

THOUGHT LEADERSHIP

LEGAL UPDATES

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Services

HR Consultation &
Training
Labor & Employment

Professionals

BARBARA A. GRANDJEAN
DENVER:
303.892.4458
BARBARA.GRANDJEAN@
HUSCHBLACKWELL.COM

JULIANNE P. STORY
KANSAS CITY:
816.983.8230
JULIANNE.STORY@
HUSCHBLACKWELL.COM

COURTNEY STEELMAN
KANSAS CITY:
816.983.8000
COURTNEY.STEELMAN@
HUSCHBLACKWELL.COM

MICHAELI HENNESSY
KANSAS CITY:
816.983.8212
MICHAELI.HENNESSY@
HUSCHBLACKWELL.COM

Long COVID as a Disability under Federal Anti-Discrimination Laws

On July 26, 2021, the White House issued a press release marking the 31st anniversary of the Americans with Disabilities Act and announcing the publication of new guidance and resources dedicated to assisting disabled individuals, including individuals with long COVID, which entails new or recurring symptoms experienced by some individuals infected with COVID-19 that can last for months after the individual is first infected, even if the initial infection was mild. Due to the “persistent and significant” health issues presented by long COVID, the Office for Civil Rights of the Department of Health and Human Services (HHS) and the Civil Rights Division of the Department of Justice (DOJ) published guidance to explain the application of federal disability laws to individuals suffering from long COVID. The federal government also published a compilation of resources, some of which apply to employers, regarding accommodations for workers suffering from long COVID.

The DOJ and HHS guidance on long COVID does not specifically address examples of reasonable accommodations or nondiscrimination in employment under the Americans with Disabilities Act (ADA) or the Rehabilitation Act of 1973 (Rehabilitation Act), but refers employers to EEOC guidance. However, the federal government’s recognition of long COVID as a disability under other titles of the ADA and sections of the Rehabilitation Act generally means that employers will be required to evaluate employees’ requests for accommodation arising from long COVID in the same manner as other requests for accommodation arising from a disability.

What is long COVID?

One of the many consequences of the COVID-19 pandemic is the deleterious and ongoing physical or mental impairments that may rise to the level of being disabilities for some individuals who were infected with COVID-19. According

to the CDC, individuals suffering from long COVID (also known as long-haul COVID or Post-Acute COVID-19 Syndrome) display a variety of ongoing symptoms that may worsen with mental or physical activity, including but not limited to fatigue, difficulty concentrating or thinking, shortness of breath, headache, heart palpitations, chest pain, cough, joint or muscle pain, depression or anxiety, fever, or loss of taste or smell. Those with long COVID, referred to as long-haulers, can also suffer autoimmune conditions, damage to multiple organs such as the heart, lungs, kidneys, skin and brain, or post-intensive care syndrome which refers to adverse health effects that begin in the intensive care unit during a COVID infection and persist after returning home. Long COVID symptoms or conditions are broadly defined, can present with varying degrees of severity, and can be chronic or temporary.

Depending on the circumstances of the individual case, long COVID can constitute a disability under the federal and state anti-discrimination laws that protect individuals with disabilities from unlawful discrimination and entitle them to reasonable accommodations in the workplace.

Assessing long COVID as a disability

Title I of the ADA and Section 503 of the Rehabilitation Act (applicable to federal contractors) protect individuals with disabilities from discrimination in the workplace. Long COVID can be considered a disability if an individual experiences lingering or new symptoms or conditions from long COVID that substantially limit a major life activity.

Employers are likely familiar with the process of assessing a disability and determining whether a worker is entitled to an accommodation under federal and state laws. As a brief overview, federal disability anti-discrimination laws require employers and workers to engage in the following process with regard to medical inquiries, the interactive process, and accommodations:

The employee must make a written or oral request that the employer make a reasonable change with regard to the employee's work to accommodate a medical condition that substantially limits the ability of the worker to perform their job;

The request initiates the interactive process between the employer and worker. The employer is entitled to request limited medical documentation to verify the existence of a physical or mental impairment that constitutes a disability, and to ask questions to clarify the reason for the accommodation and to explore alternative accommodations.

Employers have a duty to provide a reasonable accommodation to employees with a disability but also can choose to provide reasonable alternative accommodations to the employee instead of the specific accommodation requested by the employee. Broad categories of accommodations can include

providing or modifying equipment; adjusting work schedules, applying leave policies or laws, and reassigning a worker to a vacant position. Employers are not required to excuse the worker from performing the essential functions of their job; lower productivity levels; provide personal items; or provide an accommodation that creates an undue hardship for the employer.

It's important to remember that the federal disability anti-discrimination laws require employers to provide an accommodation only for the worker's own disability. They do not require the employer to provide an accommodation to an employee to assist a family member who may be disabled, although such obligations may arise under other federal or state leave laws. Additionally, the types of accommodation requests associated with long COVID will be related to new or lingering physical or mental limitations from a previous COVID-19 infection or to an existing medical condition that puts the worker at a higher risk for contracting COVID-19. As with all requests for accommodation under the disability anti-discrimination laws, employers must determine whether a physical or mental impairment is substantially limiting and creates a work-related issue.

What this means to you

Employers should be familiar with their responsibilities under various state and federal disability anti-discrimination laws and largely understand the interactive process and the need to provide reasonable accommodations to workers with a qualifying medical disability. Individuals with long COVID who request an accommodation for their disability must be provided with the same opportunity for accommodations as individuals suffering from other disabilities. Additionally, individuals with a disability who request the same accommodation that other workers receive who are not disabled should not be denied that same accommodation.

Contact us

If you have questions about your obligations under federal and state disability anti-discrimination laws with regard to workers suffering from long COVID or the newly issued guidance by the federal government, including the most recent CDC coronavirus guidance, contact Barb Grandjean, Julianne Story, Courtney Steelman, Michaeli Hennessy or your Husch Blackwell attorney.

Your comprehensive COVID-19 legal resource

Since the pandemic's onset, Husch Blackwell has continually monitored state-by-state orders regarding capacity, masking, vaccines, and more. We regularly address your FAQs and provide you with easy-to-use COVID-19 tools about returning to work and navigating federal programs. Contact our industry-specific legal teams or your Husch Blackwell attorney to plan through and beyond the pandemic.

Tracey Oakes O'Brien, Legal Content and Knowledge Manager, is a co-author of this content.