New Guidance for Employers on 'Long COVID' as a Disability

Article By
Shaniqua L. Singleton
Nelson Mullins
Idea Exchange - Alerts

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The U.S. Department of Health and Human Services and U.S. Department of Justice issued new guidance on July 26 clarifying that “long COVID,” and its potentially debilitating effects, can be a disability under Titles II (applying to state and local government) and III (applying to public accommodations) of the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act of 1973, and Section 1557 of the Patient Protection and Affordable Care Act. This guidance came on the heels of the 31st anniversary of the ADA and “[i]n light of the rise of long COVID as a persistent and significant health issue.”[1]

While this new guidance does not identify every instance in which COVID-19 or “long COVID” constitutes a disability, it does clarify that “long COVID can be a disability under the ADA, Section 504, and Section 1557 if it substantially limits one or more major life activities.”[2] According to the Centers for Disease Control and
Prevention (CDC), individuals experiencing long COVID — so called “long haulers” — may experience (non-exhaustively) tiredness or fatigue, difficulty thinking or concentrating, shortness of breath or difficulty breathing, headache, dizziness while standing, heart palpitations, chest pain, cough, joint or muscle pain, depression or anxiety, fever, or loss of taste or smell.[3] Others may develop organ damage or autoimmune conditions.[4] Because of the potential for long term symptoms lasting weeks or months after contracting COVID-19, long COVID may now constitute a physical or mental impairment under the ADA, Section 504, and Section 1557.

Critically, the DHS and DOJ’s new guidance carves out Title I of the ADA, which applies to private employers. And this guidance does not state that long COVID is always a disability. Instead, “[a]n individualized assessment is necessary to determine whether a person’s long COVID condition or any of its symptoms substantially limits a major life activity.”[5]

Though this new guidance does not apply to private employers, the U.S. Department of Labor has updated its website with resources on requesting and providing workplace accommodations for individuals with long COVID.[6] The following steps are recommended for employers assessing whether reasonable accommodations are necessary for employees experiencing the effects of long COVID:

- Review the company’s disability accommodation policies or other documents addressing the company’s compliance with the ADA and other federal and state laws.
- Engage employees in the company’s interactive process to determine the scope of the employee’s long COVID symptoms and whether they affect his or her ability to perform one or more major life activities (e.g. seeing, hearing, eating, walking, standing, sitting, reaching, etc.).
- Consider what adjustments, if any, may be made to an employee’s work environment to address the effects of long COVID and allow the employee to continue performing the essential functions of his or her role.

[2] Id.
[4] Id.