**DISABILITY ACCOMMODATIONS FOR COVID-19 LONG-HAULERS UNDER THE ADA**

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Recent guidance released by the Biden administration raises an important issue for human resources professionals and business owners already facing an influx of COVID-related accommodations requests amidst an evolving pandemic this year. As organizations contemplate bringing employees partially or fully back into the workplace, they must be conscious that some employees returning to work may suffer from the long-term effects of COVID. Although most people infected with COVID-19 get better within weeks, some can continue to experience symptoms that last months after the initial infection with either new or recurring symptoms at a later time, regardless of the mildness of the initial illness. The CDC has identified this condition as “long COVID,” [[1]](https://www.nssh.com/2021/10/disability-accommodations-for-covid-19-long-haulers-under-the-ada/" \l "_ftn1)

The emergence of long COVID raises important questions over whether these COVID “long-haulers” qualify for protections under state and federal disability and medical leave laws, especially in light of the anticipated federal vaccine mandate to be issued by the Occupational Safety and Health Administration (OSHA) this year. OSHA’s standard will undoubtedly require employers to accommodate employees with a valid medical exemption from vaccine requirements. Yet for employers there is still a lot of uncertainty surrounding the extent of protection under the Americans with Disabilities Act (ADA) for employees diagnosed with COVID-19 and long COVID, warranting a closer look at what federal guidance exists today.

The ADA defines a disability as a physical or mental impairment that substantially limits a major life activity (“actual disability”), a person who has a history or record of such an impairment (“record of”), or a person who is perceived by others as having such an impairment (“regarded as”). There is no list of medical conditions that meet the definition of a disability, and each case is determined on an individual basis. The changing nature of the coronavirus and its variants have highlighted the need for employers to engage in an interactive dialogue with employees about their impairments to identify potential accommodations needs.

Typically, like a cold, flu, or other transient virus, contracting COVID-19 would not be considered a disability under the ADA because the illness is usually limited in duration and has limited impact on major life activities. Discussed later, a recent decision in the Eastern District of Pennsylvania calls into question whether courts will regard COVID-19 as having minor impact on major life activities in “regarded as” claims of disability discrimination under the ADA. Regardless, employers should be mindful that the minor and transient analysis has potential to change when considering the debilitating effects of long COVID.

The CDC offers a long list of symptoms associated with long COVID including difficulty breathing, tiredness or fatigue, difficulty thinking and concentrating (“brain fog”), cough, chest or stomach pain, diarrhea, headache, heart palpitations, joint or muscle pain, fever, lightheadedness, and sleep problems. Some also experience long-term damage to multiple organs including the heart, lungs, kidneys skin, or brain. The CDC guidance indicates that those suffering from the long-term effects of the coronavirus might have difficult returning to work or resuming business as usual.

The EEOC has yet to issue detailed guidance on how to handle accommodations requests from long COVID employees under the ADA. For now, HR professionals and business owners can follow guidance issued by other agencies when considering requests for accommodations or medical leave requests made by COVID-19 long-haulers. In response to the CDC reports, the U.S. Departments of Health and Human Services (HHS) and Justice (DOJ) issued joint guidance indicating that long COVID may be considered a disability under the ADA. [[2]](https://www.nssh.com/2021/10/disability-accommodations-for-covid-19-long-haulers-under-the-ada/" \l "_ftn2) According to the Guidance, a person with long COVID could be disabled under the ADA if the person’s condition or any of its symptoms rises to the level of a “physical or mental impairment that substantially limits one or more major life activities.”

It is important to note that the HHS and DOJ guidance expressly states that it does not address reasonable accommodation or nondiscrimination employment issues, which are left to the EEOC. The EEOC has indicated on its website that it agrees with HHS and DOJ that long COVID may be a disability under the ADA, promising guidance in the coming weeks. For now, employers should assume the EEOC guidance will align with the HHS and DOJ guidance when assessing requests for accommodation and medical leave from COVID long-haulers.

According to the HHS and DOJ Guidance, long COVID is not always a disability under the ADA and an individualized assessment is necessary to determine whether an individual’s long COVID symptoms substantially limit a major life activity. “Major life activity” under the ADA encompasses a wide range of tasks including caring for oneself, walking, seeing, sleeping, eating, breathing, speaking, working, and even the operation of bodily functions such as the immune system or organs. Whether one of these major life activities is “substantially limited” under the ADA demands further individualized assessment.

Employers should assess whether a COVID long-hauler is substantially limited without the benefit of any medication, treatment, or other measures used to lessen any symptoms. Even if the impairment comes and goes it can be considered to “substantially limit” a major life activity based off when the impairment is active. Finally, the long COVID symptoms do not need to entirely prevent a person from performing the major life activity and the limitations do not need to be severe, permanent, or long term to rise to the level of a disability.

It is important to remember as health experts continue to learn about long COVID and its impacts, as an employer you are free to accommodate your long-haul employees even if their condition may not meet the definition of a “disability” under the ADA. The HHS and DOJ Guidance gives examples of how common long COVID symptoms could meet the substantially limits test:

* A person with long COVID who has lung damage that causes shortness of breath, fatigue, and related effects is substantially limited in respiratory function, among other major life activities.
* A person with long COVID who has symptoms of intestinal pain, vomiting, and nausea that have lingered for months is substantially limited in gastrointestinal function, among other major life activities.
* A person with long COVID who experiences memory lapses and “brain fog” is substantially limited in brain function, concentrating, and/or thinking.

These examples serve as a reminder that individuals with long COVID symptoms can meet the legal definition of an “actual disability” under the ADA and until the EEOC issues further guidance employers should assess long COVID like they would any other physical or mental impairment.

Employers should be aware that issues over the ADA’s protections for COVID-19 and pandemic-related accommodations have made their way to the courts. For those trying to navigate this uncharted territory of balancing ADA compliance while supporting employees suffering with COVID-19 and long COVID there are two areas to keep watch in the coming year for guidance and caselaw developments: vaccine mandates and discrimination suits.

The interactive process between COVID-19 long-haulers and employers will likely be under even more scrutiny than ever before as OSHA is anticipated to issue its emergency temporary standard mandating the vaccination of workers at private employees with 100 or more workers. Employers should be prepared to engage in the interactive process with their employees with long COVID when exemptions from the vaccine are requested and be ready to determine whether accommodations are necessary, feasible, or cause undue hardship under the ADA. When the EEOC guidance on long-haul covid is released, consider how this impacts your vaccine mandates as well.

In the past couple months, we have also seen two noteworthy discrimination suits. First the EEOC has shown it is paying close attention to employers’ accommodation processes and employers should be aware that caselaw in the area of pandemic-related accommodations will develop this year. This past September, the EEOC brought its first-ever pandemic related lawsuit in the U.S. District Court for the Northern District of Georgia (Civil Action No. 1:21-CV-3708-SCJ-RDC) concerning an employer’s denial of a request for an accommodation to telework, allegedly in violation of the ADA.

Another federal suit, *Matias v. Terrapin House, Inc.*, was filed in the U.S. District Court for the Eastern District of Pennsylvania by an employee claiming she was terminated because she was “regarded as” disabled under the ADA due to a COVID-19 diagnosis. The employee alleges she was terminated on the same day she informed her employer of a positive COVID-19 diagnosis. In a motion to dismiss the suit, the employer argued that COVID-19 is a transitory and minor impairment and thus the plaintiff could not have been regarded as having a “disability” under the ADA. Allowing the suit to proceed, the Court cited the HHS and DOJ Guidance, finding that the symptoms that the Plaintiff disclosed to the employer can carry longer-term impairment of major life functions and the plaintiff had plausibly alleged that the employer had regarded her as having a disability.

Even though the Plaintiff did not claim to be a COVID long-hauler, the court’s reliance on the HHS and DOJ guidance demonstrates how these long-term COVID symptoms can be construed by courts and the EEOC to rise to the level of a “disability” depending on the circumstances.  Employers need to be diligent in their analysis of employees’ requests for accommodations and engagement of the interactive process because they could be subject to liability potentially even where an employee does not have long COVID symptoms, depending how the caselaw develops.

What is evident from the emerging federal guidance and EEOC lawsuits is that employers must consider how their policies accommodate COVID-19 long-haulers now that it is clear long COVID symptoms can qualify for ADA protection.