



Is COVID-19 A Disability Under Discrimination Law? The Next Wave of Workplace Lawsuits May Answer Question

Insights

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With an increasing number of employees being diagnosed with COVID-19 and requiring a leave of absence to recover from the virus, the question arises whether having COVID-19 renders an employee “disabled” as defined under the Americans with Disabilities Act (ADA) or other state and local anti-discrimination laws. A recent lawsuit filed in New Jersey requests that the court answer this question in the affirmative and render an employee who was diagnosed with COVID-19 as disabled under the New Jersey Law Against Discrimination (LAD). In *Tihara Worthy v. Wellington Estates LLC*, a former employee alleges that she was wrongfully terminated and not permitted to return to work because of COVID-19, which she argues is a “disability.” As many non-essential businesses are beginning to reopen their doors, this lawsuit raises questions that many employers will likely be grappling with in the weeks and months to come.

The Allegations

Tihara Worthy alleges that she was employed by Wellington Estates as a Certified Medical Assistant from May 2018 until she was terminated on May 16, 2020. According to Worthy, she learned on April 19 that she tested positive for COVID-19, immediately notified her employer, and began a leave of absence.

A few weeks later, on May 11, Worthy alleges that she tested negative for COVID-19 and was cleared to return to work on May 16. Worthy claims that before she could return to work, she was terminated and told that she was not welcome back because she contracted COVID-19 and “could have gotten everyone sick.”

The complaint alleges a violation of the LAD based on disability or perceived disability, as well as a claim of common law wrongful termination in violation of public policy based upon a recently enacted statute prohibiting employers from terminating employees who take time off from work because of COVID-19. Worthy seeks, among other things, reinstatement of employment and all benefits, back pay, front pay, compensatory damages, punitive damages, and attorneys’ fees.

It is worth noting that these claims are unproven allegations at this point, and the employer will have an opportunity to defend itself in court and tell its side of the story. However, simply reviewing these allegations can help employers formulate proactive plans to avoid getting served with such a complaint in the future – or develop key defense strategies should a lawsuit emerge.

Is COVID-19 A Disability?

COVID-19 is a virus that causes a range of mild symptoms to severe illness in those who are infected. Although COVID-19 can be deadly in certain cases, individuals who contract the virus often experience symptoms for a limited period and, once the symptoms dissipate, no longer test positive for the virus.

The ADA defines “disability” as a physical or mental impairment that substantially limits one or more major life activities. The EEOC has not yet opined on whether COVID-19 is a disability under the ADA. During a March 27, 2020 webinar called “Ask the EEOC,” the agency declined to answer the question of whether COVID-19 constitutes a disability under the ADA, stating that it is “unclear” whether the virus is or could be a disability given that it is a new virus that medical experts are still learning about.

Other jurisdictions with more expansive disability protections have taken a more definitive stance. For example, the New York City Commission on Human Rights has stated that it “considers actual or perceived infection with COVID-19 to be protected as a disability under the New York City Human Rights Law.” Accordingly, employers in New York City cannot harass or discriminate against an employee based on their COVID-19 infection status, and employees with the virus may be entitled to reasonable accommodations in the workplace.

With respect to Worthy’s lawsuit, the LAD defines a disability as a “physical or sensory disability, infirmity, malformation, or disfigurement which is caused by bodily injury, birth defect, or illness ... resulting from anatomical, psychological, physiological, or neurological conditions which prevents the typical exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques.” It specifically includes AIDS or HIV infection in the definition.

While the LAD is often interpreted broadly, it remains unclear whether COVID-19 meets the statute’s definition of a disability. Only if COVID-19 falls under the definition of a disability can an employee who contracted the virus have a viable discrimination claim under the LAD. If not, an employee who was infected with COVID-19 does not have a cognizable discrimination claim, and any time the employee took off from work because they were recovering from the virus would not be considered a job protected leave under the LAD. Under the latter scenario, an employer would not violate the LAD if they did not permit an employee who contracted COVID-19 to return to work.

But Aren’t There Any Protections for Employees Who Take Time Off Because They Have COVID-19?

Regardless of whether an individual infected with COVID-19 is considered to have a disability, job protections may exist to the extent the infected employee took time off from work. For example, the Emergency Paid Sick Leave Act under the federal Families First Coronavirus Response Act provides eligible employees with up to 80 hours paid sick leave for COVID-19 related reasons. Many states and localities have also passed leave laws for those impacted by COVID-19.

New Jersey, for instance, enacted a [new law](#) that provides job protection for time taken off from work in connection with infectious disease, such as COVID-19, during the Public Health Emergency and State of Emergency declared by the Governor in [Executive Order 103](#). Specifically, the law prohibits employers from terminating or refusing to reinstate an employee if the employee requests or takes time off from work based on a recommendation from a medical professional because the employee has, or is likely to have, an infectious disease that may infect others in the workplace. Additionally, job protected leave may also be available to employees infected with COVID-19 under the [New Jersey Earned Sick Leave Law](#).

What Should Employers Do?

As different jurisdictions will have a different take on whether COVID-19 constitutes a disability, you must review any state and local guidance issued in your area to understand whether COVID-19 infection will be deemed a disability under the law. Regardless of whether COVID-19 is considered a disability, there are many leave laws which may provide employees infected with the virus with job protected time off.

In New Jersey, the state at issue in *Worthy's* lawsuit, if an employee provides medical documentation to support a COVID-19-related leave of absence, you must provide leave for the period recommended by the employee's healthcare provider. Importantly, once the employee is cleared to return to work and is no longer at risk of infecting others with the virus, they should be permitted to return to work without any changes in the terms and conditions of their employment.

To the extent you are considering terminating an employee who is on or has recently returned from a COVID-19 related absence, the decision cannot be based in whole or in part because the employee was infected with COVID-19 or took a leave of absence because they were infected with COVID-19. Before doing so, you should consult with your employment counsel to assess the risks involved with such a decision, including potential fines. You must understand the web of potential federal, state and local leave entitlements to properly provide leave to employees with COVID-19.

We will continue to monitor the *Worthy* litigation and report on any developments that may impact the treatment of employees infected with COVID-19 under disability laws. Make sure you are subscribed to [Fisher Phillips' Alert System](#) to get the most up-to-date information. For further information about COVID-19-related litigation being filed across the country, you can visit our [COVID-19 Employment Litigation Tracker](#). Our [COVID-19 Employment Litigation and Class & Collective Actions section](#) also has a listing of our litigation-related alerts and team members handling these types of cases.

For further information, contact your Fisher Phillips attorney, the author, or any member of [our Post-Pandemic Strategy Group Roster](#). You can also review our [FP BEYOND THE CURVE: Post-Pandemic Back-To-Business FAQs For Employers](#) and our [FP Resource Center For Employers](#).

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