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PERSPECTIVE

COVID long-haulers likely covered by the ADA

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Many people who contract COVID-19 recover completely within a few weeks. However, some individuals continue to experience symptoms for weeks and months after the initial COVID-19 infection. According to the Centers for Disease Control and Prevention, these individuals, known as “COVID long-haulers,” suffer “long-COVID” symptoms such as shortness of breath or difficulty breathing, tiredness or fatigue, cough, chest or stomach pain, headache, heart palpitations, joint or muscle pain, difficulty thinking or concentrating, dizziness on standing, depression or anxiety, and sleep problems. In addition, COVID long-haulers may experience multi-organ problems that affect body systems, including the heart, lung, kidney, skin, and brain functions as well as autoimmune conditions.

In light of the increasing number of individuals who suffer long-COVID symptoms, on July 26, 2021, President Joe Biden announced during the 31st anniversary commemoration of the enactment of the Americans with Disabilities Act that long-COVID symptoms can rise to the level of a disability under the ADA. Consistent with President Biden’s announcement, the U.S. Department of Justice and the U.S. Department of Health and Human Services issued a joint guidance that same day explaining that long-COVID can be a disability under Titles II (state and local government entities) and III (places of public accommodation) of the ADA as well as other federal laws protecting persons with disabilities such as Section 504 of the Rehabilitation Act of 1973 and Section 1557 of the Patient Protection and Affordable Care Act where the long-COVID substantially limits one or more major life activities.

The ADA defines a covered disability as a person who (1) has a physical or mental impairment that substantially limits one or more ma-

ajor life activities (“actual disability”); (2) has a record of such impairment (“record of”); or (3) is regarded as having such an impairment (“regarded as”). 42 U.S.C. Section 12012(1). Major life activities are those basic activities that the average person in the general population perform with little or no difficulty, such as caring for oneself, performing manual tasks, walking, seeing, hearing, eating, speaking, standing, lifting, bending, breathing, learning, reading, concentrating, thinking, communicating, and working. 42 U.S.C. Section 12012(2) (A). The impairment of major bodily functions, such as functions of the immune system, normal cell growth, including cancer, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions also qualify as disabilities. 42 U.S.C. Section 12012(2) (B). An employer should participate in the interactive process to provide a reasonable accommodation for a disability and should not discriminate against persons with disabilities.

The U.S. Equal Employment Opportunity’s ADA regulations and the DOJ and HHS joint guidance provide that the term “substantially limits” is to be construed broadly. The guidance further provides three examples of long-COVID symptoms that substantially limit a major life activity and are likely covered under the ADA:

- lung damage that causes shortness of breath, fatigue, and related effects is substantially limited in respiratory function, among other major life activities.
- symptoms of intestinal pain, vomiting, and nausea that have lingered for months impairs the gastrointestinal function, among other major life activities.
- memory lapses and “brain fog” substantially limits brain function, concentrating, and/or thinking, another major life activity.

The guidance notes, however, that long-COVID does not always qualify as a disability. Instead, whether an impairment “substan-

tially limits” a major life activity requires an individual assessment. Furthermore, the guidance only addresses the “actual disability” prong of the definition of a qualified disability under the ADA. However, the guidance cautions that the “record of” or “regarded as” definitions of a qualified disability “may also be relevant to claims regarding long-COVID.”

Best Practices

The U.S. Equal Employment Opportunity Commission, that experts look for guidance in the employment area of ADA discrimination regulations, has not, yet, issued any guidance on long-COVID. And, while the DOJ and HHS guidance does not technically apply to private employment stating that private “employment is outside the scope of this guidance document,” the definition of “disability” is the same under each section of the ADA. Thus, Courts will likely conclude that many long-COVID symptoms will qualify as disabilities under the ADA.

Accordingly, employers should engage in the interactive process with employees suffering long-COVID symptoms and identify possible reasonable accommodations for the employee as it would for any other condition that qualifies as a potential disability under the ADA. Employers may consult the U.S. Department of Labor’s resources relating to reasonable accommodations for employees with long-COVID symptoms. Accommodations may include adjusting the employee’s work schedule, providing or modifying equipment or devices, and providing unpaid leave under the Family & Medical Leave Act or accommodation leave and similar state and local leave laws. However, as with any other qualified disability under the ADA, employers are not required to remove essential job functions as an accommodation or provide any accommodation that creates an undue hardship.

When in doubt, employers should err on the side of caution. At the same time, employers should re-

frain from treating an employee as disabled before properly and thoroughly analyzing the claim and consulting counsel. Premature decisions could lead an employee to have expectations of “rights” to which he/she is not entitled under the ADA and then act to hurt an employer’s defense to a disability discrimination or failure to accommodate claim. Employers should consult with experienced counsel to assess best practices and minimize potential legal liability. ■

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