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**THE REGISTER CITIZEN**

# Opinion: Classify "Long COVID" as a disability under the ADA

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Panelist Kathy Flaherty, right, field in a symposium at Quinnipiac University.

File photo

Connecticut attorney Kathy Flaherty went to bed on March 11, 2020, with a scratchy throat and woke up the next morning with a fever. Believing that she might have the coronavirus that was just emerging around the country, she called in sick to her job as executive director at Connecticut Legal Rights Project. She assured her coworkers she would be back in two weeks. Thirteen months later, she works part-time from bed, when she can, while navigating extreme fatigue, shortness of breath and chronic pain — her “new normal.”

Like millions of Americans, Flaherty has “long COVID.”

Does she have a “disability” under the Americans with Disabilities Act, which might entitle her to a reasonable accommodation? While the Equal Employment Opportunity Commission, which enforces the ADA, has offered a wide array of useful guidance on COVID-19’s impact on the workplace, it is silent on the threshold question of whether COVID may be a disability under the ADA.

In late March 2020, an EEOC representative explained that “this is a very new virus and, while medical experts are learning about it, there is still much that is unknown.” Today, based on what is known now, the EEOC should issue guidance stating that, in virtually all cases, individuals with long COVID have a disability under the ADA.

The Centers for Disease Control and Prevention explains that long COVID is a range of symptoms that can last weeks or months. People may experience different combinations of severe fatigue, difficulty thinking or concentrating, brain fog, headaches, dizziness, heart palpitations, difficulty breathing or shortness of breath, joint or muscle pain, depression, chest pain, intermittent fevers and anxiety. It can affect most bodily systems. For some, the symptoms dissipate after three to six months. For others, they may continue for as long as nine to 12 months, often without improvement.

Medical studies indicate that as many as 30 percent of those who contracted COVID-19 may have long COVID. An estimated five million to 10 million Americans either had or currently have long COVID. Most are age 20 to 50, predominantly female and usually were not hospitalized when originally contracting the virus.

The ADA’s definition of a disability refers to a physical or mental impairment that substantially limits a major life activity. EEOC regulations provide that the term “physical impairment” includes any physiological disorder affecting one or more bodily systems. Long COVID does just that.

When determining whether an individual is substantially limited, the condition, manner and duration of the impairment and its effects on the individual’s performance of the major life activities are considered.

EEOC reluctance to take a position as to whether COVID-19 is a “disability” is consistent with the agency’s position that “there is no ‘per se’ disability.” The statute’s legislative history states that the ADA avoided adopting a laundry list of disabilities “because of the difficulty of ensuring the comprehension of such a list, particularly in light of the fact that new disorders may develop in the future.” The EEOC observed that the question of whether an individual has a disability depends on the impairment’s impact on the person’s life, rather than its name or diagnosis. Nevertheless, Congress amended the ADA in 2008 to expand and

simplify the definition of disability, providing a list of several impairments that will virtually always substantially limit a major life activity.

The EEOC should follow the same approach and issue guidance stating that, in virtually all cases, long COVID substantially limits the major life activities of the functions of the immune system and normal cell growth. If the EEOC adds COVID to its list of impairments, courts generally will rely on that language to conclude that the individual with long COVID has a disability. If challenged by an employer, the employee will still carry the burden of showing that long COVID does, in fact, substantially limit a major life activity. Nevertheless, because terminating a qualified individual with a disability violates the ADA, employers will be less likely to terminate employees because they have long COVID.

Meeting the definition opens the door for the employee to show that she would be able to perform the essential functions of the job given reasonable accommodation — the ADA's foundation.

The most effective accommodation is allowing the employee to telework. In fact, telework has been the linchpin that has enabled the American workplace to survive the disruptive effects of the pandemic. At an April 28 EEOC Commission Hearing on the Civil Rights Implications on pandemic, EEOC Vice Chair Jocelyn Samuels remarked that learning that many jobs can be performed in a remote environment has been a "silver lining" of the pandemic.

While teleworking may be the most common accommodation, it is certainly not the only one. Depending on the nature of the job and the physical and mental symptoms, alternative or additional accommodations may include allowing a part-time or flexible schedule, providing leave of absence, allowing time off for treatment, providing rest breaks, developing a plan to deal with sudden exacerbation or reducing the job's physical demands.

Flaherty's employer has accommodated her by permitting her to work part-time and remotely while letting her use accrued but unused paid time off. She has also received partial long-term disability benefits. However, her employer is an exception. Based on the feedback from online support groups like Body Politic and Survivor Camps, most individuals with long COVID have been terminated after skeptical employers don't understand why the employee could not return after two weeks or so.

Disability rights pioneer Judy Heumann recently observed that “[p]eople need to stop feeling threatened by the possibility of acquiring a temporary or permanent disability and join our movement to fight for equality and justice for all. This is especially true for people now living with disability because of COVID-19.” Concrete guidance from the federal agency which enforces the ADA will provide the newly disabled with a better understanding of their rights and employers with their obligations.

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