

KD ALERT: EEOC FINALLY CLARIFIES WHEN COVID-19 IS A PROTECTED DISABILITY

Is COVID-19 considered a disability under federal employment laws? Until yesterday, the answer to this question, which has plagued the business community since the start of the pandemic, was left up to speculation.

On December 14, 2021, and after nearly two years of silence on this specific issue, the U.S. Equal Employment Opportunity Commission ("EEOC"), which enforces federal laws prohibiting employment discrimination and retaliation, updated its COVID-19 Technical Assistance guidance, adding a new section to clarify under what circumstances COVID-19 may be considered a disability under the Americans with Disabilities Act (ADA) and the Rehabilitation Act. Unlike the EEOC's past guidance which focused on "long COVID," this new EEOC technical assistance focuses more broadly on COVID-19 as a general virus that does not resolve quickly.

An employee can show that he or she has a disability in one of three ways: (1) he or she has a physical or mental condition that substantially limits a major life activity (such as walking, hearing, learning, or limits the operation of a major bodily function); (2) he or she has a history of such a disability (past depression that is currently being successfully treated); or (3) he or she is subject to an adverse employment action (such as demotion, termination or a change in job duties or pay) due to the employer's belief that he or she has a physical or mental impairment that is more than something minor and temporary. COVID-19, without complications, now fits within this definition.

There are three main take-aways from the EEOC's new guidance. First, whether COVID-19 is a disability under the law depends on its severity. A mild case of COVID-19 that resolves quickly with no other consequences is treated like any other temporary illness and does not qualify as a disability under the ADA. According to the EEOC, COVID-19 may cause impairments that are themselves disabilities under the ADA, regardless of whether the initial case of COVID-19, itself, constituted a "disability" as that term is defined by the ADA. Put differently, more severe cases of COVID-19 or those that result in adverse health consequences likely qualify as disabilities protected by the ADA and Rehabilitation Act.

Second, the EEOC's new guidelines confirm that employees with disabilities stemming from COVID-19 are protected from employment discrimination and may be eligible for reasonable accommodations that do not cause undue hardships. The "interactive process" plays a key role here.

Third, employers must keep their personal views about COVID-19 close to the chest. Under the agency's new guidance, an employer risks violating the ADA if it relies on "myths, fears, or stereotypes" about a condition and prevents an employee's return to work once the employee is no longer infectious and, therefore, medically able to return without posing a direct threat to others.

It is anticipated that as COVID continues to evolve, so too will the EEOC's guidance, which, to date, has shown to be fluid. The EEOC has updated its guidance on employment and COVID-19 approximately 20 times throughout the pandemic. In addition, it will be interesting to see how, if at all, the EEOC's new guidance will impact already pending federal court lawsuits that are addressing this very subject. Inasmuch as state governments are still grappling with mask and vaccine mandates it remains to be seen which, if any, will fall in line with the EEOC's guidance.

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From the first days of the COVID-19 pandemic, KD has strived to keep the business and insurance communities regularly aware of the very latest legal developments in this complex field. If you have questions about these developments, please contact one of KD's experienced Labor & Employment Law attorneys nationwide.

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