# CLIENT ALERT: EEOC Issues Updated Guidance Addressing Coverage of COVID-19-Related Conditions Under the ADA

On December 14, 2021, the U.S. Equal Employment Opportunity Commission ("EEOC") issued additional guidance on COVID-19 as a "disability" under the Americans with Disabilities Act ("ADA"). The EEOC explained that, depending on the circumstances, someone who has, or had, COVID-19 can be someone: with an "actual disability"; having a "record of" a disability; or "regarded as" an individual with a disability. Each case is assessed separately, as not all COVID-19 diagnoses meet the ADA's definition of "disability". Some highlights of the EEOC guidance include:

- A person with COVID-19 has an "actual disability" if the effects from the virus or its symptoms presents a "physical or mental" impairment that "substantially limits one or more major life activities". For example, a person diagnosed with COVID-19 who experiences ongoing, yet intermittent, headaches, dizziness, and difficulty remembering or concentrating is considered substantially limited in neurologic and brain function, and therefore regarded as someone with an "actual disability".
    - The EEOC made it clear that determining whether a specific employee's COVID-19 is an actual disability always requires an individualized assessment, "and such assessments cannot be made categorically." For example, a person infected with the virus, who is either asymptomatic or presents mild symptoms that resolve within a matter of weeks, with no other consequences, will *not* be regarded as a person with an actual disability under the ADA's definition.
- An individual who has since recovered from COVID-19, but while diagnosed with COVID-19 met the ADA's definition of a person with an "actual disability", may be considered someone with a "record of" a disability, depending on the facts.
- Depending on the facts, a person may be "regarded as" an individual with a disability if the person is subjected to an adverse action because the person either actually has COVID-19, or the employer mistakenly believes the person has COVID-19, unless the actual or believed diagnosis is objectively *both* transitory (lasting or expected to last six months or less) and minor.
    - For example: An employee fired for displaying symptoms of COVID-19 which, although minor, lasted or were expected to last more than six months may be considered by the EEOC as someone "regarded as" an individual with a disability, as the employer could not show that the diagnosis was *both* transitory and minor.
- The EEOC further advised that in some cases, a medical condition, either caused or worsened by COVID-19, may be a disability under the ADA.

Notably, the EEOC's guidance supports that an employer may have defenses on action taken based on a real or believed COVID-19 diagnosis. For example, even if an employee is terminated from employment because of their COVID-19 related impairment, the individual will still need to establish that they are qualified for the job held or desired. Additionally, depending on the circumstances, the ADA's "direct threat" defense could allow an employer to require the employee with COVID-19 to refrain from physically entering the workplace during the CDC-recommended period of isolation. Additionally, in order to be entitled to a reasonable accommodation, individuals must meet either the "actual" or "record of" definitions of disability. Meeting those definitions alone does not entitle a person to a reasonable accommodation; the individual's disability must require the accommodation and the employer is not obligated to provide an accommodation that would pose and undue hardship.

Nonetheless, the new guidance reminds employers to carefully undertake an individualized

assessment when engaging in the interactive process under the ADA. Just as when employers receive any other request for an accommodation under the ADA, employers should engage in the interactive process, which may include asking the employee to provide certain information that will allow the employer to assess whether the employee meets the definition of a disabled individual under that law, and meet the need for an accommodation. Employers with any questions about the ADA and the interactive process should consult with their MBJ attorney.

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