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November 20, 2009

**Via Federal Express: 202-663-4638**

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

Re: 29 CFR Part 1630 Regulations To Implement the Equal Employment Provisions  
of the Americans with Disabilities Act, as Amended

Dear Mr. Llewellyn:

Below are my comments on the EEOC's proposed regulations. I fully understand the need for restructuring based on the Amendments to the Americans with Disabilities Act and the new emphasis for finding disabilities. However, my comments seek clarification on several issues. I am an attorney who represents management and I have had considerable experience in this area of the law, both in advising clients and litigating disability-related issues. With this understanding, let me begin by stating that I do not find anything inherently wrong with the ADA, its objective of restoring protections based on the original intent of the ADA, or even its aim of expanding coverage of the ADA to more individuals. My chief concern in reviewing the EEOC's proposed regulations is that they do not recognize, let alone account for, the possibility of individual abuses that can and likely will occur. These abuses often lead to disputes and costly litigation. The EEOC should at least tactfully caution against the possibility of deception or misapplication of this new law.

In addition, the law and the EEOC's proposed regulations need clarification in the following areas:

**1. There is need for a clearer definition of what "substantial" means and a defined protocol for making that determination.** The ADA and the EEOC's proposed regulations do not adequately define the term "disability" to give employers and individuals the predictability that prompts enactment of laws in the first place. Congress could not elaborate on what substantial meant

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and asked the EEOC for its insights on broadening the interpretation of the term. Although there is obviously an emphasis on (if not an assumption of) “disabled” status in the proposed regulations, the EEOC attempts—unrealistically, I believe—to equate the determination of protected status under the ADA to the determination of protected status under other federal anti-discrimination laws such as Title VII, 42 U.S.C. § 2000e, et seq. Following the EEOC’s recommendation, the question is, when does the employer discriminate under the ADA? The EEOC’s analysis is difficult to apply. Discrimination claims based on membership in protected categories such as race, color, and sex are fundamentally different for two basic reasons. First, these characteristics are immutable and variation within the protected status is generally not an issue in determining coverage. Second, these characteristics do not statutorily entitle the individual to any accommodations. “Disabled” status, on the other hand, is both mutable and highly variable. What’s more, it requires employers to take affirmative steps to engage employees in the interactive process of identifying and possibly providing reasonable accommodations. These two considerations will remain problematic until the EEOC clarifies what constitutes a disability and how the determination is made.

Age discrimination has had a similar problem or difficulty in defining discrimination because of the mutable nature of age issues. Where the plaintiff’s comparator is also in the protected category, courts have had to analyze the case based on a disparity of age. In other words, courts have had to determine how much older the plaintiff must be in order to be entitled to the protections of the ADEA based on more favorable treatment of other individuals who are also over the age of 40. According to most courts, although both individuals over 40 years are protected, if the disparity is not “substantial” there generally is no discrimination. See, e.g., O’Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996); see also Balderston v. Fairbanks Morse Engine, Div. of Coltec Indus., 328 F.3d 309 (7th Cir. 2003) (defining “substantially younger” as generally 10 years younger). The courts have had to determine what is substantial in terms of age, (not unlike what will have to be done with ADA issues), and in so doing, have established objective criteria. Therefore, when is a person substantially limited? Although we are not comparing disabilities here, we are comparing impairments, and I raise this issue to ask the EEOC to be more definitive in addressing this mutable and varying status to give clarification to the limits of when an impairment qualifies as a disability. To merely say a person is disabled because the person is below that of “most people”—below “average”—is not instructive. This ambiguity leaves the issue to be decided in litigation. Think about it. If, as the EEOC suggests, the “jury” will ultimately determine the standard of below or above “most people,” then each jury will be a law unto itself: a disability determination, therefore, will be in the eyes of the beholder. Even with the same set of facts, one jury may say yes and another jury may say no! That should not be how any law operates, let alone one that requires affirmative accommodations like the ADA.

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This problem is exacerbated by instructions that common sense be used to determine if a person has a disability, not an exacting review, statistics, or medical evidence. Could this analysis be any more obscure? I think when Congress delegated this to the EEOC it expected more.

To illustrate this, the employer will have to make some kind of comparative analysis as to what “most people” can do and then conclude whether a disability exists while, at the same time, will seek a collaborative process of what accommodation should be allowed where the individual is disabled and then qualified. If the individual is qualified without a need for an accommodation this does not cause the same problem. On the other hand, how do you accommodate a disability with no true understanding of what the disability is? And how does an individual prove discrimination if there is no clarification of a major life activity and a definition of substantial limitation?

The Appendix to Part 1630 discusses that “most people” is substantially similar to the term “average person in the general population.” The EEOC states that common sense should control. However, the saying goes, “common sense is not so common!” This ambiguous standard opens the door for anyone to argue that their impairment makes them achieve below most people, or below average, which will lead to abuses. As stated above, who determines whether someone is below most people or below average? Is it based on some abstract view of a person’s own life experience? Imagine the normal progression of a disability issue, and all of the varied life experiences of the individuals involved: first, the employee; second, the employer; third, the EEOC; fourth, and finally, a judge and/or jury. However, the law still requires a “substantial limitation,” but what does that mean in a disability context? Further, since the proposed regulations indicate that employers should not use any expert, medical, or statistical analyses to make a determination, what option is left? Guessing?

Impairment of basic motor skills, such as lifting, is a good illustration of an evidentiary dichotomy. The proposed regulations twice suggest that lifting restrictions of 20 lbs. may be enough to constitute a disability. Why does the EEOC suggest this level? First, who decides the employee has a 20 lb. limitation and how is that established? There is no test to verify this; the individual, or even the individual’s doctor or health care provider, can say it is a limitation of 5 lbs., 10 lbs., 15 lbs., 20 lbs., 30 lbs.<sup>1</sup> There is no medical test for these soft tissue problems. This is a mere art and not a science. Starting with this ambiguity, the proposed regulations then use a comparison to “most people” or “average.” Compounding this problem is the potential for employee abuse and, ultimately, the frustration of the employer and probability for misunderstanding, if not litigation. For example, what if the employer disagrees with the statement that the employee has a 20 lb. lifting restriction because the employer has observed the employee lifting more than 20 lbs.? The proposed regulations should provide more guidance to allow for predictability of a decision. Congress could not do so, but I believe that the EEOC can!

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<sup>1</sup> In Lusk v. Ryder, 238 F.3d 1237 (10th Cir. 2001), the Tenth Circuit was not convinced that a forty-pound lifting restriction met the substantially limited standard.

These regulations should be a source for determining the degree of limitation that makes an individual's ability to do something less than that of most people—or—below average. To merely state that the jury ultimately will determine what is “most people” and “average” based on common sense and life experiences is not workable. Further, it is problematic because it would require expensive litigation, it would not establish a preclusive effect for other litigation, and the standard, itself, will be determined on a case-by-case basis. Although cases are to be analyzed and decided on an individualized basis, the applicable standard should not; it should remain objective and consistent from one case to the next. This is of great concern where impairments are not obvious.

Further, the individual should continue to have the burden of proof to establish the standard of “most people” or “average.” What will the individual have to prove and how will the individual prove it? Therefore, when is the individual below that of “most people,” below “average” in:

Caring for oneself, Performing manual tasks, Seeing, Hearing, Eating, Walking, Standing, Sitting, Reaching, Lifting, Bending, Speaking, Breathing, Learning, Reading, Concentrating, Thinking, Communicating, Interacting with others, and Working?

As another example, how much sleep is considered to be “average” or consistent with the experience of most people? Previous court decisions have talked about “uninterrupted sleep.” Is continuous sleep what the EEOC is concerned with here? Give us guidelines to establish when these characteristics are actionable, “accommodatable,” disabilities. Give us benchmarks to guide employers in making their decisions. Other than placing the emphasis on common sense, nothing in the ADAAA or proposed regulations changes the uncertainty of this ambiguous analysis.

Further complicating the regulations is that the entire category of major life activities generally involves the element of pain and a person's threshold for pain. How much can a person lift before he or she experiences pain? Likewise, how much time can be spent walking, standing, etc., before an individual experiences pain? What could be more subjective? The current vague statements exacerbate this entire area and we need more definition from the EEOC to give meaningful guidance to employers.

Alternatively, although the EEOC may not want to establish numerous benchmarks, it could at least provide an analysis of how a limitation is to be identified, measured, and verified within the context of a major bodily function to answer the ultimate question of whether an individual is disabled. How should individuals prove the restriction and impairment and then the disability? Missing a limb is obvious and intuitive (indeed most of the proposed regulations' examples are); however, most cases are not obvious and will result in unnecessary and costly litigation. The regulations suggest that the

flu or a common cold are not substantially limiting; again, these examples minimize the concern and are too extreme to be helpful. Employers need standards and a clear procedure; not generalizations that emphasize only the assumption of a disability with obvious examples to back it up. A matrix for an ordinary evaluation and guidelines would be mutually beneficial for everyone.

The OSHA, NIOSH, DOL and DOT have established guidelines for most of the impairments listed in the proposed regulations; why not use those guidelines? Further, the issue of determining if someone is disabled obviously involves a medical review just like FMLA certification (Review DOL WH-381, WH-380-F revised January 2009).<sup>2</sup> I believe it is naïve to just compare the effects of an impairment to “most people,” and only permit common sense to guide the decision-making process. The standards, guidelines and definition set forth for a “serious health condition” under the FMLA are more meaningful than the definition of a disability under the ADA. The FMLA provides more administrative guidance and tools for employers to minimize the potential for confusion, if not fraud and abuse. Why did the DOL provide these guidelines? To provide a better understanding and the ability to avoid unnecessary abuses. Again, I believe that the EEOC can do more. The FMLA merely provides unpaid (though job-protected) leave for up to 12 weeks; the ADA, in turn, presents remedies and accommodations certain to have a much greater impact on the employee’s protections and the employer’s decisions. I recommend using a similar evaluation that permits certification to determine the existence and degree of an impairment—i.e. a disability. Further, give the employer the equal right to use an Independent Medical Exam (IME) if there is a disagreement. Why not? The DOL, through the FMLA, has established extensive guidelines mainly because, without them, there could be considerable abuses based on misdirected or misconceived ideas of a protected leave. There is now a greater possibility for misunderstanding, if not abuse, under the ADA.

Again, there should be more meaningful explanations—the ones provided by the proposed regulations are both obvious and extreme on both sides of the analysis. It should come as no surprise that an individual missing a limb, or suffering from blindness or deafness, is “disabled” under the ADA. Likewise, there should be a general consensus that an individual suffering from the common cold, or a minor sprain, is not “disabled.” Lifting restrictions again are a good example of the problem here. Not only is there an issue of weight, but there are also other factors involved in lifting, such as the height of the lift, grasp of the object being lifted (finger movement, one hand or two hands), length of lift, bending while lifting, reaching or twisting while lifting, pulling or pushing,

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<sup>2</sup> Examples of questions for health care providers include: “Answer, fully and completely all applicable parts. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. . . . best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can. Terms such as “lifetime,” “unknown,” or “indeterminate” may not be sufficient to determine FMLA coverage . . . Medical specialty . . . If the employer fails to provide a list of the employee’s essential functions or a job description, answer these questions based upon the employee’s own description of his/her job functions . . . Describe other relevant medical facts . . . include symptoms, diagnosis or any regimen of continuous treatment . . . episodic flare-ups periodically preventing the employee from performing his/her job functions. . .”

vibrating surface, and sitting (see NIOSH's description of lifting). In addition, weight could be classified as sedentary (10 lbs.), light work (20 lbs.), medium lifts (of 50 lbs. maximum with frequent lifting), heavy (lifting of 100 lbs.), and very heavy (over 100 lbs.).

This entire area needs clarification and, if there is none, the employer is at risk because of the lack of EEOC guidance and inadequate medical and vocational assessments. Then, add to this the statutory requirement to accommodate. What does an employer do to evaluate a limitation, and assess accommodations, for an unclear or ambiguous impairment? Also, there may be numerous abuses consisting of employee deception, misclassifications, and improper requests for accommodation in the absence of clear guidelines on what "substantial" means!

**2. Providing working as an additional category for an individual's limitation is not what Congress did in amending the law, and does not present a workable analysis.** The capacity to work should be based and analyzed on the same ADA standards used to determine if the employee is "substantially limited" compared to the general population. To establish a second class of disability is an unreasonable extension of the law. If the individual is not disabled under the general criteria discussed above, the employee should not be given an added layer of protection. The individual is either disabled or not disabled. If you extend working, as the regulations do, an individual may not be disabled in the analysis of "most people" but may be disabled when looking at a specific job and the employer's specific job requirements. Working should be a composition of several major life activities and should not be construed as a separate and independent major life activity. Therefore, working as a major life activity only applies to those other major life activities or functions, such as seeing, walking, etc., and whether that employee is limited more than most people in the general population regarding these activities. Working, in and of itself, is nothing and is only a manifestation of physical and mental activities. That is sufficient because to do otherwise creates a new evaluation for each and every work environment and each and every job. For example, if a baseball player, a pitcher, can no longer pitch a baseball at the speed of 98 miles per hour but can pitch at only 60 miles per hour because of a permanent muscle injury, is he disabled and could he seek the position of second baseman as an accommodation? He is not disabled and to characterize him as disabled is wrong. This baseball player is limited, but he is not limited in an activity that most people in the general population can even perform. The baseball player is not limited in throwing a ball, which most people can perform with little or no difficulty. I would be surprised if 99% of most people in the general population could throw a baseball faster than 30 miles per hour.

It is difficult to review and understand what a disability is but to make this additional expansion beyond most people becomes too difficult to administer. For example, if most people—i.e., the average person—can lift 25 lbs. with little or no difficulty, then anyone who can lift more would not be disabled vis-à-vis lifting. If an employer requires the lifting of 50 lbs. occasionally, and a specific employee has a 40 lb. limitation, does it make sense to create a sub-classification of additional

disabled employees? The law exists to protect disabled people. The employee is now not disabled with regard to most people and, if disabled vis-à-vis the specific job with a specific employer, the individual is only limited in comparison to “maybe a few or just some of the people in the general population.” That is not a limitation as compared to most people and it is an unreasonable extension of the law’s reach.

**3. Bodily functions, including the immune system, normal cell growth, endocrine, etc., create issues of application without greater guidance.** The ADA prohibits a medical examination or inquiry regarding a possible disability unless the specific inquiry is job-related and consistent with business necessity. 42 U.S.C. § 12112(d)(4). According to existing EEOC guidelines, employers are not allowed to seek general medical information regarding the diagnosis or prognosis, or any medical information; however, medical inquiries made in the context of the interactive process of accommodating disabilities are not prohibited. How will that guidance be reconciled with the ADAAA’s indication that common sense, not expert, medical or statistical evidence, should control the analysis? How can an employer verify a claimed disability now? Are all individuals with diabetes covered regardless of their degree of impairment? Would type-1 (insulin dependent), type-2 (diet restricted), and borderline diabetics (sugar count greater than 140) all be considered disabled? In a general sense, will any degree of hypoglycemia or hyperglycemia constitute a disability? Also, is any form of a seizure, without any medical understanding or diagnosis, be considered epilepsy? What about cancer? Does any difference in “cell growth” constitute cancer? What about a body mole? What about a person who has high blood pressure over 140 systolic/90 diastolic, etc.? Again, if the employer can not make any inquires, how does the employer verify the employee’s claim? There are no guidelines or an explanation for understanding the thousands upon thousands of variables. Give us some understanding and benchmarks for our analysis. Also, discuss the distinctions between major life activities and major bodily functions and how they should be evaluated. Also, clarify the regulations to allow employers to seek medical evaluations to confirm the existence of disabilities with regard to major bodily functions; otherwise, the law will require reliance on an individual’s self-serving statement—a self-diagnosis—and nothing more. Such a self-diagnosis is insufficient for purposes of administering unpaid FMLA leave; why should it be permitted for the more-costly consequences of the ADA? How else can an employee demonstrate that there is an appropriate issue regarding the immune system, normal cell growth, endocrine or reproductive functions, etc.? For example, if a man claims a simple erectile dysfunction and takes Viagra, is that a disability with regard to the major bodily function of reproduction? Please give us guidelines on what can be required from the employee. A major life activity of walking might be understood without more information when making a comparison to most people or the average person, but to discuss normal cell growth in comparison to average or most people is a meaningless analysis without medical information. We all have abnormal cell growth; we all have cancer cells, and, but for our personal immunity, these cells could multiply without controls. More definition and the transformation of the major bodily functions must be discussed for our understanding.

**4. A misclassification should not give rise to a “record of” claim, or any cause of action.** A misclassification should not be a “record of” as outlined in your Section 1630.2(k). This is not a record of a medical condition; it is a record of an insubstantial limitation. Indeed, this is a record of an error—a record of nothing. Inclusion of such scenarios does not comport with the ADA, even as amended.

**5. Please clarify who has the burden of proof and what elements need to be established to prove discrimination.** In light of the ADAAA and the reversal of several Supreme Court decisions, will the EEOC continue to apply a McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), burden of proof analysis in a circumstantial-indirect proof model in the first phase of an ADA case under these regulations and the amendments? If so, will the employee or the EEOC have to prove the individual is disabled using medical evidence (again, what does “substantial” mean?), was adversely affected, was qualified with or without an accommodation, and that the employer treated non-disabled employees more favorably and ultimately pretext? See Pugh v. City of Attica, 259 F.3d 619 (7th Cir. 2001).

**6. Why allow an actual or a record of a disability to exist for fewer than six months to meet the definition of a disability?** The Amendments provide a six-month threshold for impairments giving rise to “regarded as” claims under the third prong. It appears to me that, because accommodation is attached to the “actual” or “record of” prongs, the analysis should be at least as stringent. If an impairment lasts fewer than six months, why should the individual be designated as disabled and entitled to accommodation? I believe that for an actual, or record of, disability, the regulations should require an impairment of at least six months.

**7. The proposed regulations’ discussion of surgical intervention should be clarified.** The proposed regulations state that, if surgical intervention permanently eliminates an impairment, then such intervention can be considered as a mitigating measure, resulting in a determination that the individual is not actually disabled. This appears to be inconsistent with your comments and example of prostate cancer and it being “a record of” a disability. You could, through surgical intervention, have a complete prostate removal and a permanent solution. Is this the example? Further, what if radiation treatment resulted in a complete elimination of cancer? If the patient’s PSA is one and most males have a PSA of one, then is that individual disabled? If a person has a PSA of 9, do they have a disability or a record of a disability? What if, without any further examination, the individual’s PSA is 4 or more; is that individual disabled?

More to the point, the discussion of surgical intervention appears irrelevant given the existence of “record of” discrimination. Take skin cancer as an example. Assuming, through surgical intervention, an individual’s skin cancer is completely removed. In that event, the employee does not

have an actual disability. Regardless, however, the individual still has a record of a disability and, as such, the employer is prohibited from taking any adverse actions against the employee on that basis. Had the proposed regulations specified that employers do not need to accommodate individuals who have a “record of” a disability, this may have made more sense. The upshot of the discussion would then have been that the employee who, by way of surgical intervention, completely eliminates the underlying impairment would not have any basis for a claim under prong 1 (actual disability) or any basis for a claim/request for accommodation. However, the employee would still be able to bring a claim under prong 2 (record of a disability) to the extent the employer took any adverse actions against the employee. Closely related, why permit employees proceeding under a record of theory to also bring claims for reasonable accommodation? If someone merely has a record of a disability, how can the employer accommodate him or her?

Likewise, clarification is needed regarding the EEOC’s statement that an individual who has an impairment that is episodic or in remission is covered if the condition, when considered in its active state, substantially limits the individual. What if an individual has prostate problems but has no actual physical problems limiting him, none whatsoever; no disability? Does some, although minor or minimal, abnormal cell growth, make this individual, by definition, disabled? There should be some line of demarcation. Who decides that? For example, tell us what “normal” cell growth means. Each American has some kind of abnormal cell growth. Are all Americans, all 300 million Americans, disabled under the ADA? Further, clarification is needed regarding progressive impairments like Alzheimer’s disease, arthritis, and Parkinson’s disease. These conditions, when diagnosed, may not be limiting at all—let alone substantially. With the passage of time, however, they typically become more limiting. Clarification is needed to confirm that Section 1630.2(j)’s requirement of considering impairments that are episodic or in remission in their “active” state does not require consideration of progressive impairments when fully progressed.

Likewise, how can just knowledge of some symptoms or medication or some mitigation trigger the finding of discrimination? This is, at best, speculation often based on some unknown problem. Without proof of more there is no issue of a disability and no setting for analyzing discrimination. The employer has no knowledge of a disability; the employer is not clairvoyant! For example, if an employee is found sleeping at work, is that a symptom of something? Again, without more evidence of an impairment this event should not have any bearing on the ADA discrimination analysis. Can the employer discipline the employee for sleeping? Does the employer have to ask more questions, invade the privacy of the individual? Does the employer have to determine if the employee should be possibly examined for narcolepsy? What if the employee has no knowledge of his narcolepsy and he has not received a diagnosis of narcolepsy? The provisions of the ADA and the EEOC have cautioned employers not to make those inquiries. 42 U.S.C. § 12112 (d)(4)(A). Now what? Will the employee be discipline and then request an accommodation and, if none is granted, file a lawsuit?

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Lastly, again, the EEOC should say something about the possibility that frivolous cases could be brought by employees who have improperly alleged a disability or impairment (such as sleeping on the job) and have a preconceived notion of a desire for an accommodation. See Adkins v. Briggs & Stratton Corp., 159 F.3d 306 (7th Cir. 1998). The EEOC merely has to review the numerous cases that were filed by employees and were lost, not based on the definition of a disability, but on the excuses from individuals who do not want to work. My experience with individuals who are, in fact, disabled, is that they are deserving of respect and they work very well when given the opportunity to do so. However, the law and regulations need to provide more specificity and explanation for a better understanding of the law when abuses occur. Again, there is nothing inherently wrong with the law or its expansion; the problems arise when ambiguous standards are established without proper means for administration of the real-world scenarios.

Thank you for your consideration of these comments and I hope they will allow for changes and clarification, which will benefit everyone.

Very truly yours,

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