

# HR COMPLIANCE BULLETIN

## Highlights

### ADA Disability Definition

The ADA broadly defines the term “disability” to protect against discrimination based on “actual” disability, a “record of” disability and “being regarded as” having a disability.

### COVID-19 Disability Guidance

The EEOC’s newly added FAQs clarify, among other things, that:

- Determining whether a specific employee’s COVID-19 is a disability under the ADA always requires an individualized assessment;
- COVID-19 is an actual disability if it is a “physical or mental” impairment that “substantially limits one or more major life activities”;
- Employers must provide reasonable accommodations for individuals whose COVID-19 is an actual, past or misclassified disability; and
- Even if COVID-19 itself does not meet the ADA’s definition of a disability, it may cause later impairments that do.

## EEOC Issues FAQs on COVID-19 as a Disability Under the ADA

On Dec. 14, 2021, the Equal Employment Opportunity Commission (EEOC) issued 14 new items to its frequently asked questions and answers ([FAQs](#)) about what employers may or may not do to comply with federal fair employment laws during the COVID-19 pandemic.

The new FAQs specifically address the definition of “disability” under the Americans with Disabilities Act (ADA) and other federal laws that prohibit discrimination based on certain protected traits. Under these laws, employers may face liability if they discriminate against individuals based on disability or fail to provide reasonable accommodations to an otherwise qualified individual with a disability. An employer is subject to the ADA if it has 15 or more employees. Smaller employers may be subject to similar rules under applicable state or local laws.

This Compliance Bulletin provides the EEOC’s 14 new FAQs below. Employers that are subject to the ADA and other federal fair employment laws should not only become familiar with these FAQs but also review the [EEOC’s full guidance on COVID-19](#) and federal fair employment laws. The EEOC initially issued that guidance on March 18, 2020, and updated it several times since.

## 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. Employers with 15 or more employees should also become familiar with and follow the guidance provided in all of the EEOC’s FAQs about compliance with federal fair employment laws. These and all smaller employers should also ensure that they comply with all applicable state and local anti-discrimination laws as well.



## N. COVID-19 and the ADA’s Definition of “Disability”

Employees and employers alike have asked when COVID-19 is a “disability” under Title I of the ADA, which includes reasonable accommodation and nondiscrimination requirements in the employment context. These questions and answers clarify circumstances in which COVID-19 may or may not cause effects sufficient to meet the definition of “actual” or “record of” a disability for various purposes under the ADA, which is enforced by the EEOC. Other topics covered in this section include disabilities arising from conditions caused or worsened by COVID-19 and the ADA’s “regarded as” definition of disability with respect to COVID-19.

On July 26, 2021, the Department of Justice (DOJ) and the Department of Health and Human Services (HHS) issued “Guidance on ‘Long COVID’ as a Disability Under the ADA, Section 504, and Section 1557” ([DOJ/HHS Guidance](#)). The CDC uses the terms “[long COVID](#),” “post-COVID,” “long-haul COVID,” “post-acute COVID-19,” “long-term effects of COVID,” or “chronic COVID” to describe various post-COVID conditions, where individuals experience new, returning or ongoing health problems four or more weeks after being infected with the virus that causes COVID-19. The DOJ/HHS Guidance focuses solely on long COVID in the context of Titles II and III of the ADA, Section 504 of the Rehabilitation Act of 1973, and Section 1557 of the Patient Protection and Affordable Care Act. These EEOC questions and answers focus more broadly on COVID-19 and do so in the context of employment. This discussion does not pertain to other contexts, such as eligibility determinations for federal benefit programs.

### N.1. How does the ADA define disability, and how does the definition apply to COVID-19?

The ADA’s three-part definition of disability applies to COVID-19 in the same way it applies to any other medical condition. A person can be an individual with a “disability” for purposes of the ADA in one of three ways:

- **“Actual” disability:** The person has a physical or mental impairment that substantially limits a major life activity (such as walking, talking, seeing, hearing, or learning or operation of a major bodily function);
- **“Record of” a disability:** The person has a history or “record of” an actual disability (such as cancer that is in remission); or
- **“Regarded as” an individual with a disability:** The person is subject to adverse action because of an individual’s impairment or an impairment the employer believes the individual has, whether or not the impairment limits or is perceived to limit a major life activity unless the impairment is objectively both transitory (lasting or expected to last six months or less) and minor.

The definition of disability is construed broadly in favor of expansive coverage to the maximum extent permitted by the law. Nonetheless, not every impairment will constitute a disability under the ADA. The ADA uses a case-by-case approach to determine if an applicant or employee meets any one of the three above definitions of “disability.”

### “Actual” Disability

### N.2. When is COVID-19 an actual disability under the ADA?

Applying the ADA rules stated in [N.1.](#) and depending on the specific facts involved in an individual employee’s condition, a person with COVID-19 has an actual disability if the person’s medical condition or any of its symptoms is a “physical or mental” impairment that “substantially limits one or more major life activities.”

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An individualized assessment is necessary to determine whether the effects of a person's COVID-19 substantially limit a major life activity. This will always be a case-by-case determination that applies existing legal standards to the facts of a particular individual's circumstances. A person infected with the virus causing COVID-19 and 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, as illustrated below, depending on the specific facts involved in a particular employee's medical condition, an individual with COVID-19 might have an actual disability.

**Physical or mental impairment:** Under the ADA, a physical impairment includes any physiological disorder or condition affecting one or more body systems. A mental impairment includes any mental or psychological disorder. COVID-19 is a physiological condition affecting one or more body systems. As a result, it is a “physical or mental impairment” under the ADA.

**Major life activities:** “Major life activities” include both major bodily functions, such as respiratory, lung or heart function, and major activities in which someone engages, such as walking or concentrating. COVID-19 may affect major bodily functions, such as functions of the immune system, special sense organs (such as for smell and taste), digestive, neurological, brain, respiratory, circulatory or cardiovascular functions, or the operation of an individual organ. In some instances, COVID-19 also may affect other major life activities, such as caring for oneself, eating, walking, breathing, concentrating, thinking or interacting with others. An impairment need only substantially limit one major bodily function or other major life activity to be substantially limiting. However, limitations in more than one major life activity may combine to meet the standard.

**Substantially limiting:** “Substantially limits” is construed broadly and should not demand extensive analysis. COVID-19 need not prevent, or significantly or severely restrict, a person from performing a major life activity to be considered substantially limiting under Title I of the ADA.

The limitations from COVID-19 do not necessarily have to last any particular length of time to be substantially limiting. They also need not be long-term. For example, in discussing a hypothetical physical impairment resulting in a 20-pound lifting restriction that lasts or is expected to last several months, the EEOC has said that such an impairment is substantially limiting. By contrast, “[i]mpairments that last only for a short period of time are typically not covered, although they may be covered if sufficiently severe.”

**Mitigating measures:** Whether COVID-19 substantially limits a major life activity is determined based on how limited the individual would have been without the benefit of any mitigating measures—i.e., any medical treatment received or other step used to lessen or prevent symptoms or other negative effects of an impairment. At the same time, in determining whether COVID-19 substantially limits a major life activity, any negative side effects of a mitigating measure are taken into account.

Some examples of mitigating measures for COVID-19 include medication or medical devices or treatments, such as antiviral drugs, supplemental oxygen, inhaled steroids and other asthma-related medicines, breathing exercises and respiratory therapy, physical or occupational therapy, or other steps to address complications of COVID-19.

**Episodic conditions:** Even if the symptoms related to COVID-19 come and go, COVID-19 is an actual disability if it substantially limits a major life activity when active.



### N.3. Is COVID-19 always an actual disability under the ADA?

No. Determining whether a specific employee's COVID-19 is an actual disability always requires an individualized assessment, and such assessments cannot be made categorically.

### N.4. What are some examples of ways in which an individual with COVID-19 might or might not be substantially limited in a major life activity?

As noted above, while COVID-19 may substantially limit a major life activity in some circumstances, someone who is infected with the virus causing COVID-19 and is asymptomatic or a person whose COVID-19 results in mild symptoms similar to the common cold or flu that resolve in a matter of weeks—with no other consequences—will not be substantially limited in a major life activity for purposes of the ADA.

The following are examples of Individuals with an impairment that substantially limits a major life activity:

- An individual diagnosed with COVID-19 who experiences ongoing but intermittent multiple-day headaches, dizziness, brain fog and difficulty remembering or concentrating, which the employee's doctor attributes to the virus, is substantially limited in neurological and brain function, concentrating and/or thinking, among other major life activities.
- An individual diagnosed with COVID-19 who initially receives supplemental oxygen for breathing difficulties and has shortness of breath, associated fatigue and other virus-related effects that last or are expected to last for several months is substantially limited in respiratory function and possibly major life activities involving exertion, such as walking.
- An individual who has been diagnosed with COVID-19 experiences heart palpitations, chest pain, shortness of breath and related effects due to the virus that last or are expected to last for several months. The individual is substantially limited in cardiovascular function and circulatory function, among others.
- An individual diagnosed with "[long COVID](#)," who experiences COVID-19-related intestinal pain, vomiting and nausea that linger for many months, even if intermittently, is substantially limited in gastrointestinal function, among other major life activities, and therefore has an actual disability under the ADA.

The following are examples of individuals with an impairment that does **not** substantially limit a major life activity:

- An individual who is diagnosed with COVID-19 who experiences congestion, sore throat, fever, headaches and/or gastrointestinal discomfort, which resolve within several weeks, but experiences no further symptoms or effects, is not substantially limited in a major bodily function or other major life activity, and therefore does not have an actual disability under the ADA. This is so even though this person is subject to CDC guidance for isolation during the period of infectiousness.
- An individual who is infected with the virus causing COVID-19 but is asymptomatic—that is, does not experience any symptoms or effects—is not substantially limited in a major bodily function or other major life activity, and therefore does not have an actual disability under the ADA. This is the case even though this person is still subject to CDC guidance for isolation during the period of infectiousness.

As noted above, even if the symptoms of COVID-19 occur intermittently, they will be deemed to substantially limit a major life activity if they are substantially limiting when active, based on an individualized assessment.



## “Record of” Disability

### **N.5. Can a person who has or had COVID-19 be an individual with a “record of” a disability?**

Yes, depending on the facts. A person who has or had COVID-19 can be an individual with a “record of” a disability if the person has “a history of, or has been misclassified as having” an impairment that substantially limits one or more major life activities, based on an individualized assessment.

## “Regarded As” Disability

### **N.6. Can a person be “regarded as” an individual with a disability if the person has COVID-19 or the person’s employer mistakenly believes the person has COVID-19?**

Yes, depending on the facts. A person is “regarded as” an individual with a disability if the person is subjected to an adverse action (such as being fired, not hired or harassed) 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 objectively both transitory (lasting or expected to last six months or less) and minor. For this definition of disability, whether the actual or perceived impairment substantially limits or is perceived to substantially limit a major life activity is irrelevant.

### **N.7. What are some examples of an employer regarding a person with COVID-19 as an individual with a disability?**

The situations in which an employer might “regard” an applicant or employee with COVID-19 as an individual with a disability are varied. Some examples include:

- An employer would regard an employee as having a disability if the employer fires the individual because the employee had symptoms of COVID-19, which, although minor, lasted or were expected to last more than six months. The employer could not show that the impairment was both transitory and minor.
- An employer would regard an employee as having a disability if the employer fires the individual for having COVID-19 and the COVID-19, although lasting or expected to last less than six months, caused nonminor symptoms. In these circumstances, the employer could not show that the impairment was both transitory and minor.

### **N.8. If an employer regards a person as having a disability, for example, by taking an adverse action because the person has COVID-19 that is not both transitory and minor, does that automatically mean the employer has discriminated for purposes of the ADA?**

No. It is possible that an employer may not have engaged in unlawful discrimination under the ADA even if the employer took an adverse action based on an impairment. For example, an individual still needs to be qualified for the job held or desired.

Additionally, in some instances, an employer may have a defense to an action taken on the basis of the impairment. For example, the ADA’s “direct threat” defense could permit an employer to require an employee with COVID-19 or its symptoms to refrain from physically entering the workplace during the CDC-recommended period of isolation due to the significant risk of substantial harm to the health of others. Of course, an employer risks violating the ADA if it relies on myths, fears or stereotypes about a condition to disallow the employee’s return to work once the employee is no longer infectious and, therefore, medically able to return without posing a direct threat to others.



## Other Conditions Caused or Worsened by COVID-19 and the ADA

### N.9. Can a condition caused or worsened by COVID-19 be a disability under the ADA?

Yes. In some cases, regardless of whether an individual's initial case of COVID-19 itself constitutes an actual disability, an individual's COVID-19 may end up causing impairments that are themselves disabilities under the ADA. For example:

- An individual who had COVID-19 develops heart inflammation. This inflammation itself may be an impairment that substantially limits a major bodily function, such as the circulatory function, or other major life activity, such as lifting.
- An individual suffers an acute ischemic stroke during the course of COVID-19. Due to the stroke, the individual may be substantially limited in neurological and brain (or cerebrovascular) function.
- The individual develops diabetes attributed to the COVID-19 after their COVID-19 resolves. This individual should easily be found to be substantially limited in the major life activity of endocrine function. See [Diabetes in the Workplace and the ADA](#) for more information.

In some cases, an individual's COVID-19 may also worsen the individual's preexisting condition that was not previously substantially limiting, making that impairment now substantially limiting. For example:

- An individual initially has a heart condition that is not substantially limiting. The individual is infected with COVID-19. The COVID-19 worsens the person's heart condition so that the condition now substantially limits the person's circulatory function.

## Definition of Disability and Requests for Reasonable Accommodation

### N.10. Does an individual have to establish coverage under a particular definition of disability to be eligible for a reasonable accommodation?

Yes. Individuals must meet either the "actual" or "record of" definitions of disability to be eligible for a reasonable accommodation. Individuals who only meet the "regarded as" definition are not entitled to receive reasonable accommodation.

Of course, coverage under the "actual" or "record of" definitions does not, alone, entitle a person to a reasonable accommodation. Individuals are not entitled to an accommodation unless their disability requires it, and an employer is not obligated to provide an accommodation that would pose an undue hardship.

### N.11. When an employee requests a reasonable accommodation related to COVID-19 under the ADA, may the employer request supporting medical documentation before granting the request?

Yes. As with employment accommodation requests under the ADA for any other potential disability, when the disability or need for accommodation is not obvious or already known, an employer may ask the employee to provide reasonable documentation about disability or need for reasonable accommodation. Often, the only information needed will be the individual's diagnosis and any restrictions or limitations. The employer also may ask whether alternative accommodations would be effective in meeting the disability-related needs of the individual.

The employer may either ask the employee to obtain the requested information or request that the employee sign a limited release allowing the employer to contact the employee's health care provider directly. If the employee does not



cooperate in providing the requested reasonable supporting medical information, the employer can lawfully deny the accommodation request.

## **N.12. May an employer voluntarily provide accommodations requested by an applicant or employee due to COVID-19, even if not required to do so under the ADA?**

Yes. Employers may choose to provide accommodations beyond what the ADA mandates. Of course, employers must provide a reasonable accommodation under the ADA, absent undue hardship, if the applicant or employee meets the definition of disability, requires an accommodation for the disability and is qualified for the job with the accommodation. Accommodations might consist of schedule changes, physical modifications to the workplace, telework, or special or modified equipment.

### **Applicability of Definition of Disability**

## **N.13. If an employer subjected an applicant or employee to an adverse action, and the applicant or employee is covered under any one of the three ADA definitions of disability, does that mean the employer violated the ADA?**

No. Having a disability alone does not mean an individual was subjected to an unlawful employment action under the ADA.

For example, the fact that an applicant or employee has a current disability or a record of disability does not mean that an employer violated the ADA by not providing an individual with a reasonable accommodation. As discussed in [Section D](#), there are several considerations in making reasonable accommodation determinations, including the employee's need for the accommodation due to a disability and whether there is an accommodation that does not pose an undue hardship to the employer.

Similarly, the fact that an employer regarded an applicant or employee as an individual with a disability does not necessarily mean that the employer engaged in unlawful discrimination. For example, the ADA does not require an employer to hire anyone who is not qualified for the job. Moreover, in some instances, an employer may have a defense to an employment action taken based on an actual impairment, such as where the individual poses a [direct threat](#) to the health or safety of themselves or others in the workplace.

## **N.14. Do any ADA protections apply to applicants or employees who do not meet an ADA definition of disability?**

Yes. The ADA's requirements about disability-related inquiries and medical exams, [medical confidentiality](#), [retaliation and interference](#) apply to all applicants and employees, regardless of whether they have an ADA disability. By contrast, an individual must have a "disability" to challenge employment decisions based on disability, denial of reasonable accommodation or disability-based harassment.

*Source: Equal Employment Opportunity Commission*