



November 23, 2009

VIA ELECTRONIC SUBMISSION: <http://www.regulations.gov>

Mr. Stephen Llewellyn
Executive Officer
Executive Secretariat
Equal Employment Opportunity Commission
131 M Street, N.E.
Suite 4NW08R, Room 6NE03F
Washington, DC 20507

**Re: Regulations to Implement the Equal Employment Provisions of the
Americans With Disabilities Act, as Amended.
RIN 3046-AA85**

Dear Mr. Llewellyn:

The Society for Human Resource Management (SHRM) and its undersigned affiliates, appreciate this opportunity to comment on the Equal Employment Opportunity Commission's (EEOC) proposed regulations to implement the equal employment provisions of the Americans With Disabilities Act, as Amended (ADAAA), published in the *Federal Register* on September 23, 2009. These comments were prepared on SHRM's behalf by Seyfarth Shaw LLP¹.

SHRM is the world's largest association devoted to human resource management. Representing more than 250,000 members in over 140 countries, the Society serves the needs of HR professionals and advances the interests of the HR profession. Founded in 1948, SHRM has

¹ For more than 60 years, Seyfarth Shaw has been the "go to" labor & employment firm for business. Today, it is one of America's leading full-service law firms. Yet the firm remains rooted in employment law and litigation, with over 350 employment specialists across nine U.S. offices. What truly distinguishes Seyfarth Shaw's approach is a focus on expertise within the broad field of employment law. Employment attorneys are organized to leverage their knowledge of key workplace subspecialties, such as employment class actions, wage and hour issues, employee benefits suits, workplace safety matters, and labor-management relations disputes, to name only a few.

more than 575 affiliated chapters within the United States and subsidiary offices in China and India.

Enacted in 1990, the ADA has a strong record of protecting rights in the workplace and promoting access for individuals with disabilities. Several Supreme Court decisions interpreting the ADA narrowed the scope of the law's protections and many groups have worked to restore the Act to its original intent. The goal of returning the ADA to its original intent enjoys widespread support. In an attempt to create legislation that would not only strengthen the ADA's purposes but also garner extensive support, SHRM participated in negotiations, along with members of the disability and employer communities to help develop a compromise bill. The legislation represented the culmination of a carefully negotiated compromise among all stakeholders. The final version of the ADA Amendments Act of 2008 enjoyed bipartisan support in Congress as well as strong support from SHRM.

In light of the unique circumstances that brought about the ADA Amendments Act, carefully crafted regulations that support the compromise are especially important. SHRM appreciates the effort of the EEOC to develop the proposed regulations and accompanying guidance. SHRM is concerned, however, that the proposed regulations, in many instances, do not accurately implement the language of the statute.

SHRM has chosen to comment on several sections of the proposed regulations that we believe are of tremendous importance. These include the definition of "substantially limits"; definition of mitigating measures; examples of impairments that will consistently meet the definition of disability and impairments that will sometimes meet the definition of disability; revision of the definition of "substantially limits" with respect to the major life activity of working; and making claims using the "regarded as" and "record of" protections.

I. Proposed Regulation 1630.2(j) Removes Any Reference To The Factors Of Condition, Duration And Manner In Assessing Whether An Impairment "Substantially Limits" A Major Life Activity, And In So Doing Contravenes Legislative Intent.

The proposed regulations remove any reference to the factors of condition, duration and manner in assessing whether an impairment "substantially limits" a major life activity. Indeed, apart from the third ("regarded") as prong of disability, the proposed regulations reject the importance of an impairment's duration in determining whether the condition rises to the level of a disability. EEOC's failure to give meaningful weight to the concept of an impairment's duration in effect makes short-term impairments covered disabilities under the Amendments Act. SHRM submits that this is contrary to the ADAAA itself, as well as the relevant legislative history.

SHRM recommends that EEOC modify the proposed regulations to specify that an impairment's "duration, condition and manner" must be considered in determining whether the impairment is substantially limiting. This approach comports with ADAAA's language and

legislative history, as well as prior interpretations of the Rehabilitation Act – the state of the law embraced by Congress in enacting ADAAA.

SHRM specifically proposes that the proposed regulations be modified by: (i) reinserting the concepts of condition, duration and manner into the definition of substantially limits, and (ii) referencing cases decided under the Rehabilitation Act, which cases consistently held that conditions of limited duration do not qualify as substantially limiting impairments.

Section 2 of the ADAAA specifically states that the definition of disability should be interpreted consistently with how courts applied the definition of handicapped under the Rehabilitation Act of 1973. Cases under the Rehabilitation Act have repeatedly considered an impairment's duration in evaluating whether someone has covered a handicap. *See, e.g., McDonald v. Commonwealth of Pennsylvania, Dept. of Welfare, Polk Center*, 62 F.3d 92, 95-96 (3rd Cir. 1995) (holding that handicap requires an impairment permanent in nature and, accordingly, that employee's two-month impairment was not covered); *Paegle v. Dept. of Interior*, 813 F. Supp. 61 (D.D.C. 1993) (temporary back injury not a covered "handicap," because "it is well established that the [Rehabilitation] Act was never intended to extend to persons suffering from temporary conditions or injuries"); *Visarraga v. Garrett*, Case No. C-88-2828 FMS, 1992 U.S. Dist. LEXIS 9164, * 13 (N.D. Cal. June 12, 1992) ("In general, a temporary condition is not considered a handicap under the Rehabilitation Act."); *Evans v. City of Dallas*, 861 F.2d 846 (5th Cir. 1988) (plaintiff's non-permanent knee injury was transitory not "continuing in nature" and, therefore, he was not "handicapped" under the Rehabilitation Act of 1973); *Stevens v. Stubbs*, 576 F. Supp. 1409, 1414-15 (N.D. Ga. 1983) (individuals with temporary illnesses having no permanent effect on the individual's health do not qualify as "handicapped" persons under the Rehabilitation Act of 1973). Moreover, these cases specifically hold that if a person has an impairment of limited duration, s/he is not disabled. As the Third Circuit Court of Appeals explained, "To apply the Rehabilitation and Disabilities Acts to circumstances such as those presented here would be a massive expansion of the legislation and far beyond what Congress intended. In the absence of statutory language, or even legislative history, indicating that the Acts are to cover an impairment of such limited duration [two months], and not within the general concept of handicap, we cannot conclude that plaintiff was entitled to benefits." *McDonald*, 62 F.3d at 95-96.

Additional ADAAA legislative history demands that duration remain a factor in disability analysis. An earlier version of ADAAA (entitled "the ADA Restoration Act of 2007," H.R. 3195/S. 3406), omitted the phrase "substantially limits", which is in essence EEOC's proposed approach. That approach was specifically rejected by Congress.

Indeed, contemporaneous with passing the bill that became ADAAA, the Senate Statement of Managers made clear that, "We particularly believe that ... whether a person's activities are limited in condition, duration and manner is a useful [concept]..." in determining if the individual is substantially limited in a major life activity. 73 Fed. Reg. S8842. In its appendix to the proposed rules, EEOC even notes this but goes on to say it does not square with Congress's intent to reverse the restrictive definition of disability applied by the Supreme Court

in *Toyota Motor Mfg. v. Williams*, 534 U.S. 134 (2002). SHRM believes the Senate Managers are in the best position to proclaim their intent.²

Turning legislative history on its head, the proposed regulations state that substantially limits “*does not establish a durational minimum for the definition of disability other than for regarded* as which excludes conditions that are expected to last less than six months.” Proposed Regulations at 1630.2 (emphasis added). This is directly contrary to the Statement of Managers, which makes crystal clear that Congress added an express durational minimum in the “regarded as” prong only because “A similar exception for the first two prongs of the definition is unnecessary as the functional limitation requirement already excludes claims by individuals with ailments that are minor and short term.” 73 Fed. Reg. S8842.

As Commissioner Barker noted in the June 17, 2009 Commission Meeting, “had Congress decided against continued use of either of these fundamental concepts [condition, manner and duration, and class of jobs in determining whether an individual is substantially limited], *it would have instructed the EEOC to remove them from the regulations*, just as Congress instructed us to remove the words “significantly restricted” from the regulations.” See Commission Meeting of June 17, 2009 – Notice of Proposed Rulemaking Implementing the ADA Amendments Act of 2008, www.eeoc.gov/abouteeoc/meetings/6-17-09/transcript.html (emphasis added).³

Given Congress’s specific recognition of duration as an important factor in substantially limits analysis in the Senate Statement of Managers’ Statement, to do otherwise by regulation would disrespect the political process by which ADAAA came to be enacted. EEOC’s original regulations as to condition, manner and duration, together with the Rehabilitation Act authority discussed above, are consonant with Congress’s intent in enacting the original ADA. Congress reaffirmed that intent in enacting the ADAAA. EEOC should do likewise in its final regulations.

II. Proposed Regulations 1630.2(j)(3)(ii) and (iv) Related To Mitigating Measures Exceed Congressional Intent.

The ADAAA provides that courts may not consider the ameliorative effects of mitigating measures when determining whether an individual is disabled under the Act. It defines mitigating measures as:

(I) ***medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices,***

² In support of abandoning “condition, manner, or duration,” the Commission notes those terms have not been used by the Department of Justice in promulgating regulations under ADA Titles II and III, 42 U.S.C. § 12131 *et seq.* and 42 U.S.C. § 12141 *et seq.*, respectively. But that, of course, is because the statutory definition of disability appears at 42 U.S.C. § 12102(2) in the prefatory sections before Titles I, II, and III, and is plainly intended to apply to all three titles, none of which has a separate definition of disability.

³ In responding to Commissioner Barker’s concerns regarding the removal of duration from substantially limits analysis, Acting Chairman Ishumaru stressed that Rehabilitation Act cases should be relied upon instead. Yet, as demonstrated above, it was Rehabilitation Act authority that gave rise to the “condition, manner, and duration” approach endorsed by EEOC in its original 1991 regulations.

hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

- (II) use of assistive technology;
- (III) reasonable accommodations or auxiliary aids or services; or
- (IV) learned behavioral or adaptive neurological modifications.

42 U.S.C. § 12102(4)(E) (emphasis added).

A. EEOC's Proposed Reference To "Surgical Intervention" As a Mitigating Message Should Be Withdrawn.

Nowhere in the Amendments Act did Congress express an intent to expand the definition of mitigating measures to include "surgical interventions." The proposed regulations, however, add as a mitigating measure all surgical interventions, "except those that permanently eliminate an impairment." Prop. Sec. 1630.2(j)(3)(ii)(E). Not only does this expand ADA coverage beyond what was intended by Congress, but it also raises more questions than it answers, *e.g.*, how will an employer know if the surgical intervention has "permanently eliminated" an impairment?

In support of expanding the definition of mitigating measures, EEOC points to a statement in the House Education and Labor Committee Report (June 23, 2008) wherein the Committee advised that mitigating measures set forth in the bill were not exhaustive and that other measures – including surgical intervention – *might* mitigate an impairment. This sentiment, however, was not adopted anywhere in the final comments relating to the Act. Notably, after the Committee submitted its report in support of H.R. 3195, that version of the bill was withdrawn and replaced with S. 3406, which was ultimately passed by both houses and signed into law. Senate Bill 3406 was introduced on July 31, 2008 – after the House Committee's June 23 report. Notwithstanding the House Committee's commentary, no change was made to the Senate Bill to include surgical intervention as a form of mitigating measure to be disregarded when assessing whether an individual is disabled under the Act. Similarly, neither the Senate Congressional Record from September 11, 2008, the House Congressional Record from September 17, 2008, nor the definitive Statement of Senate Managers from September 16, 2008 mentions surgical intervention as a mitigating measure.⁴

EEOC's proposed expansion of mitigating measures also raises vexing practical questions. For example, how will an employer know if a surgical intervention has "permanently eliminated" an impairment? What about procedures intended to permanently eliminate the impairment but which fail years later? Or procedures not intended to permanently eliminate the impairment but which do, in fact, have that effect? Such inquiries will require case-by-case analysis and could be the subject of protracted disputes involving contrary diagnoses, surgical records, expert opinion, and related information.

⁴ Nor do any of those subsequent sources indicate that the Senate Bill's definition of mitigating measures was non-exhaustive or otherwise open to interpretation.

For example:

- If an individual has a stent inserted to prevent blockage of an artery, will this be considered a surgical intervention that permanently eliminates the individual's impairment? The stent is permanently inserted into the artery and intended to hold the artery open and improve blood flow. www.johnmuirhealth.com/index.php/cardiac_care_stent.html. Stents do not always work as planned, however, and sometimes fail to prevent blockage.
- Gastric bypass surgery is a proven method for permanent weight loss, oftentimes "curing" obesity and diabetes. <http://www.obeseinfo.com/default.htm>. Gastric bypass surgery, however, does not always succeed, and individuals sometimes relapse and gain weight.
- Lasik surgery is intended to permanently correct vision impairments. Lasik surgery, however, has not proven permanently successful in all cases.

In each of these examples, there is no way for an employer to know whether the surgical intervention has "permanently eliminated" the impairment absent the passage of time (sometimes decades). Each example also raises further unanswered questions. How much time must pass before a surgical intervention is deemed to have "permanently" eliminated a condition? If an employee had surgery five years ago and has had no relapse or return of an impairment, is that a permanent elimination? What happens in the interim while the individual waits to see if surgery was successful and the impairment eliminated permanently?

As EEOC notes repeatedly, Congress's express intent in enacting ADAAA was that the question of whether an individual's impairment is a disability "not demand extensive analysis." (June 17, 2009 Statement of Peggy Mastroianni, Associate Legal Counsel; June 17, 2009 Statement of Christopher J. Kuczynski, Assistant Legal Counsel.) As the above makes clear, however, the proposed regulation on surgical interventions raises far more questions than it answers. Each of these questions, and the litigation and expert testimony required to answer them, complicates the analysis of whether an individual is disabled under the Act, well beyond what was anticipated or intended by Congress.

In summary, the ADAAA does not include surgical intervention as a mitigating measure, and does not authorize EEOC to expand the list of mitigating measures. By so doing, the proposed regulation complicates an analysis Congress intended to simplify. SHRM, therefore, recommends that the EEOC remove the proposed regulation regarding surgical intervention.

B. The Proposed Definition Of "Ordinary Eyeglasses or Contact Lenses" Should Be Withdrawn and Replaced With One That Comports With Common Sense and Congress's Intent.

The proposed regulation also needlessly complicates the consideration of "ordinary eyeglasses or contact lenses" when evaluating whether or not an individual's visual impairment

constitutes a disability. By that language, Congress made clear that an individual's vision should be evaluated in its corrected state. As the U.S. Department of Labor's current FAQs provide:

The ADAAA expressly requires consideration of the ameliorative effects of "ordinary eyeglasses or contact lenses" when assessing whether impairment substantially limits a major life activity. This means that when determining whether a person is substantially limited in the major life activity of seeing, the person's vision should be assessed in its corrected state when using such eyeglasses or contact lenses.

<http://www.dol.gov/ofccp/regs/compliance/faqs/ADAfaqs.htm>

EEOC proposes to define the term "ordinary eyeglasses or contact lenses" as those "intended to *fully* correct visual acuity or to *eliminate* refractive error." Prop. § 1630.2(j)(3)(iv) (emphasis added). This definition, however, improperly imposes a standard of perfect 20/20 vision, in effect labeling as disabled all individuals with less than "fully corrected" vision. This approach does not square with Congressional intent or logic. By reversing Supreme Court cases on mitigating measures and requiring that individual impairments be considered in an unmitigated state, Congress left it for the courts to decide whether a mitigated impairment is substantially limiting. Within that framework, Congress provides an exception for eyeglasses and contacts. Thus, by the ADAAA's plain language and logic, the question is whether those who wear glasses (or contacts) are substantially limited as to seeing. Whatever "substantially limits" means, it must mean more than "slight imperfection." Yet that is the logic of EEOC's position, for anyone with less than 20/20 corrected vision is, by definition, disabled under the proposed regulation. This definition was clearly rejected by Congress as well as by those who negotiated the compromise language.

A better direction for EEOC to take would be to focus instead on the word "ordinary," and make clear that only "extraordinary" eyeglasses would fall outside the intended exception. For example, bifocal or trifocal lenses, or slightly conical lenses used to correct mild astigmatism, are commonly used and available both in contact lenses and eyeglasses. (Of the approximately 168.5 million adult Americans who use vision correction, only 50.8% have single vision lenses. www.allaboutvision.com/resources/statistics-eyewear.htm.) Also, it may be that instead of multifocal lenses, an individual will carry more than one pair of glasses – such as one pair for reading a menu in a dim restaurant, and a different pair to sharpen distances while driving. Each of these should be considered "ordinary" – indeed, anything available either in contact lens or eyeglasses form from a walk-in retail eye clinic should be considered part of this "ordinary eyeglasses exception" to mitigating measures. In contrast, bulky corrective lenses or visual aid devices that would be viewed as "extraordinary" or uncommon, should fall outside the intended exception.⁵

⁵ By contrast with progressive lenses and bifocals, which are common, only 4.4% of adult Americans use computer glasses, which are customized, special-purpose glasses specifically prescribed to reduce eyestrain and improve vision while using a computer. See www.allaboutvision.com/cvs/computer_glasses.htm. It is these specialized glasses, not ordinary eyeglasses that may afford someone less than perfect vision, which Congress meant to treat as a mitigating measure for purposes of ADAAA.

SHRM recommends that the EEOC revise the regulations to clarify that the ameliorative effects of bifocal and multifocal lenses that correct visual acuity should be considered in determining whether an individual is disabled under the Act. More specifically, SHRM recommends that the second sentence of Section 1630.2(j)(3)(iv) be revised to read: “The term ‘ordinary eyeglasses or contact lenses’ as defined in the ADA as amended means lenses that are widely available in eyeglass and contact lens form (including bifocal and other multifocal lenses), such that the individual who wears them is not substantially limited in the major life activity of seeing.”

III. Proposed Section 1630.2(j)(5) Contravenes Congressional Intent By Creating *Per Se* Disabilities And Selectively Discarding The Functional Approach Recognized By Congress.

The primary problem with proposed Section 1630.2(j)(5) is that it essentially creates a list of *per se* disabilities and thereby discards the individualized, functional assessment championed by the drafters of the Rehabilitation Act, the ADA, and the ADAAA. Indeed, ADAAA’s legislative history demonstrates that Congress plainly intended to retain an individualized, functional analysis of disability. Inclusion of a *per se* list was considered during extensive discussions among the employer and disability communities and was ultimately rejected.

There is absolutely no reason to think Congress intended to discard that functional analysis and start afresh. To the contrary, Congress considered and rejected the ADA Restoration Act of 2007, which would have deemed any physical or mental impairment to be *per se* disabling – without reference to the impairment’s functional effect on the individual. By declining to adopt this new definition of “disability” and instead enacting the ADAAA, Congress made clear its intention to retain the ADA’s individualized, functional approach.

Indeed, the text of ADAAA and the Act’s legislative history frequently cite with approval the approach to coverage taken by courts under the Rehabilitation Act of 1973. The Commission’s stated purpose behind the Proposed Rules has been to restore that approach. Proposed Section 1630.2(j)(5), however, effectively rejects the individualized, case-by-case analysis of disability recognized by Congress and the courts for almost 40 years.⁶ Under the Rehabilitation Act, courts have consistently noted that disability cannot properly be defined through “abstract lists and categories of impairments.” *See Forrisi v. Bowen*, 794 F.2d 931, 933 (4th Cir. 1986). In defining all individuals with the same impairment as identically limited, proposed section 1630.2(j)(5) labels as “disabled” all individuals with a given impairment of any sort or degree – regardless of whether the impairment functionally limits the individual. Individuals with identical impairments are not necessarily limited to identical degrees, however. A list of

⁶ Determining “who is a handicapped person under the [Rehabilitation] Act is best suited to a ‘case by case determination.’” *Rezza v. U.S. Dep’t of Justice*, No. 87-6732, 1988 WL 48541, at *2 (E.D. Pa. May 16, 1988), quoting *Forrisi v. Bowen*, 794 F.2d 931, 933 (4th Cir. 1986). “It is the impaired individual who must be examined not just the impairment in the abstract.” *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088, 1099 (D. Haw. 1980) (determining whether a disability is a qualifying handicap under the Rehabilitation Act requires a case-by-case analysis).

impairments that would consistently meet the definition of disability effectuates stereotypic assumptions that the Rehabilitation Act made unlawful more than three decades ago.

The notion of *per se* disabilities also is an affront to Congress's intent in enacting the ADA of 1990. The ADA, like the Rehabilitation Act before it, did not attempt to create a "laundry list" of impairments that are necessarily disabling. To the contrary, ADA legislative history shows this approach to be anathema to the concerns of disability rights advocates and the inclusive, hard-won protections embodied in the original ADA. Congress expressly repudiated the *per se* approach in 1990:

[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and *resulting from stereotypic assumptions not truly indicative of the individual abilities of such individuals to participate in, and contribute to, society*;

42 U.S.C. § 1201(a)(7) (emphasis added). By creating a list of *per se* disabilities, the Commission would be endorsing the very wrongs the ADA was intended to rectify.⁷

SHRM is not oblivious to judicial decisions that led Congress to amend the ADA. Many ADA plaintiffs lost cases in federal courts (or were discouraged from filing them) because the Supreme Court imposed strict standards and hurdles that have been subsequently rejected by the ADAAA. Some well-intentional advocates who previously championed an individualized, case-by-case approach to defining disability now regret subsequent court decisions and argue instead for automatic – effectively *per se* – disabilities. But good intentions are not the point. What matters is the law, enacted by Congress and the President, as embodied now in the ADAAA. The ADAAA and the entire disability law scheme codified at 42 U.S.C. 12101 *et seq.*, leaves it up to the individual to self-identify as actually disabled (or not). The ADAAA does not change that; it prohibits employers from inquiring into the generally private matters of physical and mental impairments, unless and until a qualified individual requests accommodation. 42 U.S.C. 12112(d) (restrictions on pre-employment and post-offer exams and inquiries); 29 C.F.R. 1630.9 (App.) (no duty to accommodate until individual requests accommodation). Who is to say that these facets of disability law are more or less important than threshold coverage issues? Congress, perhaps, but not EEOC. Yet EEOC now claims that prerogative, by designating as covered disabilities a list of impairments identified not by the affected individual nor by Congressional mandate, but rather by (proposed) regulatory fiat.⁸

⁷ As EEOC itself previously noted, "the determination of whether an individual has a 'disability' is not necessarily based on the name of the diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of that individual." 29 C.F.R. § 1630.2(j) (App.). Some with impairments, be they physical or mental, may choose not to self-identify, for as many reasons as there are persons with disabling impairments.

⁸ In presenting its proposed list of conditions that will "consistently meet" the definition of disability, the Commission states that this approach "does not undermine the importance of the individualized assessment that is the hallmark of ADA analysis, not only for judges and lawyers, but for managers, supervisors and human resource professionals committed to voluntary compliance" Statement of C. Kuczynski June 17, 2009, Tr. at 6. In the next breath, however, EEOC explains that its approach remains individualized because the listed conditions "should be found to be substantially limiting each time the individualized assessment is applied to them." *Id.* With due

By categorically declaring that an individualized assessment of the listed impairments will “consistently” make them substantially limiting, proposed Section 1630.2(j)(5) would make such an individualized assessment pointless. Practically speaking, at least as to those listed impairments, an employee would need only proffer a diagnosis of a listed impairment, even if her functional limitations are minimal or non-existent.⁹ This was the approach proposed under the ADA Restoration Act, or at least a subset of that approach, which proposal Congress chose not to enact.

Mental health clinicians differ on the diagnostic criteria for a number of mental health conditions, including several of the listed mental impairments, and some clinicians may diagnose such conditions more readily than others. Indeed, with respect to a number of mental health conditions, clinicians often disagree about the applicability of diagnostic criteria set forth in the DSM-IV. Accordingly, it would be problematic for employers to have to rely purely on medical diagnoses (upon which reasonable health professionals can and do disagree), rather than focusing on an individual’s actual, functional limitations. For example, while Obsessive Compulsive Disorder (OCD) is certainly a legitimate impairment that can be substantially limiting, someone with obsessive tendencies but minimal limitations could easily be diagnosed with OCD. Under the proposed regulations, such diagnosis would trigger a duty to accommodate and possible liability under a host of other theories (disparate treatment, disparate impact, etc.), all on account of a diagnosis with no functional, workplace-related effect.

For these reasons, SHRM recommends that the EEOC eliminate this section in order to reflect Congressional intent to reject a *per se* list.

IV. Proposed Section 1630.2(j)(6) Contravenes Congressional Intent By Effectively Discarding The Case-By-Case Approach For Determining Disability.

SHRM agrees that the ADAAA mandates broad construction in favor of coverage. However, SHRM respectfully submits that the inclusion and wording of EEOC’s proposed examples exceed what Congress intended under ADAAA. Any list of impairments departs from the ADA’s original scheme, whereby a determination of a disability must be made under an individualized, case-by-case approach. Moreover, from a practical standpoint, if the proposed regulations become final, it would be very risky for employers *not* to deem individuals with any of these impairments as having a disability. This would trigger exposure under the “regarded as”

respect, this is regulatory hubris bordering on sophistry. EEOC also says an individualized assessment will still be required to determine whether an individual with a disability is qualified, whether an accommodation would pose an undue hardship, etc. But that is beside the point. As demonstrated above, Congress intended an individualized assessment of the threshold question of disability under ADAAA, just as it had done previously under the ADA and under the Rehabilitation Act before that.

⁹ For example, although Autism can sometimes be a devastating impairment, many people experience a milder variation that hardly impacts their lives at all and may be undetectable to others. The same can be said of many of the other listed impairments.

prong, exposure not based on myths, stereotypes, or misperceptions but rather on fear of litigation.

In addition to including examples of conditions that would consistently meet the definition of disability, EEOC's proposed regulations also include seven (7) examples of impairments that "may be disabling for some individuals but not others." Prop. Reg. § 1630.2(j)(6). Although the examples are presented as requiring more analysis than the "consistently meets" examples, their inclusion (plus the proposed regulatory wording) mean these impairments will "more likely than not" be considered disabling. Specifically, the regulations indicate various ways in which each particular impairment will substantially limit a major life activity. This framework detracts from the long-standing ADA precept that whether a condition constitutes a disability must be determined on an individualized, case-by-case basis. Indeed, the way the examples are worded (*i.e.*, "is an individual with a disability") suggests that anyone with the specified impairment will be deemed disabled under ADAAA, no matter how minimal the impact on a major life activity or bodily function.

The listed impairments have widely varying effects and doubtless have a substantial impact on some but a minimal impact on others. The proposed regulations attempt to recognize as much; however, when the stated examples are coupled with the admonitions that they be construed in favor of broad coverage and without extensive analysis, employers will inevitably conclude that individuals with these impairments have covered disabilities.

Including these examples makes it riskier for employers to attempt to determine on their own whether an employee with any of these listed impairments/conditions is actually disabled. From a practical compliance standpoint, employers must presume that the listed conditions are "per se" disabling, or, at minimum, very likely disabling. This contravenes the ADA's original intent, for to treat as disabled those who are not in fact disabled encourages stereotypes and assumptions about disabilities. *See* S. Rep. No. 116, 101st Cong., 2d Sess. 23-24 (Senate Report); H.R. Rep No. 485 Part 3, 101st Cong, 2d. Sess. 30-31 (1990) (House Judiciary Report); H.R. Rep No. 485 Part 2, 101st Cong, 2d. Sess. 53 (1990) (House Labor Report). *See also* 29 C.F.R. 1630.2(l) (App.). In enacting the ADA, Congress repudiated the notion of "per se" disabilities, an intent reflected not only under ADA's "regarded as" prong but also in statutory prohibitions against disability-related inquiries – subjects the employer must not discuss unless and until the employee requests accommodation. *See* 42 U.S.C. § 12102; 29 C.F.R. § 1630.13. Those prohibitions remain the law under ADAAA. Indeed, Congress further repudiated acts rooted in myths or stereotypes by *expanding* "regarded as" protections under the ADAAA. 42 U.S.C. § 121012(3).

EEOC's proposed "list of 7" would also lead to limited resources being devoted to individuals who may well have the listed impairment(s) but are not substantially limited in any major life activity, and thus are not truly disabled. This is likely to occur at the expense of actually disabled individuals. Specifically mentioning these seven examples, even with the caveat that there should be no negative implication from the omission of other impairments, would likely disadvantage disabled individuals in the long run. Employers, the Commission, and courts would likely be flooded with accommodation requests (and litigation) from individuals with listed impairments, regardless of how the impairment affects their major life activities.

Moreover, people with disabling conditions not specifically listed would be left waiting in line and potentially relegated to being perceived as “less disabled” than their counterparts with the stated impairments. For example, if an employer expends significant resources purchasing ergonomic keyboards to accommodate the many employees who present with carpal tunnel syndrome diagnoses, an employee with hand tremors (who has difficulty typing and thus requires special dictation software as an accommodation) may not receive that accommodation because the employer’s limited resources already have been expended. To assume otherwise – that employers large or small can afford to accommodate all individuals who request accommodation (or to litigate an “undue hardship” defense, which EEOC typically disfavors to say the least) – ignores current economic reality.

While the proposed regulations address various studies suggesting that the cost of a reasonable accommodation has not significantly increased since passage of the ADA, EEOC expressly recognizes that accommodations can be very expensive, as there is a large variance in the costs of providing reasonable accommodations. Indeed, the proposed regulations cite several conflicting studies wherein the average costs of reasonable accommodations were extremely high, including one with costs as high as \$14,434. Significantly, these studies were conducted *before* the instant proposed regulations issued, and thus do not account for the inevitable increase in costs under ADAAA’s expanded definition of disability (not to mention the manifold increase in accommodation requests that would follow from EEOC’s proposed lists of conditions that either are consistently disabling or may be disabling). The cumulative effects of increasing requests for accommodation are likely to leave disabled individuals competing for scarce resources.

Although the proposed regulations disavow negative implications based on the omission of particular impairments or major life activities, there is simply nothing to be gained from regulatory reference to the seven examples chosen. The proposed regulations provide no bright line rules for determining actual disability. Rather, by referencing these seven examples, the proposed regulations in effect provide a list of “probably per se” disabilities.

Asthma, for instance, is listed as an impairment that may or may not be disabling. Yet the proposed example suggests that anyone with asthma who experiences effects when exposed to various substances is disabled. But it does not follow that everyone with asthma plus some sensitivity to strong odors is disabled. The better approach for determining whether someone is has a disability remains assessing the individual’s condition in relation to her breathing or respiratory functions: in other words, the functional analysis retained by Congress under the ADAAA. *See* Statement of Senate Managers at S8842. The proposed regulations effectively preclude that approach, leaving employers with the inevitable impression that any effect, no matter how minimal, will lead to a finding of disability.

Another included example is that of back or leg impairments. The regulations state that a person with such an impairment who is substantially limited in *the length of time she can walk, the distance she can walk, or the weight she can lift*, is an individual with a disability (*such as where the impairments results in a 20 lb lifting restriction that is expected to last for several months or more*). Prop. Reg. 1630.2(j)(6)(D). However, the regulations provide no bright line test for measuring the threshold of time/distance a person must be able to walk, or how much he

must be able to lift before being considered to have a disability. Employers are left wondering where to draw line. When coupled with the mandate favoring broad coverage and no extensive analysis, any individual with a lifting restriction is *ipso facto* a person with a disability.

SHRM recommends that the EEOC remove this section of the proposed rule.

V. EEOC's Proposed Regulations on the Definition of "Working" Exceed What Congress Intended Under the ADAAA.

Nothing in ADAAA's legislative history suggests that the current regulatory definition needs revising. If Congress had intended to change that definition, it would have specifically directed EEOC to do so. Instead, ADAAA legislative history establishes unequivocally that Congress intended the current regulation to remain the law: "Because there is no functional limitation requirement under the 'regarded as' prong of the definition, the requirement for proving substantial limitation of the major life activity of working under the first two prongs is not applicable to the analysis under the third prong, and *EEOC regulations regarding the major life activity of working under the first two prongs are not impacted by this change.*" See House Committee on Education and Labor Report, June 23, 2008 p. 14 (emphasis added). That report specifically provides that Congress "*does not intend to convey that EEOC regulations regarding class of jobs/range of jobs under the first two prongs need to be revisited as a result of the clarification of the third.*" *Id.* (emphasis added).

Unlike the clear intent to modify "substantially limits," "regarded as", and other ADA terms, Congress did not authorize EEOC to remove or replace the current regulatory definition of working. The Senate Statement of Managers, ADAAA's definitive legislative history, instructs that EEOC shall make only "necessary modifications to their regulations to reflect the changes and clarifications embodied in the ADA Amendments Act." 73 Fed. Reg. S8843. In that the current definition of "working" was not changed by the Amendments Act, EEOC has exceeded its authority by attempting to rewrite a definition that Congress intended to leave unchanged. Although Congress specifically rejected the definition of disabled and "substantially limits" set forth in *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999), and *Toyota Motor Mfg., Ky. v. Williams*, 534 U.S. 184 (2002), it did not reject the Court's analysis of "working" in those cases. Indeed, Congress specifically left intact those portions of *Sutton* and *Toyota* holding that an individual must be unable to perform a class or broad range of jobs in order to be substantially limited in the major life activity of working. See *Sutton*, 527 U.S. at 492; *Toyota*, 534 U.S. at 201 (rejecting the "specific job" theory because "[o]therwise, *Sutton's* restrictions on claims of disability based on a substantial limitation in working will be rendered meaningless because an inability to perform a specific job can be recast as an inability to perform a 'class' of tasks associated with that specific job").

A. The Proposed Regulations are Based on a Flawed Premise.

EEOC proposes to redefine the major life activity of working because "Courts have struggled over the years with the analysis in the EEOC current regulation defining what it means to be substantially limited in working." (June 17, 2009, Statement of C. Kuczynski, EEOC

proposed rulemaking meeting). In fact, courts have had no difficulty applying the current regulatory definition.

The current “class of jobs” approach is rooted in the Rehabilitation Act of 1973. Regulations under that act provide: “With respect to the major life activity of working--(i) The term substantially limits means significantly restricted in the ability to perform either a *class of jobs or a broad range of jobs* in various classes as compared to the average person having comparable training, skills, and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working” 40 C.F.R. 60-741.2(q)(3)(i) (emphasis added). Courts consistently followed that approach under the Rehabilitation Act. *See e.g., Forrasi v. Bowen*, 794 F.2d 931 (4th Cir. 1986); *Jasany v. U.S. Postal Service*, 755 F.2d 1244 (6th Cir. 1985); *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088 (D. Hawaii 1980). Courts thereafter uniformly followed that same approach under ADA. *See e.g., Contreras v. Suncast Corp.*, 237 F.3d 756 (7th Cir. 2001) (employee who could not lift more than 45 pounds, engage in strenuous work, or drive a fork lift failed to demonstrate how restrictions prevented him from engaging in a “class of jobs”); *Duncan v. Washington Metro. Area Transit Auth.*, 240 F.3d 1110 (D.C. Cir. 2001) (plaintiff unable to lift 20 pounds failed to establish he was disqualified from a class or range of jobs); *Schuler v. SuperValue Inc.*, 336 F.3d 702 (8th Cir. 2003) (employee who could not drive forklift due to epilepsy was precluded from performing specific warehouse jobs, but failed to show he was substantially limited in a class or broad range of jobs, such as other manual labor positions or other warehouse positions). Thus, EEOC is proposing to fix a regulation that has never been broken.

B. EEOC’s New “Type of Work” Analysis is Unnecessary at Best and Doubtless Confusing

EEOC proposes to change the focus of inquiry from a “class” or “broad range” of jobs to the “type of work” an individual is performing (Proposed Regulation 7(iii)), ostensibly because “Type of work is more straightforward and easier to understand.” *See* Proposed Interpretive Guidance, Federal Register at 48447. In fact, the proposed “type of work” standard is unnecessary and can only result in needless confusion.

SHRM agrees that “many of the examples of types of work, and many of the examples of job-related requirements characteristic of a type of work” set forth in the proposed rule “make up either a class or broad range of jobs under the prior standard.” Proposed Interpretive Guidance at 48447. Those include “food service jobs, clerical jobs, or law enforcement jobs.” Prop. § 1630.2(j)(7)(iii)(B). These examples are consistent with EEOC’s Compliance Manual guidance on what is meant by a “class” of jobs. EEOC Compl. Man. § 902.4 at pp. 24-26 (“class of jobs” includes such categories as “heavy labor jobs,” “clerical jobs,” or “jobs requiring the use of a computer.”) Similarly, EEOC has previously identified the following “broad ranges of jobs”: work in high-rise buildings; heavy equipment operation; airport ground work; full-time work. *Id.* § 902.4, pp. 25-27. All of which appear to be a “type” of job under the proposed regulation. In which event the difference between “type” of jobs and a “class” or “broad range” of jobs is no difference at all.

But surely EEOC intends “type” to mean *something* different from “class” or “broad range”. Why else would the agency propose to rescind its own 1991 regulation and to nullify the long line of cases that pre- and post-date that regulation? Unfortunately, EEOC’s explanation of “type” provides no meaningful guidance about what that term means, or how courts should apply it. One might expect “type” to be more narrow than “class” or “broad range”, given EEOC’s otherwise expansive view of ADAAA protections. Yet the proposed regulations identify “assembly line jobs” as a “type of work.” It seems to SHRM that assembly line work is perhaps the best illustration of a broad range of jobs, some of which are sedentary (seated), others of which are not; some of which are repetitive, others of which are not. Some are technically challenging (involving computer work or precision tools), whereas others are not; some are physically demanding, whereas others are not.

Current authority on whether someone is substantially limited in the major life activity of working looks to specific factors, including the geographical area to which the individual has reasonable access, the job from which the individual has been disqualified, and the number and types of jobs using (and not using) similar training, knowledge, skills, or abilities within that geographical area from which the individual is also disqualified because of the impairment. The proposed regulations would eliminate these factors, and instead look to the job the individual has been performing or its job-related requirements, or the job for which the individual is applying, and “jobs with similar qualifications or job related requirements which the individual would be substantially limited in performing because of the impairment.” Prop. § 1630.2(j)(7)(iii)(A). EEOC favors this approach so that employees need not engage a statistical or vocational expert to help establish disability. Proposed Interpretive Guidance at 48448. However, if the only claimed major life activity at issue is working, then expert analysis may still be appropriate (sometimes necessary) to help determine the extent of the employee’s inability to perform other jobs “with similar qualifications or job related requirements...”

Take, for example, the employee who claims to be substantially limited as to assembly line work. All stakeholders agree the employee is not actually disabled if she shows only the inability to perform her own particular job. Shouldn’t that employee then be encouraged to proffer evidence – expert or otherwise – of other jobs with similar qualification requirements or essential functions? But if the employee must do that, why shouldn’t she have the benefit of EEOC’s current guidance and regulations, so she knows how to go about establishing inability to perform other jobs, be they a “type” or class/broad range of jobs?

EEOC’s current guidance already instructs that “the terms ‘numbers and types of jobs’ ... as used in the factors discussed above, are not intended to require an onerous evidentiary showing. Rather, the terms only require the presentation of evidence of general employment demographics and/or of recognized occupational classifications that indicate the approximate number of jobs (*e.g.*, ‘few,’ ‘many,’ ‘most’) from which and individual would be excluded because of an impairment.” 29 C.F.R. Part 1690.2(j)(App.).

In light of plainly expanded coverage as to dozens of other major life activities, SHRM submits that the pre-Amendment framework is the best framework for evaluating whether an individual is substantially limited in the major life activity of working. The current regulatory definitions, therefore, should be retained.

VI. Proposed Regulation 1630.2(l)(2) Would Expand “Regarded As” And “Record Of” Protections Beyond Those Enacted Under ADAAA.

Proposed section 1630.2(l)(2) states that “a prohibited action based on an actual or perceived impairment includes, but is not limited to, an action based on a symptom of such an impairment, or based on medication or any other mitigating measure used for such an impairment.” SHRM believes that the ADAAA’s expressly expanded definition of disability makes this “clarification” both unnecessary and confusing. The proposed regulations would base liability on evidentiary matters – evidence that would already establish liability under the first and/or third prongs of disability, particularly as those prongs have been expanded by ADAAA.¹⁰

Taking Example 1 described in the proposed regulations, an individual who is taking anti-seizure medication would generally qualify as *actually* disabled, based upon an underlying impairment of neurological function. It would not be necessary for this individual to seek recourse under “regarded as” analysis. Likewise, if an employer were aware that an individual was taking anti-seizure medication, or (as in Example 2) could see the outward manifestation of an impairment, this would already suffice to prove disability under the new “regarded as” prong (bearing in mind that under that prong, the employer will be charged with knowledge of a protected condition so long as it knows of – or believes there is – an impairment, regardless of whether that impairment is substantially limiting). SHRM cannot imagine a circumstance in which an individual would be protected under this proposed regulation who is not already protected under other aspects of the ADAAA. SHRM recommends that the EEOC eliminate this provision of the proposed regulation.

Section 1630.9(e) of the proposed regulation should likewise be eliminated. Under this proposal, an employer must reasonably accommodate “an individual with a substantially limiting impairment *or a record of a substantially limiting impairment*” (emphasis added), whereas an individual who is “only ‘regarded as’ disabled within the meaning of 1630.2(l)” need not be accommodated. Proposed section 1630.9(e) exceeds the scope of the ADAAA, which contemplates that individuals needing accommodation will be covered as having “actual” disabilities. If there was any question in this regard after ADA was amended, it was answered in the 2008 Senate Managers’ Statement: “[W]e believe it is an acceptable compromise given our strong expectation that such individuals would now be covered under the first prong of the definition, properly applied.” 73 Fed. Reg. S8842.

Moreover, if an individual is not actually, presently impaired, the most basic principles of logic and accommodation mean the individual needs no accommodation. “Reasonable accommodation” has always meant enabling an otherwise qualified individual to perform the essential functions of her job. 42 U.S.C. §§ 12111(8), 12112(a)(5)(A); 29 C.F.R. 1630.2(o)(2). Unless an individual has an actual, present impairment, the concept of accommodation is academic as a matter of logic and law. See *Kaplan v. City of N. Las Vegas*, 323 F.3d 1226, 1231-

¹⁰ Proposed § 1630.2(k) properly states that “An individual has a record of a disability if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.”

33 (9th Cir. 2003) (“If we were to conclude that ‘regarded as’ plaintiffs are entitled to reasonable accommodation, impaired employees would be better off under the statute if their employers treated them as disabled even if they were not. This would be a perverse and troubling result.”); *Weber v. Strippit, Inc.*, 186 F.3d 907, 916-17 (8th Cir. 1999) (“The ADA cannot reasonably have been intended to create a disparity in treatment among impaired but non-disabled employees, denying most the right to reasonable accommodations but granting to others, because of their employers’ misperceptions, a right to reasonable accommodations no more limited than those afforded actually disabled employees.”); *Workman v. Frito-Lay, Inc.*, 165 F.3d 460, 467 (6th Cir. 1999) (“Under the third prong, “regarded as” having a disability, the defendant correctly contends that a finding on this basis would obviate the Company’s obligation to reasonably accommodate Workman.”); *Newberry v. E. Texas State Univ.*, 161 F.3d 276, 280 (5th Cir. 1998) (“[A]n employer need not provide reasonable accommodation to an employee who does not suffer from a substantially limiting impairment merely because the employer thinks the employee has such an impairment.”). In short, an individual with no impairment needs no accommodation.

Thank you for the opportunity to comment on the proposed rules to implement the ADA. We appreciate your consideration of SHRM’s views and would welcome the opportunity to meet with EEOC staff to further discuss our recommendations.

Yours truly,



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