



7 Key Takeaways for Employers as EEOC Says COVID-19 Is “Sometimes” a Disability Under The ADA

Insights

12.16.21

As we predicted would happen in our [Insight in July](#), the Equal Employment Opportunity Commission just [released guidance](#) to clarify under what circumstances COVID-19 may be considered a disability under the ADA and the Rehabilitation Act. While there is nothing groundbreaking or particularly surprising in the EEOC’s December 14 guidance, employers can take comfort knowing that the EEOC has made clear that its analysis for determining whether COVID-19 is a disability will be conducted in a manner that is no different from the way it assesses other conditions or alleged disabilities. Therefore, with a few minor tweaks to your standard approach, you can properly handle disability-related issues or inquiries arising from COVID-19. Here are seven key takeaways employers need to know.

Background

Before we look at the guidance released on Tuesday morning, some background is in order. In July 2021, the White House published a [Fact Sheet](#) with a link to [Joint Guidance](#) published by the Office for Civil Rights at HHS and the Department of Justice deeming “Long COVID” to be a disability under federal disability laws. [We analyzed this development in a July 28 Insight that can be found here.](#)

As time has passed, the EEOC has studied how COVID-19 symptoms and complications might be covered under the American with Disabilities Act and its amendments (ADA), along with Section 501 of the Rehabilitation Act (which applies to federal workers). The December 14 guidance that resulted from this research takes the form of an update to the EEOC’s Technical Assistance Questions and Answers. The EEOC’s new questions and answers focus broadly on COVID-19 and the definition of “disability” under Title I of the ADA and Section 501 of the Rehabilitation Act, which both address employment discrimination. They clarify circumstances in which COVID-19 may or may not cause effects sufficient to meet the definition of “actual” or “record of” a disability.

In releasing the update, EEOC Chair Charlotte Burrows announced: “This update to our COVID-19 information provides an additional resource for employees and employers facing the varied manifestations of COVID-19. Like effects from other diseases, effects from COVID-19 can lead to a disability protected under the laws the EEOC enforces. Workers with disabilities stemming from COVID-19 are protected from employment discrimination and may be eligible for reasonable accommodations.”

7 Key Takeaways

Key Takeaways

Here are the seven key considerations employers should know about in order to properly handle COVID-19 situations in the workplace from a disability perspective.

#1: The ADA's three-part definition of disability applies to COVID-19 in the same way it applies to any other medical conditions. A person can be an individual with a “disability” for purposes of the ADA in one of three ways:

- “Actual” Disability: The person has a physical or mental impairment that substantially limits a major life activity (such as walking, talking, seeing, hearing, or learning, or operation of a major bodily function);
- “Record of” a Disability: The person has a history or “record of” an actual disability (such as cancer that is in remission); or
- “Regarded as” an Individual with a Disability: The person is subject to an adverse action because of their impairment or an impairment the employer believes they have is perceived to limit a major life activity, unless the impairment is objectively both transitory (lasting or expected to last six months or less) and minor.

#2: COVID-19 can be an actual disability under the ADA if the person’s medical condition or any of its symptoms is a “physical or mental” impairment that “substantially limits one or more major life activities.” This will always be a case-by-case determination that applies existing legal standards to the facts of a particular employee’s circumstances. A person with COVID-19 who is asymptomatic or a person whose COVID-19 results in mild symptoms similar to those of the common cold or flu that resolve in a matter of weeks — with no other consequences — will not have an *actual disability* within the meaning of the ADA. However, an individual with COVID-19 might have an actual disability if they have a physical or mental impairment that interferes with a major life activity.

COVID-19 is challenging in that the limitations from the virus do not necessarily have to last any particular length of time to be substantially limiting. According to the EEOC, the symptoms also need not be long-term. And even if the symptoms related to COVID-19 come and go, the EEOC will consider COVID-19 an actual disability if it substantially limits a major life activity when active.

#3: The EEOC provides examples of when a COVID-19 impairment substantially limits a major life activity. These examples include:

- An individual diagnosed with COVID-19 experiences ongoing but intermittent multiple-day headaches, dizziness, brain fog, and difficulty remembering or concentrating, which the employee’s doctor attributes to the virus.
- An individual diagnosed 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 are expected to last, for several months.

- An individual who has been diagnosed with COVID-19 experiences heart palpitations, chest pain, shortness of breath, and related effects due to the virus that last, or are expected to last, for several months.
- An individual diagnosed with long-term COVID-19 experiences virus-related intestinal pain, vomiting, and nausea that linger for many months, even if intermittently.

#4: But it is possible for a COVID-19 impairment to not substantially limit a major life activity.

According to the EEOC, this could occur in these types of examples:

- An individual who is diagnosed with COVID-19 experiences congestion, sore throat, fever, headaches, and/or gastrointestinal discomfort, which resolve within several weeks and the person experiences no further symptoms or effects.
- An individual is infected with the virus causing COVID-19 but is asymptomatic.

#5: A person who has or had COVID-19 may be an individual with a “record of” a disability and therefore protected under the ADA. This could occur if a person who has or had COVID-19 has “a history of, or has been misclassified as having, an impairment that substantially limits one or more major life activities.”

#6: A person can be “regarded as” an individual with a disability if the person has COVID-19 or the person’s employer mistakenly believes the person has the virus. A person is “regarded as” an individual with a disability if they are subjected to an adverse action because they have an impairment or the employer mistakenly believes the person has such an impairment, unless the actual or perceived impairment is objectively both transitory and minor. The EEOC Technical Assistance gives us some examples in the COVID-19 context:

- An employer would regard an employee as having a disability if it fires the individual because they had symptoms of COVID-19, which, although minor, lasted or were expected to last more than six months.
- An employer would regard an employee as having a disability if it fired the individual for having COVID-19, and the virus, although lasting or expected to last less than six months, caused non-minor symptoms.

#7: A condition caused or worsened by COVID-19 can be a disability under the ADA. The EEOC said this could occur in some cases, regardless of whether an individual’s initial case of COVID-19 itself constitutes an actual disability. The EEOC Technical Assistance provides these examples:

- An individual who had COVID-19 who develops heart inflammation.
- An individual with COVID-19 suffers an acute ischemic stroke.
- After an individual’s COVID-19 resolves, the individual develops diabetes attributed to the COVID-19.

- An individual with a heart condition that is not substantially limiting but COVID-19 worsens the person's heart condition.

The EEOC Technical Assistance Does Not Change the Way Employers View Discrimination Concerns and Evaluate Accommodation Requests

The EEOC's guidance makes it clear that the agency will carefully review COVID-19 related disability discrimination and failure-to-accommodate charges. Therefore, you should take proactive measure to address forthcoming COVID-19 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 COVID-related disabilities;
- 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 forms to be completed by the employee's healthcare provider; 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.

An important concluding note: employers are not required to accommodate a "perceived as" disability. Therefore, the asymptomatic COVID-19 person does not have to be accommodated under the ADA. However, you may operate in a state that has a more stringent definition of disability that requires accommodation. Check with your Fisher Phillips counsel to confirm whether you have this obligation.

Conclusion

Although employees with COVID-related impairments 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 EEOC's Guidance.

We will continue to monitor developments related to COVID-19, including any additional 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 authors of this Insight, or any attorney in our [Employee Leaves and Accommodation Practice Group](#).

Related People



Andria Lure Ryan

Partner

404.240.4219

Email



R. Bryan Holbrook

Partner

704.778.4173

Email





Myra K. Creighton

Partner

404.240.4285

Email

Service Focus

Employee Leaves and Accommodations

Workplace Safety and Catastrophe Management

Trending

COVID-19/Vaccine Resource Center