

## 4 Things To Know About COVID 'Long-Haulers' At Work

By **Vin Gurrieri**

Law360 (August 13, 2021, 7:37 PM EDT) -- The growing recognition that COVID-19 leaves some people with long-term symptoms adds another layer of challenges for employers, whether federal regulators ultimately decide the virus qualifies as a disability or not.

The Centers for Disease Control and Prevention defines "long COVID" or "long-haul COVID" as "new, returning or ongoing health problems" that people experience at least four weeks after first being infected with the coronavirus. Though **legal questions remain** about whether COVID-19 itself or medical conditions associated with long COVID-19 that workers experience fall under the purview of the Americans with Disabilities Act, employers already are dealing with situations in which employees' bouts with the virus have led to lingering aftereffects.

Those "post-COVID conditions," which can last at least for months even in people who had only mild cases of COVID-19, may include fatigue, brain fog, regular headaches, heart palpitations, mood swings and lightheadedness. For people who had severe cases of COVID-19, long-term symptoms may include autoimmune conditions that can damage healthy organs, according to the CDC, which notes that research is still being conducted to better understand long-term, post-COVID-19 medical conditions.

"This is a significant issue ... because when we look at the numbers of long-haulers and the expected costs, they are going to be significant," said Ian Carleton Schaefer of Loeb & Loeb LLP, who noted that data suggests anywhere from 10% to 30% of the tens of millions of Americans to contract COVID-19 are long-haulers.

"I think the first point is really one of awareness that this is going to affect every single employer and there's going to be what I perceive as an inevitable and huge crush of not only ADA claims for accommodations and the like, ... but also short-term disability [and] long-term disability. And that's going to overwhelm the system that exists from a cost perspective," Schaefer said.

Here, experts lay out four tips for businesses that could have COVID-19 "long-haulers" in their workforce.

### **Be Ready for Wave of Intermittent Leave**

Under the ADA, employers must engage in a back-and-forth with workers to explore reasonable potential accommodations as long as any accommodation doesn't pose an "undue hardship" on the business. But no matter the severity of long-haul COVID-19 conditions that workers may develop or **whether they qualify as a disability**, it is likely that employers soon will be facing a barrage of requests from workers for leave time if they aren't already.

Among the types of absences that workers may request is intermittent leave — a periodic form of leave that allows eligible workers to take allotted time off in separate blocks instead of all at once. Employers often cite intermittent leave as one of the trickiest to implement and track, in part because of the short, inconsistent time frames in which workers take it.

"I think we should be prepared as employers for a flurry of intermittent leave requests, which historically ... is one of the most challenging types of leave, to administer and to manage, because it's so disruptive to a workplace," Schaefer said.

He suggested employers "sort of double down and revisit what the existing practices are when people make requests for intermittent leave," which he noted is both "permissible and very common" in the context of both the ADA and the Family and Medical Leave Act.

When an employee is going to and from medical treatments or otherwise has inconsistent work schedules, it "often leads to frustration on the part of employers and how to manage" it and also opens the door to retaliation against those who may be entitled to intermittent leave under the ADA or the FMLA, Schaefer said.

Schaefer also noted there could be scenarios in which a person is entitled to intermittent leave under one law but not the other, saying employers "can't forget about the interplay" between the ADA and different statutes that allow for leave, like the FMLA and various state paid sick leave laws.

"It will require a lot of thoughtful navigation around [the question] of, 'Is someone entitled to leave?' and 'Is leave paid?' and 'How [do leaves] interact with one another?'" Schaefer said. "These aren't necessarily new concepts traditionally. It's just the application of them in dealing with this new paradigm [that] I think, is going to be really tricky."

### **Lay Down Primer**

But even before accommodation and leave requests start trickling in, employers would be wise to have their protocols for handling those requests locked in and avoid trying to figure out what to do on the fly, according to Michael Schmidt, vice chair of Cozen O'Connor's labor and employment practice.

"They need to know now what those protocols are going to be and who's going to be involved in making those decisions so that those processes are in place," Schmidt said, adding that company leaders also should know "how they are going to go about determining the need for accommodations versus whether an individual is unable to return and what may be available from either a short-term disability or long-term disability standpoint."

Similarly, employers also should move quickly to get managers and supervisors trained so they know the rules of the road when dealing with long-haulers.

"They're the ones who really need to know what they can do, what they can't do, what they shouldn't say, and who to direct any type of need or request to within the company," Schmidt said of frontline supervisors who interact with workers on a daily basis.

Since "not all long-haul COVID conditions are created equal," and could vary widely, Schaefer also said employers shouldn't respond with a one-size-fits-all approach.

For example, a person who begins experiencing occasional bouts of dizziness may need an accommodation that allows them to sit down for periods of time, whereas a person with brain fog or chronic fatigue may have a condition that qualifies as a disability under the ADA.

"So, engaging in an individualized assessment like we would for any other ADA-type matter is going to be important, but there's a new gloss on it," Schaefer said. "Because these conditions have the potential of coming and going in a way that we may not be sensitized to or familiar with."

### **Know What Symptoms are at Play**

On top of having a clear idea ahead of time about their internal processes, employers should also be proactive in understanding exactly what symptoms or newly developed conditions are giving workers a hard time when they arise.

Carole Spink, a partner at McDermott Will & Emery LLP and member of the firm's COVID-19 employment task force, said employers should be aware that long-haul or post-COVID-19 medical conditions "can have long-lasting effects," which means "new, additional and/or future accommodations may be required."

"As part of the interactive process, employers should ensure that they obtain adequate information on the specific long haul effects the employee is experiencing and how the effects can be accommodated in the workplace," Spink said.

This step, she noted, is key since some symptoms of long-haul COVID-19, like headaches or tiredness, are "quite common" during cold and flu season. Moreover, businesses also should plan for the eventuality that long-haul symptoms may force workers off the job for a sustained period of time.

"As they have done throughout the pandemic, employers should have a plan for addressing potential long-term absences as a result of post-COVID effects," Spink added. "On the practical side, at some point employers may need to determine whether a particular situation has become such that providing a continuing reasonable accommodation would pose an undue burden."

### **Keep Good Records**

Whether it's assessing leave requests or considering the prospect of reasonable accommodations for COVID-19 long-haulers, it behooves employers to meticulously document and memorialize as much information as possible in case any disputes arise down the line.

That includes things like vaccination records, sick time employees took and reasons that workers call in sick that they say are related to COVID-19, according to Lisa Wiltshire Alstead, a partner at McDonald Carano LLP. Alstead said employers should keep track of any reports of symptoms by workers on top of any mandated record-keeping obligations imposed by the Occupational Safety and Health Administration and other regulators.

"In addition to looking into putting your vaccination policy in place, ... employers really just want to have good record-keeping," Alstead said. "I know obviously, OSHA has its regulations and requirements for record-keeping, but I think this will be really important ... if you get to the point where you need to either address your individual employees and whether one of them may have a disability."

September Rea, a Los Angeles-based principal at Polsinelli PC, said there are specific steps under the ADA in general and particularly in California that employers must take to engage in the interactive process, even if a condition doesn't qualify as a disability. That includes asking for the "right documentation in the right way" and not seeking too much documentation or asking about unrelated medical information, Rea said, while stressing the importance for employers to have detailed job responsibilities on file.

"One thing I really recommend for employers is to have written job descriptions with essential functions for each position," Rea said. "So that if somebody does need an accommodation, you can have that form given to their doctor, and their doctor then can determine very specifically what limitations they have for those essential functions, if any, and how that could impact them doing their job."

Rea said companies in white collar professions, like tech companies, for example, haven't typically had those sorts of specific job descriptions, which could hinder their ability to respond to situations in which a worker has conditions associated with long COVID-19.

"Long COVID or the long-haulers often experience brain fog and impairment that would really impact their ability to do these white collar jobs," Rea said. "So that's a change for some of our clients to think about it in those terms."

And detailed documentation is especially key in situations in which employers suspect a worker may be taking advantage of the accommodation processes in place, Rea said, noting that some employers are "very afraid ... that long-haul is going to be abused."

"Most of what I get right now isn't, 'How do we accommodate?' it's, 'We think this person is just using this as an excuse.' Especially ... in those situations, that's when we need to toe the line on documenting the conversations and asking for the right documentation," Rea said. "The worst thing people can do is just write it off and say, 'We assume it's being abused.' ... You can refuse an

accommodation, or you can find the person doesn't qualify, but you need to still go through the process."

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