

# IN IT FOR THE LONG HAUL? WHITE HOUSE SEEKS TO PROVIDE ADA COVERAGE TO THOSE WITH “LONG COVID”

Insights  
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While employers are excited to see many of their employees return to work following prolonged absences due to the pandemic, one unfortunate consequence is that disability discrimination and failure-to-accommodate claims are likely to increase further in 2021. President Biden just announced his administration’s intent to apply federal disability discrimination law protections to individuals suffering from “long COVID.” Faced with yet another effort to increase the scope of the Americans with Disabilities Act (ADA), it is critical for employers to understand the impact of the newly published July 26 [Joint Guidance](#), the distinction between a typical COVID-19 diagnosis and a long COVID diagnosis under the ADA, and the steps that should be taken now to ensure compliance and mitigate risk.

## Brief ADA Background

When President George H.W. Bush signed the ADA into law on July 26, 1990, he proudly declared it to be another “independence day,” noting that every person “with a disability can now pass through once-closed doors into a bright new era of equality, independence, and freedom.” While the ADA was universally accepted as a necessary addition to U.S. civil rights legislation, it poses a unique challenge for employers by prohibiting discrimination and requiring reasonable accommodations. The ADA also necessitates continued attention, because its scope tends to increase with the passage of time.

In 2008, President George W. Bush signed the Americans with Disabilities Act Amendments Act (ADAAA), which

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expanded the ADA's coverage by overturning several employer-friendly Supreme Court decisions interpreting the term "disability." Employers felt the impact of the ADAAA immediately. In 2008, only 20.4% of all Charges of Discrimination filed with the Equal Employment Opportunity Commission (EEOC) alleged disability discrimination. That percentage has increased every year since, with disability claims being asserted in 36.1% of EEOC Charges filed in 2020. By way of comparison, race discrimination charges *decreased* by 3% over that same span, and no other claims have increased by more than 2%.

## **Another Expansion of the ADA? Long COVID Enters the Frame**

We can expect to see these numbers rise in 2021 and beyond thanks to a unique condition called long COVID – at least, if the White House has anything to say about it. As President Biden explained during his announcement commemorating the 31st anniversary of the ADA's passage:

*Many Americans who seemingly recovered from the virus still face lingering challenges, like breathing problems, brain fog, chronic pain and fatigue. These conditions can sometimes, sometimes ... rise to the level of a disability. So, we're bringing agencies together to make sure that Americans with long COVID who have a disability have access to the rights and resources that are due under the disability law.*

The White House also published a [Fact Sheet](#) with a link to newly released [joint guidance](#) published by the Office for Civil Rights at HHS and Department of Justice.

According to the Centers for Disease Control and Prevention (CDC), "long COVID" applies to individuals who continue to experience lingering COVID symptoms, or who have new/recurring symptoms months after first being infected. The individuals are sometimes referred to as "long-haulers." The most common symptoms of long COVID, which tend to worsen with physical or mental activity, include: tiredness or fatigue; difficulty thinking/concentrating (i.e. "brain fog"); shortness of breath; headache; dizziness; heart palpitations; chest pain; cough; joint/muscle pain; depression or anxiety; fever; and/or loss of taste or smell. Some individuals also experience damage to their heart, lungs, kidneys, and brain.

## **How Does Long COVID Fit Within the Existing ADA Statutory Scheme?**

Under the ADA, "disability" means an individual who has (A) "a physical or mental impairment that substantially limits one or more major life activities," (i.e. an "actual disability"); (B) "a record of such impairment"; or (C) is "regarded as having such an impairment."

"Major life activities" include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

The Joint Guidance expressly states that long COVID can be an "actual disability" under the ADA, and provides three possible examples. The guidance describes (i) a person with lung damage who is substantially limited in respiratory function; (ii) a person with lingering intestinal pain, vomiting, and nausea; and (iii) a person with "brain fog" who is substantially limited in brain function, concentrating, and/or thinking.

Significantly, the Joint Guidance also states that long COVID is "not always" a disability and that an individualized assessment remains necessary. The guidance does not address the 'record of' or 'regarded as' parts of the disability definition, but notes that they "may also be relevant to claims regarding long COVID." While the guidance also notes that "employment is outside the scope of this guidance document," employers should nevertheless be mindful of it when determining whether employees with long COVID are disabled under the ADA, as the groundwork has now been laid for such claims.

### **What Does the EEOC Say?**

As of today, the EEOC has not taken a position on whether long COVID is a disability under the ADA. Assuming the EEOC eventually does so, it will likely to adopt the same position as the Office of Civil Rights at HHS and the Department of Justice. Luckily for employers, the EEOC has recognized that the circumstances of the pandemic are relevant to whether an employee's requested accommodation poses an undue hardship. For example, an accommodation request that would have been seemingly inexpensive and "reasonable" prior to the pandemic may

now pose an undue hardship for employers given prolonged periods of reduced income and possible business disruptions.

## **What Types of Accommodations Will Long-Haulers Request?**

It appears the first case to assert disability discrimination and failure to accommodate long COVID - *Edelman v. Aristocrat Plastic Surgery, P.C. et al.* - was filed in the U.S. District Court the Eastern District of New York on June 2. While the plaintiff in *Edelman* did not specifically identify a requested accommodation, the symptoms of long COVID and the examples provided under the Joint Guidance suggest the most likely requests will be flexible work hours and/or continued remote work. Indeed, according to the [Fisher Phillips COVID-19 Employment Litigation Tracker](#), disputes regarding "remote work" and "leave conflicts" are the most common of the 2,897 COVID-19-related employment cases filed as of July 23.

The EEOC has taken another employer-friendly position on this topic. The agency has noted that just because an employer provided flexible hours or telework during the pandemic to slow the spread of COVID-19 does not necessarily mean that the company must automatically provide telework to every disabled employee who requests it going forward. In this regard, the EEOC views temporary arrangements made during the pandemic as a "trial period" for the company to assess what may be appropriate as employees continue to return to work.

## **What Should Employers Do Next?**

You should take proactive measure to address forthcoming long COVID claims, including the following:

- Thoroughly analyze company, department, and employee production/performance levels before, during, and after the pandemic to determine the feasibility of alternative schedules, remote work, and other "accommodations" likely to be requested by employees suffering from long COVID upon their return to work;
- Review your company's ADA request for accommodation processes and procedures to ensure compliance with the latest guidance pertaining to COVID-19;

- Update medical inquiry forms (i.e. ADA Interactive Process forms) and develop COVID-specific and long COVID-specific forms to be completed by the employee's physician; and
- Continue to train managers and supervisors on the importance of avoiding inappropriate and potentially disability-related inquiries regarding COVID-19 along with protecting confidentiality of employee medical information

## Conclusion

Although employees suffering from long COVID may not always be able to establish that they are disabled or entitled to a reasonable accommodation under the ADA, you should take proactive steps to prepare for what is likely to be an onslaught of such claims following the issuance of the Joint Guidance. We will continue to monitor developments related to long COVID, including any forthcoming guidance from the EEOC. Make sure you are subscribed to [Fisher Phillips' Insight system](#) to get the most up-to-date information.

If you have questions about how to ensure your reasonable accommodation policies comply with the ADA and other applicable laws, contact your Fisher Phillips attorney, the author of this Insight, or any attorney in our [Employee Leaves and Accommodation Practice Group](#).