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**Workplace Accommodations and Other  
Lessons From the Pandemic**

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## Introduction

Individuals have filed various kinds of pandemic-related lawsuits alleging discrimination and other claims. The author provided written testimony to the EEOC summarizing the types of COVID-19 cases seen through the spring of 2021, at the Commission’s meeting on the Workplace Civil Rights Implications of the COVID-19 Pandemic.<sup>1</sup>

This paper does not repeat that information, but instead updates it in part, and collects the developing case law on certain ADA issues that have arisen during the pandemic.

### Pandemic Case Law and EEOC Guidance

#### 1. COVID-19 can be a disability.

Most cases seeking pandemic-related accommodations are based on conditions—separate from COVID-19—that create a recognized and heightened risk. In those cases, there is no need to prove that COVID-19 is a disability. On the other hand, the plaintiff may need to prove the heightened risk, particularly if the CDC has not identified the condition as a risk factor. *Compare Frederick v. Allor Mfg., Inc.*, No. 220CV12790TGBRSW, 2022 WL 598746, at \*5 (E.D. Mich. Feb. 28, 2022) (“[A]lthough susceptibility to severe illness as a result of COVID-19 may constitute a disability in some factual scenarios, Frederick has not provided any evidence to support a claim that his history makes him particularly susceptible to COVID-19.”).

Other cases present the question directly whether COVID-19 is a disability. The EEOC states that COVID-19 is a physiological condition affecting one or more body systems, and as a result, it is a “mental or physical impairment” under the ADA. It also states that a person infected with the virus causing COVID-19 who is asymptomatic, or who has only mild symptoms (like the common cold or flu) that resolve in a matter of weeks with no other consequences, will not have an actual disability. But depending on specific facts, an individual with COVID-19 might have an actual disability, and the EEOC gives several examples. For more details, see Questions N.2 through N.8 in *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, last update on March 14, 2022.<sup>2</sup>

In addition, a condition that is caused or worsened by COVID-19, but is separate from the virus, may be a disability under the ADA. *See What You Should Know, supra*, at N.9.

In several recent cases, the court denied motions to dismiss because the plaintiffs alleged sufficient facts to show that their COVID-19 was a perceived disability. *Alvarado v. The Valcap Group, LLC*, No. 3:21-CV-1830-D, 2022 WL 953331, at \*4–5 (N.D. Tex. Mar. 30, 2022) (collecting authorities on both sides); *Guerrero v. Summit Aerospace, Inc.*, No. 21-CV-24006, 2022 WL 579499 (S.D. Fla. Feb. 25, 2022); *Booth v. GTE Federal Credit Union*, No. 8:21-CV-1509-KKM-JSS, 2021 WL 5416690, at \*3–6 (M.D. Fla. Nov. 20, 2021). Note too, that while Texas

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<sup>1</sup> This testimony is available online at <https://www.eeoc.gov/meetings/meeting-april-28-2021-workplace-civil-rights-implications-covid-19-pandemic/east>.

<sup>2</sup> The EEOC guidance is available online at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

law generally tracks the ADA, some state laws may have a broader definition of disability. *See, e.g., Arazi v. Cohen Brothers Realty Corp.*, No. 1:20-CV-8837-GHW, 2022 WL 912940, at \*9–10 (S.D.N.Y. Mar. 28, 2022) (decided under New York city and state statutes).

In another case, *Brown v. Roanoke Rehab. & Healthcare Ctr.*, No. 3:21-CV-00590-RAH, 2022 WL 532936 (M.D. Ala. Feb. 22, 2022), the court denied a motion to dismiss, finding sufficient allegations that the plaintiff’s COVID-19 was both an actual and a regarded-as disability. *See also Brown v. The Reny Company*, No. 4:21-CV-395-KPJ, 2022 WL 992696, at \*4 (E.D. Tex. Mar. 31, 2022).

But there is contrary authority. In *Thompson v. City of Tualatin*, No. 3:21-CV-01587-MO, 2022 WL 742682 (D. Or. Mar. 11, 2022), a case challenging a masking requirement, the court observed that “[t]he vast majority of cases of COVID-19 last fewer than 20 days. Thus, being perceived as having COVID-19 is not a cognizable disability under the ADA.” *Id.* at \*2 (citation omitted).

In *Payne v. Woods Services, Inc.*, No. CV 20-4651, 2021 WL 603725 (E.D. Pa. Feb. 16, 2021), and in *Williams v. The City of New York*, No. 20-CV-8622 (JPO), 2022 WL 976966, at \*5 (S.D.N.Y. Mar. 31, 2022), the court found that the plaintiffs had not alleged sufficient facts to show that their COVID-19 was a disability. And in *Johnson v. Gerresheimer Glass Inc.*, No. 21-CV-4079, 2022 WL 117768, at \*6 (N.D. Ill. Jan. 12, 2022), the court dismissed a disparate-treatment claim because although the plaintiff alleged that the employer knew she had tested positive for COVID-19, she failed to allege that the employer knew of the debilitating symptoms she had experienced.

In *Baum v. Dunmire Property Management, Inc.*, No. 21-CV-00964-CMA-NYW, 2022 WL 889097 (D. Colo. Mar. 25, 2022), the plaintiff alleged that she was fired because her father had COVID-19. The court purported to give deference to the EEOC guidance on COVID-19 as a disability, but apparently (and mistakenly) thought that only Long COVID could be a disability, and since the plaintiff’s father died in the hospital after only 15 days, his COVID-19 could not have been a disability. *Id.* at \*5. This makes no sense, is contrary to the ADAAA and its authorities, and is contrary to the EEOC guide on COVID-19 that the court claimed to find helpful. *What You Shuld Know, supra*, at N.2 (“The limitations from COVID-19 do not necessarily have to last any particular length of time to be substantially limiting.”).

In *Alvarado v. ValCap Grp., LLC*, No. 3:21-CV-1830-D, 2022 WL 19686 (N.D. Tex. Jan. 3, 2022), the court found that simply being exposed to someone with COVID-19, and quarantining for seven days on advice of a doctor, was insufficient to show that the employer regarded the plaintiff as actually *having* COVID-19.<sup>3</sup> *See also Parker v. Cenlar FSB*, No. CV 20-02175, 2021 WL 22828 (E.D. Pa. Jan. 4, 2021) (similar).

Also, the fact that an employer may have perceived someone as being at higher risk of serious illness because of his *age* did not reflect a perceived *disability*. *Hice v. Mazzella Lifting Techs., Inc.*, No. 2:21CV281, 2022 WL 636640, at \*7–8 (E.D. Va. Mar. 4, 2022).

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<sup>3</sup> On the other hand, the court in *Alvarado* allowed the plaintiff to proceed on certain EPSLA leave claims.

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