EEOC Issues New Guidance on Covid-19 Disabilities under the ADA and Rehabilitation Act

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On December 14, the Equal Employment Opportunity Commission (EEOC) issued new guidance relating to when Covid-19 is a "disability" under the ADA and the Rehabilitation Act. Essentially, the EEOC guidance says that Covid-19 may be a disability depending on the circumstances and even if it is not a "disability," employers can still be in trouble if they "regard" an employee as disabled due to Covid-19.

As a reminder, the ADA provides protections to employees of employers with 15 or more employees if the employee has a protected disability (as defined by the Act), a record of a disability, or is regarded as having a disability. The ADA also applies to state and local government employers, employment agencies, and labor unions. All nondiscrimination standards under Title I of the ADA also apply to federal agencies under Section 501 of the Rehabilitation Act.

Under the new guidance, the EEOC has said "long Covid" or other Covid-19 related health complications *may* qualify as a disability. For example, Covid-19 symptoms could linger, and the employee could experience ongoing but intermittent multiple-day headaches, dizziness, brain fog, and difficulty remembering or concentrating, which the employee's doctor attributes to the virus. Alternatively, an individual who has been diagnosed with COVID-19 could experience heart palpitations, chest pain, shortness of breath, and related effects due to the virus that last, or are expected to last, for several months. In either situation, the employee would have a "disability" under the ADA. The employee would then be entitled to all rights afforded to individuals with a disability under the ADA, such as a reasonable accommodation. It is important to remember that each employee will be different. Simply having Covid-19 does not automatically mean an employee has a disability under the ADA. An employer must perform an individualized assessment of each employee.

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Even if an employee does not have a disability under the ADA or Rehabilitation Act, an employer would still be prohibited from firing an employee that is "regarded as" disabled because of a Covid-19 diagnosis. For example, an employer is prohibited terminating an individual because the employee had symptoms of COVID-19, which, although minor, lasted or were expected to last more than six months. In that instance, it would be irrelevant whether the employee meets the definition of "disability" under the ADA, because he or she was regarded as having such a condition.

Employers in Michigan were already precluded in certain cases from firing employees who have to isolate due to Covid-19. Those protections stem from Michigan's Covid-19 Employee Rights Act which Governor Whitmer signed into law in October of 2020. This new guidance from the EEOC clarifies additional protections and rights employees may have, such as the right to a reasonable accommodation, when the employee has lingering Covid-19 symptoms that meet the definition of disability.

Navigating the new guidance in conjunction with Michigan's Covid-19 Employment Rights Act, OSHA rules, workers compensation, and FMLA issues can be a daunting task. If you have any questions about employee Covid-19 related issues, please contact your Butzel Labor & Employment Attorney.

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