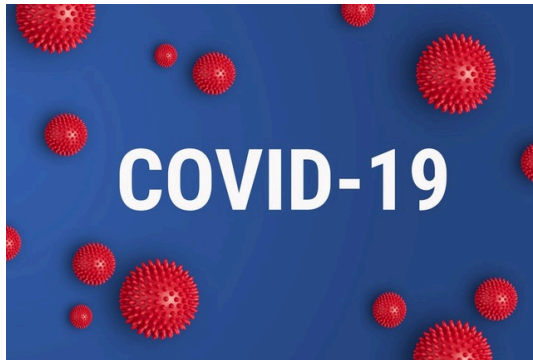


Lingering COVID-19 Symptoms May Trigger ADA and FMLA Protection

Labor & Employment Law Update

on August 10, 2021



President Biden announced recently that those suffering “Post-Acute Sequelae of Sars-Cov-2 Infection,” aka long haul COVID-19, may qualify for protection under the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA).

Our understanding of the aftereffects of COVID-19

continue to evolve. The CDC currently lists the most common post-COVID symptoms on their website. These symptoms include:

- Dyspnea or increased respiratory effort
- Fatigue
- Post-exertional malaise and/or poor endurance “Brain fog,” or cognitive impairment
- Cough
- Chest pain
- Headache
- Palpitations and/or tachycardia
- Arthralgia
- Myalgia
- Paresthesia
- Abdominal pain
- Diarrhea
- Insomnia and other sleep difficulties

- Fever
- Lightheadedness
- Impaired daily function and mobility
- Pain
- Rash (e.g., urticaria)
- Mood changes
- Anosmia or dysgeusia
- Menstrual cycle irregularities

Employers should treat requests for leave or accommodation relating to long haul COVID-19 as they would any other non-obvious impairment.

Employees seeking FMLA leave – whether intermittent or as a block of time:

Is the employer covered by the FMLA? If so, is the employee eligible (i.e. employer has 50 employees within 75 miles of employee's work site; employee has been employed at least 12 months and worked at least 1250 in the past 12 months)? Provide Form **WH-381. *Provide the form even if the employee is not eligible for FMLA leave.***

If the employee is eligible for FMLA leave, require health care certification that the claimed incapacity qualifies the employee for FMLA protection. Provide Form **WH-380-E (for employees seeking leave for their own symptoms) or WH-380-F (for employee seeking leave to care for a family member).**

Use Form **WH-382 to designate the leave as FMLA leave or to notify the employee that the leave is not approved or that additional information is needed.**

Individuals seeking ADA Accommodation for post-COVID-19 symptoms:

Engage in an **interactive process with the individual to determine what their limitations are and what accommodations they seek. Remember, the ADA requires employers to reasonably accommodate employees and applicants for employment who have disabilities.**

Conduct an **individualized assessment to determine whether the individual has a disability as defined by the ADA. A "disability" in this context is an impairment that substantially limits major life functions. To this end, ask the individual to have their health care provider provide written confirmation of:**

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- the nature of the impairment, its severity, expected duration, and the extent to which it substantially limits the individual's major life functions;
- the individual's ability to perform the essential functions of the position, with or without reasonable accommodation; and
- what accommodations the provider believes would allow the individual to safely perform the essential functions of the position.
- If it appears the individual has a disability, further engage with the individual regarding potential accommodations. While the ADA does not allow the individual to dictate the accommodation the employer provides, it is preferable for the individual and the employer to agree.

[Assess undue hardship on business operations.](#)

Regardless of the outcome, carefully document all steps in the process and clearly communicate with the individual seeking accommodation both during the interactive process and as to the final decision on the matter.

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