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BLOGS

COVID-19;Discrimination

EEOC Recognizes “Long COVID” May Be a Disability Under the ADA

According to the Centers for Disease Control and Prevention (“CDC”), some individuals may experience post-COVID-19 conditions that involve a wide range of long-term health problems. Per the CDC, these post COVID-19 conditions may be known as “long COVID, long-haul COVID, post-acute COVID-19, long-term effects of COVID, or chronic COVID.” [\[1\]](#) These long-COVID symptoms can include:

- Difficulty breathing or shortness of breath
- Tiredness or fatigue
- Symptoms that get worse after physical or mental activities
- Difficulty thinking or concentrating (sometimes referred to as “brain fog”)
- Cough
- Chest or stomach pain
- Headache
- Fast-beating or pounding heart (also known as heart palpitations)
- Joint or muscle pain
- Pins-and-needles feeling
- Diarrhea
- Sleep problems
- Fever
- Dizziness on standing (lightheadedness)
- Rash
- Mood changes

- Change in smell or taste
- Changes in menstrual period cycles

On July 26, 2021, the Office for Civil Rights of the U.S. Department of Health Services (“HHS”) and the U.S. Department of Justice Civil Rights Division, Disability Rights Section (“DOJ”) issued guidance^[2] explaining that long COVID can be a disability under Titles II (prohibiting discrimination by state and local governments) and III (prohibiting discrimination by public accommodations) of the Americans with Disabilities Act (ADA); the 1973 Rehabilitation Act and the Patient Protection and Affordable Care Act. The guidance, however, makes clear that it does not address the employment disability discrimination and accommodation issues implicated by long COVID given that the EEOC, not HHS and the DOJ, enforces the employment provisions of Title I of the ADA.

Highly summarized, the HHS and DOJ guidance states that long COVID can be a physical or mental impairment under the ADA. It also recognizes that long COVID can substantially limit a major life activity, which includes a wide range of activities, such as “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, writing, communicating, interacting with others, and, working.” Further, the guidance identifies common symptoms of long COVID to include tiredness or fatigue, difficulty thinking or concentrating, shortness of breath, headache, dizziness on standing, loss of taste or smell, etc. Some individuals also experience damage to multiple organs including the heart, lungs, kidneys, skin and brain.

While the HHS and DOJ guidance does not address employment discrimination and accommodation issues, the EEOC has taken a similar view of long COVID. On September 9, 2021, the EEOC posted a Notice^[3] on its website in which it recognized that long COVID could be a disability under Title I the ADA and Section 501 of the federal Rehabilitation Act. Title 1 of the ADA applies to private employers with 15 or more employees, state and local government employees, employment agencies, and labor unions. In its Notice, the EEOC essentially adopted the long COVID analysis set forth in the July guidance published by the HHS and DOJ.

Based upon the HHS and DOJ guidance and the EEOC Notice, an employer should engage in an individual assessment to determine if an employee’s long COVID condition or any of its symptoms substantially limits a major life activity and, as such, is a legally protected disability. Where a disability exists and an employee requests or has an open and obvious need for a long COVID-related accommodation, an employer should engage in a good-faith, interactive process to determine if it can provide a reasonable accommodation without creating an undue hardship on the business.

[1] The CDC’s website discussing long COVID can be found at: <https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects.html>.

[2] See the HHS and DOJ guidance at: <https://www.hhs.gov/civil-rights/for-providers/civil-rights-covid19/guidance-long-covid-disability/index.html>.

[3] See EEOC Notice at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.