

HR COMPLIANCE BULLETIN

Highlights

Long COVID Guidance

The DOJ and DHHS guidance clarifies, among other things, that:

- ✓ Long COVID is a medical condition that can last weeks or months after coronavirus infection and can worsen with physical or mental activity;
- ✓ Long COVID is a disability under the ADA, Section 504 and Section 1557 if it substantially limits one or more life activities;
- ✓ Individuals whose long COVID qualifies as a disability are entitled to the same protections against discrimination as any other person with a disability; and
- ✓ Businesses and governments may need to adjust the way they operate to accommodate an individual's long COVID-related limitations.

DOJ and DHHS Issue Guidance on “Long COVID” and Federal Laws

On July 26, 2021, the U.S. Department of Justice (DOJ) and Department of Health and Human Services (DHHS) issued [joint guidance](#) on a medical condition called “long COVID” and how it may be considered a disability under various federal laws that protect individuals against discrimination. These laws include:

- Title II of the Americans with Disabilities Act (ADA), which applies to state and local governments;
- Title III of the ADA, which applies to public accommodations;
- Section 504 of the Rehabilitation Act of 1973 (Section 504), which applies to certain schools and other educational entities; and
- Section 1557 of the Patient Protection and Affordable Care Act (Section 1557), which applies to certain health plans.

Although employment is outside the scope of topics addressed in the new guidance, it includes information that may be relevant to employers. For example, it may help determine whether an individual with long COVID has a disability under Title I of the ADA or Section 501 of the Rehabilitation Act, both of which apply to employers with 15 or more employees. However, employers that wish to learn more about workplace issues relating to COVID-19 should review [separate guidance issued by the U.S. Equal Employment Opportunity Commission](#) (EEOC).

Action Steps

All employers should follow the most current guidelines and suggestions for maintaining workplace safety, as issued by the [Centers for Disease Control and Prevention](#) (CDC) and any applicable state or local health agencies. Businesses and other entities subject to the laws listed above should also review the guidance issued by the DOJ and DHHS, which is provided in this Compliance Bulletin below.



1. What Is Long COVID, and What Are its Symptoms?

According to the CDC, people with long COVID have a range of new or ongoing symptoms that can last weeks or months after being infected with the virus that causes COVID-19 and that can worsen with physical or mental activity. Examples of common symptoms of long COVID include:

- Tiredness or fatigue;
- Difficulty thinking or concentrating (sometimes called “brain fog”);
- Shortness of breath or difficulty breathing;
- Headache;
- Dizziness on standing;
- Fast-beating or pounding heart (known as heart palpitations);
- Chest pain;
- Cough;
- Joint or muscle pain;
- Depression or anxiety;
- Fever; and
- Loss of taste or smell.

This list is not exhaustive. Some people also experience damage to multiple organs, including the heart, lungs, kidneys, skin and brain.

2. Can Long COVID Be a Disability Under the ADA, Section 504 and Section 1557?

Yes, long COVID can be a disability under the ADA, Section 504 and Section 1557 if it substantially limits one or more major life activities. These laws and their related rules define a person with a disability as one of the following:

- An individual with a physical or mental impairment that substantially limits one or more of the individual’s major life activities (“actual disability”);
- A person with a record of this type of impairment (“record of”); or
- A person who is regarded as having such an impairment (“regarded as”).

This guidance only addresses the “actual disability” part of the disability definition. A person with long COVID has a disability if their condition or any of its symptoms is a “physical or mental” impairment that “substantially limits” one or more major life activities. It does not address the “record of” or “regarded as” parts of the disability definition, though these may also be relevant to claims regarding long COVID.

a. Long COVID Is a Physical or Mental Impairment

A physical impairment includes any physiological disorder or condition affecting one or more body systems, including, among others, the neurological, respiratory, cardiovascular and circulatory systems. A mental impairment includes any mental or psychological disorder, such as an emotional or mental illness.

Long COVID is a physiological condition affecting one or more body systems. For example, some people with long COVID experience:

- Lung damage;
- Heart damage, including inflammation of the heart muscle;
- Kidney damage;
- Neurological damage;



- Damage to the circulatory system resulting in poor blood flow; and
- Lingering emotional illness and other mental health conditions.

Accordingly, long COVID is a physical or mental impairment under the ADA, Section 504 and Section 1557.

b. Long COVID Can Substantially Limit One or More Major Life Activities

“Major life activities” include a wide range of activities, such as caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, writing, communicating, interacting with others and working. The term also includes the operation of a major bodily function, such as the functions of the immune system, cardiovascular system, neurological system, circulatory system or the operation of an organ.

The term “substantially limits” is construed broadly under these laws and should not demand extensive analysis. The impairment does not need to prevent or significantly restrict an individual from performing a major life activity, and the limitations do not need to be severe, permanent or long-term.

Whether an individual with long COVID is substantially limited in a major bodily function or other significant life activity is determined without the benefit of any medication, treatment or other measures the individual uses to lessen or compensate for symptoms. Even if the impairment comes and goes, it is considered a disability if it would substantially limit a major life activity when the impairment is active. Long COVID can substantially limit a major life activity. The situations in which an individual with long COVID might be substantially limited in a major life activity are diverse. Among possible examples, some include:

- A person with long COVID who has lung damage that causes shortness of breath, fatigue and related effects is substantially limited in respiratory function, among other major life activities.
- A person with long COVID who has symptoms of intestinal pain, vomiting and nausea that have lingered for months is substantially limited in gastrointestinal function, among other major life activities.
- A person with long COVID who experiences memory lapses and “brain fog” is substantially limited in brain function, concentrating or thinking.

3. Is Long COVID Always a Disability?

No. An individualized assessment is necessary to determine whether a person’s long COVID condition or any of its symptoms substantially limits a major life activity. The CDC and health experts are working to better understand long COVID.

4. What Rights Do People Whose Long COVID Qualifies as a Disability Have Under the ADA, Section 504 and Section 1557?

People whose long COVID qualifies as a disability are entitled to the same protections from discrimination as any other person with a disability under the ADA, Section 504 and Section 1557. Summarily, they are entitled to full and equal opportunities to participate in and enjoy all aspects of civic and commercial life.

For example, this may mean that businesses or state or local governments will sometimes need to change how they operate to accommodate a person’s long COVID-related limitations.



For people whose long COVID qualifies as a disability, these changes, or “reasonable modifications,” may include:

- Providing additional time on a test for a student who has difficulty concentrating;
- Modifying procedures so a customer who finds it too tiring to stand in line can announce their presence and sit down without losing their place in line;
- Providing refueling assistance at a gas station for a customer whose joint or muscle pain prevents them from pumping their own gas; or
- Modifying a policy to allow a person who experiences dizziness when standing to be accompanied by their service animal trained to stabilize them.

5. What Federal Resources Are There For People With Symptoms of Long COVID?

The DHHS has a webpage on civil rights and COVID-19, which is available [here](#). The DOJ has a website that discusses topics related to COVID-19 and the ADA, which is available [here](#). Those who believe they or others have been discriminated against by an entity covered by the ADA may file a complaint with the DOJ’s Disability Rights Section. More information about this is available [here](#).

The CDC’s website also has a page on post-COVID conditions that includes a discussion of long COVID. That page is available [here](#).

The Administration for Community Living’s document, “How ACL’s Disability and Aging Networks Can Help People with Long COVID,” provides information on resources and programs to assist people with long COVID. This document is available [here](#).

Finally, as noted above, those who wish to learn more about COVID-19 and employment should review guidance and resources issued by EEOC, which are available [here](#). The EEOC’s main COVID-19 publication, “What You Should Know about COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,” is available [here](#).

Source: Departments of Justice and Health and Human Services