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Accommodating Employees Disabled by “Long COVID”

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The World Health Organization (“WHO”) recently reported over 46,780,000 confirmed cases of COVID-19 and over 756,000 resulting deaths in the United States alone. WHO, [COVID-19 Dashboard](#) (Nov. 17, 2021). While some compare COVID-19 to the seasonal flu, the approximately 48,000 domestic deaths from the seasonal flu over the past two years pale in comparison to the COVID-19 mortality numbers. Centers for Disease Control and Prevention (“CDC”), [Past Seasons Estimated Influenza Disease Burden](#) (Oct. 1, 2020). By any measure, the damage from the COVID-19 pandemic continues to increase, especially considering that one in three individuals who contract COVID-19 may continue to experience symptoms and ongoing health problems for weeks to months after their initial infection. CDC, [MMWR Report](#) (Sep. 19, 2021). The CDC refers to these long-term effects of the COVID-19 illness as “long COVID,” and has described the symptoms as including difficulty thinking or concentrating (known as “brain fog”), tiredness or fatigue, difficulty breathing or shortness of breath, chest or stomach pain, headache, sleep problems, and symptoms that worsen after physical or mental activities. CDC, [Post-COVID Conditions](#) (Sep. 16, 2021). According to the CDC, long COVID can have long-term effects on the heart, lungs, kidneys, skin, and brain functions. *Id.*

The Department of Health and Human Services (“DHHS”) and the Department of Justice (“DOJ”) recognize long COVID as a “persistent and significant health issue.” DHHS & DOJ, [Guidance on “Long Covid” as a Disability Under the ADA, Section 504, and Section 1557](#) (July 26, 2021). Within the past five months, the DHHS, DOJ, and U.S. Equal Employment Opportunity Commission (“EEOC”) have confirmed that long COVID may qualify as a disability under the Americans with Disabilities Act (“ADA”). *Id.*; EEOC, [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#) (Sep. 9, 2021) (“9/9/2021 EEOC Guidance”).

In this article, we discuss employers’ obligations to reasonably accommodate employees claiming to qualify for disability status under the ADA due to long COVID, and steps employers should consider in responding to employees’ requests for accommodation.

ADA Basics

The ADA prohibits employers with 15 or more employees from discriminating against a qualified individual on the basis of disability. 42 U.S.C. § 12112(a). An individual has a covered disability if that person has (1) a physical or mental impairment that “substantially limits” one or more of the individual’s “major life

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“activities,” (2) a record of such an impairment, or (3) is regarded as having such an impairment. *Id.* at § 12102. Major life activities include working, concentrating, thinking, communicating, breathing, sleeping, walking, standing, lifting, bending, speaking, and performing manual tasks. *Id.* A major life activity may also be the operation of a major bodily function, such as functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. *Id.*

Employers must make “reasonable accommodations” for an otherwise qualified employee with a disability, unless the employer can demonstrate that the accommodation would impose an “undue hardship” on the operation of their business. *Id.* at § 12112(b)(5)(A). An “undue hardship” is a significant difficulty or expense for the employer, which is assessed considering the feasibility and cost of the accommodation, the resources available to the employer, and the nature of the employer’s business. 42 U.S.C. § 12111(10); 29 C.F.R. § 1630.2(p). If a particular accommodation would result in undue hardship, an employer is not required to provide it but must consider other potential accommodations that would not cause undue hardship. EEOC, [*Revised Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act*](#) (Oct. 17, 2002) (“10/17/2002 EEOC Guidance”).

Is Long COVID a Disability?

On July 26, 2021, DHHS and DOJ published joint guidance (“Departments’ Guidance”) establishing that long COVID can be a disability under Titles II and III of the ADA.¹ The Departments’ Guidance notes that some people with long COVID (known as “long haulers”) experience neurological damage, lung damage, heart damage, kidney damage, circulatory system damage, and/or mental health conditions. According to the Departments’ Guidance, long COVID *may* be a disability if the condition substantially limits one or more major life activities. For example, a long hauler may experience memory lapses and “brain fog,” which may substantially limit their major life activities of concentrating and thinking.

The Departments’ Guidance confirms that long COVID is not automatically given disability status, as an individualized assessment is necessary in each case. This is consistent with the ADA’s requirement that the existence of disabilities must be determined on a case-by-case basis. See *Albertson’s Inc. v. Kirkingburg*, 527 U.S. 555, 566 (1999). Moreover, at least one federal court has ruled that contracting the COVID-19 virus alone does not establish the existence of a disability under the ADA. See *Champion v. Mannington Mills, Inc.*, 2021 WL 2212067, at *4 (M.D. Ga. May 10, 2021). Long COVID is manifested through a range of symptoms varying in severity, so although it may be apparent that, for example, an individual with limited breathing capacity will qualify as disabled, other individuals affected by long COVID in less severe ways may not satisfy the ADA “disability” definition. CDC, [*Post-COVID Conditions*](#) (Sep. 16, 2021).

Although the Departments’ Guidance specified that “employment is outside of the scope of this guidance document,” the EEOC announced that it agrees with the Departments’ analysis of long COVID. 9/9/2021 EEOC Guidance. The EEOC recognizes that long COVID “may be a disability” under the ADA “in certain circumstances.” In a September 9, 2021 Notice, the EEOC stated that it would release guidance about COVID-19 and ADA “disability” in the employment context “in the coming weeks.” 9/9/2021 EEOC Guidance.

Practical Implications

The Departments’ Guidance and the EEOC’s agreement with that Guidance signals that employers should consider making reasonable accommodations for employees with long COVID. The EEOC has required that employers engage in an informal dialogue with employees who request accommodations for their disabilities called the “interactive process.” The purpose of this dialogue is for the employer to collaborate with the employee in determining whether a reasonable accommodation is possible, such that the accommodation will enable the employee to perform the essential functions of the job. See 10/17/2002 EEOC Guidance; *Holly v. Clairson Indus., L.L.C.*, 492 F.3d 1247, 1256 (11th Cir. 2007).

Potential reasonable accommodations for employees with long COVID may include job restructuring, transferring an employee to a vacant position, making changes to an employee's workstation or permitting the employee to work from home, and/or modifying the employee's work schedule (e.g., reduction in hours and/or time off). See 10/17/2002 EEOC Guidance. For instance, for long haulers who have difficulty concentrating, a possible accommodation may be relocating that employee's workstation from a busy part of the office to a quieter location. See EEOC, [Persons with Intellectual Disabilities in the Workplace and the ADA](#) (May 15, 2013). An employer similarly may consider accommodating the "brain fog" experienced by some long haulers by providing uninterrupted work time, memory aids such as flowcharts and check lists, and allowing the use of noise cancellation technology in the office. Job Accommodation Network, [Accommodating Employees with COVID-19-Related Symptoms](#) (Jan. 3, 2021).

Employers may consider accommodating long haulers whose symptoms worsen after physical or mental activities by modifying their work schedule or permitting employees to take rest breaks. The EEOC explains that a modified schedule could include "adjusting arrival or departure times, providing periodic breaks, altering when certain functions are performed, allowing an employee to use accrued paid leave, or providing additional unpaid leave." 10/17/2002 EEOC Guidance. For example, in a case in which an on-campus police officer's high blood pressure symptoms were triggered by his twelve-hour shifts, the U.S. Court of Appeals for the Eleventh Circuit held that a reasonable jury could determine that modifying the employee's schedule to instead consist of eight-hour shifts was a reasonable accommodation. *Snead v. Fla. Agric. & Mech. Univ. Bd. of Trs.*, 724 Fed. Appx. 842, 846-847 (11th Cir. 2018).

The reasonable accommodation requirement under the ADA never requires an employer to reallocate essential functions of an employee's job. 10/17/2002 EEOC Guidance. Similarly, an employer is not required to bump another employee out of their position in order to accommodate a disabled employee.² See *U.S. Airways, Inc. v. Barnett*, 535

U.S. 391, 405 (2002); *Jackan v. New York State Dept. of Labor*, 205 F.3d 562, 566 (2d Cir.), cert. denied, 531 U.S. 931 (2000). In contrast, an employer may be obligated to allow a disabled employee to work a modified schedule as a reasonable accommodation provided that such an accommodation would not pose an undue hardship to the employer. 10/17/2002 EEOC Guidance.

Accommodation of individuals suffering from "brain fog" due to long COVID may pose a particular challenge for employers. In a case in which a Chief Phycologist with supervisory and clinical responsibilities suffered from a memory impairment, the U.S. Court of Appeals for the Seventh Circuit considered two categories of potential accommodations: (1) relying upon common strategies to compensate for memory difficulty such as note-taking, and (2) job restructuring in the form of eliminating administrative and supervisory responsibilities and structuring a lighter caseload. *Id* at 288. The Court did not find either of these accommodations to be viable solutions in part because it was only speculative that such tactics would actually allow the Chief Phycologist to perform the essential functions of his job. *Id* at 289. Moreover, the Court did not approve of the second category of accommodations because it would require the employer to eliminate essential supervisory functions of the Chief Phycologist's job. *Id*.

Ultimately, employers should educate themselves about long COVID so that they can recognize requests for disability accommodations. An employee's request for a disability accommodation may not – and is not legally required to – be in writing or contain the terms "reasonable accommodation," "Americans with Disabilities Act," or "disability." EEOC, [Disability Accommodation Tips](#) (last accessed November 17, 2021). Nevertheless, employers have an obligation to engage in the interactive process once they receive a request from an employee or have reason to know that an employee is experiencing job-related problems due to a disability. 10/17/2002 EEOC Guidance.

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¹ Note, however, that the definition of “disability” in different federal or state statutes may differ from the ADA. For example, the definition of disability under the Social Security Act, 42 U.S.C. §§ 301-1305, is “the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.” 20 C.F.R. § 404.1505(a).

² However, a disabled employee may be able to show that special circumstances warrant assigning the disabled employee to a particular position that another employee is entitled to under the employer’s seniority system. See *U.S. Airways*, 535 U.S. 391 at 405-06.

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