

## EEOC Advises COVID-19 May Be ADA-Protected Disability

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On December 14, 2021, the Equal Employment Opportunity Commission (“EEOC”) [updated its COVID-19 Technical Assistance Guidance](#) to address when COVID-19 is a disability within the meaning of the Americans with Disabilities Act (“ADA”). The Guidance makes clear that, in certain circumstances, individuals with COVID-19 will be entitled to job protections under the ADA.

According to the EEOC, COVID-19 will be deemed an ADA-protected disability where it “substantially limits a major life activity,” either physically or mentally. This determination requires an individualized, case-by-case assessment of how COVID-19 has impacted the individual. However, COVID-19 is not always a disability under the ADA. The Guidance provides that “[a] person infected with the virus causing COVID-19 who is asymptomatic or a person whose COVID-19 results in mild symptoms similar to those of the common cold or flu that resolve in a matter of weeks—with no other consequences—will not have an actual disability within the meaning of the ADA.”

However, the Guidance provides that, depending on the facts of the case, a person who has or had COVID-19 may be protected under the ADA as an individual with a “record of” a disability. This would occur where a person has “a history of, or has been misclassified as having” an impairment that “substantially limits one or more major life activities, based on individualized assessment.”

Further, an employee may still be protected by the ADA to the extent that the employee is “regarded” as someone with a disability. “A person is ‘regarded as’ an individual with a disability if the person is subjected to an adverse action . . . because the person has an impairment, such as COVID-19, or the employer mistakenly believes the person has such an impairment, unless the actual or perceived impairment is both transitory (lasting or expected to last six months or less) and minor.” If someone is “regarded” as having a disability, substantial impairment is irrelevant.

Regarding a person as having a disability does not automatically constitute discrimination under the ADA. The Guidance makes clear that an employer’s adverse employment action against a person regarded as disabled would not violate the ADA if the individual is not qualified for the job held or desired. Further, the person’s impairment may provide the basis for a defense to an ADA claim, such as in cases where a person’s COVID-19 presents a “direct threat” due to the significant risk of substantial harm to the health of others the person’s presence in the workplace poses, based on relevant Centers for Disease Control and Prevention data. However, an employer may not rely on “myths, fears, or stereotypes about a condition” when taking an adverse action or preventing an employee from returning to work.

The EEOC continues to provide updates on COVID-19 as new issues emerge and employers are tasked with solving new problems in the context of COVID-19. Those interested can find a full list of COVID-19 guidance released by the EEOC on their [website](#).

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