Insights, News & Events

COVID-19 AS A DISABILITY: FIRING RETAIL EMPLOYEES FOR ATTENDANCE ISSUES BECOMES RISKY

Insights
May 9, 2022

Almost two years into the pandemic, federal workplace discrimination officials issued guidance on when an individual who contracted COVID-19 might have a disability under disability law. The overall tenor of the guidance from the Equal Employment Opportunity Commission (EEOC) (which we summarized here) suggested that COVID would be a disability under the Americans with Disabilities Act (ADA) when the individual continued to suffer from COVID-related conditions for a long period after the time of acute illness. Plaintiffs' attorneys have now brought many cases under the ADA where the worker's disability is alleged to be a severe case of COVID lasting two to three weeks with no other long-term symptoms – and some courts have been sympathetic to these cases. The resulting line of cases suggests that retail employers may need to exclude COVID-related absences when considering discharging an employee for attendance issues. Understanding when the ADA must be considered in conjunction with an acute case of COVID is important for retail employers to avoid costly missteps.

Some History

The ADA significantly differs from most employment discrimination laws in that ascertaining who the law protects requires some analysis. An employee's age, gender, and race are readily ascertainable. But not always so with disability status. It often requires deeper examination and sometimes results in situations where you're just not sure whether the employee has an ADA disability.

Related People

Edward F. Harold
Regional Managing Partner
504.592.3801

Service Focus

Employee Leaves and Accommodations

Industry Focus

Retail

Every time an employee's medical condition impacts their job, an employer's first action should be to consider if the employee has ADA protections. Complicating the analysis, however, is that some medical conditions change over time and can be more or less severe for the same individual – so the result of an analysis done one year may be wrong the next. For this reason, ADA litigation has often focused on whether the plaintiff even had a disability and was able to proceed with their lawsuit.

The original definition of disability under which coverage was determined required that an individual be "substantially" limited in performing a major life due to a physical impairment. For many years after the ADA's enactment, courts held plaintiffs to a high bar in proving a medical condition's impact on their life constituted a disability. The Supreme Court held to meet the definition "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." The EEOC's guidance at the time equated substantially limited to "significantly restricted." Throughout this time, plaintiffs' claims were routinely dismissed by courts upon findings that the individual's impairments were not of sufficient severity to provide ADA protections.

In 2008, Congress concluded that the courts had been too restrictive in their interpretation of the ADA's definition of disability. It amended the ADA's definition of disability "to restore the intent and protections" of the statute. The Act's preamble expressly rejected three Supreme Court decisions that had strictly interpreted the definition of disability – and also expressly rejected the EEOC's guidance.

While the underlying definition of disability did not change, Congress directed the Act to be interpreted to provide broad protection. Importantly for the analysis of COVID-19 as a disability, it also created a new and broader definition of being "regarded as disabled" (which is another way in which a worker can proceed with an ADA claim). This new definition essentially resulted in just about every employee with any medical condition automatically being within the act's protection if the employer took adverse action against the employee because of the medical condition.

The only exclusion was for medical conditions that were transitory, lasting six months or less, and minor. Notably, following the 2008 amendments, the EEOC's guidance

expressly stated that the "transitory and minor" provision of the definition would not apply to the definition of actual disability. The agency also removed the prior regulation that stated temporary conditions were typically not to be considered disabilities. Appellate courts have since repeatedly concluded that temporary conditions might constitute an actual disability.

Enter COVID

COVID-19 has been a ubiquitous part of our lives since March 2020. While much has been learned about it in the last two years, there are still many unknowns – particularly how common and how serious long-term symptoms might be. But one aspect is clear: the symptoms in individual cases can vary from asymptomatic to terminal. Not all individuals have all symptoms and the prevalence of various symptoms can differ widely among different strains.

Employees claiming their bout of COVID should count as a disability have had significant success in overcoming motions to dismiss under both the actual and regarded as disability definitions when their complaints describe their illness as having had significant symptoms despite recovering with no continuing symptoms.

Where Workers Have Found Success

Under the "regarded as" disabled definition, several courts accurately noted that the exclusion for transitory and minor conditions requires both the elements to be met. They then conclude while the COVID cases may have been transitory, descriptions of symptoms such as severe weakness, fatigue, brain fog, high blood pressure, cough, difficulty breathing, fever, swollen eyes, loss of taste, and loss of smell all established the cases were not minor. Courts holding cases of COVID are actual disabilities have generally gotten there by noting that the transitory nature of a condition is not a consideration in the actual disability definition. Therefore, if the symptoms constituted substantial limitations – even if only for two weeks – COVID could properly be considered an actual disability.

Where Employers Have Prevailed

The courts that have dismissed COVID ADA claims generally rely less on the language of the ADA. They instead focus on the concept that the ADA was never intended to cover acute

medical conditions from which individuals fully recovered. One theme repeated throughout these decisions is that an employer who follows public health authority guidance to send employees home or otherwise treat them a certain way is not in and of itself demonstrating evidence the employer regarded the employee as disabled. And as one judge noted in rejecting a plaintiff's COVID as a disability allegation, "employers across the nation will be shocked to learn that if any of their employees are sick for just a few days, then those employees are 'disabled' and now protected by the ADA." But these decisions also suggest that the plaintiffs therein did not allege that they suffered severe symptoms.

The general state of the law, then, is that an individual who has a severe case of COVID-19 even if it lasts two weeks may have a disability, while an individual with a mild or asymptomatic case probably does not.

Where Does this Leave Retailers?

It should go without saying that, in the current environment, retailers are not looking for reasons to discharge employees. As an industry, they have bent over backwards to keep people working and employed. Discharging employees just because they contract COVID would be counterproductive.

The problem for retailers is that this new era brings with it a new potential legal claim that may require you to perform some adjustments to your standard workplace procedures to be in a position to defend against them. Discharge decisions based on **attendance** are the prime area of concern.

If the case law develops where it looks like it is heading – that firing an individual because of a COVID-related work absence could violate the ADA – employees will have a route to make many more claims than they can now. Any employee fired for attendance could claim that some of the absences were due to a serious case of COVID. Given the prevalence of home tests, an employee's testimony may be sufficient to go to trial on the existence of the condition and the severity of it even without medical records supporting these elements.

Here are four steps you should consider to put yourself in the best possible position.

1. **Improve Your Documentation Related to Absences**

Preventing these claims from succeeding will require employers to maintain better record keeping around employees calling in sick to be able to prove that the employee never notified you of a COVID diagnosis. If an employee does notify you about their condition, seeking information about the severity of the symptoms would be appropriate because you need the information to determine your ADA obligations. A contemporaneous record maintained by the supervisor that the employee was reporting no or mild symptoms will be invaluable in a lawsuit.

2. **Consider Tweaking No-Call-No-Show Rules**

   Your strict no-call-no-show rules might also need tweaking. If supervisors fail to maintain contemporaneous records of the employee's failure to notify of an absence, it will open the door for claims that the employee told the supervisor they were out of work because of COVID. What should be an easily defensible discharge can turn into a swearing match requiring a trial to resolve. Where employees are FMLA eligible, these practices should help defend against FMLA claims as well.

3. **Train Your Managers**

   Despite the best intentions of companies to provide time off for employees with COVID, you must educate frontline supervisors who bear the brunt of attendance issues about these concerns. Particularly, you must teach them that a COVID diagnosis requires a different analysis and they should seek assistance from Human Resources in these scenarios. Otherwise, frustration with an already poorly performing employee might result in a bad decision.

4. **Consider Your Testing Options**

   You should also consider whether you will require an employee to submit a positive COVID test from a medical provider if the employee does claim an absence due to COVID. As reinfections rise with the latest COVID variant, false claims of COVID cases – particularly if employees understand they cannot be disciplined for such absences – are likely to rise.

Conclusion

Unfortunately, many retailers remain short-staffed with employees having a hard time keeping shelves stocked and customers serviced. In these conditions, adding additional paperwork and duties might not be a viable solution. You may consider automating or outsourcing attendance control functions to avoid burdening supervisors.

We will monitor these developments and provide updates as warranted, so make sure that you are subscribed to Fisher Phillips' Insights to get the most up-to-date information direct to your inbox. If you have further questions, contact your Fisher Phillips attorney, the author of this Insight, or any member of our Retail Industry Group.