EEOC: Current COVID Infection Could be a Disability Under the ADA

HR Insights

The US Equal Employment Opportunity Commission (EEOC) recently published guidance regarding when a current COVID-19 infection is a disability under the Americans with Disabilities Act. So, what does that mean for employers?

Just like any other medical condition, on a case-by-case basis, employers need to consider whether an applicant or employee's contraction of COVID-19 meets any of the ADA's definitions of "disability." Under the ADA, a person can have a disability in one of three ways: they can have an "actual" disability, a "record of" a disability, or be "regarded as" an individual with a disability.

Does this applicant or employee have an "actual" disability?

The ADA considers a person with COVID-19 as having 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."**

COVID-19 is considered a **"physical or mental impairment"** because it is a physiological condition affecting one or more of the body's systems.

COVID-19 may affect a person's **"major life activities"** including their major bodily functions, such as functions of the immune system, special sense organs (such as smell and taste), digestive, neurological, brain, respiratory, circulatory, or cardiovascular functions. Additionally, COVID-19 may affect major life activities, such as caring for oneself, eating, walking, breathing, concentrating, thinking, or interacting with others.

The EEOC stresses that an individualized assessment is necessary to determine whether the effects of an individual person's COVID-19 "substantially limits" one of their major life activities.

To be considered **"substantially limiting,"** COVID-19 does not have to prevent or severely restrict, a person from performing a major life activity. The limitations do not necessarily have to last any particular length of time to be substantially limiting. They also do not have to be considered long-term. Even if the symptoms related to COVID-19 come and go, if those symptoms are substantially limiting the person's major life activity *when active,* they will likely be considered a disability.

Additionally, employers need to remember that this assessment of the person's limitations should be based on how the individual is affected by their symptoms without regard to any mitigating measures, such as medical treatment. However, if their medical treatment causes them to suffer negative side effects, those negative side effects should be taken into account as well.

While COVID-19 may substantially limit a major life activity in some circumstances, someone infected with the virus causing COVID-19 who is asymptomatic or a person whose COVID-19 results in mild symptoms, similar to the common cold or flu, that resolve in a matter of weeks with no other consequences will not be substantially limited in a major life activity for purposes of the ADA. For example, the EEOC guidance states that an individual who is diagnosed with COVID-19 who experiences congestion, sore throat,

fever, and/or headaches that resolve within several weeks *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 true even if the applicant or employee is still subject to CDC guidelines for isolation during their period of infectiousness.

Does this applicant or employee have a "record of" a disability?

A person who has or has had COVID-19 can be an individual with a "record of" a disability if the person has "a history of, or has been misclassified as having," an impairment that substantially limits one or more major life activities, based on an individualized assessment.

This means that if an applicant or employee had COVID-19 in the past and there is a "record of" it being substantially limiting to one or more of their major life activities as discussed above, the ADA considers this a disability.

Is this applicant or employee "regarded as" an individual with a disability?

Was this person subjected to an adverse employment action, such as being fired, not hired, or harassed *because* they actually have (or had) COVID-19 or because there was a mistaken belief that the person has (or had) COVID-19?

If yes, then the individual is regarded as having a disability unless their actual or perceived contraction of COVID-19 is minor and lasts (or is expected to last) six months or less.

For example, an employer has "regarded" an employee as having a disability if the employer fires an individual *because* the employee had symptoms of COVID-19, which, although minor, lasted or were expected to last more than six months.

An example of symptoms lasting more than six months might be when an individual is diagnosed with "Long COVID," which is a term used by the CDC to describe various post-COVID conditions, where individuals experience new, returning, or ongoing health problems four or more weeks after being infected with the virus that causes COVID-19.

Does this applicant or employee have other conditions "caused or worsened" by COVID-19?

In some cases, regardless of whether an individual's initial case of COVID-19 would be considered an "actual disability" under the ADA, an individual's COVID-19 may end up causing impairments that are themselves disabilities or worsen an employee's pre-existing condition so much that it would now be considered a disability.

An example of this might be an employee who had COVID-19 and then developed heart inflammation that substantially limits a major bodily function, such as their circulatory function.

If you answered "Yes" to any of the above questions, what should you do next?

Now that you have determined that the individuial's COVID-19 likely falls within one of the ADA's definitions of "disability," you must treat the individual the same as any other person who has a disability in the workplace.

Employers must engage in the interactive process and provide a reasonable accommodation under the ADA, absent undue hardship, if the applicant or employee: (1) Meets the definition of disability; (2) requires an accommodation to perform the essential function of their job; and (3) is otherwise qualified for the job.

When the disability or need for accommodation is not obvious or already known, an employer may ask the employee to provide reasonable documentation about the disability and/or need for reasonable accommodation from their health care provider. The employer may also ask about alternative accommodations that would be effective.

Final Reminders:

The EEOC reminds us that having a disability alone does not mean an individual was subjected to an unlawful employment action under the ADA. For example, just like with any other disability, the fact that an applicant or employee has a current disability due to COVID-19 does not mean that an employer has violated the ADA by not providing an individual with a reasonable accommodation. Individuals are not entitled to an accommodation unless their disability requires it, and an employer is not obligated to provide an accommodation that would pose an undue hardship.

The undue hardship standard under the ADA is difficult to meet. If you are considering denying an accommodation because you believe it would pose an undue hardship, we recommend you consult with an experienced employment law attorney before denying the accommodation.

Additionally, the ADA's "direct threat" defense may allow 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. However, the EEOC stresses that employers should not rely on myths, fears, or stereotypes about a condition to prohibit the employee from returning to work once they are no longer infectious and no longer pose a "direct threat."