

GILL RAGON OWEN

— ATTORNEYS —

KEEPING YOU INFORMED

EEOC Guidance regarding “Long-COVID”

The EEOC recently updated its guidance to address questions about “long-COVID” and employer considerations for employees who request accommodations under the Americans with Disabilities Act.

The EEOC stated that the ADA’s three-part definition of disability applies to COVID-19 in the same way it applies to any other medical condition and should be construed broadly in favor of expansive coverage, to the maximum extent permitted by the law. The EEOC did note, however, that not every impairment will constitute a disability under the ADA. Employers should analyze each request on a case-by-case basis to determine if an applicant or employee qualifies.

The EEOC also included the following information on ADA definitions:

Actual Disability. A person with COVID-19 has an actual disability if the person’s medical condition or any of its symptoms is a “physical or mental” impairment that “substantially limits one or more major life activities.” An individualized assessment is necessary to determine whether the effects of a person’s COVID-19 substantially limit a major life activity. This will always be a case-by-case determination that applies existing legal standards to the facts of a particular individual’s circumstances. A person infected with the virus causing COVID-19 who is asymptomatic or a person whose COVID-19 results in mild symptoms similar to those of the common cold or flu that resolve in a matter of weeks—with no other consequences—will not have an actual disability within the meaning of the ADA. However, depending on the specific facts involved in a particular employee’s medical condition, an individual with COVID-19 might have an actual disability, as illustrated below.

Physical or Mental Impairment: Under the ADA, a physical impairment includes any physiological disorder or condition affecting one or more body systems. A mental impairment includes any mental or psychological disorder. COVID-19 is a physiological condition affecting one or more body systems. As a result, it is a “physical or mental impairment” under the ADA.

Major Life Activities: “Major life activities” include both major bodily functions, such as respiratory, lung, or heart function, and major activities in which someone engages, such as walking or concentrating. COVID-19 may affect major bodily functions, such as functions of the immune system, special sense organs (such as for smell and taste), digestive, neurological, brain, respiratory, circulatory, or cardiovascular functions, or the operation of an individual organ. In some instances, COVID-19 also may affect other major life activities, such as caring for oneself, eating, walking, breathing, concentrating, thinking, or interacting with

others. An impairment need only substantially limit one major bodily function or other major life activity to be substantially limiting. However, limitations in more than one major life activity may combine to meet the standard.

Substantially Limiting: “Substantially limits” is construed broadly and should not demand extensive analysis. COVID-19 need not prevent, or significantly or severely restrict, a person from performing a major life activity to be considered substantially limiting under Title I of the ADA.

The limitations from COVID-19 do not necessarily have to last any particular length of time to be substantially limiting. They also need not be long-term. For example, in discussing a hypothetical physical impairment resulting in a 20-pound lifting restriction that lasts or is expected to last several months, the EEOC has said that such an impairment is substantially limiting. App. to 29 C.F.R. § 1630.2(j)(1)(ix). By contrast, “[i]mpairments that last only for a short period of time are typically not covered, although they may be covered if sufficiently severe.” Id.

Mitigating Measures: Whether COVID-19 substantially limits a major life activity is determined based on how limited the individual would have been without the benefit of any mitigating measures—i.e., any medical treatment received or other step used to lessen or prevent symptoms or other negative effects of an impairment. At the same time, in determining whether COVID-19 substantially limits a major life activity, any negative side effects of a mitigating measure are taken into account.

Some examples of mitigating measures for COVID-19 include medication or medical devices or treatments, such as antiviral drugs, supplemental oxygen, inhaled steroids and other asthma-related medicines, breathing exercises and respiratory therapy, physical or occupational therapy, or other steps to address complications of COVID-19.

Episodic Conditions: Even if the symptoms related to COVID-19 come and go, COVID-19 is an actual disability if it substantially limits a major life activity when active.

The EEOC also included some examples of individuals with an impairment that substantially limits a major life activity. Those examples include the following:

- An individual diagnosed with COVID-19 who experiences ongoing but intermittent multiple-day headaches, dizziness, brain fog, and difficulty remembering or concentrating, which the employee’s doctor attributes to the virus, is substantially limited in neurological and brain function, concentrating, and/or thinking, among other major life activities.
- An individual diagnosed with COVID-19 who initially receives supplemental oxygen for breathing difficulties and has shortness of breath, associated fatigue, and other virus-related effects that last, or are expected to last, for several months, is substantially limited in respiratory function, and possibly major life activities involving exertion, such as walking.
- An individual who has been diagnosed with COVID-19 experiences heart palpitations, chest pain, shortness of breath, and related effects due to the virus that last, or are expected to last, for several months. The individual is substantially limited in cardiovascular function and circulatory function, among others.
- An individual diagnosed with “long COVID,” who experiences COVID-19-related intestinal pain, vomiting, and nausea that linger for many months, even if intermittently, is

substantially limited in gastrointestinal function, among other major life activities, and therefore has an actual disability under the ADA.

Additionally, the EEOC gave some examples of individuals with an impairment that does NOT substantially limit a major life activity. Those examples include the following:

- An individual who is diagnosed with COVID-19 who experiences congestion, sore throat, fever, headaches, and/or gastrointestinal discomfort, which resolve within several weeks, but experiences no further symptoms or effects, is not substantially limited in a major bodily function or other major life activity, and therefore does not have an actual disability under the ADA. This is so even though this person is subject to CDC guidance for isolation during the period of infectiousness.
- An individual who is infected with the virus causing COVID-19 but is asymptomatic—that is, does not experience any symptoms or effects—is not substantially limited in a major bodily function or other major life activity, and therefore does not have an actual disability under the ADA. This is the case even though this person is still subject to CDC guidance for isolation during the period of infectiousness.

If you have any questions, please contact Jenny Teeter or Brianna Cook.

GILL RAGON OWEN

— ATTORNEYS —

425 West Capitol Avenue Suite 3800, Little Rock, Arkansas 72201

www.gill-law.com

[501.376.3800](tel:501.376.3800)

