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BLOGS

COVID-19;Discrimination

COVID-19: Is the Pandemic Really Over for Employers?

On May 9, 2023, the United States Department of Health and Human Services issued a press release announcing that the federal Public Health Emergency for COVID-19 would expire on May 11, 2023. The Public Health Emergency has been renewed 13 times since it was first issued on January 31, 2020, at a time when there were only six known cases of COVID-19 and no known deaths in the United States. In declaring the end of the Public Health Emergency, the Department of Health and Human Services cited the success of the Biden-Harris Administration in effectively implementing the largest adult vaccination program in United States history, with over 270 million people receiving at least one shot of a COVID-19 vaccine and the fact that since January 2021, COVID-19 deaths have declined by 95% and hospitalizations are down nearly 91%.

The EEOC, however, released updates to its [COVID-19 Technical Assistance Questions and Answers guidance](#) on May 15, 2023, taking the position that the guidance “remains relevant even with the end of the COVID-19 Public Health Emergency on May 11, 2023,” and the “end of the declaration does not change the requirements of the federal equal employment opportunity laws,” discussed in the guidance.

There are several updates in the guidance indicating that employers must continue to consider COVID-19 when determining how to satisfy their obligations under the Americans with Disabilities Act, the Rehabilitation Act and other employment laws. Some key updates coming out of the May 15, 2023, guidance include the following:

- The updated guidance explains that the end of the Public Health Emergency for COVID-19 does not mean that employers can automatically terminate reasonable accommodations that were provided due to pandemic-related circumstances. Employers may, however, reevaluate accommodations that were granted during and due to the Public Health Emergency and, in consultation with the employee, assess whether there continues to be a need for those accommodations. The guidance explicitly calls out that this evaluation may include a request for documentation addressing why there may be an ongoing need for certain accommodations and whether alternative accommodations are available.
- The updated guidance provides specific examples of reasonable accommodations that may assist employees suffering from Long COVID. Earlier versions of the guidance clarified that COVID-19 and Long COVID may constitute actual disabilities under the ADA, depending on the nature of a particular employee’s symptoms and experience with the virus. For employees whose Long COVID symptoms rise to the level of a physical or mental impairment that substantially limits a major life activity, the updated guidance specifies that reasonable accommodations may include a quiet workspace, use of noise canceling or white noise devices, and uninterrupted work time to address the symptom of brain fog; alternative lighting and reducing glare from screens to address headaches; rest breaks or removal of “marginal functions” involving physical exertion to address joint pain or shortness of breath; and a flexible work schedule or telework options to address fatigue. As with any reasonable accommodation, these options should be considered in the context of the nature of the employee’s symptoms, the job duties and the design of the workplace.



- The updated guidance also addresses possible harassment and discrimination related to COVID-19. The guidance advises employers to train managers and supervisors regarding their role in watching for, stopping and reporting any harassment or other discrimination. In the context of pandemic-related harassment, this could take the form of a supervisor or coworker violating the ADA by harassing an employee with a disability-related need to wear a mask or take other COVID-19 precautions. It may also take the form of a supervisor or coworker violating Title VII by harassing an employee who is receiving a religious accommodation to forgo mandatory vaccination.

Although the worst of the public health crisis is behind us, the EEOC signals that COVID-19 will continue to be in the mix for the foreseeable future as employers navigate the world of ADA reasonable accommodations and other employment laws.