 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 accommodation where a request was made (or an earlier request was renewed) or to other alleged discriminatory acts that occurred on or after January 1, 2009.

2. What is the purpose of the ADAAA?

Among the purposes of the ADAAA is the reinstatement of 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, 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. The ADAAA explicitly rejected certain Supreme Court interpretations of the term “disability” and a portion of the EEOC regulations that it found had inappropriately narrowed the definition of disability. As a result of the ADAAA and EEOC’s final regulations, it will be much easier for individuals seeking the law’s protection to demonstrate that they meet the definition of “disability.” As a result, many more ADA claims will focus on the merits of the case.

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

Yes. The ADAAA specifically states that all of its changes also apply to:

- section 501 of the Rehabilitation Act (federal employment),
- section 503 of the Rehabilitation Act (federal contractors), and
- section 504 of the Rehabilitation Act (recipients of federal financial assistance and services and programs of federal agencies).

The changes to the definition of disability also 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 portions of the ADA and the Rehabilitation Act concerning employment, such as a provision that requires covered entities to show that qualification standards that screen out individuals based on uncorrected vision are job-related and consistent with business necessity, and changes to the general prohibition of discrimination in § 102 of the ADA.

The EEOC’s final regulations apply to Title I of the ADA and section 501 of the Rehabilitation Act, but they do not apply to Titles II and III of the ADA, or sections 503 and 504 of the Rehabilitation Act.

4. Who is required to comply with these regulations?

These regulations apply to all private and state and local government employers with 15 or more employees, employment agencies, labor organizations (unions), and joint labor-management committees. [Section 1630.2(b)] Additionally, section 501 of the Rehabilitation Act applies to federal executive branch agencies regardless of the number of employees they have. The use of the term “covered entity” in this Q&A and the Appendix refers to all such entities.

5. How does the ADAAA define “disability?”

The ADAAA and the final regulations define a disability using a three-pronged approach:

- a physical or mental impairment that substantially limits one or more major life activities (sometimes referred to in the regulations as an “actual disability”), or
- a record of a physical or mental impairment that substantially limited a major life activity (“record of”), or
- when a covered entity takes an action prohibited by the ADA because of an actual or perceived impairment that is not both transitory and minor (“regarded as”). [Section 1630.2(g)]

6. Must individuals use a particular prong of the definition of disability when challenging a covered entity's actions?

Not necessarily. Claims for denial of reasonable accommodation must be brought under one or both of the first two prongs of the definition of disability (i.e., an actual disability and/or a record of a disability) since the ADAAA specifically states that those covered under only the "regarded as" definition are not entitled to reasonable accommodation. While other types of allegations (e.g., failure to hire or promote, termination, harassment) may be brought under any of the definitions, an individual may find it easier to claim coverage under the "regarded as" definition of disability. An individual only has to meet one of the three prongs of the definition of "disability." [Section 1630.2(g)(3) and Appendix Section 1630.2(g)]

7. How do the regulations define the term "physical or mental impairment"?

The regulations define "physical or mental impairment" as any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin and endocrine. They also cover any mental or psychological disorder, such as intellectual disability (formerly termed mental retardation), organic brain syndrome, emotional or mental illness, and specific learning disabilities. [Section 1630.2(h)]

The definition of "impairment" in the new regulations is almost identical to the definition in EEOC's original ADA regulations, except that the immune and circulatory systems have been added to the list of body systems that may be affected by an impairment, because these systems are specifically mentioned in the ADAAA's examples of major bodily functions. (See Question 8.)

8. What are "major life activities"?

The final regulations provide a non-exhaustive list of examples of major life activities: 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. Most of these examples are taken from the ADAAA, which in turn adopted them from the original ADA regulations and EEOC guidances, or from ADA and Rehabilitation Act case law.

The final regulations also state that major life activities include the operation of *major bodily functions*, including functions of the immune system, special sense organs and skin, normal cell growth, digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. Although not specifically stated in the NPRM, the final regulations state that major bodily functions include the operation of an individual organ within a body system (e.g., the operation of the kidney, liver, or pancreas).

As a result of the ADAAA's recognition of major bodily functions as major life activities, it will be easier to find that individuals with certain types of impairments have a disability. (For examples of impairments affecting major bodily functions that should easily be concluded to meet the first or second part of the definition of "disability," see Question 19.)

9. When does an impairment "substantially limit" a major life activity?

To have an "actual" disability (or to have a "record of" a disability) an individual must be (or have been) substantially limited in performing a major life activity as compared to most people in the general population. Consistent with the ADAAA, the final regulations adopt "rules of construction" to use when determining if an individual is substantially limited in performing a major life activity. These rules of construction include the following:

- An impairment need not prevent or severely or significantly limit a major life activity to be considered "substantially limiting." Nonetheless, not every impairment will constitute a disability.
- The term "substantially limits" should be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA.
- The determination of whether an impairment substantially limits a major life activity requires an individualized assessment.
- In keeping with Congress' direction that the primary focus of the ADA is on whether discrimination occurred, the determination of disability should not require extensive analysis.
- Although determination of whether an impairment substantially limits a major life activity as compared to most people will not usually require scientific, medical, or statistical evidence, such evidence may be used if appropriate.
- An individual need only be substantially limited, or have a record of a substantial limitation, in one major life activity to be covered under the first or second prong of the definition of "disability."

Other rules of construction are discussed in more detail in Questions 10-17. [Section 1630.2(j)(1)(i-v) and (viii)]

10. Do the final regulations require that an impairment last a particular length of time to be considered substantially limiting?

No. As discussed in Question 25, the ADAAA excludes from "regarded as" coverage an actual or perceived impairment that is both transitory (i.e., will last fewer than six months) and minor. However, neither the ADAAA nor the final regulations apply this exception found in the "regarded as" definition of disability to the other two definitions of disability. One of the "rules of construction" states that the effects of an impairment lasting fewer than six months can be substantially limiting. [Section 1630.2(j)(1)(ix)]

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

Yes. The ADAAA and the final regulations 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 Appendix provides examples of impairments that may be episodic, including epilepsy, hypertension, asthma, diabetes, major depressive disorder, bipolar disorder, and schizophrenia. An impairment such as cancer that is in remission but that may possibly return in a substantially limiting form will also be a disability under the ADAAA and the final regulations. [Section 1630.2(j)(1)(vii) and corresponding Appendix section]

12. What are mitigating measures?

Mitigating measures eliminate or reduce the symptoms or impact of an impairment. The ADAAA and the final regulations provide a non-exhaustive list of examples of mitigating measures. They include medication, medical equipment and devices, prosthetic limbs, low vision devices (e.g., devices that magnify a visual image), hearing aids, mobility devices, oxygen therapy equipment, use of assistive technology,

reasonable accommodations, and learned behavioral or adaptive neurological modifications. In addition, the final regulations add psychotherapy, behavioral therapy, and physical therapy to the ADAAA's list of examples. [Section 1630.2(j)(5)]

13. May the positive effects of mitigating measures in limiting the impact of an impairment on performance of a major life activity be considered when determining whether someone has a disability?

No, except for ordinary eyeglasses or contact lenses (see Question 14). The ADAAA and the final regulations direct that the positive (or ameliorative) 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. This may mean focusing on the extent of limitations prior to use of a mitigating measure or on what would happen if the individual ceased using a mitigating measure. [Section 1630.2(j)(1)(vi) and corresponding Appendix section]

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

No. "Ordinary eyeglasses or contact lenses" – defined in the ADAAA and the final regulations as lenses that are "intended to fully correct visual acuity or to eliminate refractive error" – must be considered when determining whether someone has a disability. For example, a person who wears ordinary eyeglasses for a routine vision impairment is not, for that reason, a person with a disability under the ADA. The regulations do not establish a specific level of visual acuity for determining whether eyeglasses or contact lenses should be considered "ordinary." This determination should be made on a case-by-case basis in light of current and objective medical evidence. [Sections 1630.2(j)(1)(vi) and (j)(6) and corresponding Appendix sections]

15. May the negative effects of a mitigating measure be taken into account in determining whether an individual meets the definition of "disability"?

Yes. The ADAAA allows consideration of the negative effects 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. However, it will often be unnecessary to consider the non-ameliorative effects of mitigating measures in order to determine whether an individual has a disability. For example, it is unnecessary to consider the burdens associated with receiving dialysis treatment for someone whose kidney function would be substantially limited without this treatment. [Section 1630.2(j)(4)(ii)]

16. May 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 both the positive and negative effects of a mitigating measure. The negative effects of mitigating measures may include side effects or burdens that using a mitigating measure might impose. For example, someone with diabetes may need breaks to take insulin and monitor blood sugar levels, and someone with kidney disease may need a modified work schedule to receive dialysis treatments. On the other hand, if an individual with a disability uses a mitigating measure that results in no negative effects and eliminates the need for a reasonable accommodation, a covered entity will have no obligation to provide one.

17. Can a covered entity require that an individual use a mitigating measure?

No. A covered entity cannot require an individual to use a mitigating measure. However, failure to use a mitigating measure may affect whether an individual is qualified for a particular job or poses a direct threat. [Appendix Section 1630.2(j)(1)(vi)]

18. After an individualized assessment is done, are there certain impairments that will virtually always be found to result in substantial limitation in performing certain major life activities?

Yes. Certain impairments, due to their inherent nature and the extensive changes Congress made to the definitions of "major life activities" and "substantially limits," will virtually always be disabilities. (See Questions 8-11 and 13.) For these impairments, the individualized assessment should be particularly simple and straightforward.

19. Do the regulations give any examples of specific impairments that will be easily concluded to substantially limit a major life activity?

Yes. The regulations identify examples of specific impairments that should easily be concluded to be disabilities and examples of major life activities (including major bodily functions) that the impairments substantially limit. The impairments 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 infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder, and schizophrenia. [Section 1630.2(j)(3)]

20. May the condition, manner, or duration under which a major life activity can be performed be considered in determining whether an impairment is a disability?

Yes. The Commission did not include the concepts of "condition, manner, or duration" (used in the original ADA regulations published in 1991) in the NPRM, believing that use of the terms might lead to the kind of excessive focus on the definition of "disability" that Congress sought to avoid. In response to comments on behalf of both employers and individuals with disabilities, however, we have included the concepts of condition, manner, or duration (where duration refers to the length of time it takes to perform a major life activity or the amount of time the activity can be performed) in the final regulations as facts that may be considered if relevant. But, with respect to many impairments, including those that should easily be concluded to be disabilities (see Question 19), it may be unnecessary to use these concepts to determine whether the impairment substantially limits a major life activity.

Assessing the condition, manner, or duration under which a major life activity can be performed may include consideration of the difficulty, effort, or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life

activity can be performed; and/or the way an impairment affects the operation of a major bodily function. [Section 1630.2(j)(4)(i) and (ii) and corresponding Appendix section]

21. When is someone substantially limited in the major life activity of working?

In certain situations, an impairment may limit someone's ability to perform some aspect of his or her job, but otherwise not substantially limit any other major life activity. In these situations, the individual may be substantially limited in working. However, with all of the changes made by the ADAAA, in particular the inclusion of major bodily functions as major life activities and revisions to the "regarded as" prong of the definition of "disability," it should generally be unnecessary to determine whether someone is substantially limited in working. [Appendix Section 1630.2(j)]

The final regulations, unlike the NPRM, do not mention the major life activity of working other than by its inclusion in the list of major life activities (see Question 8). However, the Appendix discusses how to determine substantial limitation in a number of major life activities, including working. The Appendix discussion of working, unlike the NPRM, states that substantial limitation in this major life activity will be made with reference to difficulty performing either a "class or broad range of jobs in various classes" rather than a "type of work." The Appendix also notes that a "class" of work may be determined by reference to the nature of the work (e.g., commercial truck driving or assembly line jobs), or by reference to job-related requirements that an individual is limited in meeting (e.g., jobs requiring extensive walking, prolonged standing, and repetitive or heavy lifting). Demonstrating a substantial limitation in performing the unique aspects of a single specific job is not sufficient to establish that a person is substantially limited in the major life activity of working.

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

Yes. The ADAAA did not make changes to the part of the ADA that excludes from coverage a person who currently engages in the illegal use of drugs when a covered entity acts on the basis of such use. However, the ADA also still says that a person who no longer engages in the illegal use of drugs may be an individual with a disability if he or she:

- 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 Anonymous or Narcotics Anonymous). [Section 1630.3(a)-(b)]

23. Is pregnancy a disability under the ADAAA?

No. Pregnancy is not an impairment and therefore cannot be a disability. Certain impairments resulting from pregnancy (e.g., gestational diabetes), however, may be considered a disability if they substantially limit a major life activity, or if they meet one of the other two definitions of disability discussed below. [Appendix Section 1630.2(h)]

24. When does an individual have a "record of" a disability?

An individual who does not currently have a substantially limiting impairment but who had one in the past meets this definition of "disability." An individual also can meet the "record of" definition of disability if she was once misclassified as having a substantially limiting impairment (e.g., someone erroneously deemed to have had a learning disability but who did not).

All of the changes to the first definition of disability discussed in the questions above – including 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, and the requirement to disregard the positive effects of mitigating measures – will apply to evaluating whether an individual meets the "record of" definition of disability. [Section 1630.2(k) and corresponding Appendix section]

25. What does it mean for a covered entity to "regard" an individual as having a disability?

Under the ADAAA and the final regulations, a covered entity "regards" an individual as having a disability if it takes an action prohibited by the ADA (e.g., failure to hire, termination, or demotion) based on an individual's impairment or on an impairment the covered entity 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, which required an individual seeking coverage under this part of the definition to show that a covered entity believed the individual's impairment (or perceived impairment) substantially limited performance of a major life activity. [Section 1630.2(l)(1)]

A covered entity will regard an individual as having a disability any time it takes a prohibited action against the individual because of an actual or perceived impairment, regardless of whether the covered entity asserts, or even ultimately establishes, a defense for its action. As discussed in Question 26, the legality of the covered entity's actions is a separate inquiry into the merits of the claim. [Section 1630.2(l)(2)]

The final regulations state that a covered entity may challenge a claim under the "regarded as" prong by showing that the impairment in question, whether actual or perceived, is both transitory and minor. In other words, whether the impairment in question is transitory and minor is a defense available to covered entities. However, a covered entity may not defeat a claim by asserting it believed an impairment was transitory and minor when objectively this is not the case. For example, an employer that fires an employee because he has bipolar disorder, or an employment agency that refuses to refer an applicant because he has bipolar disorder, cannot assert that it believed the impairment was transitory and minor because bipolar disorder is not objectively transitory and minor. [Section 1630.15(f) and corresponding Appendix section]

26. If a covered entity regards an individual as having a disability, does that automatically mean the covered entity has discriminated against the individual?

No. The fact that a covered entity's action may have been based on an impairment does not necessarily mean that a covered entity 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, a covered entity 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 covered entity's action was required by another federal law (e.g., a law that prohibits individuals with certain impairments from holding certain kinds of jobs). As under current law, a covered entity will be held liable only when an individual proves that the entity engaged in unlawful discrimination under the ADA. [Sections 1630.2(l)(3) and 1630.2(o)(4), and Appendix Sections 1630.2(l) and (o)]

27. Does an individual have to establish coverage under a particular definition of disability to be eligible for a reasonable accommodation?

Yes. Individuals must meet either the "actual" or "record of" definitions of disability to be eligible for a reasonable accommodation. Individuals who *only* meet the "regarded as" definition are not entitled to receive reasonable accommodation. Of course, coverage under

the “actual” or “record of” definitions does not, alone, entitle a person to a reasonable accommodation. An individual must be able to show that the disability, or past disability, requires a reasonable accommodation. [Sections 1630.2(k)(3), 1630.2(o)(4), 1630.9(e)]

28. What do the final regulations say about qualification standards based on uncorrected vision?

The ADAAA and the final regulations require that a covered entity show that a challenged qualification standard based on uncorrected vision is job-related and consistent with business necessity. An individual challenging the legality of an uncorrected vision standard need not be a person with a disability, but the individual must have been adversely affected by the standard. The Appendix notes that individuals who are screened out of a job because they cannot meet an uncorrected vision standard will usually meet the “regarded as” definition of disability. [Section 1630.10(b) and corresponding Appendix section]

29. 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. Nearly all of the ADAAA’s changes only affect the definition of “disability.” None of the key ADA terms listed in this Question, or the burdens of proof applicable to each one, have changed. The only provision in the ADAAA affecting the reasonable accommodation obligation is that a covered entity does not have to provide one to an individual who only meets the “regarded as” definition of disability.

30. Why do the regulations no longer refer to a “qualified individual with a disability”?

Consistent with the ADAAA, the final regulations now refer to “individual with a disability” and “qualified individual” as separate terms. They also now prohibit discrimination “on the basis of disability” rather than “against a qualified individual with a disability because of the disability of such individual.” The changes to the regulations reflect changes made by the ADAAA itself, which are intended to make the primary focus of an ADA inquiry whether discrimination occurred, not whether an individual meets the definition of “disability.” However, an individual must still establish that he or she is qualified for the job in question. [Section 1630.4 and the Introduction to the Appendix]

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

No. The ADAAA and the final regulations specifically state that no changes alter the standards for determining eligibility for benefits under State workers’ compensation laws or under Federal and State disability benefit programs. [Section 1630.1(c)(3) and corresponding Appendix section]

32. May 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. [Section 1630.4(b) and corresponding Appendix section]

33. Will the EEOC be updating all of the ADA-related publications on its website to be consistent with the final ADAAA regulations?

Yes. When EEOC updates a particular document, we will note this on our website and explain what changes were made to the document. To avoid misunderstanding, all of these documents currently contain notices about the ADAAA indicating that some of the material in the documents may no longer reflect the law. It should be noted that because the ADAAA focused almost exclusively on changing the definition of “disability,” content in these documents unrelated to the definition of “disability” – including the meaning of qualified, essential functions, reasonable accommodation, and direct threat – remains unaffected by the ADAAA and the final regulations. Therefore, individuals can continue to rely on these parts of the documents as reflecting current law.

For more information about the ADA, please visit our website or call our toll-free number.

EEOC website: www.eeoc.gov
800-669-4000 (Voice) and 800-669-6820 (TTY)
All calls are confidential.

For more information about reasonable accommodations, contact the Job Accommodation Network. JAN provides free, expert, and confidential guidance on workplace accommodations.

JAN website: www.askjan.org
800-526-7234 (Voice) and 877-781-9403 (TTY)

Comparison of the ADA, the ADA Amendments Act & the FEHA

Term	Americans with Disabilities Act of 1990 (ADA) (42 U.S.C. § 12101, et seq.) and Subsequent Court Decisions	ADA Amendments Act of 2008 (Eff. 1/1/09) (ADAAA) (Pub. Law 110-325; 42 U.S.C. § 12101, et seq., as amended)	Fair Empl. & Hous. Act (FEHA) (Gov. Code § 12900, et seq., as amended by the Prudence K. Poppink Act of 2000)
“Disability” Definition	<p>An employee or applicant is “disabled” if s/he: (1) has an actual physical or mental impairment that <i>substantially limits</i> a major life activity; (2) has a record of such an impairment; or (3) is regarded as having such an impairment. [§ 12102(2).]</p> <p>U.S. Supreme Court and circuit court cases narrowed this definition, excluding many medical impairments from the definition of “disabilities.”</p>	<p>Congress reaffirmed that the definition of “disability” should be construed in favor of <i>broad coverage</i> of individuals, specifically disapproving U.S. Supreme Court cases which had narrowed coverage. [See Congressional findings at Pub. Law 110-325, §2(a) & (b); 42 U.S.C. § 12102(1) & see rules of construction language at § 12102(4).]</p>	<p>A person is “disabled” if s/he has a physical or mental impairment that <i>limits</i> a major life activity; has a record of such an impairment, is regarded as having or having had such an impairment, or is regarded or treated as having an impairment that has no present disabling effect but might become a future disability. [§§ 12926(i) & (k), 12926.1(c).]</p> <p>Definitions of physical and mental disabilities are to be <i>broadly construed</i>. [§ 12926.1(b)]</p> <p>FEHA is specifically distinguished from the ADA. [§ 12926.1(a) & (d).]</p>
“Mitigating Measures”	<p>Mitigating measures which ameliorate disabilities’ effects such as medication or medical supplies are considered in determining whether a person is substantially limited in a major life activity. [Sutton v. United Airlines (1999) 527 U.S. 471; Murphy v. United Parcel Service (1999) 527 U.S. 516 & Albertson’s, Inc. v. Kirkingburg (1999) 527 U.S. 555).]</p>	<p>Mitigating measures are <i>not</i> considered in determining whether an individual has an impairment that substantially limits a major life activity [§ 12102(4)(E)], but “ordinary eyeglasses or contact lenses” may be taken into account. [§ 12102(4)(E)(i)(I).]</p>	<p>Mitigating measures are not considered in determining whether an individual has an impairment that “limits” a major life activity unless the mitigating measure itself limits a major life activity. [§§ 12926(i)(1)(A) & (k)(1)(B), 12926.1(c).]</p> <p>No mention of eyeglasses or contact lenses.</p>

Comparison of the ADA, the ADA Amendments Act & the FEHA

Term	ADA	ADAAA	FEHA
<p>“Substantially Limits”</p>	<p>An impairment “substantially limits” a “major life activity” if it prevents or severely restricts the individual from performing the activity. [<i>Toyota Motor Mfg. of Kentucky v. Williams</i> (2002) 534 U.S. 184, 198.]</p> <p>EEOC regulations provide: “substantially limits” means “significantly restricts.” [29 C.F.R. § 1630.2(j)(ii).]</p>	<p>The ADAAA’s Congressional findings provide that the EEOC and the Supreme Court have incorrectly interpreted the term “substantially limits” to establish a greater degree of limitation than Congress intended. [ADAAA of 2008, Pub. Law 110–325, § 2(a)(4)–(8) & (b)(6).]</p>	<p>FEHA requires that the physical or mental condition “limits” one or more major life activities, making “the achievement of the major life activity “difficult.” [§§ 12926(i)(1)(B) & (k)(1)(B)(ii), 12926.1(c).]</p>
<p>“Major Life Activity”</p>	<p>A “major life activity” must be an activity that is “of central importance to most people’s daily lives.” [<i>Toyota Motor Mfg. of Kentucky v. Williams, supra</i>, 534 U.S. at p. 184.]</p> <p>Some lower courts had required that individuals must be limited in more than one major life activity to be considered “disabled.” [See, e.g., <i>E.E.O.C. v. HBH Inc.</i> (E.D.La. Dec. 9, 1999) 1999 WL 11385333; <i>E.E.O.C. v. J. B. Hunt Transport, Inc.</i> (2d Cir. 2003) 321 F.3d 69; <i>McChure v. General Motors Corp.</i> (5th Cir. 2003) 2003 WL 21766539.]</p>	<p>Disavows <i>Toyota v. Williams</i> and gives a non-exhaustive list of major life activities, including seeing, hearing, eating, sleeping, walking, learning and concentrating, as well as the operation of “major bodily functions” such as the immune and endocrine systems and normal cell growth. [§ 12102(2).]</p> <p>Only one major life activity is needed to establish a limitation. [§ 12102(4)(C)]</p>	<p>Major life activities are to be “broadly construed” and include physical, mental, and social activities and working. [§§ 12926(i)(1)(C) & (k)(1)(B)(iii), 12926.1(c)]</p> <p>An employee’s impairment need affect only a particular job, not a class or broad range of employment, to “limit” the major life activity of “working.” [§ 12926.1(c)]</p>

Comparison of the ADA, the ADA Amendments Act & the FEHA

Term	ADA	ADAAA	FEHA
“Episodic Conditions”	Some federal courts had held that episodic or intermittent impairments, such as epilepsy or post-traumatic stress disorder, were not covered as disabilities. [See, e.g., <i>Chenoweth v. Hillsborough County</i> (11th Cir. 2001) 250 F.3d 1328 and <i>Todd v. Academy Corp.</i> (1999) 57 F.Supp.2d 488. [epilepsy]; <i>Schriner v. Sysco Food Serv.</i> (M.D. Pa. 2005) 2005 WL 1498497 & <i>Hewitt v. Alcan Aluminum Corp.</i> (N.D.N.Y.2001), 185 F.Supp.2d 183, 189 [post-traumatic stress disorder].]	Clarifies that impairments that are episodic or in remission are considered disabilities if the impairment while in its active phase substantially limits a major life activity. [§ 12102(4)(D).]	Specifically states that chronic or episodic conditions are covered as disabilities. [§ 12926.1(c).]
“Regarded as Having a Disability”	In <i>Sutton</i> , the U.S. Supreme Court required an individual to prove that the employer actually believed that the individual was disabled and also believed that many other employers would have discriminated against the individual also.	ADAAA focuses on how an individual is treated rather than proving the employer’s perception. ADAAA provides that an individual meets the “regarded as having such an impairment” if the individual establishes that s/he has been subjected to an ADA-prohibited action because of an actual or perceived physical or mental impairment whether or not that impairment is actually a disability (that is, the impairment limits or is perceived to limit a major life	FEHA still focuses on an employer’s perception. An individual is protected if s/he is “regarded or treated as” having or having had any physical or mental condition that (1) makes achievement of a major life activity difficult; or (2) has no present disabling effect but may become a future qualifying physical or mental condition. [§ 12926(i)(4)-(5) & (k)(4)-(5).] There is no durational limit to be a disability in FEHA. Note that FEHA provides that when the ADA’s definition of “disability”

Comparison of the ADA, the ADA Amendments Act & the FEHA

Term	ADA	ADAAA	FEHA
		<p>activity, so long as the impairment lasts more than six months). [§ 12102(3)(A).]</p> <p>Employers have no duty to provide a reasonable accommodation or modification to individuals who fall solely under the “regarded as” prong. [§ 12201(h).]</p>	<p>results in “broader protection” of the civil rights of disabled individuals than the FEHA’s, then “that broader protection” or coverage prevails over conflicting FEHA provisions. [§ 12926(l).]</p> <p>Employer has a duty to engage in interactive process to explore reasonable accommodation with an employee <i>regarded as</i> disabled. [<i>Gelfo v. Lockheed Martin</i> (2006) 140 Cal.App.4th 34.]</p>
Findings and Construction	<p>The terms “substantially limits” and “major life activity” must be “interpreted strictly to create a demanding standard for qualifying as disabled.” [<i>Williams</i>, 534 U.S. at p. 197.]</p>	<p>Reaffirms that the ADA should be broadly construed. [ADAAA of 2008, Pub. Law 110–325, § (a); 12102(4)]. In ADA cases, whether an individual’s impairment is a disability should not demand extensive analysis. Instead, courts’ attention should be on whether covered entities have complied with their obligations. And, EEOC should adopt new regulations consistent with ADAAA’s broad coverage intent. [ADAAA of 2008, Pub. Law 110–325, § (b)(5)-(6).]</p>	<p>FEHA provides protections independent of ADA, containing broad definitions of what is considered a disability. [12926.1.]</p>