Disability Discrimination in the Time of "Long" COVID: What's Next?

Ian D. Mitchell, Esq.
Reminger Co., L.P.A.

The last two years of the COVID-19 pandemic have seen a marked shift in how most people work and the manner in which employers engage with their workforce in the face of changing circumstances due to the coronavirus. One specific aspect of this shift is the way in which COVID-19 has altered the traditional considerations employers must make when evaluating their obligations under the Americans with Disabilities Act. In addition, employers have had to adjust to periodically-issued, new guidances from the EEOC over the last two years concerning revised standards for complying with the ADA. More adjustments will inevitably be necessary as a result of the most recent EEOC guidance concerning "long COVID" as a disability, and this article focuses on the issues employers and litigators may face as a consequence of the federal government's new policy position.

As a refresher, Title I of the ADA applies to private employers with 15 or more employees, and also applies to state and local government employers, employment agencies, and labor unions.[1] The law generally prohibits discrimination against "qualified individuals" with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment.[2] Under the Act, a "qualified individual" is one who, with or without reasonable accommodation, can perform the essential functions of his or her job. Individuals may be considered "disabled" for purposes of the ADA if they: (1) have a physical or mental impairment that substantially limits one or more major life activities; (2) have a record of such an impairment; or (3) are regarded as having such an impairment.[3]

On July 26, 2021, following remarks from President Biden concerning the debilitating long-term effects of COVID-19 in some individuals,[4] the Department of Health and Human Services, in coordination with the Department of Justice's Civil Rights Division, issued a guidance defining the condition known as "long COVID" or "long-haul COVID".[5] The guidance went further to state that "long COVID can be a disability under the ADA, Section 504, and Section 1557 if it substantially limits one or more major life activities."[6] On December 14, 2021, the EEOC followed suit and updated its "COVID-19 Technical Assistance" page to reflect new guidance on the law relating to COVID-19 as a disability under the ADA.

First, defining "long COVID" presents a unique challenge for employers, as the condition generally refers to the long-term effects of a COVID-19 infection, which often resemble symptoms associated with numerous other medical conditions. However, in an effort to provide a more cohesive working definition of long COVID, the CDC defines individuals suffering from it as those who "have a range of new or ongoing symptoms that can last weeks or months after they are infected with the virus that causes COVID-19 and that can worsen with physical or mental activity."[7] In particular, the (non-exhaustive) list of known symptoms that help define the condition include the following: tiredness or fatigue; difficulty thinking or concentrating (sometimes called "brain fog"); shortness of breath or difficulty breathing; headache; dizziness

Continued

on standing; fast-beating or pounding heart (known as heart palpitations); chest pain; cough; joint or muscle pain; depression or anxiety; fever; loss of taste or smell.[8] Critically, though, the DOJ/DHHS guidance goes on to state that long COVID is a physical or mental impairment that *can* substantially limit one or more major life activities.

The clarification advanced in the federal agencies' guidances from July and December 2021 is important because it effectively lowers the bar for an employee to state a cognizable claim for disability discrimination when the health condition at issue is long COVID. Prior to the new position taken by the EEOC, DOJ, and DHHS, employers could (and often did) seek dismissal of claims brought under the ADA by arguing that COVID-19 and its symptoms did not qualify as a "regarded as" disability because of its "transitory and minor" nature. Recall that the ADA does not provide relief for an adverse employment action where the employer perceives the employee to have a disability that is objectively transitory and minor.[9] Given that most people infected with COVID-19 recover from their symptoms after several days or weeks, the transitory and minor exception would seem applicable to the majority of cases. However, long COVID potentially complicates that analysis, as illustrated in one of the EEOC's Technical Assistance examples: "An employer would regard an employee as having a disability if the employer fires the individual because the employee had symptoms of COVID-19, which, although minor, lasted or were expected to last more than six months."[10] As a result, the new guidance position makes clear that courts must consider the nature and duration of symptoms associated with an individual's COVID-related condition when evaluating claims brought under the ADA.

The DOJ/DHHS Guidance and EEOC position also make it clear that, so long as an individual's long COVID condition "substantially impairs a major life activity," there should be no hesitancy to view long COVID as an "actual disability" for purposes of an ADA claim.[11] Even so, the EEOC reminds that "[d]etermining whether a specific employee's COVID-19 is an actual disability always requires an individualized assessment, and such assessments cannot be made categorically."[12] As such, each claim should be considered on a case-by-case basis and the employer should continue to take care to engage in the interactive process, particularly when evaluating whether a reasonable accommodation must be provided to an employee suffering from long COVID.[13] Notably, symptoms related to long COVID can be considered an "actual disability" under the EEOC's new analysis, even if those symptoms are episodic in nature, provided that they still substantially limit a major life activity when active.

The end result of this new analysis is that, although many federally-mandated job-protected leave policies for employees have expired (*e.g.*, the Families First Coronavirus Response Act), employers with 15 or more employees might still be obligated to make reasonable accommodations for employees impacted by long COVID and/or other COVID-19 related conditions into the foreseeable future. As such, employers should be cognizant of the fact that they might need to provide time off, flexible hours, revised job assignments (including remote work), or other modifications to an employee's job responsibilities in order to enable employees suffering from long COVID to continue performing the "essential functions" of their jobs. This flexibility and an employer's awareness of its obligations under the ADA, particularly in light of the new policy clarifications, will be critical to avoid incurring a disability discrimination claim associated with long COVID.

In addition, the process of working with employees to recognize instances of disability due to long COVID and working with employees to determine whether a reasonable accommodation can be made is exacerbated by the known symptoms of the condition. How, for example, can or should an employer accommodate an employee whose symptoms are inability to focus or loss of taste/smell? The challenges presented by long COVID as a disability,

CONTINUED

though new and changing, require employers and their counsel to thoroughly examine the EEOC's Technical Assistance page and stay abreast of new developments in the law, while at the same time continuing to apply the traditional framework for engaging in the interactive process. Employers can take some comfort in recalling that they are within their rights under the ADA to ask the employee for additional information related to his/her condition, so that the disability can be verified by a medical professional and so that the employer can better determine the appropriate accommodation to provide.

Endnotes

1 See 42 U.S.C. § 12111(5).

2 See 42 U.S.C. § 12112(a).

3 29 C.F.R. § 1630.2(g).

4 *Biden Administration Suggests Long-Haul COVID Illness May Constitute A Disability Under ADA*, Laura Lawless, NATIONAL LAW REVIEW, July 28, 2021, https://www.natlawreview.com/article/biden-administration-suggests-long-haul-covid-illness-may-constitute-disability.

5 *Guidance on "Long COVID" as a Disability Under the ADA, Section 504, and Section 1557*, July 26, 2021, Dept. of Health and Human Services.

6 *Id.*

7 *Id.*

8 *Id.*

9 *Eshleman v. Patrick Indus., Inc.*, 961 F.3d 242, 246 (3d Cir. 2020) (citing 42 U.S.C. § 12102(3)(B)); *see also Matias v. Terrapin House, Inc.*, Case No. 5:21-cv-02288, 2021 U.S. Dist. LEXIS 176094, at **11-12 (E.D. Pa. Sept. 16, 2021) (finding that employee had stated a viable claim for "regarded as" disability discrimination, citing the DOJ/DHHS Guidance in support of employee's claim, and rejecting employer's "transitory and minor" exception argument).

10 *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#N (last visited February 16, 2022).

11 *See id*.

12 *Id.*

13 *See id.*

Ian D. Mitchell Esq., practices at Reminger Co., L.P.A.'s Cincinnati office, where he focuses on employment litigation, commercial litigation, directors' and officers' liability, and professional liability cases.