

Long COVID is protected by the ADA — what you need to know

While the data on long-COVID numbers are still inconclusive, most are in agreement that these long-lasting effects of the virus are causing significant issues for employers. The most conservative estimates say that at least 10% of those infected with COVID-19 suffer from signs of long-COVID. More common estimates are closer to 30%, with some studies suggesting even higher numbers. That means that businesses must be prepared to deal with employees suffering from the effects of long-COVID, especially as the virus continues to periodically surge.

In accordance with EEOC guidance published on December 14, 2021, COVID-19, and specifically, long-COVID can qualify as a disability under the ADA. The guidance illustrates how an individual diagnosed with COVID-19 or a post-COVID condition could be considered to have a disability under the ADA and the Rehabilitation Act (which covers public sector employers and employers that receive funds from federal entities).

In July 2021, “long-COVID” or “chronic COVID” symptoms were recognized as a disability by the U.S. Departments of Justice and Health and Human Services. The newer EEOC Guidance puts that in context for the laws that it interprets. The guidance is clear that COVID-19 is not always a disability—it specifically states that “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.” Nevertheless, an applicant or employee who has contracted COVID-19 may have impairments and disabilities as a result, even if the COVID-19 infection was itself not severe enough to be a disability. Individuals whose lungs and cardiovascular systems are damaged by the virus may fall into this group.

A case by case basis

The guidance reminds readers that an individualized assessment is necessary to determine whether the effects of an individual’s COVID-19 infection substantially limit a major life activity and that this is always a case-by-case determination of the facts.

The EEOC points out that “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.” It cautions that “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.” Individuals with underlying conditions may have those conditions worsened by COVID-19, as well.

Qualifying impairments

Examples provided by the EEOC of when COVID-19 or its effects may qualify as having an impairment that

substantially limits a major life activity include:

- 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.

The Agency's guidance also reminds employers that individuals may be subject to the protections of the ADA if they have a "record of" a disability or are "regarded as" disabled, and that individuals who have or have had COVID-19 may fall into these protected groups as well.