

## Major Life Activities

Then	Now
<ul style="list-style-type: none"> <li>• Defined in EEOC regulations as:               <ul style="list-style-type: none"> <li>○ “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”</li> <li>○ Interpreted in the <i>Toyota Motor</i> case as:                   <ul style="list-style-type: none"> <li>▪ Those activities that are of central importance to most people’s daily lives.</li> <li>▪ “That these terms need to be interpreted strictly to create a demanding standard for qualifying as disabled is confirmed by the first section of the ADA, which lays out the legislative findings and purposes that motivate the Act. When it enacted the ADA in 1990, Congress found that ‘some 43,000,000 Americans have one or more physical or mental disabilities.’ If Congress intended everyone with a physical impairment that precluded the performance of some isolated, unimportant, or particularly difficult manual task to qualify as disabled, the number of disabled Americans would surely have been much higher.”</li> </ul> </li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Congress expressly found that the <i>Toyota Motor</i> Court misunderstood the intent of the ADA.</li> <li>• The ADAAA struck the finding about some 43 million Americans having a disability.</li> <li>• The definition is now in the statute itself:               <ul style="list-style-type: none"> <li>○ “major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.” AND ALSO</li> <li>○ “a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”</li> <li>○ The forthcoming NPRM from the EEOC adds:                   <ul style="list-style-type: none"> <li>▪ To “major bodily functions”: hemic, lymphatic, and musculoskeletal systems.</li> <li>▪ These examples: “Kidney disease affects bladder function; cancer affects normal cell growth; diabetes affects functions of the endocrine system (e.g., production of insulin); epilepsy affects neurological functions or functions of the brain; and HIV and AIDS affect functions of the immune system and reproductive functions.”</li> </ul> </li> </ul> </li> </ul>

## Substantially Limits

Then	Now
<ul style="list-style-type: none"> <li>• Defined in the EEOC regulations as:               <ul style="list-style-type: none"> <li>○ (i) Unable to perform a major life activity that the average person in the general population can perform; or</li> <li>○ (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.</li> </ul> </li> <li>• Factors to Consider (per Regulations):               <ul style="list-style-type: none"> <li>○ (i) The nature and severity of the impairment;</li> <li>○ (ii) The duration or expected duration of the impairment; and</li> <li>○ (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.</li> </ul> </li> <li>• When the activity is working, “substantially limit” meant:               <ul style="list-style-type: none"> <li>○ significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.</li> <li>○ We were to consider:</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Congress expressly rejected the Supreme Court’s prior interpretation of “substantially limits” as “prevents or severely restricts.”               <ul style="list-style-type: none"> <li>○ Congress explained that “the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis”</li> </ul> </li> <li>• The EEOC’s NPRM states “that in order to be ‘substantially limiting,’ an impairment need not severely restrict or significantly restrict performance of a major life activity.”</li> <li>• The NPRM states that comparison of an individual’s limitation to that of most people in the general population often may be made using a common-sense analysis without resorting to scientific or medical evidence.</li> <li>• The NPRM also identifies several conditions that are essentially “per se” disabilities:               <ul style="list-style-type: none"> <li>○ Blindness</li> <li>○ Deafness</li> <li>○ Intellectual disabilities (formerly called mental retardation)</li> <li>○ Partially or completely missing limbs</li> <li>○ Mobility impairments that require the use of a wheelchair</li> <li>○ Autism</li> <li>○ Cancer</li> </ul> </li> </ul>

<ul style="list-style-type: none"> <li>▪ (A) The geographical area to which the individual has reasonable access;</li> <li>▪ (B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or</li> <li>▪ (C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).</li> </ul> <ul style="list-style-type: none"> <li>• Guidance re Temporary Impairments: <ul style="list-style-type: none"> <li>○ “[T]emporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities.”</li> </ul> </li> <li>• Mitigating Measures: <ul style="list-style-type: none"> <li>○ <i>Sutton</i> case had told us that we are to evaluate the individual <u>in his or her corrected state</u>—how he or she is with the use of mitigating measures (e.g., medication, corrective lenses, etc.).</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>○ Psychiatric disabilities such as major depression, bipolar disorder, and schizophrenia</li> <li>○ HOWEVER, just because these conditions are per se disabilities does not necessarily mean the person is “qualified” or entitled to an accommodation (see below)</li> <li>• The NPRM provides these examples of conditions, that while not per se disabilities, <i>may</i> substantially limit a major life activity (this is not an exhaustive list, obviously): <ul style="list-style-type: none"> <li>○ Asthma</li> <li>○ High blood pressure</li> <li>○ Coronary artery disease</li> <li>○ Learning disabilities</li> <li>○ A back or leg impairment</li> <li>○ Carpal tunnel syndrome</li> <li>○ Psychiatric disabilities such as panic or anxiety disorder and forms of depression other than major depression</li> <li>○ Hypothyroidism</li> </ul> </li> <li>• Guidance re Temporary Impairments: <ul style="list-style-type: none"> <li>○ The EEOC’s NPRM states that an impairment lasting for fewer than 6 months may still be substantially limiting.</li> </ul> </li> <li>• The statute also provides these rules: <ul style="list-style-type: none"> <li>○ An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability. <ul style="list-style-type: none"> <li>▪ Example from EEOC’s NPRM: “Someone with diabetes whose endocrine function (i.e., ability to produce insulin)</li> </ul> </li> </ul> </li> </ul>
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is substantially limited need not also show that he is substantially limited in eating or any other major life activity.”

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

▪ NPRM examples: epilepsy, hypertension, multiple sclerosis, asthma, cancer, and psychiatric disabilities such as major depression, bipolar disorder, and post-traumatic stress disorder.

● **Major Change re Mitigating Measures**

● The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as—

○ (I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

○ (II) use of assistive technology;

○ (III) reasonable accommodations or auxiliary aids or services; or

○ (IV) learned behavioral or adaptive neurological modifications.

● EXCEPTION: “The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

● **Substantially Limited in Working**

	<ul style="list-style-type: none"><li>● NPRM states that an impairment “substantially limits the major life activity of working if it substantially limits an individual’s ability to perform, or to meet the qualifications for, <u>the type of work at issue</u> as compared to most people having comparable training, skills, and abilities.”<ul style="list-style-type: none"><li>○ The concept of a “type of work” replaces the concepts of a class or broad range of jobs.</li><li>○ A type of work, the proposed rule says, may be defined in terms of the nature of the work or in terms of specific job-related requirements.</li><li>○ Examples of types of work include commercial truck driving (i.e., driving those types of trucks specifically regulated by the U.S. Department of Transportation as commercial motor vehicles), assembly line jobs, food service jobs, clerical jobs, or law enforcement jobs.</li><li>○ Job-related requirements characteristic of types of work include jobs requiring: repetitive bending, reaching, or manual tasks; repetitive or heavy lifting; prolonged sitting or standing; extensive walking; driving; working under certain conditions, such as in workplaces characterized by high temperatures, high noise levels, or high stress; or working rotating, irregular, or excessively long shifts.</li></ul></li><li>● NPRM makes two more points:<ul style="list-style-type: none"><li>○ First, the fact that an individual has obtained employment elsewhere is not dispositive of whether an individual is substantially limited in working.<ul style="list-style-type: none"><li>▪ So, for example, the proposed rule says that someone who can’t perform jobs</li></ul></li></ul></li></ul>
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	<p>requiring repetitive bending or heavy lifting is still substantially limited in working, even if he has skills that qualify him to perform work that does not include these requirements.</p> <ul style="list-style-type: none"> <li>▪ Someone who is denied a reasonable accommodation and therefore cannot perform manufacturing work requiring repetitive manual tasks could still be considered substantially limited in working, even if the individual was subsequently offered the same kind of work for another employer with an accommodation.</li> </ul> <p>○ Second, the statistical analysis that some courts have required in “working” cases is unnecessary to show that an individual is substantially limited in working.</p>
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<b>Regarded As Disabled</b>	
<b>Then</b>	<b>Now</b>
<ul style="list-style-type: none"> <li>• For an employee to qualify under the regarded-as prong, the employee had to show the employer regarded him as substantially limited in a major life activity—not just regarded him as unable to do this one particular job. <i>See Sutton v. United Air Lines, Inc.</i>, 527 U.S. 471, 490-91 (1999) (“An employer runs afoul of the ADA when it makes an employment decision based on a physical or mental impairment, real or imagined, that is regarded as substantially limiting a major life activity. Accordingly, an employer is free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment—such as one’s height, build, or singing voice—are preferable to others, just as it is free to decide that some limiting, but not substantially limiting, impairments make individuals less than ideally suited for a job.”).</li> </ul>	<ul style="list-style-type: none"> <li>• The statute provides: <ul style="list-style-type: none"> <li>○ An individual meets the requirement of ‘being regarded as having such an impairment’ if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment <u>whether or not the impairment limits or is perceived to limit a major life activity</u>.</li> <li>○ EXCEPTION: Unless the impairment upon which the employer takes action is “transitory and minor.” <ul style="list-style-type: none"> <li>▪ A transitory impairment is an impairment with an actual or expected duration of 6 months or less.</li> </ul> </li> </ul> </li> <li>• The NPRM provides several examples: <ul style="list-style-type: none"> <li>○ An employer that does not hire someone</li> </ul> </li> </ul>

	<p>for a temporary job due to a sprained wrist that will prevent the individual from typing for three weeks has not regarded the individual as having a disability, since a sprained wrist is transitory and minor.</p> <ul style="list-style-type: none"><li>○ But an employer who does not hire someone for a manufacturing job, believing she has carpal tunnel syndrome, regards the individual as having a disability, since carpal tunnel syndrome is not transitory and minor.</li><li>○ The proposed rule also makes it clear that actions based on an impairment's symptoms or based on an individual's use of a mitigating measure (e.g., medication), amount to actions based on an impairment.</li><li>○ SILVER LINING: Individuals covered only under the "regarded as" prong of the definition of disability are not entitled to reasonable accommodation. (No change in law in our circuit.)</li></ul>
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