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An Update on COVID-19 Employment Issues

Presented By
Giana Ortiz

Author Contact Information:

Giana Ortiz

The Ortiz Law Firm

Arlington, Texas 76013

gortiz@ortizlawtx.com

817-861-7984

This conference is being held nearly two years from the initial COVID-19-related closures in March 2020. Since that time, many public-school employees (“Employees”) have faced some of the most challenging times in their careers. Employees of all positions have adapted to the new normal (*i.e.*, a state of constant change). As protocols related to COVID-19 (“Covid”) from school officials, government officials, and even medical officials are updated regularly and constantly changing, so are the wave of issues related to returning to work. This paper addresses Covid-related developments in the Americans with Disabilities Act (“ADA”), Family Medical Leave Act (“FMLA”), and Texas Workers’ Compensation claims.¹

1. ADA

The U.S. Equal Employment Opportunity Commission (“EEOC”) and U.S. Department of Health and Human Services (“HHS”) updated guidance on Covid and its application to the ADA and other employment laws. This paper addresses recent additions to the ongoing guidance.

A. Covid as a Disability. The EEOC recently confirmed that whether a condition caused by Covid is a “disability” must be analyzed in the same way a disability would be analyzed for any other medical condition.² To that end, a person can be an individual with a “disability” for purposes of the ADA in one of three ways:

- “Actual” Disability: The person has a physical or mental impairment that substantially limits a major life activity (such as walking, talking, seeing, hearing, or learning, or operation of a major bodily function).³
- “Record of” a Disability: The person has a history or “record of” an actual disability (such as cancer that is in remission); or
- “Regarded as” an Individual with a Disability: The person is subject to an adverse action because of an individual’s impairment or an impairment the employer believes the individual has, whether or not the impairment limits or is perceived to limit a major life activity, unless the impairment is

¹ The ADA and Workers’ Compensation topics have been originally presented at the 2021 UT CLE School Law Conference by Rebecca Bradley and Dan Price (discussing Workers’ Comp) and Tiger Hanner, Kristi Godden, and Cynthia Rincon (discussing ADA). The papers accompanying those presentations are an excellent companion resource to the instant paper. This paper aims to address developments in the ever-changing landscape of Covid-related ADA and Workers’ Compensation employment issues in the intervening year.

² See EEOC: What You Should Know: <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#D> (updated Dec. 14, 2021; last visited Jan. 8, 2022). This text is updated regularly by the EEOC to reflect ongoing guidance related to Covid.

³ *Id.* at Questions N.1-N.2.

objectively both transitory (lasting or expected to last six months or less) and minor.

i. Covid as “Actual Disability.” The EEOC guidance makes clear physical limitations caused by Covid “do not necessarily have to last any particular length of time to be substantially limiting,” nor do the symptoms need to be long term. Further, the symptoms needn’t be sustained, but may come and go and still limit major life activity and constitute an actual disability. However, symptoms must actually limit the major life activity – asymptomatic and/or mild cases would not qualify.⁴

ii. Covid as “Record Disability.” A person who has or had Covid can be an individual with a “record of” a disability if they had a history of (or were misclassified as having) Covid as an actual disability.

iii. Covid as “Regarded as Disability.” For this definition, the fact that a person actually had an impairment that substantially limits a major life activity is irrelevant. What matters is only that the person is subjected to adverse employment action because the person either had or was mistakenly believed to have a Covid impairment. This does not prevent an employer from excluding the employee from work during the CDC-recommended isolation period if such exclusion is to protect the health of others.

B. Long Covid as a Disability. The HHS released guidance on “long Covid” as a disability. Long Covid occurs when any person infected with Covid does not recover from the illness within weeks, but rather continues to experience symptoms for months after initially contracting the disease.⁵ Symptoms of long Covid include constant fatigue, impaired thought and concentration, difficulty breathing, constant pain, and depression.⁶ Long Covid, according to the HHS, can be a disability if it substantially limits one or more life activities.

Major life activities often limited by long Covid include, for example, lung damage which causes ongoing or intermittent impairment in respiratory function (e.g., shortness of breath, fatigue).⁷ Ongoing gastrointestinal limitation and/or lapses in memory and concentration may also constitute limitations in major life activity. Even if the long Covid effect or impairment is intermittent, it is considered a disability if it would limit a major

⁴ *Id.*

⁵ See Appendix 1: <https://www.hhs.gov/civil-rights/for-providers/civil-rights-covid19/guidance-long-covid-disability/index.html> (updated July 26, 2021; last visited Jan. 8, 2022); see also Ask Jan, Covid-19 Longhaulers and the ADA (March 11, 2021), available at <https://askjan.org/blogs/jan/2021/03/covid-19-long-haulers-and-the-americans-with-disabilities-act.cfm> (last visited January 8, 2022).

⁶ *Id.*

⁷ *Id.*

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