COVID-19 as a Disability Under the ADA: Considerations for Employers as the Pandemic Continues

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In response to questions from employers and employees alike regarding when COVID-19 constitutes a disability for purposes of the nondiscrimination and reasonable accommodations provisions of the Americans with Disabilities Act ("ADA"), the Equal Employment Opportunity Commission ("EEOC") recently published some updated guidance on this topic.

So-called "Long COVID" was deemed to constitute a disability under the ADA by the Department of Justice and the Department of Health and Human Services in July 2021. The EEOC's more recent guidance, which was included as an update to its Technical Assistance Questions and Answers,[1] focuses more broadly on COVID-19 generally in the employment context under the ADA. There are several important takeaways from the EEOC's recent guidance:

- **We should apply the ADA's definition for "disability" to COVID-19 the same way we would for any other medical condition.** This means that an employee's COVID-19 symptoms may constitute a disability under the ADA if the COVID-19 creates (1) an "actual" disability, meaning that the employee has a physical or mental impairment that substantially limits a major life activity; (2) a "record of" a disability, such as a disease that is in remission; or (3) a belief by the employer that the employee is "regarded as" having a disability, meaning that the employer believes the employee has an impairment. The EEOC's guidance includes a reminder that—just like in the typical disability analysis under the ADA—the definition of disability in the COVID-19 context is to be construed broadly in favor of expansive coverage.
- **Whether an employee's COVID-19 is an actual disability for purposes of the ADA depends on the specific facts and circumstances of that particular employee's medical condition.** As with the typical disability analysis under the ADA, determining whether COVID-19 is an actual disability under the ADA requires an individualized assessment as to whether the effects of an employee's COVID-19 substantially limit a major life activity.
    - The guidance notes specifically that an employee who is *asymptomatic* or has *only mild* COVID-19 symptoms "similar to those of the common cold or flu that resolve in a matter of weeks" will **not** have an actual disability under the ADA. Merely being subject to CDC isolation requirements also does not substantially limit a major life activity, according to the EEOC.
    - However, the EEOC also notes that COVID-19 may substantially limit a number of major life activities, including "caring for oneself, eating, walking, breathing, concentrating, thinking, or interacting with others." The guidance provides specific examples of COVID-19 symptoms which would be deemed substantially limiting of major life activities, meaning they would constitute a disability under the ADA, including: (1) an employee with COVID-19 who has "ongoing but intermittent multiple-day headaches, dizziness, brain fog, and difficulty remembering or concentrating"; (2) an employee with COVID-19 who "initially receives supplemental oxygen for breathing difficulties and has shortness of breath, associated fatigue, and other virus-related effects that last, or expected to last, for several months"; (3) an employee with COVID-19 who has "heart palpitations, chest pain, shortness of breath, and related effects due to the virus that last, or are expected to last, for several months"; and (4) an individual diagnosed with "long COVID who experiences COVID-19 related intestinal pain, vomiting, and nausea that linger for many months, even if intermittently."
- **There is no set length of time that COVID-19 symptoms must last to be deemed substantially limiting and thus a disability under the ADA.** An impairment that "lasts or is expected to last several months" is substantially limiting according to the EEOC guidance, while impairments that "last only for a short period of time are typically not covered." The distinction, according to the EEOC guidance, is whether the employee's COVID-19 symptoms fall into the "several weeks" or the "several months" categories—with the former likely not being deemed substantially limiting, unless the symptoms are very severe, and the latter much more likely to be deemed substantially limiting. Moreover, if an employee's COVID-19 symptoms come and go intermittently, the employee's COVID-19 may nevertheless constitute an actual disability under the ADA if symptoms substantially limit a major life activity while actively present.
- **An employer may be on the hook for a violation of the ADA where the employee had a "record of" or was "regarded as" having a disability based on COVID-19, even if the employer was mistaken about the employee having COVID-19.** If the employer, rightly or wrongly, believes that an employee has an impairment, such as COVID-19, and takes an adverse action toward that employee because of the actual or perceived impairment, the employer would be in violation of the ADA **unless** the actual or perceived impairment is "objectively both transitory (lasting or expected to last six months or less) **and** minor."

    - Specific examples of ADA "regarded as" violations provided by the EEOC guidance include where the employer (1) fired an employee because the employee had symptoms of COVID-19, which although minor, lasted or were expected to last more than six months; and (2) fired an employee because the employee had COVID-19, which did not last or was not expected to last for six months, but which caused non-minor symptoms.
    - Thus, where an employer believes that an employee may have COVID-19, and expects that the employee's symptoms are non-minor or may last more than six months, the employer should not discharge the employee for a reason such as attendance violations due to the COVID-19 illness.
- **An employer may need to provide a reasonable accommodation of a COVID-19-related disability.** To be eligible for a reasonable accommodation under the ADA, an employee must either have an actual disability or a record of a disability—merely being regarded as having a disability is not enough to qualify for a reasonable accommodation. Employers may request supporting medical documentation before granting a request for reasonable accommodation of a COVID-19-related disability.

The main takeaway from the EEOC's recent guidance on COVID-19 as a disability under the ADA is the importance for employers to carefully follow the standard analysis under the ADA when evaluating an employee's COVID-19 impairments which may potentially constitute a disability under the ADA, **before** denying an employee's request for accommodation of a COVID-19-related impairment, and **before** taking an adverse action (such as writing up or firing) an employee for missing work due to COVID-19.

[1] *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws: Technical Assistance Questions and Answers*, § N, "COVID-19 and the Definition of 'Disability' Under the ADA/Rehabilitation Act," updated December 14, 2021, available at https://web.archive.org/web/20220222191739/https:/www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.