

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

Re: RIN 3046-AA85

Dear Mr. Llewellyn,

We are writing on behalf of the International Public Management Association for Human Resources (IPMA-HR), the National Public Employer Labor Relations Association (NPELRA) and the International Municipal Lawyers Association (IMLA) in response to the Notice of Proposed Rulemaking to implement the equal employment provisions of the Americans with Disabilities Act as Amended.

IPMA-HR is an association representing the interests of federal, state and local government human resources professionals. The association's members are often the ones with direct responsibility for handling requests for reasonable accommodations and for engaging in the interactive process. As such, the proposed regulations are of particular interest to our members.

NPELRA is an organization for public-sector labor relations and human resource professionals, with a network of state affiliates with over 2,900 members around the country. The governmental agencies represented in NPELRA employ more than 4 million workers in federal, state and local government.

IMLA is a non-profit, professional organization that has been an advocate and resource for local government attorneys since 1935. Owned solely by over 2500 members, IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. IMLA collects from and disseminates information to its

membership across the United States and Canada and helps governmental officials prepare for litigation and develop new local laws.

We appreciate the Commission's efforts to provide clarity and detail. We have reviewed the NPRM and would like to highlight a few areas that are of concern to our members.

- (1) The language in Section 1630.2(j)(2)(v) relating to when a transitory and minor impairment is covered by the law is confusing and we respectfully suggest that you delete it.

The ADAAA included language under the "regarded as" prong of the definition of disability stating that an impairment that is transitory and minor will not be covered. The law states, "A transitory impairment is an impairment with an actual or expected duration of 6 months or less."

Yet, in Section 1630.2(j)(2)(v) the proposed regulations state that because the law did not establish a durational minimum for the other two prongs of the definition of disability - the "actual disability" and the "record of a disability" that "An impairment may substantially limit a major life activity even if it lasts, or is expected to last, for fewer than six months."

The associations believe that including temporary or minor illnesses in the definition of a "disability" will make it extremely difficult for employers to distinguish genuine disabilities from those conditions that are truly minor and not intended to be covered by Congress.

The associations believe that this provision will provide an unnecessary burden on employers and in fact could undermine the purpose of the ADA by requiring employers to spend needless

time and resources determining if transitory and minor illnesses are covered by the law.

In addition, employees generally do not need the ADA's protection for transitory and minor impairments because these are generally covered under existing sick leave and short-term disability policies.

We are mindful that later in the regulations the Commission states "temporary non-chronic impairments of short-duration with little or no residual effects (such as the common cold, seasonal or common influenza, a sprained joint, minor and non-chronic gastrointestinal disorders, or a broken bone that is expected to heal completely) usually will not substantially limit a major life activity."

Because of the apparent contradiction and the difficulty employers will have trying to determine if an impairment is transitory and minor, we would respectfully request that you delete proposed Section 1630.2(j)(2)(v).

- (2) Significant changes are made to the definition of a disability in the NPRM that are not found in the ADA Amendments Act itself. The associations are concerned with the potential administrative burden imposed by these changes as well as the increased likelihood of unnecessary lawsuits.

- a. Section 1630.2(j) - the Commission notes that it has deleted the "condition, manner, or duration" language found in the current regulations in Section 1630.2(j)(ii):

The term "substantially limits" means - (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.

While Congress made it clear that the "significantly restricted" language should be deleted, the legislative history indicates that Congress intended to retain the "condition, manner or duration" language. See *Statement of Managers—S. 3406 at S8842*.

The associations believe that this language provides useful guidance to employers in evaluating when an individual meets the definition of a disability. The associations would encourage the Commission to retain this language as it assists employers in distinguishing between impairments and covered disabilities.

- b. The Commission creates a list of conditions that will consistently meet the definition of a disability in Section 1630.2(j)(5). While a per se list of disabilities provides some certainty for employers, this provision raises the possibility that employers would be in a position of either providing accommodations - such as time off - to individuals who are not and have not experienced any limitations - or face the possibility of a lawsuit. We would suggest that the Commission include this type of list in non-binding guidance documents, if at all, and include a caveat that the disability assessment should be made on a case by case basis, but with respect to listed disabilities the analysis is likely to be brief. Doing so will lower the potential for unnecessary litigation.

- c. The Commission also includes a list of impairments that may be disabling for some individuals but not others in Section 1630.2(j)(6). This list, along with the one discussed above, appear to create separate tiers of disabilities requiring different levels of analysis by employers. There is no

authority for this in the ADA Amendments Act or the original ADA. This represents a vast departure from current practice, which is to engage in an individualized assessment of impairments. We are uncertain how the Commission chose each type of disability for each category and what the practical implications might be of such a distinction. Such a change might be better accomplished through the legislative process where the pros and cons of such a system could be fully aired through committee hearings.

- (3) The Commission appears to be adding a new category of "regarded as disabled" based upon symptoms only. Section 1630.2(1)(2) of the NPRM says "A prohibited action based on an actual or perceived impairment 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."

The associations respectfully request that the Commission delete this provision entirely. It is likely to cause confusion for employers who will now have to apply ADA analysis to situations without any indication from the employee that he or she is disabled. For instance, how should an employer treat an employee who routinely shows up late to work? Must the employer determine if the tardiness is in fact a symptom of a disability?

As in number (2) above, the associations believe that such a dramatic change from the current regulations would be better accomplished through the legislative process where stakeholders would have the opportunity to express their concerns and opinions through committee hearings.

- (4) The Associations would also like to express concern with Section 1630.2(j)(7) regarding when an individual is substantially limited in the major life activity of working. The proposed

change away from "class" or "broad range" of jobs to "type of work" may have the effect of creating more litigation and uncertainty for employers as courts struggle to give meaning to the new phraseology. The current "class" or "broad range of jobs" has been considered by the courts and gives employers some assurance of what the terms mean.

Thank you for considering our comments. If you have any questions or would like additional information please feel free to contact us at (703) 549-7100.

Sincerely,



Neil E. Reichenberg
Executive Director
IPMA-HR



Mike Kolb
Executive Director
NPFLRA



Chuck Thompson
General Counsel and Executive Director
IMLA