



November 23, 2009

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

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

RE: RIN 3046-AA85 – The Proposed Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended

Dear Mr. Llewellyn:

On behalf of the International Franchise Association (IFA), I respectfully submit these comments in response to the Equal Employment Opportunity Commission (EEOC or Commission)'s notice of proposed rulemaking (NPRM or proposed rule) published in the September 23, 2009 *Federal Register* (74 *Fed. Reg.* 48431). The NPRM proposes revisions to the EEOC regulations and accompanying interpretive guidance under Title I of the Americans with Disabilities Act (ADA) in response to changes made to the ADA by the Americans with Disabilities Act Amendments Act of 2008 (the ADAAA or the Act).

Founded in 1960, the IFA is the oldest and largest trade association in the world devoted to representing the interests of franchising. The IFA is a membership organization of franchisors, franchisees, and suppliers. The IFA's mission is to safeguard and enhance the business environment for franchising worldwide. In addition to serving as a resource for current and prospective franchisors and franchisees, the IFA and its members advise public officials across the country about the laws that govern franchising, with the goals of promoting franchise growth and advancing the interests of franchisees, franchisors, and suppliers. The IFA is the only trade association that acts as a voice for both franchisors and franchisees throughout the United States and the world. IFA represents more than 85 industries, including more than 11,000 franchisee, 1,200 franchisor and 600 supplier members nationwide. According to a 2008 study conducted by PricewaterhouseCoopers, there are more than 900,000 franchised establishments in the U.S. that are responsible for creating 21 million American jobs and generating \$2.3 trillion in economic output.

Many of IFA's members are subject to the ADA and will be affected by any changes the EEOC makes to the ADA regulations. Please find our detailed comments below.

COMMENTS

IFA fully supports the ADA's goal of including people with disabilities in all aspects of society, including employment for people who are willing and able to work despite their disabilities. IFA supported passage of the ADA Amendments Act because we believed that the courts had excluded from ADA protections individuals that Congress intended to be covered by the Act. Our support for the ADAAA, however, was premised on the fact that it struck a correct balance between the needs of individuals with disabilities and those of employers.

IFA is concerned that the NPRM disrupts this balance to the detriment of IFA members, particularly franchised small business owners. In many sections of the NPRM, the EEOC seems to disregard statutory language and clear direction from Congress. While we have concerns with several sections in the NPRM, including references to per se disabilities and proposed changes to the major life activity of working, we have focused our comments on four sections that threaten to pose the most significant challenges for our small business members: NPRM sections 1630.2(j)(1); 1630.2(j)(2)(v) and (l)(2) and the deficiencies in the regulatory impact analysis. That said, we urge the Commission to also remove in the final regulations any references to per se disabilities and the NPRM's proposed changes to the major life activity of working.

Our detailed comments are set forth below.

I. The Preliminary Regulatory Impact Analysis

IFA disagrees with the EEOC's conclusion that the NPRM "will very likely be below the \$100 million threshold for 'economically significant' regulations" and urges the EEOC to conduct further regulatory impact analysis. Among other things, the EEOC's assumptions ignore the confusion, litigation and increased compliance costs as a result of the NPRM's proposed changes to 1630.2(j)(1) (eliminating references to "condition, manner and duration"), 1630.2(j)(2)(v) (ambiguity over the treatment of transitory and minor conditions), 1630.2(j)(7) (changes to the major life activity of working), and 1630.2(l)(2) (actions taken on the basis of a symptom of an impairment). (74 *Fed. Reg.* at 48433-48439). In addition, the surveys relied upon by the Agency for cost estimates by EEOC's own admission only ask about a limited number of disabilities and thus may not capture the population covered by NPRM. *Id.* at 48436.¹ Finally, the Agency's estimate of costs related to training and changes to policies and procedures — which strike us as particularly low — does not rely on *any* empirical research. *Id.* at 48438. Indeed, the EEOC admits that its \$70 million estimate is based on data that is "not prevalent or ideal" and the "estimates are volatile."

II. Section 1630.2(j)(1)

¹ Indeed, the EEOC seems to down play the possible increases of individuals covered as disabled in the impact analysis, while at the same time emphasizing the increased breath of coverage in the proposed rule. *See* 74 *Fed. Reg.* at 48437, 48440 (*compare* "one million additional workers represent an upper bound of those consistently meet the definition of disability" with "the definition of disability ... shall be construed in favor of broad coverage of individuals to the maximum extent permitted" as it is applied to a workforce of over 150 million (*Bureau of Labor Statistics*)).

The EEOC's existing ADA regulations list "condition, manner and duration" as issues to consider when determining whether an impairment is substantially limiting. 29 C.F.R. Part 1630.2(j)(2). The NPRM suggests removing these factors from the ADA's regulations. (74 *Fed. Reg.* at 48446). This is contrary to Congress' specific direction and would greatly complicate the process for determining what is substantially limiting. The ADAAA's legislative history specifically states that "condition, manner and duration" should remain as considerations for determining whether an impairment is substantially limiting. The Senate Managers' Statement for the ADA Amendments Act, citing the original ADA's legislative history, states,

A person is considered an individual with a disability for the purposes of the first prong of the definition when [one or more of] the individual's important life activities are restricted as to the condition, manner or duration under which they can be performed in comparison to most people. . . . We particularly believe that this test, which articulated an analysis that considered whether a person's activities are limited in condition, duration and manner, is a useful one. (Statement of Managers to accompany S. 3406 at S8842.)

The NPRM further complicates the disability determination process by stating that, "[t]he comparison of an individual's limitation to the ability of most people in the general population often may be made using a common sense standard, without resorting to scientific or medical evidence." NPRM section 1630.2(j)(2)(iv) (74 *Fed. Reg.* at 48440). This suggests employers and courts should not consider hard evidence that may be directly relevant to whether a condition is indeed limiting, let alone substantially limiting.

We respectfully ask the EEOC to delete 1630.2(j)(2)(iv) and reinsert in the regulations references to "condition, manner and duration."

III. Section 1630.2(j)(2)(v)

The ADAAA states that impairments "with an actual or expected duration of 6 months or less" cannot be a basis for a "regarded as" claim under the Act. ADA Amendments Act § 4 (a) (42 U.S.C. § 12102(2)). The Act does not specifically provide a similar limitation for the remaining two prongs of the definition of disability. Nonetheless, it is clear that if a condition cannot meet the lower standard of an impairment under the "regarded as" prong, it certainly cannot meet the higher standard of a substantially limiting impairment under the other prongs.

Yet, NPRM section 1630.2 states: "The 'transitory and minor' exception in 1630.2(l) of this part (the 'regarded as' prong of the definition of 'disability') does not establish a durational minimum for the definition of 'disability' under § 1630.2(g)(1) (actual disability) or § 1630.2(g)(2) (record of a disability)." (74 *Fed. Reg.* at 48440). An impairment may substantially limit a major life function even if it lasts, or is expected to last, for fewer than six months.

This section of the NPRM is contrary to Congressional intent and a common sense reading of the statute. According to the ADAAA's legislative history, the six-month limitation was added to the "regarded as" prong because, "absent this exception, the third prong of the definition would have covered individuals who are regarded as having common ailments like the cold or flu." Report of the House Committee on

Education and Labor, H. Rep. No. 110-730, Part 1, at 14. Congress said “[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.” Statement of Managers at S8842; *see also*, Report of the House Committee on the Judiciary at 18, H. Rep. No. 110-730, Part 2, at 18 and Report of the House Committee on Education and Labor at 14, H. Rep. No. 110-730, Part 1, at 14. Simply put, Congress did not specifically include the durational limitation language for prongs one and two of the definition of disability, because it felt the “substantially limits” requirement would already preclude consideration of conditions covered by the exemption in 42 U.S.C. § 12102(2) (i.e., conditions of six months or less).

While the EEOC recognizes in NPRM section 1630.2(j)(8) that “temporary, non-chronic conditions of short duration with little or no residual effects usually will not be considered an impairment or disability,” the NPRM does not define “short duration.” (74 Fed. Reg. at 48443.) In fact, the proposed rule acknowledges in several places that “short term” conditions do not constitute disabilities under prong one, but repeatedly fails to provide any clear guidance as to what “short term” means. There are many impairments that could last less than six months but longer than the “short duration” alluded to in NPRM section 1630.2(j)(8).

The confusion and ambiguity the NPRM creates over this issue invites unnecessary litigation, abuse of ADA protections and complicates disability determinations. We therefore ask that the EEOC delete NPRM section 1630.2(j)(2)(v) and include in the regulations a section clarifying that the “substantially limiting” requirement generally precludes finding an impairment of six months or less is a disability under prong one.

IV. NPRM Section 1630.2(l)(2)

NPRM section 1630.2(l)(2) states that “[a] prohibited action [under the regarded as prong] 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.” (74 Fed. Reg. at 48443.) The proposed rule provides two examples:

- (i) *Example 1:* An individual who is not hired for a driving job because he takes anti-seizure medication is regarded as having a disability, even if the employer is unaware of the reason the employee is taking the medication.
- (ii) *Example 2:* An employer that refuses to hire someone with a facial tic regards the individual as having a disability, even if the employer does not know that the facial tic is caused by Tourette Syndrome. *Id.*

While, as a result of the ADAAA, the ADA’s “regarded as” prong now prohibits an employer from taking adverse actions based on “an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity,” nothing in the ADAAA or the ADA prohibits actions based solely on symptoms of an impairment. ADA Amendments Act § 4 (a) (42 U.S.C. § 12102(2)). The issue of whether an employer perceives an individual as having an impairment because of a symptom and therefore violates the Act is an evidentiary question. The EEOC does not have the authority under the ADA to deem that *possible* evidence of a *possible* violation of the Act in itself constitutes a violation of the Act.

In addition, it takes little imagination to envision situations where an employment action could be taken based on some action or characteristic that might be a symptom of an impairment, but also might be encountered frequently in the absence of any impairment. Tardiness, unscheduled absences and inappropriate workplace behavior are just a few examples. While the ADA prohibits actions based on regarding an employee as disabled, it does not require employers to ignore substandard workplace performance.

We ask that the EEOC delete NPRM section 1630.2(1)(2) from the final regulations.

CONCLUSION

The IFA and its members were supportive of the ADA Amendments Act because it struck the proper balance between the rights of employees and the obligations of employers. Therefore, the IFA requests that the EEOC uphold the intentions of Congress and make the aforementioned changes the NPRM before it becomes a final rule. Thank you for this opportunity to comment on the proposed rulemaking.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David French". The signature is stylized and cursive.

David French
Vice President, Government Relations