Return to Office and Adjusting to Post Pandemic Employment

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Two full years after a national emergency was declared and we all first started thinking about concepts like social distancing and looking for gallons of hand sanitizer, change continues to be one constant for employers. The consensus (at least for now) is the United States is no longer in the "pandemic phase" of COVID-19, but rather is transitioning into the "endemic phase" – a phase where COVID-19 transmission rates fall to a constant but manageable baseline, perhaps confined to certain regions, compared to actively spreading throughout the population at exponential rates. As a result, many companies already have or are calling their employees back to work hoping to establish a new normal – a post pandemic equilibrium, which some refer to as "living with COVID."

For employers, "living with COVID" is far from normal – human resources personnel, corporate in-house counsel, and managers will continue to grapple with accommodation requests under Title VII for religious reasons and the ADA due to a disability. In this article, we will address how we are seeing some of the more common changes playing out. First, we revisit the concept of whether COVID is a disability under the law so employers can consider obligations that come along with such designation. Next, we provide information about the EEOC's new guidance on caregiver discrimination and discuss requests for time off to take care of others related to COVID and long COVID symptoms. Last, we review how vaccine mandates and accommodations can be handled, including requests to continue to work remotely when an employer wants its workforce to return and provide some tips on how to handle these requests.

Is COVID-19 a Disability? What About Long COVID?

In December 2021, the EEOC updated its COVID-19 technical assistance clarifying under what circumstances COVID-19 may qualify as a disability under each of the three standards of the Americans with Disabilities Act – *i.e.*, "actual disability," "record of disability," or "regarded as an individual with a disability." This guidance noted COVID-19 can be considered an actual disability under the ADA if it substantially limits one or more major life activities. However, the EEOC's guidance stresses an individualized assessment is necessary, taking into account an employee's specific symptoms and the effect of those symptoms on the employee's major life activity.

As an example, the EEOC's guidance explains that employees infected with COVID-19 who are asymptomatic or present with mild symptoms, like the flu or common cold, will not be considered disabled within the meaning of the ADA. However, those employees experiencing severe symptoms or "long-haul COVID" may be considered disabled. The Center for Disease Control and Prevention (CDC) uses the terms "long COVID," "post-COVID," "long-haul COVID," and "chronic COVID" to describe various post-COVID conditions where an individual experiences new, returning, or ongoing symptoms of COVID-19 for four or more weeks after they are first infected with COVID-19, which can worsen with physical or brain activity. To name a few, some common symptoms of long COVID include: tiredness or fatigue, difficulty thinking or concentrating (a/k/a "brain fog"), shortness of breath or difficulty breathing, headache, dizziness on standing, fast beating or pounding heart, chest pain, cough, joint or muscle pain, depression or anxiety, loss of taste or smell. And, experts believe long COVID may affect persons who had mild or no symptoms of original infection. The EEOC notes "[t]he limitations from COVID-19 do not necessarily have to last any particular length of time to be substantially limiting." The symptoms

do not have to be long term – even if the symptoms come and go, the EEOC will consider COVID-19 as an actual disability if the symptoms substantially limit a major life activity when active.

Regardless of whether an employee's initial case of COVID-19 itself constituted a disability, an employee's COVID-19 diagnosis may end up causing impairments that are themselves disabilities under the ADA. Also, an employee's COVID-19 illness may worsen an employee's pre-existing conditions – not previously disclosed by the employee because they were not substantially limiting. Examples include an individual who had COVID-19 who develops heart inflammation or an individual with COVID-19 suffers an acute ischemic stroke.

While individuals who meet only the regarded as definition are not entitled to receive reasonable accommodation, employers could still violate the law for taking an adverse action against someone because the employer does not want to deal with the effects of long COVID-19, regardless of whether the symptoms actually exist. According to the EEOC's guidance, an employee may be protected under the regarded as status if the employee is subject to an adverse action (*e.g.*, being fired, not hired, or harassed) because they have COVID-19 or the employer mistakenly believes they do.

While the EEOC confirmed an employee will not be regarded as disabled if the employer believes the impairment is objectively transitory or minor – meaning COVID-19 infection would last six months or less – a recent federal judge denied a motion to dismiss a claim brought by an employee who was terminated during a quarantine period after being exposed to COVID-19. The employer moved to dismiss the employee's claims asserting COVID-19 was transitory and minor impairment so it could not have perceived the employee as disabled. The court denied the employer's motion to dismiss, stating the employer ignored the "minor" component of the standard because the employee alleged she told her supervisor she was suffering from a severe and

symptom-laden case of COVID-19 and found the allegations were sufficient to demonstrate her impairments were not minor. The federal guidance cited to by the court means employers may see many more decisions along these lines, permitting workers to advance ADA claims for COVID-19 related conditions.

Accommodation Requests And Caregiver Discrimination

Another issue for employers to watch closely is related to potential accommodations required to be provided to employees because of COVID-19 based on family obligations. On March 14, 2022, the EEOC issued new guidance entitled *The COVID-19 Pandemic and Caregiver Discrimination Under Federal Employment Discrimination Laws* ("Caregiver Guidance"). In its Caregiver Guidance, the EEOC expressly recognized "[t]he COVID-19 pandemic has significantly impacted employees' work and personal obligations" and "required millions of Americans with caregiving responsibilities for children, spouses, partners, older relatives, individuals with disabilities, or other individuals to quickly adjust to vastly changed circumstances."

As employees return to offices, employers are likely to continue receiving requests for modified work arrangements based not on the employee's disability, but that of a family or household member. The ADA prohibits associational discrimination, but employers' accommodation obligations are usually limited to situations where an employee's own health condition creates an impairment. Additionally, federal Family and Medical Leave Act obligations must be considered, including whether COVID-19 or long COVID-19 is a serious health condition, which requires a different analysis from whether the same condition is a disability. The FMLA may require an employer allow an eligible employee to take leave to care for a family member with a serious health condition.

Further, as noted in the EEOC Caregiver Guidance, caregiver discrimination violates federal law if it is based on the employee's sex, race, color, religion, national origin, age, disability, or genetic information or the employee's ***association with*** an individual with a disability or on the race, ethnicity or other protected characteristic of the individual for whom the employee is providing care.

Vaccine Mandates and Requests for Continued Remote Work

Last, with return to work comes implementation of vaccine requirements that some employers have been putting off while employees are working from home. As the EEOC previously stated, "federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be fully vaccinated against COVID-19, subject to reasonable accommodation provisions of Title VII and the ADA." Florida's vaccine law further complicates the scene as it facially requires employers with a mandate (not a vaccinate or test policy) to allow individuals to opt out simply by filing out appropriately providing information requested in a pre-approved form. Thus, despite finally feeling ready to require return to the office and making a determination, for whatever reason, that in-person work is preferable, employers are facing more accommodation requests either under Title VII or the ADA or under Florida's vaccine law, which require employers to consider allowing employees to continue remote work or some other accommodation.

Now that many employers have learned they can function with a largely if not entirely remote workforce, despite not preferring to allow remote work as the primary way to perform work, requests to allow remote work are on the rise. Pandemic induced investments by companies have improved remote work capabilities and continued innovations will enhance remote interactivity. Further, in some areas of the country, fears of mingling and proximity to others will

linger. In addition, mental health issues are becoming either more common or easier to talk about (or both). Such issues, which may very well constitute disabilities, are being revealed, requiring employers to justify in many cases why remote work may not be a reasonable accommodation.

Remember, the law generally allows employers to reject a requested accommodation if there is no underlying disability. For example, an employer need not honor the request to work remotely of an employee who wants to work from home simply because it is more convenient or simply in order to save on child care. Further, even if an accommodation is needed, an employer need not provide the requested accommodation if another reasonable accommodation is available and the employer prefers the alternate. Still, the trend right now is for courts to discount a wholesale rejection of a remote work request particularly when the employee was able to work remotely in the same position during the pandemic. Thus, employers should be careful in considering these requests and ensure they are documenting discipline and work product issues for all employees so that any issues that become glaring for a remote work employee can be appropriately addressed.

As the endemic continues, the employment law world will surely continue to evolve. As your business navigates the road ahead of it, be sure to consult experienced employment counsel.

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