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YOU JUST MIGHT FIND . . . YOU GET WHAT YOU NEED – A PRACTICAL GUIDE TO FINDING AND MANAGING DISABILITY ACCOMMODATIONS

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INTRODUCTION

The rules have changed. After two decades of fairly predictable defense verdicts premised upon threshold coverage issues under the Americans with Disabilities Act ("ADA"), the Americans with Disabilities Amendments Act of 2008 ("ADAAA") has upended the playing field. With the ADAAA, proposed regulations, and emergent case law now defining "disability" into virtual irrelevance, the battleground for disability discrimination claims has shifted to the issues of "qualified individual" with a disability; "reasonable accommodation" and "undue hardship;" and the motivation behind challenged employment actions. Avoiding liability – or, at a minimum, amassing a favorable record for trial – requires strict adherence to the interactive process, and considered business practices designed to identify and accommodate disabilities, including amorphous mental impairments. This paper describes the nature and scope of the ADA's coverage and protections, surveys changes made by the ADAAA, proposed regulations, and emergent case law, and describes innovative methods employers are using to facilitate the interactive process. As way of both example and warning, this paper also highlights specific coverage and accommodation issues arising in the context of mental impairments.

I. Nature and Scope of the ADA's Coverage and Protections

A. Which Employers Are Covered Under the ADA?

Title I of the ADA covers the following entities:

1. Private employers.

2. State and local governments.

3. Employment agencies.

4. Labor organizations or joint labor-management committees.[1]

Note: "Employers" are defined under the ADA as persons engaged in an industry affecting commerce, and must have fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.[2]

Note: Federal sector employers are covered under the separate, but similar, provisions of Section 501 of the Rehabilitation Act of 1973.[3]

B. Which Employees Are Covered Under the ADA?

Title I of the ADA prohibits discrimination against "qualified individuals" on the basis of "disability."[4]

"Qualified individuals" are defined as:

1. Individuals who;

2. With or without reasonable accommodation;

3. Can perform the essential functions of the employment position they hold or desire; and

4. Have the requisite skill, experience, education, and other job-related requirements of the position.[5]

"Disability" is defined as:

1. A physical or mental impairment that substantially limits one or more major life activities.

2. A record of such an impairment.

3. Being regarded as having such an impairment.[6]

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[1] *See* 42 U.S.C. §§ 12111(2), (5)(B)(i); 29 C.F.R. §§ 1630.2(b), (e)(2)(i).
[2] *See* 42 U.S.C. § 12111(5)(A); 29 C.F.R. § 1630.2(e)(1).
[3] *See* 29 U.S.C. § 791.
[4] *See* 42 U.S.C. § 12112(a); 29 C.F.R. § 1630.4.
[5] *See* 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m).

Note on mental impairments: The regulations broadly define "mental impairments" to include "emotional or mental illness."[7] EEOC enforcement guidance cites the following examples of "emotional or mental illnesses": major depression, bipolar disorder, anxiety disorders (including panic disorder, obsessive compulsive disorder, and post-traumatic stress disorder), schizophrenia, and personality disorders.[8] This guidance further recites that the American Psychiatric Association's Diagnostic and Statistical Manual ("DSM") of Mental Disorders is relevant to the identification of mental disorders.[9]

C. What Is the Nature and Scope of the ADA's Protections?

Title I of the ADA prohibits disability discrimination in regard to:

1. Job application procedures.

2. Employment actions (*e.g.*, hiring, advancement, discharge, compensation, job training).

3. Other terms, conditions, and privileges of employment.[10]

Both the ADA and its regulations provide examples of prohibited actions falling under each of these categories.[11] Unintuitive examples include: (1) engaging in contractual arrangements with the effect of subjecting job applicants or employees to disability discrimination (*e.g.*, disability discrimination effected through referral agencies, labor unions, or organizations providing benefits or training to employees),[12] and (2) discriminating against an individual because of the known disability of a third party with whom he is known to have a family, business, or social relationship.[13] The ADA further prohibits retaliation,[14] and generally prohibits harassment on the basis of disability.[15]

Note: The ADA provides a limited defense to a charge of discrimination on the ground that an individual poses a "direct threat" to the health or safety of other individuals in the workplace.[16] A "direct threat" means a significant risk to the health or safety of others that cannot be eliminated through reasonable accommodation.[17] The ADA further contains specific rules

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[6] *See* 42 U.S.C. § 12102(1)(A)-(C); 29 C.F.R. § 1630.2(g)(1)-(3).
[7] *See* 29 C.F.R. § 1630.2(h)(2).
[8] U.S. Equal Employment Opportunity Commission, EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, ¶ 1 (1997), http://www.eeoc.gov/policy/docs/psych.html.
[9] *Id*.
[10] *See* 42 U.S.C. § 12112(a); 29 C.F.R. § 1630.4(a)-(i).
[11] *See* 42 U.S.C. § 12112(b)(1)-(7); 29 C.F.R. § 1630.4(a)-(i).
[12] *See* 42 U.S.C. § 12112(b)(2); 29 C.F.R. § 1630.6.
[13] *See* 42 U.S.C. § 12112(b)(4); 29 C.F.R. § 1630.8.
[14] *See* 42 U.S.C. § 12203(a).
[15] *See, e.g.*, *Lanman v. Johnson County*, 393 F.3d 1151, 1155-56 (10th Cir. 2004) (ADA harassment prohibited) (collecting cases).
[16] *See* 42 U.S.C. § 12113(a)-(b); 29 C.F.R. § 1630.15(b)(1)-(2).
[17] *See* 42 U.S.C. § 12111(3); 29 C.F.R. § 1630.2(r) ("direct threat" must be based on reasonable medical judgment that relies on the most current medical knowledge, and/or the best available objective evidence).

addressing alleged discrimination against food handlers with communicable diseases.[18]

Title I of the ADA separately (and uniquely amongst federal antidiscrimination statutes) defines disability discrimination in negative terms to include:

1. Failing to make "reasonable accommodation;"

2. To the known physical or mental limitations;

3. Of an otherwise qualified applicant or employee with a disability;

4. Unless the covered entity can demonstrate that the accommodation would impose an "undue hardship" on the operation of its business.[19]

The ADA relatedly prohibits denial of an employment opportunity to an otherwise qualified job applicant or employee where such denial is based on the covered entity's need to make reasonable accommodations to such individual's physical or mental impairments.[20]

II. Actual and Expected Changes Effected by the ADAAA, Proposed Regulations, and Emergent Case Law

A. What Controversial Issues Were Addressed by the ADAAA?

The ADAAA primarily addressed controversies arising from two Supreme Court cases:

1. ***Sutton v. United Air Lines*** **(1999)**: Considered disability discrimination claims by two severely myopic plaintiffs who were denied employment for failing to satisfy minimum vision requirements based on uncorrected visual acuity. Held that any measures taken to correct for, or mitigate, a physical or mental impairment must be taken into account in determining whether an individual is "disabled."[21]

   Note on mental impairments: *Sutton*'s holding was invoked by many lower courts in finding that mental impairments did not constitute "disabilities" where they were adequately controlled by medication.[22]

2. ***Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*** **(2002)**: Considered failure to accommodate claim by plaintiff with carpal

[18] *See* 42 U.S.C. § 12113(e)(1)-(3); 29 C.F.R. § 1630.16(e)(1)-(2).
[19] *See* 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.9(a).
[20] *See* 42 U.S.C. § 12112(b)(5)(B); 29 C.F.R. § 1630.9(b).
[21] *See* 527 U.S. 471, 482 (1999).
[22] *See, e.g., Collins v. Prudential Inv. and Ret. Servs.*, 119 F. App'x 371, 378 (3d Cir. 2005) (ADHD/ADD not a "disability" where it is corrected through medication).

tunnel syndrome. Held that an impairment must "prevent" or "severely restrict" a major life activity to constitute a "substantial limitation" on that activity. Further held that a "major life activity" must be an activity "of central importance to daily life."[23]

Note: Pre-ADAAA regulations defined the term "substantially limits" in similarly restrictive terms to mean "unable to perform" a major life activity, or "significantly restricted" in the performance of that activity.[24]

The ADAAA also addressed controversies related to additional Supreme Court pronouncements, lower court decisions, and/or circuit splits:

1. **"Regarded as" disability**: Pre-ADAAA courts were split on the issue of whether individuals covered under the "regarded as" prong of the ADA's definition of disability were entitled to reasonable accommodation.[25] Such courts also required plaintiffs alleging "regarded as" disability to prove that defendants perceived their real or imagined disabilities to be "substantially limiting."[26]

2. **Episodic Disabilities or Disabilities in Remission**: Supreme Court law predating the ADAAA required a physical or mental impairment's impact to be "permanent or long term."[27] As such, many lower courts found impairments not to be substantially limiting when they were episodic in nature, or in remission.[28]

   Note on mental impairments: Courts frequently invoked this rule in finding that mental impairments did not constitute "disabilities" where their manifestations were merely episodic or intermittent.[29]

3. **Substantial Limitation in More Than One Major Life Activity**: Some pre-ADAAA courts held, or at least strongly suggested, that plaintiffs must be substantially limited in more than one major life activity to be considered "disabled" under the ADA.[30]

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[23] *See* 534 U.S. 184, 198 (2002).
[24] *See* 29 C.F.R. § 1630.2(j)(1)(i)-(ii).
[25] *See, e.g., D'Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220, 1235 (11th Cir. 2005) (discussing circuit split).
[26] *See, e.g., Sutton*, 527 U.S. at 490-91.
[27] *See Toyota*, 534 U.S. at 185.
[28] *See, e.g., E.E.O.C. v. Sara Lee Corp.*, 237 F.3d 349, 352 (4th Cir. 2001) ("To hold that a person is disabled whenever that individual suffers from an occasional manifestation of an illness would expand the contours of the ADA beyond all bounds.").
[29] *See, e.g., Rohan v. Networks Presentations LLC*, 375 F.3d 266, 276 (4th Cir. 2004) (plaintiff with post-traumatic stress disorder and depression not substantially limited in major life activity of interacting with others where her flashback episodes were "sporadic and last[ed], at most, thirty minutes").
[30] *See, e.g., Hold v. Grand Lake Mental Ctr., Inc.*, 443 F.3d 762, 766-67 (10th Cir. 2006) (plaintiff with cerebral palsy not "disabled" where she was not restricted in the ability to perform a "broad range of manual tasks"); *Littleton v. Wal-Mart Stores, Inc.*, 231 F. App'x 874, 877 (11th Cir. 2007) (noting that the ability to drive a car might be inconsistent with an alleged disability affecting the major life activities of thinking and communicating).

4. **"Working" as a Major Life Activity**: Pre-ADAAA courts often questioned whether "working" was a major life activity.[31] The regulations similarly required plaintiffs to demonstrate a significant restriction in their ability to perform a "class of jobs," or a "broad range of jobs in various classes," in order to establish substantial limitation in the major life activity of working.[32]

B. What Changes Did the ADAAA Effect?

On September 25, 2008, President George W. Bush signed the ADAAA into law. On January 1, 2009, the Act became effective.[33] The Act's most significant changes affected the ADA's treatment of "disability" in the aggregate, and its definitions of "substantially limits," "major life activities," and "regarded as" disability in particular:

1. **"Disability" in the Aggregate**: The ADAAA rejected *Sutton*'s holding that "disability" must be assessed in reference to measures taken to correct for, or mitigate, physical or mental impairments.[34] Instead, the Act provides that the determination of whether an impairment substantially limits a major life activity must be made without regard to the ameliorative effects of mitigating measures.[35]

   The ADAAA further provides that an impairment need not substantially limit more than one major life activity to constitute a "disability,"[36] and that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.[37]

   Note: The mitigating effects of ordinary eyeglasses or contact lenses may still be considered in determining disability under the ADAAA.[38]

   Note on mental impairments: The ADAAA provides examples of mitigating measures that must not be considered in determining disability. As potentially relevant to mental impairments, this list includes "medication," and "learned behavioral or adaptive neurological modifications."[39]

2. **"Substantially Limits"**: The ADAAA rejected *Toyota's* holding that an impairment must "prevent" or "severely restrict" a major life activity to constitute a "substantial limitation" upon that activity.[40] The Act further rejected the regulations' definition of "substantially limits" as "significantly

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[31] *See, e.g.*, *Sutton*, 527 U.S. at 492; *Toyota*, 523 U.S. at 200 (noting the "conceptual difficulties inherent in the argument that working could be a major life activity").
[32] 29 C.F.R. § 1630.2(j)(3)(i).
[33] *See generally* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 8 (codified at 42 U.S.C. §§ 12101 *et seq*.) (hereinafter "ADAAA").
[34] *See id.* § 2(b)(2).
[35] *See id.* § 4(a) (codified at 42 U.S.C. § 12102(4)(E)(i)(I)-(IV)).
[36] *See id.* § 4(a) (codified at 42 U.S.C. § 12102(4)(C)).
[37] *See id.* § 4(a) (codified at 42 U.S.C. § 12102(4)(D)).
[38] *See id.* § 4(a) (codified at 42 U.S.C. § 12102(4)(E)(ii)).
[39] *See id.* § 4(a) (codified at 42 U.S.C. § 12102(4)(E)(i)(I)-(IV)).
[40] *See id.* § 2(b)(4).

restricted" in the performance of a major life activity.[41] Instead, the ADAAA provides that the definition of "disability" shall be construed "in favor of broad coverage," and shall be interpreted consistently with the findings and purposes of the Act.[42] The Act's findings and purposes, in turn, recite that the question of whether an individual's impairment constitutes a disability "should not demand extensive analysis."[43]

Note: The ADAAA expressly grants the Equal Employment Opportunity Commission ("EEOC") authority to issue regulations implementing the Act's definition of "disability."[44] The Act further recites Congress's expectation that the EEOC will revise its regulation defining the term "substantially limits."[45]

3. **"Major Life Activity"**: The ADAAA rejected *Toyota's* holding that a "major life activity" must be one of "central importance to most people's daily lives."[46] Instead, the Act provides two non-exclusive lists of "major life activities."[47] The first list contains traditional activities previously recognized in regulations, as well as other activities not previously recognized (except in some EEOC guidance and court decisions).[48] The second list uniquely contains "major bodily functions," including "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."[49]

   Note: The ADAAA expressly recognizes "working" as a major life activity.[50]

   Note on mental impairments: The ADAAA's lists include multiple activities or major bodily functions potentially relevant to mental impairments, including sleeping, concentrating, thinking, communicating, and neurological and brain functions.[51]

4. **"Regarded As" Disability**: The ADAAA rejected the requirement that plaintiffs alleging "regarded as" disability prove that defendants perceived their real or imagined disabilities to be "substantially limiting."[52] Instead, the Act provides that plaintiffs satisfy the "regarded as" definition of disability by proving that they suffered disability discrimination "because of an actual or perceived physical or mental impairment whether or not the

[41] *See id.* § 2(b)(6).
[42] *See id.* § 4(a) (codified at 42 U.S.C. § 12102(4)(A)-(B)).
[43] *See id.* § 2(b)(5).
[44] *See id.* § 6(a)(2) (codified at 42 U.S.C. § 12205a); *see also, e.g.*, *Toyota*, 534 U.S. at 194 (questioning the EEOC's authority to issue regulations interpreting the term "disability").
[45] *See* ADAAA § 2(b)(6).
[46] *See id.* § 2(b)(4).
[47] *See id.* § 4(a) (codified at 42 U.S.C. § 12102(2)(A)-(B)).
[48] *Compare* 29 C.F.R. § 1630.2(i), *with* ADAAA § 4(a) (codified at 42 U.S.C. § 12102(2)(A) (listing, *inter alia*, performing manual tasks, seeing, hearing, and eating)).
[49] *See* ADAAA § 4(a) (codified at 42 U.S.C. § 12102(2)(B)).
[50] *See id.* § 4(a) (codified at 42 U.S.C. § 12102(2)(A)).
[51] *See id.* § 4(a) (codified at 42 U.S.C. § 12102(2)(A)-(B)).
[52] *See id.* § 2(b)(3).

impairment limits or is perceived to limit a major life activity."[53] The ADAAA also provides that no reasonable accommodation need be extended to individuals who merely satisfy the "regarded as" definition of disability.[54]

Note: "Regarded as" disability does not apply to impairments that are "transitory and minor" under the ADAAA. An impairment is "transitory" if its actual or expected duration is six months or less.[55]

Amongst the ADAAA's sole employer-friendly amendments is a prohibition on reverse discrimination claims.[56] The Act nonetheless leaves untouched the ADA's definitions of "qualified individual" with a disability,[57] "reasonable accommodation,"[58] and "undue hardship."[59] The Act similarly leaves untouched the regulations' definition of the "essential functions" of a job.[60]

C. What Changes Might the Proposed Regulations Effect?

On September 23, 2009, the EEOC published proposed regulations to implement the ADAAA.[61] Despite conclusion of the sixty day notice and comment period, and despite holding four full-day town hall meetings across the country to discuss the proposed regulations, the EEOC has not yet issued final regulations.[62] This delay could persist into 2011 given the addition of new EEOC commissioners, and a new EEOC general counsel.[63]

The proposed regulations include many predicable, and some less predictable, interpretations of the ADAAA. Predictable interpretations include:

1. The ADA's definition of "disability" is to be construed broadly in favor of coverage, and shall not require "extensive analysis."[64]

   Note: The proposed regulations add that the determination of disability "often may be made using a common-sense standard, without resorting to scientific or medical evidence."[65]

2. An impairment that substantially limits one major life activity need not limit other major life activities to constitute a disability.[66]

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[53] *See id.* § 4(a) (codified at 42 U.S.C. § 12102(3)(A)).
[54] *See id.* § 6(a)(1) (codified at 42 U.S.C. § 12201(h)).
[55] *See id.* § 4(a) (codified at 42 U.S.C. § 12101(3)(A)-(B)).
[56] *See id.* § 6(a)(1) (codified at 42 U.S.C. § 12201(g)).
[57] *See* 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m).
[58] *See* 42 U.S.C. § 12111(9); 29 C.F.R. § 1630.2(o).
[59] *See* 42 U.S.C. § 12111(10)(A)-(B); 29 C.F.R. § 1630.2(p)(1)-(2).
[60] *See* 29 C.F.R. § 1630.2(n).
[61] *See* Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, As Amended, 74 Fed. Reg. 48431 (proposed Sept. 23, 2009) (to be codified at 29 C.F.R. pt. 1630) (hereinafter "ADAAA Proposed Regs").
[62] *See* U.S. Equal Employment Opportunity Commission, Notice Concerning the Americans with Disabilities (ADA) Amendments Act of 2008, http://www.eeoc.gov/laws/statutes/adaaa_notice.cfm (last visited Aug. 29, 2010).
[63] *See* Julie Athey, *Why Wait for the EEOC? Expert Clarifies ADAAA Requirements*, HRhero.com, June 17, 2009, http://hrhero.com/hl/articles/2010/06/17/why-wait-for-the-eeoc-expert-clarifies-adaaa-requirements.
[64] *See* ADAAA Proposed Regs, 74 Fed. Reg. at 48439, 48440 (to be codified at 29 C.F.R. §§ 1630.1(4), 1630.2(j)(2)(i)).
[65] *Id.* at 48440 (to be codified at 29 C.F.R. § 1630.2(j)(2)(iv)).

3. An impairment that substantially limits a major life activity need not otherwise limit the ability to perform activities of central importance to daily life.[67]

4. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.[68]

   Note on mental impairments: The proposed regulations provide a non-exclusive list of such potential disabilities, including "psychiatric disabilities such as depression, bipolar disorder, and post-traumatic stress disorder."[69]

5. Mitigating measures are not to be considered in determining disability.[70]

   Note: Like the ADAAA, the proposed regulations provide a non-exclusive list of mitigating measures that must not be considered in determining disability. Along with the measures outlined in the ADAAA, this list includes "surgical interventions, except for those that permanently eliminate an impairment."[71]

   Note on mental impairments: The proposed regulations state in an illustrative example that an individual taking psychiatric medication for depression has a disability if there is evidence that the depression, if left untreated, would substantially limit a major life activity.[72]

6. An individual is "regarded as" having a disability if he is subjected to discrimination based on actual or perceived impairment, whether or not the impairment limits or is perceived to limit a major life activity.[73]

   Note: The proposed regulations add that "regarded as" disability discrimination may also arise from adverse employment actions taken based on the symptoms of actual or perceived impairments, or on medication used to treat such impairments (*e.g.*, failure to hire because an applicant takes anti-seizure medication, or because he has a facial tic).[74]

7. An employer is not required to provide reasonable accommodation to an individual who is only "regarded as" disabled under the ADA.[75]

8. Reverse discrimination claims are not actionable.[76]

Less predictable interpretations in the proposed regulations include:

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[66] *See id.* at 48440 (to be codified at 29 C.F.R. § 1630.2(j)(2)(iii)).
[67] *See id.* at 48440 (to be codified at 29 C.F.R. § 1630.2(j)(2)(ii)).
[68] *See id.* at 48441 (to be codified at 29 C.F.R. § 1630.2(j)(4)).
[69] *See id.*
[70] *See id.* at 48440-41 (to be codified at 29 C.F.R. § 1630.2(j)(3)(i)).
[71] *Compare* ADAAA § 4(a) (codified at 42 U.S.C. § 12102(4)(E)(i)(I)-(IV)), *with* ADAAA Proposed Regs 74 Fed. Reg. at 48441 (to be codified at 29 C.F.R. § 1630.2(j)(3)(ii)(A)-(E)).
[72] *See id.* at 48441 (to be codified at 29 C.F.R. § 1630.2(j)(3)(iii)(A)).
[73] *See id.* at 48443 (to be codified at 29 C.F.R. § 1630.2(l)(1)).
[74] *See id.* at 48443 (to be codified at 29 C.F.R. § 1630.2(l)(2)(i)-(ii)).
[75] *See id.* at 48443, 48444 (to be codified at 29 C.F.R. §§ 1630.2(o)(4), 1630.9(e)).
[76] *See id.* at 48444 (to be codified at 29 C.F.R. § 1630.4(b)).

1. 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. (By contrast, an impairment need not prevent, or significantly or severely restrict, the performance of a major life activity.)[77]

2. Some types of impairments will "consistently meet the definition of disability," and will "consistently result in a determination that the person is substantially limited in a major life activity." A non-exclusive list of such effective *per se* disabilities includes deafness, blindness, intellectual disability (*i.e.*, mental retardation), partially or completely missing limbs, mobility impairments requiring the use of a wheelchair, and thirteen other impairments (*e.g.*, cancer, cerebral palsy, diabetes, epilepsy, HIV or AIDS, multiple sclerosis, muscular dystrophy).[78]

   Note on mental impairments: The list of thirteen other effective *per se* disabilities includes six mental impairments: autism, major depression, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia.[79]

3. Some types of impairments may be disabling for some individuals but not others. Such impairments may require "more analysis in order to determine whether or not" they are disabilities, although they should still not demand "extensive analysis." A non-exclusive list of such possible disabilities includes asthma, high blood pressure, learning disabilities, back or leg impairments, carpal tunnel syndrome, and hyperthyroidism.[80]

   Note on mental impairments: The proposed regulations' list of possible disabilities also includes three mental impairments: panic disorder, anxiety disorder, and some forms of depression other than major depression.[81]

4. Some temporary, non-chronic impairments of short duration with little or no residual effects "usually will not" constitute disabilities. An apparently non-exclusive list of such non-disabilities includes the common cold, seasonal or common influenza, a sprained joint, minor and non-chronic gastrointestinal disorders, and broken bones that are expected to heal completely.[82]

   Note: This regulation is arguably inconsistent with a pronouncement elsewhere in the regulations that "[a]n impairment may substantially limit a major life activity even if it lasts, or is expected to last, for fewer than six months."[83]

5. An impairment substantially limits the major life activity of working if it substantially limits an individual's ability to perform the "type of work" at issue. The "type of work" at issue includes the job the individual has been

[77] *See id.* at 48440 (to be codified at 29 C.F.R. § 1630.2(j)(1)).
[78] *See id.* at 48441 (to be codified at 29 C.F.R. § 1630.2(j)(5)(i)(A)-(H)).
[79] *See id.* at 48441 (to be codified at 29 C.F.R. § 1630.2(j)(5)(i)(H)).
[80] *See id.* at 48442 (to be codified at 29 C.F.R. § 1630.2(j)(6)(i)(A)-(G)).
[81] *See id.* at 48442 (to be codified at 29 C.F.R. § 1630.2(j)(6)(i)(E)).
[82] See *id.* at 48443 (to be codified at 29 C.F.R. § 1630.2(j)(8)).
[83] *See id.* at 48440 (to be codified at 29 C.F.R. § 1630.2(j)(2)(v)).

performing, and jobs with similar qualifications or job-related requirements (*e.g.*, commercial truck driving, assembly line jobs, food service jobs, clerical jobs, law enforcement jobs). A "type of work" may also be determined in reference to job-related requirements characteristic of types of work, including jobs requiring: repetitive bending, reaching, or manual tasks; heavy lifting; prolonged sitting or standing; extensive walking; driving; working under high temperatures or noise levels; and working specific types of shifts.[84]

Note on mental impairments: The proposed regulations list jobs that require work in "high stress" environments as an example of a "job-related requirement" that is characteristic of a type of work.[85]

6. Major life activities include sitting, reaching, and interacting with others.[86]

Note: These major life activities were not previously recognized in either the regulations or the ADAAA.[87]

D. What Are the ADAAA's, and the Proposed Regulations', Expected Effects on Employers?

Changes effected by the ADAAA are expected to include increased litigation and non-litigation costs to employers.

Increased litigation costs to employers are expected to result from both the changed volume and nature of ADA discrimination charges:

1. **Changed Volume of ADA Discrimination Changes**: In 2009, the EEOC received a total of 93,277 charges of discrimination, of which 21,451 alleged disability discrimination. In 2010, the EEOC estimates that it will receive an additional 5,561 charges alleging disability discrimination. In 2011, as public knowledge of the ADAAA grows, the EEOC estimates that it will receive an additional 9,020 charges alleging disability discrimination.[88]

   Note: These figures represent 26% and 42% increases, respectively, over the number of received EEOC charges alleging disability discrimination in 2009.

2. **Changed Nature of ADA Discrimination Charges**: Because both the ADAAA, and the proposed regulations, relax the ADA's definition of "disability," fewer dispositive motions on the threshold coverage issue of "disability" are expected to succeed. This means more exposure for employers. By contrast, litigation is expected to focus on the coverage issue of "qualified individual" with a disability; "reasonable accommodation" and

[84] *See id.* at 48442 (to be codified at 29 C.F.R. § 1630.2(j)(7)(ii)-(iii)).
[85] *See id.* at 48442 (to be codified at 29 C.F.R. § 1630.2(j)(7)(iii)(C)).
[86] *See id.* at 48440 (to be codified at 29 C.F.R. § 1630.2(i)(1)).
[87] *Compare id*., *with* 29 C.F.R. § 1630.2(i), *with* ADAAA § 4(a) (codified at 42 U.S.C. § 12102(2)(A)).
[88] *See* U.S. Equal Employment Opportunity Commission, Fiscal Year 2011 Congressional Budget Justification (2010), http://www.eeoc.gov/eeoc/plan/2011budget.cfm.

"undue hardship;" and the motivation behind challenged employment actions. Because these issues are arguably more fact-intensive than the threshold coverage issue of "disability," litigation may result in more – and more extensive – discovery, and ultimately in more jury trials.

Note on mental impairments: Disputing the existence of mental disabilities may prove particularly difficult for employers due to the ADAAA's: (1) relaxed definition of "substantially limits;"[89] (2) codified list of "major life activities" (to include sleeping, concentrating, thinking, communicating, neurological functions, brain functions,[90] and, at least under the proposed regulations, interacting with others);[91] (3) clarification that episodic impairments are disabilities if they would be substantially limiting when active;[92] and (4) prohibition on the consideration of such mitigating measures as medication, learned behavior, or adaptive neurological modifications, in determining disability.[93]

The ADAAA's increased non-litigation costs to employers are expected to result from both more attention to the interactive process, and more individuals requesting accommodation:

1. **More Attention to the Interactive Process**: Prudent employers should likely assume that most individuals requesting accommodation will be found to be "disabled" under the ADAAA. As such, these employers should likely pay more attention to the interactive process in order to minimize exposure to failure to accommodate claims, and compensatory and punitive damages.[94]

2. **More Individuals Requesting Accommodation**: As knowledge of the ADAAA's relaxed definition of "disability" disseminates, more individuals are expected to request accommodation. For instance, the regulatory impact analysis accompanying the proposed regulations recites that as many as one million additional individuals may consistently meet the ADAAA's definition of "disability," and that accommodating such individuals may cost employers as much as $235 million per year over the next five years.[95]

   Note on mental impairments: The number of individuals requesting accommodation for mental impairments may increase as more veterans return from service in Iraq and Afghanistan.

E. What Are the ADAAA's Effects Reflected in Emergent Case Law?

Current ADAAA case law almost exclusively addresses the Act's retroactivity to events predating the January 1, 2009, effective date. Such law alternately holds that

[89] *See id.* § 4(a) (codified at 42 U.S.C. § 12102(4)(A)-(B)).
[90] *See id.* § 4(a) (codified at 42 U.S.C. § 12102(2)(A)-(B)).
[91] *See* ADAAA Proposed Regs, 74 Fed. Reg. at 48440 (to be codified at 29 C.F.R. § 1630.2(i)(1)).
[92] *See* ADAAA § 4(a) (codified at 42 U.S.C. § 12102(4)(D)).
[93] *See id.* § 4(a) (codified at 42 U.S.C. §§ 12102(4)(E)(i)(I), (IV)).
[94] *See* § III(B), *infra*.
[95] *See* ADAAA Proposed Regs, 74 Fed. Reg. at 48437.

the ADAAA may not be applied retroactively,[96] might be applied to cases that were pending as of January 1, 2009, but which sought only injunctive relief,[97] or may be considered as evidence of Congress's intent in passing the original ADA.[98]

Some emergent case law nonetheless considers the ADAAA substantively. This law generally construes the definition of "disability" broadly, and/or suggests alternate grounds on which employers might successfully defend against disability discrimination claims:

1. **Cases Construing the Definition of "Disability" Broadly**: Multiple cases acknowledge that the term "disability" is to be construed broadly.[99] For instance, one such case finds a plaintiff to be "disabled" in just a footnote.[100] Other cases reject arguments that impairments are not disabling when they are episodic in nature;[101] acknowledge that impairments must be assessed in their non-mitigated states;[102] or recognize that heightened standards like "significant restriction" may not be used in determining the existence of a disability.[103]

   Other cases cite and consider major life activities codified in the ADAAA,[104] including the Act's unique list of "major bodily functions."[105]

   Finally, some cases acknowledge that individuals who are only "regarded as" disabled are not entitled to accommodation.[106] Conceptually related

[96] *See, e.g., E.E.O.C. v. Agro Distrib., LLC*, 555 F.3d 462, 469 n.8 (5th Cir. 2009); *Milholland v. Sumner County Bd. of Educ.*, 569 F.3d 562, 565 (6th Cir. 2009); *Lytes v. DC Water & Sewer Auth.*, 572 F.3d 936, 939-42 (D.C. Cir. 2009).
[97] *See, e.g., Jenkins v. Nat'l Bd. of Med. Exam'rs*, No. 08-5371, 2009 WL 331638, at *1-*2 (6th Cir. Feb. 11, 2009) (injunctive relief sought for an accommodation on a future medical licensing exam).
[98] *See Rohr v. Salt River Project Agric. Improvement and Power Dist.*, 555 F.3d 850, 861 (9th Cir. 2009) ("[T]he ADAAA sheds light on Congress' original intent when it enacted the ADA.").
[99] *See, e.g., Quinones v. Potter*, 661 F. Supp. 2d 1105, 1119 (D. Ariz. 2009) ("The definition of 'disability' and 'substantially limits' are to be broadly construed.").
[100] *See Pridgen v. Dep't of Public Works / Bureau of Highways*, No. WDQ-08-2826, 2009 WL 4726619, at *4 n.17 (D. Md. Dec. 1, 2009) (plaintiff with monocular vision found to be disabled in footnote).
[101] *See, e.g., Menchaca v. Maricopa Cmty. Coll. Dist.*, 595 F. Supp. 2d 1063, 1070 (D. Ariz. 2009) (plaintiff with traumatic brain injury and PTSD arguably disabled where she was arguably substantially limited in certain major life activities when subjected to "stressors").
[102] *See, e.g., Rohr*, 555 F.3d at 862 ("[D]iabetes will be assessed in terms of its limitations on major life activities when the diabetic does *not* take insulin injections or medicine and does not require behavior adaptations such as a strict diet." (emphasis in original)); *see also Kemp v. Holder*, 610 F.3d 231, 236 (5th Cir. 2010) (intimating that a plaintiff who was not substantially limited in any life activity while wearing hearing aids might nonetheless be disabled under the ADAAA).
[103] *See, e.g., Chiesa v. N.Y. State Dep't of Labor*, 638 F. Supp. 2d 316, 322 (N.D.N.Y. 2009); *but see Noriega-Quijano v. Potter*, No. 5:07-CV-204-FL, 2009 WL 6690943, at *5 (E.D.N.C. Mar. 31, 2009) (plaintiff not disabled "even under the newly broadened standards" where medical evidence only showed "nominal[] restrict[ion] in performing major life activities").
[104] *See, e.g., Franchi v. New Hampton Sch.*, 656 F. Supp. 2d 252, 258 (D.N.H. 2009) (considering major life activity of eating).
[105] *See, e.g., Green v. Am. Univ.*, 647 F. Supp. 2d 21, 29 (D.D.C. 2005) (considering functions of the bowels).
[106] *See, e.g., Powers v. USF Holland, Inc.*, No. 3:07-CV-246 JVB, 2010 WL 1994833, at *5 (N.D. Ind. May 13, 2010).

cases acknowledge that "regarded as" disability does not apply to transitory and minor impairments such as broken bones.[107]

2. **Cases Suggesting Alternate Grounds on Which Employers Might Successfully Defend Against Disability Discrimination Claims:** A significant number of cases eschew determinative ADAAA analyses by focusing instead on whether plaintiffs are "qualified individuals" with a disability.[108] Some such cases find plaintiffs not to be "qualified" where they cannot perform the essential functions of the job,[109] or where they fail to prove their ability to do so with reasonable accommodation.[110]

   Other cases likewise eschew determinative ADAAA analyses to instead focus on the causation element in plaintiffs' *prima facie* case,[111] or on pretext.[112]

   Note: Some emergent case law suggests that employers might still prevail on motions to dismiss, particularly after *Iqbal*,[113] where plaintiffs do not specifically plead the major life activity in which they are substantially limited.[114] Similar cases suggest that plaintiffs must specifically plead such factual matters as the essential functions of the job they desire, or their ability to perform such functions with or without reasonable accommodation.[115]

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[107] *George v. TJX Companies, Inc.*, No. 08 CV 275(ARR)(LB), 2009 WL 4718840, at *8 (E.D.N.Y. Dec. 9, 2009) ("[P]laintiff was not regarded as having [a disability] . . . because there is no evidence in the record to support a finding that plaintiff's fractured arm would not heal within six months.").

[108] *See, e.g.*, *Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169, 188 (3d Cir. 2009) (acknowledging that the ADAAA did not "purport[] to amend" the definition or construction of "qualified individual").

[109] *See, e.g.*, *Munoz v. Echosphere, L.L.C.*, No. 09-CV-0308-KC, 2010 WL 2838356, at *12 (W.D. Tex. July 15, 2010) (ADAAA disability assumed; plaintiff not "qualified" where she was unable to attend work for a prolonged and uncertain period of time).

[110] *See, e.g.*, *Shannon v. Postmaster Gen. of the U.S. Postal Serv.*, 335 F. App'x 21 (11th Cir. 2009) (retroactivity of ADAAA immaterial; plaintiff not "qualified" because he did not show that, with reasonable accommodation, he could perform the essential functions of the job).

[111] *See, e.g.*, *Brown v. Bd. of Regents for Okla. Aric. and Mech. Colleges*, No. CIV-07-1240-C, 2009 WL 467754, at *2-*3 (W.D. Okla. Feb. 24, 2009) (applicability of ADAAA immaterial; plaintiff fails to state *prima facie* case of disability discrimination where she fails to adduce evidence that defendant terminated her "because of" her disability); *see also Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 306 (3d Cir. 1999) (*prima facie* case under the ADA requires that a plaintiff establish that he: (1) is disabled; (2) is qualified with or without reasonable accommodation to perform the essential functions of the job; and (3) suffered an adverse employment action as a result of discrimination).

[112] *See Petrunti v. Cablevision*, No. 08-CV-2277(JFB)(AKF), 2009 WL 5214495, at *5 n.3, (E.D.N.Y. Dec. 30, 2009) (applicability of ADAAA immaterial; plaintiff fails to establish pretext for alleged discriminatory termination).

[113] *See Ashcroft v. Iqbal*,129 S. Ct. 1937, 1949 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'").

[114] *See Broderick v. Research Found. of State Univ. of N.Y.*, No. 10-CV-3612 (JS)(ETB), 2010 WL 3173832, at *2 (E.D.N.Y. Aug. 11, 2008) ("notwithstanding the [ADAAA]'s new liberal pleading standards," plaintiff fails to state a claim where she does not explain what major life activity is substantially limited).

[115] *See, e.g.*, *Longariello v. Phoenix Union High Sch. Dist.*, No. CV- 09-16-6-PHX-LOA, 2009 WL 4827014, at *4 n.4, *5 (D. Ariz. Dec. 15, 2009); *Jackson v. Napolitano*, No. Cv-09-1822-PHX-LOA, 2010 WL 94110, at *3 n.4, *5 (D. Ariz. Jan. 5, 2010).

Nonetheless, contrary cases suggest that the ADAAA effectively created a more relaxed pleading standard.[116]

III. Innovative Measures Employers Are Using to Facilitate the Interactive Process

A. What Does the ADA Require with Respect to Reasonable Accommodation?

As described above, disability discrimination is defined under the ADA as including failure to make reasonable accommodation to the known limitations of an otherwise qualified employee with a disability, unless the covered entity may demonstrate "undue hardship" on the operation of its business.[117]

"Undue hardship," in turn, is defined under both the ADA and the regulations as "action requiring significant difficulty or expense."[118] Factors relevant to "undue hardship" include:

1. The nature and cost of the accommodation.

2. The overall financial resources of the facility or facilities involved in the accommodation (including the number of persons at such facilities, and the effect on expenses and resources).

3. The overall financial resources of the covered entity, and the overall size of the business of the covered entity (with respect to the number of employees, and the number, type, and location of facilities).

4. The covered entity's type of operation (including the composition, structure, and functions of its workforce, and the relationship between the facility in question and the covered entity).

5. The accommodation's impact upon the facility's operation (including upon other employees' ability to perform their duties, and upon the facility's ability to conduct business).[119]

Note: Although "undue hardship" requires fact-specific assessment, courts often find "undue hardship" where requested accommodations would increase the workload of other employees.[120]

Note: The EEOC maintains in current interpretative guidance that employers must consider funding from both vocational rehabilitation agencies and available tax deductions and credits in assessing "undue hardship."[121] This guidance further

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[116] *See, e.g., Gil v. Vortex, LLC*, 697 F. Supp. 2d 234, 240 (D. Mass. 2010) ("Although [plaintiff] might have done a better job of providing details in his Complaint describing the precise nature of his 'substantial limitations,' enough is pled to satisfy the relaxed disability standard of the Amendments Act."); *see also Horgan v. Simmons*, -- F. Supp. 2d --, 2010 WL 1434317, at *3-*4 (N.D. Ill. Apr. 12, 2010).
[117] *See* 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.9(a).
[118] *See* 42 U.S.C. § 12111(10)(A); 29 C.F.R. § 1630.2(p)(1).
[119] *See* 42 U.S.C. § 12111(10)(B)(i)-(iv); 29 C.F.R. § 1630.2(p)(2)(i)-(v).
[120] *See, e.g., Milton v. Scrivner, Inc.*, 53 F.3d 1118, 1125 (10th Cir. 1995) ("An accommodation that would result in other employees having to work harder or longer hours is not required.").
[121] *See* 29 C.F.R. pt. 1630 app. § 1630.2(p).

recites that an individual requesting accommodation should be given the option of paying any surplus cost of the accommodation that constitutes "undue hardship" for the employer.[122]

"Reasonable accommodation" is defined in the regulations to include:

1. Modifications or adjustments to the work environment;

2. Or to the manner or circumstances under which the position held or desired is customarily performed;

3. That enable a qualified individual with a disability to perform the essential functions of that position.[123]

Note: "Reasonable accommodation" is also defined in the regulations to include modifications or adjustments that enable: (1) qualified applicants with a disability to be considered for positions they desire; or (2) employees to enjoy equal benefits and privileges of employment as are enjoyed by similarly situated, non-disabled employees.[124]

"Essential functions" are defined in the regulations as "fundamental job duties."[125] By contrast, "essential functions" do not include "marginal functions."[126] A job function might be considered "essential" where:

1. The position exists to perform that function.

2. A limited number of employees are available amongst whom the performance of that function may be distributed.

3. The function is highly specialized such that the individual in the position is hired for his expertise or ability to perform that particular function.[127]

Note: Evidence of whether a particular function is "essential" includes: (1) the employer's judgment as to whether it is essential; (2) written job descriptions; (3) the amount of time employees spend performing the function; (4) the consequences of not requiring the employee to perform the function; (5) the terms of a collective bargaining agreement; (6) the actual experience of former employees in the job; and (7) the current experience of employees in similar jobs.[128]

Both the ADA and the regulations provide the following non-exclusive list of potential "reasonable accommodations":

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[122] *See id.*
[123] *See* 29 C.F.R. § 1630.2(o)(1)(ii).
[124] *See* 29 C.F.R. §§ 1630.2(o)(1)(i), (iii).
[125] *See* 29 C.F.R. § 1630.2(n)(1).
[126] *See id.*
[127] *See* 29 C.F.R. § 1630.2(n)(2)(i)-(iii).
[128] *See* 29 C.F.R. § 1630.2(n)(3)(i)-(vii).

1. Making existing facilities used by employees readily accessible to and usable by individuals with disabilities (*e.g.*, changing floor plans to permit wheelchair access).

2. Job-restructuring (*e.g.*, shifting "marginal duties" to other employees, modifying how or where work tasks are performed).

3. Part-time or modified work schedules (*e.g.*, unpaid leave, flexible hours).

4. Reassignment to vacant position.

5. Acquisition or modification of equipment or devices.

6. Adjustment or modifications of examinations, training materials, or policies.

7. Provision of qualified readers or interpreters.[129]

Note: Employers generally need not promote disabled individuals,[130] or either create new positions, or bump other employees from existing positions,[131] as a reasonable accommodation. Although employees must generally be qualified for the vacant positions to which they are reassigned,[132] courts disagree on whether they must be the best candidates for such positions.[133] Notably, employers generally need not reassign disabled employees to vacant positions in violation of seniority rules.[134] Employers also need not reassign applicants to vacant positions as a reasonable accommodation.[135]

Note: The elimination or reallocation of a job's essential functions is not a reasonable accommodation.[136] Nonetheless, employers must generally accommodate the adverse side effects of the medical treatment of disabilities.[137] Most courts require a causal connection between the disability and the accommodation sought.[138] Finally, employers are generally not required to provide personal items that assist employees throughout their daily activities (*e.g.*, prosthetic limbs, wheelchairs, eyeglasses).[139]

B. What Does the ADA Require with Respect to the Interactive Process?

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[129] *See* 42 U.S.C. § 12111(9)(A)-(B); 29 C.F.R. § 1630.2(o)(2)(i)-(ii).
[130] *See* 29 C.F.R. pt. 1630 app. § 1630.2(o).
[131] *See, e.g., Gile v. United Airlines, Inc.*, 95 F.3d 492, 499 (7th Cir. 1996).
[132] *See, e.g., id.*
[133] *Compare, e.g., Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1166-67 (10th Cir. 1999), *with E.E.O.C. v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1028-29 (7th Cir. 2000).
[134] *See U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 393-94, 403-05 (2002).
[135] *See* 29 C.F.R. pt. 1630 app. § 1630.2(o).
[136] *See, e.g.*, C.F.R. pt. 1630 app. § 1630.2(o); *Schwertfager v. City of Boynton Beach*, 42 F. Supp. 2d 1347, 1365 (S.D. Fla. 1999) ("Under the ADA, employers are not required to eliminate the essential functions of the job.").
[137] *See, e.g., Felix v. N.Y. City Transit Auth.*, 324 F.3d 102, 107 (2d Cir. 2003) ("Adverse effects of disabilities and adverse side effects from the medical treatment of disabilities arise 'because of the disability.'").
[138] *See, e.g., Wood v. Crown Redi-Mix*, 339 F.3d 682, 687 (8th Cir. 2003) ("[T]here must be a causal connection between the major life activity that is limited and the accommodation sought.").
[139] *See* 29 C.F.R. pt. 1630 app. § 1630.9.

The ADA does not explicitly mandate the interactive process, and the regulations merely provide that:

> To determine the appropriate reasonable accommodation it may be necessary for covered entities to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitation resulting from the disability and potential reasonable accommodations that could overcome those limitations.[140]

Given this guidance, courts disagree as to whether, or in what sense, the interactive process is required.[141] Courts also disagree regarding the consequences of not engaging in the interactive process.[142]

Despite such disagreement, good faith participation in the interactive process may be necessary to prove the reasonableness of any eventual accommodation,[143] and it may absolve employers from liability for compensatory or punitive damages.[144] Furthermore, courts routinely consider which party was responsible for breakdown in the interactive process in assessing liability.[145]

The EEOC's current interpretative guidance describes a four-step process employers should follow to identify a reasonable accommodation following an employee request:

1. The employer should analyze the job involved and determine its purpose and essential functions.

2. The employer should consult with the employee to determine his precise job-related limitations and how those limitations could be overcome with reasonable accommodation.

3. In consultation with the employee, the employer should identify potential accommodations and the effectiveness each would have in enabling the employee to perform the essential functions of the position.

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[140] 29 C.F.R. § 1630.2(o)(3).

[141] *Compare, e.g.*, *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 633 (7th Cir. 1998) ("The ADA requires that employer and employee engage in an interactive process to determine a reasonable accommodation."), *with Hartnett v. Fielding Graduate Inst.*, 198 F. App'x 89, 94 (2d Cir. 2006) ("We have yet to determine . . . whether an employer's failure to carry out such an interactive process gives rise to an independent cause of action.").

[142] *Compare, e.g.*, *Picinich v. United Parcel Serv.*, 321 F. Supp. 2d 485, 511 (N.D.N.Y. 2004) ("[T]he failure to engage in an interactive process is relevant only where it leads to the more fundamental failure to provide an accommodation."), *with Dargis v. Sheahan*, 526 F.3d 981, 988 (7th Cir. 2008) (no requirement to engage in interactive process where no reasonable accommodation is possible).

[143] *See, e.g.*, *Feliberty v. Kemper Corp.*, 98 F.3d 274, 280 (7th Cir. 1996) ("[R]easonableness does depend on a good-faith effort to assess the employee's needs and to respond to them.").

[144] *See* 42 U.S.C. § 1981a(a)(3) (compensatory and punitive damages limited where employer "demonstrates good faith efforts, in consultation with the person with the disability . . . to identify and make a reasonable accommodation").

[145] *See, e.g.*, *Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130, 1137 (7th Cir. 1996) ("Liability for failure to provide reasonable accommodations ensues only where the employer bears responsibility for the breakdown [in the interactive process]."); *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1287 (11th Cir. 1997) ("Liability simply cannot arise under the ADA when an employer does not obstruct an informal interactive process; makes reasonable efforts to communicate with the employee and provide accommodations based on the information it possesses; and the employee's actions cause a breakdown of the interactive process.").

4. The employer should select and implement the accommodation that is most appropriate for both the employer and the employee, taking the employee's preference into consideration.[146]

Note: The employee, not the employer, must generally initiate the interactive process by requesting an accommodation.[147] Nonetheless, an employer may be required to initiate the process under certain circumstances, including when either the disability, the need for accommodation, or an employee's inability to request accommodation, is obvious.[148]

Note: Employers may require individuals to provide documentation of their need for accommodation where such need is not obvious.[149] Additionally, employers may select the least expensive accommodation available, assuming it is effective.[150] If an employee rejects such a selected accommodation, he will no longer be considered to be a "qualified individual" with a disability.[151]

C. What Innovative Measures Are Employers Using to Facilitate the Interactive Process?

As described above, the threshold coverage issue of "disability" has been defined into virtual irrelevance under the ADAAA, proposed regulations, and emergent case law. Prudent employers should likely assume that all but the most transitory and minor of impairments (*e.g.*, the common cold, seasonal influenza, sprained joints) will be found to be "disabilities."

To fulfill their legal obligations under the ADA, employers should likely respond to all requests for accommodation. Considered preparation for – and careful engagement in – the interactive process will minimize exposure to failure to accommodate claims, and create a favorable record on the other additional issues most relevant to post-ADAAA litigation (*e.g.*, "qualified individual" with a disability, and the motivation behind challenged employment actions).

Innovative measures employers are using to facilitate the interactive process include measures taken in anticipation of requests for accommodation; measures designed to centralize decision-making on requests for accommodation; measures designed to amass a favorable record during the interactive process; and measures taken after the interactive process to support claims of "undue hardship":

1. **Innovative Measures Taken in Anticipation of Requests for Accommodation**: Employers should create or update written job descriptions to accurately describe all "essential functions" of a job. Essential functions may be identified through observation of employees at work, or through consultation with employees and their front-line supervisors. Job descriptions should reflect the actual performance of a job,

[146] *See* 29 C.F.R. pt. 1630 app. § 1630.9.
[147] *See, e.g., Cannice v. Norwest Bank Iowa N.A.*, 189 F.3d 723, 727 (8th Cir. 1999) ("In order to be entitled to an accommodation, the employee must inform the employer than an accommodation is needed.").
[148] *See, e.g., Smith v. Henderson*, 376 F.3d 529, 535-36 (6th Cir. 2004).
[149] *See* 29 C.F.R. pt. 1630 app. § 1630.9.
[150] *See id.*
[151] *See* 29 C.F.R. § 1630.9(d).

and should avoid inclusion of "marginal functions." Employees should also be apprised of – and ideally acknowledge their agreement with – the essential functions of their positions.

Note: Under the regulations, courts must accord limited deference to both employers' judgments as to which job functions are "essential," and to employers' written job descriptions.[152]

Employers should also train managers, supervisors, and human resources employees on changes effected by the ADAAA. Supervisors and managers should likely be refreshed on how to avoid basing employment decisions on generalizations about the job-related limitations of an impairment. Managers and supervisors should instead be reminded to base employment decisions solely on employees' actual job performance.

Finally, employers should revise employee handbooks and policies to ensure consistency with the ADAAA's new definition of "disability." Such revisions might also be used to centralize decision-making on requests for accommodation, as discussed below.

2. **Innovative Measures Designed to Centralize Decision-Making on Requests for Accommodation**: Employers should consider centralizing decision-making on requests for accommodation in recognition of the many advantages presented:

Centralization encourages development of a centralized budget for accommodations, relieving pressure on regional offices or facilities to deny accommodations in order to control costs. Under the regulations, "undue hardship" requires consideration of the overall financial resources of a covered entity, and not just of the office or facility providing the accommodation.[153]

Centralization permits one department to administer the interrelated leave rights created by the ADA, the Family and Medical Leave Act,[154] and state workers' compensation acts.

Centralization minimizes managers' and front-line supervisors' knowledge of employees' impairments and requests for accommodation. Such minimization, in turn, renders it less likely that managers or supervisors will take adverse employment actions against employees on the basis of disability, or retaliate in response to accommodation requests. This minimization also reduces the possibility that managers and supervisors will be found to have engaged in "regarded as" discrimination resulting from their knowledge of employees' disabilities. To insulate managers and supervisors from undesired knowledge of disabilities and accommodation requests, employees should be directed to request all accommodations directly from the centralized department handling such requests. All

[152] *See* 29 C.F.R. § 1630.2(n)(3)(i)-(ii).
[153] *See* 42 U.S.C. § 12111(10)(B)(iii); 29 C.F.R. § 1630.2(p)(2)(iii).
[154] *See* 29 U.S.C. § 2601 *et seq*.

communications between employees and this department should be kept confidential.

Centralization facilitates impartial consideration of accommodation requests by removed parties who may compare the essential functions of a job, as documented in job descriptions, against job-related limitations, as documented in medical records. Impartial consideration of accommodation requests further results in more consistent, and generally more defensible, responses to requests for accommodation.

Note: Employers should avoid providing more expensive accommodations to higher-level employees than to other employees as this practice may be invoked to refute claims of "undue hardship."

3. **Innovative Measures Designed to Amass a Favorable Record During the Interactive Process:** Employers should request written documentation of employees' job-related impairments where such impairments are not obvious. Specifically, employers should request medical information describing the nature, severity, and expected duration of an employee's impairment; the specific activities limited by that impairment; and the degree to which the activities are limited. Employers should also provide the employee's doctor with a copy of the employee's job description, including a list of his essential functions.

   Note: Employees' medical information is protected under the confidentiality provisions of the ADA, including the requirement that such information be maintained in separate medical files.[155] Employers should accordingly not disclose the reason behind an employee's accommodation to other employees.

   Employers should also scrupulously document all employee requests for accommodation, and all of their own responses, or counterproposals, to such requests. Any personal meetings with employees should be attended by witnesses.

   Note: Because employees may generally not recover for failure to accommodate where they cause a breakdown of the interactive process,[156] employers should ensure that they always conclude the interactive process with a defensible response to the employee's last request or inquiry.

   Employers should further document the rationale behind any refusal to provide a requested accommodation on the ground of "undue hardship." Conversely, if an employee refuses to accept a reasonable accommodation offered by the employer, or refuses to pay for that portion of the accommodation which constitutes "undue hardship," the employer should obtain a signed acknowledgement from the employee reciting this refusal.

[155] *See generally* 42 U.S.C. § 12112(d)(3)(B).
[156] *See, e.g.*, *Nugent v. St. Lukes Roosevelt Hosp. Ctr.*, 303 F. App'x 943, 945 (2d Cir. 2008).

Note: Employers may consult leading work accommodation resources such as the Job Accommodation Network ("JAN") for free, confidential guidance on potential accommodations. JAN may be contacted at P.O. Box 6080, Morgantown, WV 26506-6080, 1-800-526-7234, http://askjan.org.

Note on mental disabilities: Although "reasonable accommodation" requires fact-specific assessment, some cases suggest that part-time work may be a reasonable accommodation for depression.[157]

Finally, employers should make good faith attempts at communicating with employees, promptly responding to all requests, and explaining all decisions throughout the interactive process. Keeping employees engaged in the interactive process increases the changes of identifying a mutually acceptable accommodation, and decreases the acrimony that might otherwise lead to litigation.

4. **Innovative Measures Taken After the Interactive Process to Support Claims of "Undue Hardship"**: Even if employers believe that a requested accommodation will impose "undue hardship" on their operations, they should still generally agree to test the accommodation for a limited period of time. During this testing period, employers may document any hardship that actually results from the accommodation, thus amassing compelling evidence for trial. During the trial period, employers may also request that employees pay any surplus cost of the accommodation that constitutes "undue hardship."

   Conversely, employers may discover during the testing period that a requested accommodation is reasonable.

[157] *See, e.g., Ralph v. Lucent Tech., Inc.*, 135 F.3d 166 (1st Cir. 1998).