

COVID long haulers are likely protected by the ADA and FMLA



While the pandemic is winding down for most Americans, one group continues to suffer the consequences of a pandemic that struck people unequally. They're the "long haulers," so-called because they can't seem to shake the COVID-19 virus' effects. Often in their prime working years, long haulers complain of debilitating fatigue, chest pain, headaches, and persistent fevers. Worst, some say they're experiencing a sensation they call brain fog that makes it hard to concentrate.

Chances are that some of your employees contracted COVID-19 during the pandemic. Most likely recovered with no lasting disabilities, however, some may still suffer from effects even if they did not become severely ill. For employers expecting to participate in the post-pandemic boom, long haulers constitute a potential problem. The reality is that long-haulers may raise your health care costs, require multiple reasonable accommodations, and need time off. They may need physical and mental therapy and may miss work sporadically when symptoms flare.

The reality is also that most long haulers are protected by existing employment laws. Federal and state laws limit what employers can do to remove long haulers from the payroll. Those same laws also place strict limits on when you can refuse to hire or recall long haulers. It's important to understand what you can and cannot do.

Recalling or hiring COVID-19 long haulers

At least two federal laws regulate how you handle long haulers who apply or are on your recall list. The Americans with Disabilities Act (ADA) prohibits employers from discriminating against disabled applicants. A disability is a physical or mental impairment that substantially limits a major life activity. The Family and Medical Leave Act (FMLA) provides eligible workers with job-protected leave for their own serious health conditions. Both laws essentially make it illegal for employers to screen out most COVID-19 long haulers from

recall or hire. The ADA calls doing so disability discrimination and the FMLA calls doing so interference with FMLA leave rights.

Here's an example of how a long hauler diagnosis may play out.

Example

Jane worked for a boutique specialty store as a sales clerk. The store employed more than 50 workers before shutting down. She tested positive for COVID-19 during the initial spring 2020 surge while the boutique was shut down as non-essential. She had worked for the boutique for 2 years before being laid off. The boutique has recently opened after pandemic restrictions were lifted and business is good. The HR department is recalling employees and Jane has been offered her position back. Jane informed HR that she is a long hauler and is undergoing treatment for recurring headaches, fevers, and body aches. Now her former supervisor wants HR to skip over Jane in favor of other candidates.

Problems

Passing over Jane likely violates both the ADA and the FLMA. Currently, there is no official diagnosis for COVID-19 long haul syndrome. However, a health care provider likely will certify that Jane suffers from a serious health condition related to COVID-19. Her symptoms likely substantially impair a major life function. They also likely interfere with her ability to perform the essential functions of her job. Refusing to hire or recall a disabled worker because of their disability violates the ADA. In addition, Jane may be entitled to leave under the FMLA. Even though there has been a break in service, she is immediately covered. Employment gaps of less than seven years don't cut coverage. She has met her FMLA one-year employment eligibility. Refusing to hire her would interfere with her FMLA rights.

The ADA and COVID-19 long haul workers

Workers with long hauler symptoms may or may not be disabled under the ADA. As with all disabled persons, each must be assessed individually. Some who suffer only occasional or minor symptoms may not qualify as disabled. Others may very well have symptoms that together substantially interfere with a major life function. These functions include breathing, walking, sleeping, and thinking. Still, others may be currently disabled but their condition may slowly improve over time, rendering them no longer disabled.

What's an employer to do? If a long hauler worker claims to be disabled, handle him as any other worker requesting accommodations. Engage in the interactive accommodations process. Gather information on the alleged disability to determine whether she is disabled. At the same time, consider possible reasonable accommodations. Long haulers with trouble concentrating due to 'brain fog' may need extra time to complete tasks. Those with persistent insomnia may need schedule modifications and so on.

For some long haulers, there may come a time when no reasonable accommodation is feasible. For example, a long hauler worker may need frequent unplanned days off. He may be unable to perform the essential function of regular attendance. Once he has used all available leave, the employer would have to consider whether additional time off is reasonable. If attendance still is a problem, the employer can discharge the worker.

A frequently cited long haul symptom is "brain fog." If this is a persistent problem, consider accommodations, but do track performance. If it becomes clear the employee cannot perform the job over time, you can also terminate the employee.

Bottom line

The ADA allows discharge if, after reasonable accommodations, the long hauler cannot perform the essential

functions of the job.

The FMLA and COVID-19 long haul workers

Generally, long hauler workers who are otherwise eligible for FMLA leave will be able to take FMLA leave. Employees need to suffer from a serious health condition to qualify. A serious health condition is an illness, injury, impairment, or physical or mental condition that involves:

- Inpatient care in a hospital, hospice, or residential medical care facility; or
- Continuing treatment by a healthcare provider.”

It would be a rare COVID-19 long hauler worker who would not meet that requirement.

Employers should treat requests for FMLA leave from long hauler workers as they would any other FMLA request. If you routinely request FMLA certifications before approving requests, do so for long haulers too. [New FMLA certification forms](#) make it easier for doctors to decide whether the patient has a serious health condition. The forms also provide employers with the information they need to approve or reject requests.

Long haul workers may be eligible for blocks of leave or intermittent leave. Intermittent leave can be used for unpredictable and sudden long hauler symptoms like headaches and fevers. Make sure workers follow any call-off process you have in place. Employees who don't can and should be disciplined.

Bottom line

Approve FMLA leave as appropriate. After leave has been exhausted, consider whether the ADA offers protection. If not, you can discharge the long hauler worker for missing work.

Litigation

There have been a handful of ADA and state disability discrimination lawsuits filed so far by long hauler workers. None have yet gone to trial. However, the number is expected to grow as the EEOC works through complaints and clears them for court. For employers, the best bet is to follow existing ADA and FMLA processes. Then, if the time has come to discharge the worker, make sure to contract counsel for guidance.