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Employee Benefit Plan Review

Long COVID Now an ADA Disability

By Barbara E. Hoey and Sebastian Clarkin

In a move that comes as no surprise, the Equal Employment Opportunity Commission ("EEOC") has updated its COVID-19 technical assistance to provide guidance on when COVID-19 may be considered a "disability" under the Americans with Disabilities Act ("ADA"), making specific reference to the Department of Justice ("DOJ")/ Department of Health and Human Services ("HHS") guidance discussed in the background section below.

The EEOC's technical assistance focuses "more broadly on COVID-19" beyond just "long COVID," and does so "in the context of Title I of the ADA and section 501 of the Rehabilitation Act, which cover employment." However, the EEOC's guidance clearly echoes the DOH/HHS guidance and states that long COVID or sustained symptoms of COVID may be a "disability" under the law.

In many states, long COVID could also qualify as a disability under state laws. So employers should be ready for more claims in the future, even when the pandemic (finally) ends, from employees who suffer symptoms of COVID as a chronic illness.

The Guidance

What Is Long COVID and When Is It a Disability?

The EEOC has reemphasized that determining whether COVID may be considered a "disability" under the law is a fact-intensive question, requiring an analysis of the extent to which COVID's symptoms, its long-term effects, or the manner in which it exacerbated the symptoms of another condition "substantially limit a major life activity," as discussed in the background section below. This means that an individual suffering, even intermittently, from certain symptoms relating to long COVID can be considered to be "disabled" under the law.

The EEOC provides several examples of these impairments, including: "brain fog" and difficulty remembering or concentrating; substantially limited respiratory function; chest pains; or intestinal pain.

Importantly, the EEOC distinguishes these "substantially limiting" conditions from less-serious symptoms, such as "congestion, sore throat, fever, headaches, and/or gastrointestinal discomfort, which resolve within several weeks," which would not create a "disability." But make no mistake: even these relatively insignificant symptoms may constitute a disability if they last or are expected to last for a significant period of time (i.e., more than six months).

According to the guidance, while long COVID "does not automatically qualify as a disability," as with any disability inquiry, an employer is obligated to engage cooperatively with an ailing employee to conduct an "individualized assessment" and determine whether that employee's long COVID symptoms constitute physical or mental impairments that

substantially limit one or more major life activities.

The guidance emphasizes that the symptoms need not necessarily manifest physically – long COVID may substantially affect an individual's psychological or emotional wellbeing to the point that an accommodation may be required.

What Employers Can and Cannot Do

Thankfully, the EEOC has not issued employees with long COVID a ticket not to do their jobs.

Not wanting employers to lose sight of the bigger picture, the EEOC also clarified that taking an adverse action against an employee disabled due to COVID-19 does not automatically mean that the action to discriminatory. Rather, an employer may have legitimate, non-discriminatory reasons for having undertaken the adverse action. The EEOC points to the circumstance in which the affected employee was no longer able to perform their job duties at all due to the disability. Additionally, the EEOC states that "the ADA'S 'direct threat' defense could permit an employer to require an employee with COVID-19 or its symptoms to refrain from physically entering the workplace during the CDC-recommended period of isolation, due to the significant risk of substantial harm to the health of others."

In sum, the EEOC's guidance is concordant with the DOJ/HHS guidance discussed in the background section below. But do not let this article's focus on long COVID distract from the larger point that any COVID-19 infection, including active infections, may constitute a "disability" under Title I of the ADA depending on the severity and duration of the symptoms. Each employee brings their own set of facts that require an individualized analysis.

Background

It seems that at every turn, COVID-19 is keeping employers from catching their breath. It is important that employers navigate having employees work from home, reopening and remaining compliant with the law and Centers for Disease Control and Prevention ("CDC") guidelines, mask and vaccine mandates, and what to do when an employee tests positive for the virus. Now another issue confronts employers: how to best accommodate employees who are suffering from COVID symptoms months after having been infected with the virus – long COVID.

What Employers Should Know

The guidance, just like our understanding of long COVID, is frustratingly vague. The silver lining is that any employer already sensitive to the accommodation needs of its employees is already well-positioned to account for the needs of employees with long COVID symptoms. Employers should not fall prey to tunnel vision and determine whether an employee's symptoms are due to COVID per se.

Rather, they must stay focused on the fundamental question: are these symptoms substantially limiting my employee's ability to perform their job?

As with any medical condition, the substance of an ensuing "cooperative dialogue" between employer and employee may vary greatly depending on the employee's duties, their symptoms, and the advice they receive from their medical care providers. Of course, any employer may make the reasonable request that an employee provide a doctor's note in order to substantiate a request for an accommodation under the ADA, but simply making that request of an employee does not absolve an employer from making reasonable efforts to engage with that employee to determine what accommodations, if any, are available.

Planning for the Future

Employers should also anticipate ongoing and evolving accommodation discussions, particularly if the employee is in fact a COVID "long-hauler." The long-term effects of a COVID infection are still not fully understood, and the best-prepared employer is the one ready to adapt to an employee's needs not only reasonably, but also rapidly.

That Can Mean a Few Different Things

- *Document*. It will be crucial for anyone performing a human resources function to (securely) memorialize the substance of every discussion regarding an employee's requests for accommodation. At the same time, be sure to sequester and secure any medical records, and work to ensure confidentiality.
- *Assess Regularly.* As so little is known about long COVID, and because symptoms may suddenly lessen or become more severe in time, employers should require affected employees to agree upon pre-determined "check-in" meetings. At a specific date in the future, employer and employee might reconvene to reassess what further (or fewer) accommodations the employee could require. This is a sensitive issue, however, and is best done in concert with qualified legal counsel.
- *Be Flexible.* If an employee requires an accommodation for long COVID, be flexible in addressing their requests. Consider whether you can grant the accommodations, and document why you can or cannot. Finally, before denying an accommodation, be sure that there is now reasonable way that the accommodation may be granted.

Whether the issue is discrete or you are seeking to devise a broad-strokes policy that can affect every employee, it is always wise to consult outside counsel. This will ensure that you are aware of the locally applicable laws and regulations regarding disability accommodations,

particularly COVID-related accommodations.

Barbara E. Hoey, a partner at Kelley Drye & Warren LLP and member of the firm's Executive Committee, counsels clients in all areas of employment law, and defends single-plaintiff, multi-plaintiff and class action litigation. Sebastian Clarkin is an associate at the firm representing a diverse client base in all areas of labor and employment law. The authors may be reached at *bhoey@kelleydrye.com* and *sclarkin@kelleydrye.com*, respectively.