

ALI-ABA Audio Seminar

NEW Proposed Regulations for the ADA Amendments Act

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**Questions and Answers on the Notice of Proposed Rulemaking for the ADA
Amendments Act of 2008**

By

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The ADA Amendments Act of 2008 (ADAAA) was enacted on September 25, 2008, and became effective on January 1, 2009. This law made a number of significant changes to the definition of "disability." Congress directed EEOC to amend its ADA regulation to reflect the changes made by the ADAAA, which is why EEOC has approved a Notice of Proposed Rulemaking (NPRM) [\[HTML\]](#) | [\[PDF\]](#) . The NPRM was published in the Federal Register on September 23, 2009.

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

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

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

No. The ADAAA does not apply retroactively. So, for example, the ADAAA would not apply to a situation in which an employer allegedly failed to hire, terminated, or denied a reasonable accommodation to someone with a disability in December 2008, even if the person did not file a charge with the EEOC until after January 1, 2009. The original ADA definition of disability would be applied to such a charge. However, the ADAAA would apply to denials of reasonable accommodations where a request was made, or an earlier request was renewed, on or after January 1, 2009.

2. What is the purpose of the ADAAA?

The ADAAA states that its purpose is "to reinstate a broad scope of protection" by expanding the definition of the term "disability." Congress found that persons with many types of impairments – including epilepsy, diabetes, multiple sclerosis, intellectual disabilities (formerly called mental retardation), major depression, and bipolar disorder – had been unable to bring ADA claims because they were found not to meet the ADA's definition of "disability." Yet, Congress thought that individuals with these and other impairments should be covered and revised the ADA accordingly. Congress explicitly rejected certain Supreme Court interpretations of the term "disability" and a portion of the EEOC regulation that it found had inappropriately narrowed the definition of disability. As a result of the ADAAA, it will be much easier for individuals seeking the law's protection to demonstrate that they meet the definition of "disability," and far more ADA cases will focus on whether discrimination actually occurred.

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

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

4. How does the ADAAA define "disability"?

The ADAAA defines a disability as:

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

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

5. What are "major life activities"?

They are basic activities that most people in the general population can perform with little or no difficulty. The ADAAA provides a non-exhaustive list of examples of major life activities. Many are drawn from the 1991 ADA regulation and subsequent EEOC guidances, or from ADA and Rehabilitation Act court cases. Examples of major life activities include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working. Three of these examples – sitting, reaching, and interacting with others – are not specifically included in the ADAAA's non-exhaustive list of major life activities, but are included in the proposed regulation.

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

To meet one of the first two definitions of "disability," an individual must either have an impairment that substantially limits performance of one major life activity or have a record of an impairment that substantially limited one major life activity. It does not matter if the major life