

COVID-19 and the Americans with Disabilities Act: Balancing Fear, Safety, and Risk as America Goes Back to Work

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I. INTRODUCTION

The Americans with Disabilities Act (ADA) will play a significant role in protecting employees and employers while reversing the massive work disruptions caused by COVID-19.¹ The United States' unemployment rate reflects the magnitude of the disruptions; the unemployment rate reached almost 15%, and over 43 million Americans filed unemployment claims during the first half of 2020.² Additionally, millions of Americans began working from home or otherwise altering their work routine to protect themselves and others from spreading the virus.³ Researchers and the Centers for Disease Control and Prevention (CDC) state that COVID-19 will likely become endemic to the United States' population.⁴ The endemic presence of COVID-19 will create new ongoing legal obligations for employers under the ADA, which are explored in this paper.

The ADA was enacted in 1990 to address the "serious and pervasive social problem" caused by society's historical tendency to "isolate and segregate individuals with disabilities."⁵ When the ADA was passed, "Congress acknowledged that society's accumulated myths and

¹ Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213. The Americans with Disabilities Act is a landmark piece of civil rights legislation passed in 1990 and amended in 2009.

² Sarah Chaney & Eric Morath, *April Unemployment Rate Rose to a Record 14.7%*, WALL ST. J. (May 8, 2020), <https://www.wsj.com/articles/april-jobs-report-coronavirus-2020-11588888089>; Anneken Tappe, *Nearly 43 Million Americans Have Filed for Unemployment Benefits During the Pandemic*, CNN BUS. (June 4, 2020), <https://www.cnn.com/2020/06/04/economy/unemployment-benefits-coronavirus/index.html>; News Release, U.S. Dep't of Labor, Bureau of Labor Statistics, *The Employment Situation: April 2020* (May 8, 2020), https://www.bls.gov/news.release/archives/empsit_05082020.pdf.

³ May Wong, *Stanford Research Provides a Snapshot of a New Working-From-Home Economy*, STAN. NEWS (June 29, 2020), <https://news.stanford.edu/2020/06/29/snapshot-new-working-home-economy> (estimating that 42% of the workforce was working from home in June 2020).

⁴ Ruiyun Li et al., *Substantial Undocumented Infection Facilitates the Rapid Dissemination of the Novel Coronavirus (SARS-CoV-2)*, 368 SCIENCE 489, 492 (2020), <https://science.sciencemag.org/content/sci/368/6490/489.full.pdf> (noting that prior to COVID-19, there were already "four endemic coronavirus strains circulating in the human populations," and "[i]f the novel coronavirus follows the pattern of 2009 H1N1 pandemic influenza, it will also spread globally and become a fifth endemic coronavirus within the human population"); CENTERS FOR DISEASE CONTROL AND PREVENTION, PRINCIPLES OF EPIDEMIOLOGY IN PUBLIC HEALTH PRACTICE: AN INTRODUCTION TO APPLIED EPIDEMIOLOGY AND BIOSTATISTICS 72 (3d ed. 2012), <https://www.cdc.gov/csels/dsepd/ss1978/lesson1/section11.html> (defining "endemic" as "the constant presence and/or usual prevalence of a disease or infectious agent in a population within a geographic area").

⁵ *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 674–75 (2001).

fears about disability and disease are as handicapping as the physical limitations that flow from the actual impairment.”⁶

Contagious diseases like COVID-19 are particularly problematic when it comes to employment discrimination. Few physical impairments “give rise to the same level of public fear and apprehension as contagiousness.”⁷ The CDC notes regarding COVID-19 that “[f]ear and anxiety about a disease can lead to social stigma . . . toward people, places, or things.”⁸ For example, when discussing the case of a nurse quarantined after traveling to an area of an Ebola outbreak, one court noted, “Bad science and irrational fear often amplify the public’s reaction to reports of infectious disease” and added that “Ebola . . . is a virus, not a malevolent magic spell.”⁹

Pandemics like the COVID-19 pandemic are not uncommon historically. According to one historian, “Epidemics unfold as social dramas” that “start at a moment in time, proceed on a stage limited in space and duration, follow a plot line of increasing revelatory tension, move to a crisis of individual and collective character, then drift toward closure.”¹⁰ The “world has seen four influenza pandemics in the last century,” including (1) the “Spanish Flu” of 1918; (2) the “Asian” and “Hong Kong” Flus of the 1950s and 1960s; (3) the SARS outbreak in 2003 (which was technically “considered a pandemic ‘scare’”); and (4) the H1N1 outbreak in 2009.¹¹ The Spanish Flu of 1918 pandemic was the “most severe” and “killed 675,000 people in the United States and 50 million people worldwide.”¹² The World Health Organization (WHO) declared COVID-19 a pandemic on March 11, 2020.¹³

COVID-19 is caused by a coronavirus related to two other coronaviruses involved in previous outbreaks, including the Severe Acute Respiratory Syndrome (SARS) virus outbreak in 2002–03 and the Middle East Respiratory Syndrome (MERS) virus outbreak still going on

⁶ Sch. Bd. of Nassau Cty. v. Arline, 480 U.S. 273, 284 (1987).

⁷ *Id.*

⁸ *Reducing Stigma*, CTRS. FOR DISEASE CONTROL AND PREVENTION (June 11, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/reducing-stigma.html> [hereinafter CDC, *Reducing Stigma*].

⁹ *Hickox v. Christie*, 205 F. Supp. 3d 579, 584 (D.N.J. 2016).

¹⁰ David S. Jones, *History in a Crisis—Lessons for COVID-19*, 382 NEW ENG. J. MED. 1681 (2020), <https://www.nejm.org/doi/full/10.1056/NEJMp2004361>.

¹¹ *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N (EEOC) [hereinafter EEOC, *Pandemic Preparedness*], <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act> (last visited September 5, 2020).

¹² *Id.* at n.3.

¹³ *Id.*

from 2012.¹⁴ COVID-19 is caused by the Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2).¹⁵ The WHO designated the disease caused by the virus as Coronavirus Disease 2019, or “COVID-19,” in February 2020.¹⁶

The COVID-19 virus is believed to spread from person-to-person mainly between people who are within about 6 feet of each other (i.e., in close contact) and via “respiratory droplets produced when an infected person coughs, sneezes, or talks.”¹⁷ Droplets “can land in the mouths or noses of people who are nearby or possibly be inhaled into the lungs.”¹⁸ The virus may be contagious before people show symptoms and can live on surfaces for spread from hand-to-face touching.¹⁹ People with COVID-19 carry the virus (i.e., are possibly contagious to others) for an average of twenty days and up to thirty-seven days in some individuals.²⁰

The most common symptoms of COVID-19 for patients admitted to the hospital were fever and cough, followed by sputum production and fatigue.²¹ But even among hospitalized patients, these symptoms were not reliable indicators of infection since less than one-third of patients had a fever at the time of admission and less than one-fifth had an

¹⁴ Zunyou Wu & Jennifer McGoogan, *Characteristics of and Important Lessons From the Coronavirus Disease 2019 (COVID-19) Outbreak in China: Summary of a Report of 72,314 Cases From the Chinese Center for Disease Control and Prevention*, 323(13) JAMA INTERNAL MED. 1239, 1239–41 (2020), <https://jamanetwork.com/journals/jama/fullarticle/2762130>.

¹⁵ Fei Zhou et al., *Clinical Course and Risk Factors for Mortality of Adult Inpatients with COVID-19 in Wuhan, China: A Retrospective Cohort Study*, 395 LANCET 1054, 1054 (2020), <https://www.thelancet.com/action/showPdf?pii=S0140-6736%2820%2930566-3>.

¹⁶ *Id.*

¹⁷ *How to Protect Yourself & Others*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (last updated July 31, 2020).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Zhou et al., *supra* note 15, at 1054, 1058 (noting that “[t]he shortest observed duration of viral shedding among survivors was 8 days, whereas the longest was 37 days” and that the median was 20 days).

²¹ *Id.*

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elevated respiratory rate.²² Hospitalized patients spend an average of three weeks in the hospital according to one study.²³

The severity of the illness varies greatly between individuals. COVID-19 symptoms range from asymptomatic infection to severe viral pneumonia with respiratory failure and death.²⁴ No specific antiviral therapies have been identified to treat these viruses, so the treatment is supportive care.²⁵

Multiple factors have been found to relate to the severity of COVID-19 cases and the risk of death or severe complications in particular individuals. Older age is a risk factor for death.²⁶ Comorbidities, like high blood pressure, diabetes, and coronary heart disease, were present in over half of patients in one early study of Chinese COVID-19 patients.²⁷ In a study of 5,700 New York patients, male sex, hypertension, obesity, and diabetes were also risk factors for hospitalization.²⁸ On July 26, 2020, a total of 16,076,713 global cases had been reported, leading to 644,661 deaths in 188 “countries/regions” for a case fatality rate of 4.0%.²⁹ But, in the United States, the CDC estimates that the case fatality rate is around 0.4%.³⁰

²² Safiya Richardson et al., *Presenting Characteristics, Comorbidities, and Outcomes Among 5,700 Patients Hospitalized with COVID-19 in the New York City Area*, 323(20) JAMA INTERNAL MED. 2052, 2054 (2020), <https://jamanetwork.com/journals/jama/full-article/2765184> (noting that at the time of hospitalization, only 30.7% of hospitalized patients had fevers and only 17.3% had an elevated respiratory rate over twenty-four breaths/minute).

²³ Zhou et al., *supra* note 15, at 1057 (noting for hospitalized patients, “The median time from illness onset . . . to discharge [is] 22 days . . .”).

²⁴ *Id.* at 1054.

²⁵ Wu & McGoogan, *supra* note 14, at 1241.

²⁶ Zhou et al., *supra* note 15, at 1054.

²⁷ *Id.* at 1054.

²⁸ Richardson et al., *supra* note 22, at 2052 (noting that that there was a male propensity (61.3% were male), 56% had hypertension, 41.7% were obese, and 33.8% had diabetes).

²⁹ *COVID-19 Dashboard by the Center for Systems Science and Engineering (CSSE)*, JOHN HOPKINS UNIV. [hereinafter COVID-19 Operations Dashboard], <https://www.arcgis.com/apps/opsdashboard/index.html#/bda7594740fd40299423467b48e9ecf6> (last visited July 26, 2020).

³⁰ *COVID-19 Pandemic Planning Scenarios*, CTRS. FOR DISEASE CONTROL AND PREVENTION (CDC) (July 10, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios-h.pdf> [hereinafter CDC, *Pandemic Planning*] (see Scenario 5); Arman Azad, *CDC Estimates that 35% of Coronavirus Patients Don't Have Symptoms*, CNN HEALTH (May 22, 2020), <https://www.cnn.com/2020/05/22/health/cdc-coronavirus-estimates-symptoms-deaths/index.html> (“The CDC also says its ‘best estimate’ is that 0.4% of people who show symptoms and have Covid-19 will die.”).

Others indicate that the United States' case fatality rate may be more in-line with that of seasonal influenza, which is 0.1%.³¹

The above characteristics of COVID-19 will impact the legal analysis under the ADA. The ADA provides the boundaries and framework to protect employers and employees in dealing with discrimination related to disabilities.³² The Equal Employment Opportunity Commission (EEOC) enforces Title I of the ADA and issues guidelines.³³ But the EEOC Guidance does "not have the force and effect of law," so throughout this Article I will rely on EEOC Guidance (which tends to be more specific to pandemic flu), as well as underlying case law, statutes, and regulations.³⁴ This Article will discuss (1) whether and/or how populations of employees impacted by COVID-19 can be considered individuals with a "disability" protected by the ADA, and (2) how the ADA will help define the ways that employers and employees deal with COVID-19 as Americans go back to work.

II. COVID-19 AND "DISABILITY" UNDER THE ADA

How employees and employers affected by COVID-19 are treated under the ADA hinges upon whether COVID-19 and/or COVID-19-related impairments are considered "disabilities" under the ADA's definition. This Part will first explore the ADA's treatment of some other communicable diseases. Then, it will apply the ADA definition of "disability" to COVID-19. Finally, this Part will explore a potential new group of "disabled" individuals under the ADA: those susceptible to life-altering COVID-19 complications (including death).

A. Communicable Diseases as Disabilities

Infectious and communicable diseases are disabilities under the ADA under some circumstances.³⁵ The Supreme Court of the United

³¹ Anthony Fauci et al., *Covid-19—Navigating the Uncharted*, 382(13) *NEW ENG. J. MED.* 1268, 1268 (2020), <https://www.nejm.org/doi/pdf/10.1056/NEJMe2002387> (stating that "the overall clinical consequences of Covid-19 may ultimately be more akin to those of a severe seasonal influenza (which has a case fatality rate of approximately 0.1%)").

³² 29 C.F.R. pt. 1630, app. § 1630.2 (2019) (explaining, "Title I of the ADA prohibits disability-based discrimination in employment.").

³³ *Id.* (pointing out, "Pursuant to the ADA as amended, the EEOC is expressly granted the authority and is expected to amend these regulations. 42 U.S.C. 12205a.").

³⁴ EEOC, *Pandemic Preparedness*, *supra* note 11 ("The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.").

³⁵ *Sch. Bd. Of Nassau Cty. v. Arline*, 480 U.S. 273, 284 (1987) ("Allowing discrimination based on the contagious effects of a physical impairment would be

States has recognized that allowing discrimination based on the contagiousness of a disease is inconsistent with the ADA's basic purpose of ensuring that people with disabilities are "not denied . . . benefits because of the prejudiced attitudes or the ignorance of others."³⁶ The Court observed that "[e]ven those who suffer or have recovered from such noninfectious diseases as epilepsy or cancer have faced discrimination based on the irrational fear that they might be contagious."³⁷

The Supreme Court has recognized infectious diseases—including tuberculosis (TB) and human immunodeficiency virus (HIV)—as disabilities under the ADA.³⁸ Tuberculosis was recognized as a disability by the Supreme Court in *Arline*.³⁹ Ms. Gene Arline was first hospitalized for TB in 1957, but her disease subsequently went into remission for twenty years from 1957 to 1977.⁴⁰ For thirteen years (from 1966 to 1979), Arline was an elementary school teacher in Nassau County, Florida.⁴¹ During the last two years of her employment, she experienced three relapses of TB.⁴² After positive TB cultures in 1977 and 1978, she was suspended with pay for the remainder of the school year.⁴³ The school board then fired Arline at the end of the school year, "not because she had done anything wrong" but because of the recurrence of her TB.⁴⁴ In the aftermath, the Supreme Court held that "a

inconsistent with the basic purpose of § 504 [and the ADA], which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others.").

³⁶ *Id.* (referring to § 504 of the Rehabilitation Act, which Congress has made clear applies to the ADA, which adopted the Rehabilitation Act's definitions); *see also* 29 C.F.R. pt. 1630, app. § 1630.2 (2019) (noting that "Congress intended that the relevant case law developed under the Rehabilitation Act would be generally applicable to the term 'disability' as used in the ADA.").

³⁷ *Arline*, 480 U.S. at 284.

³⁸ 28 C.F.R. pt. 36, app. C § 36.104 ("[S]ymptomatic HIV disease is an impairment that substantially limits a major life activity; therefore, it has been included in the definition of disability under this part. . . . [A]symptomatic HIV disease is an impairment that substantially limits a major life activity, either because of its actual effect on the individual with HIV disease or because the reactions of other people to individuals with HIV disease cause such individuals to be treated as though they are disabled."); *see also* *Bragdon v. Abbott*, 524 U.S. 624, 647 (1998) (holding asymptomatic HIV infection to be a disability under the ADA).

³⁹ *Arline*, 480 U.S. at 281.

⁴⁰ *Id.* at 276.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

person suffering from the contagious disease of tuberculosis can be a handicapped person” and that “Arline is such a person.”⁴⁵

In another prominent example, *Bragdon* recognized HIV as a disability.⁴⁶ An asymptomatic HIV-positive patient sought to have a cavity filled by her dentist who refused to treat her in his office after she disclosed her HIV status on a patient registration form.⁴⁷ The Supreme Court found that HIV infection is a disability under the ADA even before it causes symptoms.⁴⁸

Employers may not discriminate against qualified individuals with communicable diseases that fulfill the definition of “disability” under Title I of the ADA “on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”⁴⁹ The definition of discrimination includes:

- (1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of the applicant or employee . . . ;
- (2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity’s qualified applicant or employee to discrimination . . . ;
- (3) utilizing standards, criteria, or other methods of administration—
 - (A) that have the effect of discrimination on the basis of disability . . . ;
- (5)(A) not making reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability . . . , unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or (B) denying employment opportunities to a job applicant or employee who is [otherwise qualified], if such denial is based on the need . . . to make reasonable accommodation . . . ;
- (6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria

⁴⁵ *Arline*, 480 U.S. at 289.

⁴⁶ *Bragdon v. Abbott*, 524 U.S. 624, 641 (1998). For the relevant details of *Bragdon*, see discussion *infra* Section III.D.

⁴⁷ *Id.* at 628–29.

⁴⁸ *Id.* at 647.

⁴⁹ 42 U.S.C. § 12112(a).

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... is shown to be job-related for the position in question and is consistent with business necessity; and (7) [subjecting applicants or employees to prohibited medical inquiries or examinations].⁵⁰

The “ADA does not preempt any Federal law, or any State or local law, that grants to individuals with disabilities protection greater than or equivalent to that provided by the ADA.”⁵¹ But “the ADA does preempt inconsistent requirements established by State or local law for safety or security sensitive positions.”⁵² For example, “suppose a municipality has an ordinance that prohibits individuals with tuberculosis from teaching school children;” if a teacher with “dormant tuberculosis challenges a private school’s refusal to hire him or her on the basis of the tuberculosis, the private school would not be able to rely on the city ordinance as a defense under the ADA.”⁵³

B. COVID-19 as a “Disability”

The ADA states:

An individual is considered to have a “disability” if that individual (1) has physical or mental *impairment* that *substantially limits* one or more of that person’s *major life activities* (the “actual disability” prong); (2) has a *record of* such an impairment (the “record of” prong); or (3) is *regarded* by the covered entity as an individual with a disability ... (the “regarded as” prong).⁵⁴

The rules of construction for the ADA require that the definition of “disability” “be construed in favor of broad coverage of individuals ... to the maximum extent permitted by the terms of [the ADA].”⁵⁵ To be a person with a “disability” under the ADA, “an individual is only required to satisfy one prong.”⁵⁶

The terms “substantially limits” and “major life activities” apply to both the first and second prongs where individuals are “affirmatively seeking reasonable accommodations,”⁵⁷ so they will be defined here and discussed more specifically below in the appropriate sections.

⁵⁰ See *id.* § 12112(b), (d).

⁵¹ 29 C.F.R. pt. 1630, app. §1630.1(c) (2019).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ 29 C.F.R. pt. 1630, app. § 1630.2(g) (emphasis added).

⁵⁵ *Id.*; 42 U.S.C. § 12102(4)(A).

⁵⁶ 29 C.F.R. pt. 1630, app. § 1630.2(g)(2).

⁵⁷ *Id.* § 1630.2(j)

First, the term “substantially limits” is “not meant to be a demanding standard” and is to be “construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA.”⁵⁸ Congress stated the term “should not be unduly used as a tool for excluding individuals from the ADA’s protections.”⁵⁹ The impairment “need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting,” but instead should simply “limit the ability of an individual to perform a major life activity as compared to most people in the general population.”⁶⁰ In other words, the “level of limitation required is ‘substantial’ as compared to most people in the general population, which does not require a significant or severe restriction.”⁶¹ The “primary object of attention” is whether employers comply with their ADA obligations, so the issue of “whether an impairment ‘substantially limits’ a major life activity should not demand extensive analysis,” and should not require “scientific, medical, or statistical analysis”—although such evidence is not prohibited.⁶² Nevertheless, “[n]ot every impairment will constitute a disability within the meaning of this section.”⁶³ Importantly, temporary impairments lasting less than six months can be substantially limiting, as discussed below.

Second, the ADA’s list of major activities that can be affected by COVID-19 includes “caring for oneself, performing manual tasks, . . . eating, sleeping, walking, standing, lifting, bending, speaking, *breathing*, learning, . . . concentrating, thinking, communicating, and working.”⁶⁴ The ADA also includes the operation of “major bodily functions” as “major life activities,” including the operation of the lungs, the respiratory system, and other major bodily functions potentially affected by COVID-19.⁶⁵

1. Actual Disability Prong

Most COVID-19 survivors will not qualify as having an actual disability under the ADA. The actual disability prong of the ADA defines disability as an individual having a physical or mental impairment that

⁵⁸ *Id.* § 1630.2(j)(1)(i).

⁵⁹ *Id.*

⁶⁰ 29 C.F.R. pt. 1630, app. § 1630.2(j)(1)(ii).

⁶¹ *Id.*

⁶² *Id.* § 1630.2(j)(1)(iii), (v).

⁶³ *Id.* § 1630.2(j)(1)(ii); *Bush v. Donahoe*, 964 F. Supp. 2d 401, 415 (W.D. Pa. 2013); *Koller v. Riley Riper Hollin & Colagreco*, 850 F. Supp. 2d 502, 513 (E.D. Pa. 2012).

⁶⁴ 29 C.F.R. pt. 1630, app. § 1630.2(i) (emphasis added).

⁶⁵ *Id.*

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substantially limits one or more major life activities.⁶⁶ The duration of the impairment is “only one factor in determining whether the impairment substantially limits a major life activity, and impairments that last only a short period of time may be covered if sufficiently severe.”⁶⁷ As noted above, COVID-19 patients experience a range of symptoms ranging from no symptoms (i.e., asymptomatic) to mild upper respiratory tract illness like the “common cold” to severe pneumonia, to respiratory failure.⁶⁸ Whether or not the individual has an actual disability related to COVID-19 infection under the first prong of the ADA will require an individualized assessment. The “test is whether, *at the time of the adverse employment action*, the limitation caused by the impairment was ‘substantial.’”⁶⁹

First, severe cases requiring hospitalization like those with severe pneumonia or respiratory failure, especially if there are permanent effects, will likely qualify as disabilities under the ADA. For example, in *Arline*, the teacher was hospitalized for an acute form of TB “in such a degree that it affected her respiratory system.”⁷⁰ The Supreme Court noted that “Arline thus had a physical impairment . . . affecting her respiratory system . . . serious enough to require hospitalization, a fact more than sufficient to establish that one or more of her major life activities were substantially limited by her impairment.”⁷¹

For COVID-19 patients, one Chinese study of over 70,000 cases found that approximately 19% of patients required hospitalization for “severe” or “critical” symptoms, with 14% of cases being “severe” (i.e., including shortness of breath, high respiratory frequency, low blood oxygen, and/or chest x-ray changes) and 5% being “critical” (i.e., including respiratory failure, shock, and/or multiple organ failure).⁷² During the illnesses and immediate recovery period of patients who were hospitalized for COVID-19 and presented ongoing symptoms, major life activities ranging from breathing to simply walking are likely demonstrably substantially limited by the impairment resulting from the COVID-19 infection.⁷³ The timing of the adverse employment action

⁶⁶ 29 C.F.R. pt. 1630, app. § 1630.2(g).

⁶⁷ Regulations to Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 76 Fed. Reg. 16978, 16982 (Mar. 25, 2011) (to be codified at 29 C.F.R. pt. 1630).

⁶⁸ Zhou et al., *supra* note 15, at 1054.

⁶⁹ *Bush v. Donahoe*, 964 F. Supp. 2d 401, 417 (W.D. Pa. 2013).

⁷⁰ *Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 281 (1987).

⁷¹ *Id.*

⁷² See Wu & McGoogan, *supra* note 14, at 1239.

⁷³ See Regulations to Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 76 Fed. Reg. 16978 (Mar. 25, 2011) (to be codified at

in relation to the employee's impairment status will be determinative.⁷⁴ Therefore, it seems likely that this population of serious or critically ill COVID-19 patients (i.e., approximately one-fifth (around 19%) of COVID-19 patients) will be considered disabled under the first prong during the time they are severely affected by the disease.

Second, in contrast, less severe COVID-19 cases that likely do not require hospitalization (i.e., approximately 81% of COVID-19 cases)⁷⁵ and that completely resolve within a few weeks are unlikely to be considered actual disabilities. Generally, the ADA was not adopted to address "minor, transitory impairments [e.g., the "common cold" or flu], except if of such a severe nature that one could not avoid considering them disabilities."⁷⁶ Therefore, most short-term impairments—like broken wrists that set properly or brief illnesses—do not qualify for ADA coverage, but some temporary conditions might be covered.⁷⁷ "The duration of an impairment is one factor that is relevant in determining whether the impairment substantially limits a major life activity," and "[i]mpairments that last only for a short period of time are typically not covered, although they may be covered if sufficiently severe."⁷⁸ The ADA requires that the "qualifying impairment create an 'important' limitation."⁷⁹ According to the WHO, mild COVID-19 cases typically resolve in around two weeks, while severe cases usually resolve in three to six weeks.⁸⁰

Many courts have found that "[t]emporary conditions, such as back or knee injuries," are not disabilities under the ADA "even though they may have substantially interfered with a major life activity for a period

29 C.F.R. pt. 1630). If the COVID-19-related impairments are sufficiently severe—even for a relatively short amount of time—they may qualify as a "disability" under the ADA because duration is "only one factor" to be used in the determination.

⁷⁴ *Bush*, 964 F. Supp. 2d 401, 417 (W.D. Pa. 2013) ("[T]he test is whether, at the time of the adverse employment action, the limitation caused by the impairment was 'substantial.'").

⁷⁵ See Wu & McGoogan, *supra* note 14, at 1239 ("Most cases were classified as mild (81%; i.e., nonpneumonia and mild pneumonia).").

⁷⁶ *Koller v. Riley Riper Hollin & Colagreco*, 850 F. Supp. 2d 502, 513 (E.D. Pa. 2012).

⁷⁷ *Id.*

⁷⁸ See *Bush*, 964 F. Supp. 2d at 418; 29 C.F.R. pt. 1630, app. § 1630.2(j)(1)(ix) (2019) (quoting Joint Hoyer-Sensenbrenner Statement on the Origins of the ADA Restoration Act of 2008, H.R. 3195 (reviewing provisions of H.R. 3195 as revised following negotiations between representatives of the disability and business communities) at 5).

⁷⁹ See H.R. Rep. No. 110-730, at 9 (2008).

⁸⁰ WORLD HEALTH ORGANIZATION, REPORT OF THE WHO-CHINA JOINT MISSION ON CORONAVIRUS DISEASE 2019 (COVID-19) 1, 14 (Feb. 2020) [hereinafter WHO, JOINT MISSION], <https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf>.

of time.”⁸¹ For example, one court found that two weeks of pain and difficulty returning to work after knee surgery did “not rise to the level of important, let alone, substantial limitations on a major life activity”; the court observed that the plaintiff’s claims “simply do not rise to the level necessary to infer any disability under the ADA.”⁸² Similarly, broken bones, as well as joint sprains, are often not sufficient to qualify.⁸³ Likewise, short-term, intermittent back pain has often been found to not qualify as an actual impairment. For example, one court discussing short-term back pain explained that a “temporary non-chronic impairment of short duration is not a disability covered by the [ADA]” and that the “evidence . . . would not allow a reasonable juror to conclude that plaintiff’s limitations were anything more than temporary impairments.”⁸⁴ Even shingles leaving permanent visible facial marks and pulmonary hypertension of several months have been found insufficient under the first prong of the ADA.⁸⁵ There are many other examples.⁸⁶

Some courts even make more generalized findings that seem to conflict with the idea that some temporary impairments can be actual disabilities. One court, for example, found that transitory illnesses with no permanent effects are not impairments within the meaning of the

⁸¹ 33 AM. JUR. PROOF OF FACTS 3d 1 (1995).

⁸² Koller v. Riley Riper Hollin & Colagrecio, 850 F. Supp. 2d 502, 513–15 (E.D. Pa. 2012).

⁸³ See, e.g., Kruger v. Hamilton Manor Nursing Home, 10 F. Supp. 3d 385, 389 (W.D.N.Y. 2014) (finding a broken arm insufficient); Spath v. Berry Plastics Corp., 900 F. Supp. 893 (N.D. Ohio 1995) (finding a broken ankle insufficient).

⁸⁴ Macfarlan v. Ivy Hill SNF, LLC, 675 F.3d 266, 274 (3d Cir. 2012). See, e.g., Nehan v. Tootsie Roll Indus., Inc., 54 F. Supp. 3d 957, 975 (N.D. Ill. 2014) (finding an employee with a temporary and brief back condition was not disabled); Mazur v. N.Y.C. Dept. of Educ., 53 F. Supp. 3d 618, 635–36 (S.D.N.Y. 2014) (finding a teacher with an ankle injury was not disabled); Palmieri v. City of Hartford, 947 F. Supp. 2d 187, 199 (D. Conn. 2013) (finding that a police officer who fully recovered within a year with a back injury was not disabled).

⁸⁵ Adams v. City of Chicago, 706 F. Supp. 2d 863, 873, 879 (N.D. Ill. 2010).

⁸⁶ See, e.g., Willis v. Noble Envtl. Power, LLC, 143 F. Supp. 3d 475, 484 (N.D. Tex. 2015) (finding dehydration and heat stroke were not disabilities); Peterson v. Garmin Int’l, Inc., 833 F. Supp. 2d 1299, 1318 (D. Kan. 2011) (finding that fecal incontinence resolving after one year was not a disability); Anderson v. United Conveyor Supply Co., 461 F. Supp. 2d 699, 706 (N.D. Ill. 2006) (finding that hysterectomy recovery period was not a disability).

ADA.⁸⁷ Another court said an impairment must be long-term or permanent to be considered a disability under the ADA.⁸⁸

But some courts do find that temporary impairments can be actual impairments, and an individualized assessment is necessary to make this determination because “[n]othing in the statutory law prohibits temporary impairments from qualifying as a disability.”⁸⁹ For example, one court found that a lumbar disc herniation and temporary degenerative changes did not bar an ADA claim and that impairments lasting less than six months can be substantially limiting under the ADA.⁹⁰ Similarly, courts have found that temporary impairments—such as a hernia,⁹¹ lifting restrictions during pregnancy,⁹² and sarcoidosis flare-ups⁹³—may constitute a disability.

Third, even fully recovered individuals with a history of severe COVID-19 disease will unlikely be considered disabled under the actual disability prong once they are recovered, unless they suffered some other permanent disability related to the disease (e.g., permanent lung disease). Most hospitalized patients recover within around six weeks.⁹⁴ If the adverse employment action occurs after a full recovery, then the ADA’s actual impairment prong will be unlikely to apply—so the other prongs (discussed below) will come into play.

2. “Record of” a Disability Prong

Most COVID-19 survivors will not qualify for protection under the ADA as having a “record of” disability since 81% of the cases are asymptomatic or mild.⁹⁵ The second prong of the ADA’s definition of “disability” provides that “an individual with a record of an impairment that substantially limits or limited a major life activity is an individual

⁸⁷ *Lopez v. Kempthorne*, 684 F. Supp. 2d 827, 867–68 (S.D. Tex. 2010) (quoting *de la Torres v. Bolger*, 781 F.2d 1134, 1137 (5th Cir. 1986)) (“An ‘impairment’ does not include ‘transitory illnesses which have no permanent effect on the person’s health.’”).

⁸⁸ *See Bibee v. Gen. Revenue Corp.*, 991 N.E.2d 298, 302 (Ohio Ct. App. 1st Dist. 2013) (quoting *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2002)) (“[T]he impairment’s impact must also be permanent or long-term.”).

⁸⁹ 33 AM. JUR. PROOF OF FACTS 3d 1 (1995); *see also Clemente v. Exec. Airlines, Inc.*, 213 F.3d 25, 31 (1st Cir. 2000) (noting that temporary impairments are not precluded from constituting a disability under the ADA).

⁹⁰ *Hodges v. District of Columbia*, 959 F. Supp. 2d 148, 154–55 (D.D.C. 2013).

⁹¹ *Bob-Maunuel v. Chipotle Mexican Grill, Inc.*, 10 F. Supp. 3d 854, 881 (N.D. Ill. 2014).

⁹² *Heatherly v. Portillo’s Hot Dogs, Inc.*, 958 F. Supp. 2d 913, 920 (N.D. Ill. 2013).

⁹³ *Allen v. Baltimore Cty.*, 91 F. Supp. 3d 722, 731 (D. Md. 2015).

⁹⁴ WHO, JOINT MISSION, *supra* note 80, at 14.

⁹⁵ *Wu & McGoogan*, *supra* note 14, at 1239 (“Most cases were classified as mild (81%; i.e., nonpneumonia and mild pneumonia).”).

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with a disability.”⁹⁶ EEOC regulations say that an individual “has a record of a disability if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.”⁹⁷ Additionally, the EEOC states that the prong “shall be construed broadly to the maximum extent permitted by the ADA and should not demand extensive analysis.”⁹⁸ The alleged disability “must be one that substantially limits one or more major life activities; a record of recovery from a minor laceration or the common cold would not qualify for coverage under this definition.”⁹⁹

The “record of” prong is intended “to ensure that people are not discriminated against because of a history of disability.”¹⁰⁰ For example, this prong protects “an individual who was treated for cancer ten years ago but who is now deemed by a doctor to be free of cancer, from discrimination based on that prior medical history.”¹⁰¹

Records that might be used to demonstrate the impairment include “education, medical, or employment records,” among others.¹⁰² In *Arline*, the Supreme Court noted that “Arline’s hospitalization for tuberculosis in 1957 suffices to establish that she has a ‘record of . . . impairment’ . . . and is therefore a handicapped individual.”¹⁰³ The individual is covered even if the “covered entity does not specifically know about the relevant record.”¹⁰⁴ But, of course, the individual will have to “prove that the covered entity discriminated on the basis of the record of the disability” for the covered entity to be liable for disability discrimination under this prong.¹⁰⁵ Individuals often are covered by both the first and second prong, although they only have to be covered by one prong to meet the definition of disability as noted above.¹⁰⁶ An individual with a record of a disability is entitled to reasonable accommodations (discussed below).¹⁰⁷

⁹⁶ 29 C.F.R. pt. 1630, app. § 1630.2(k) (2019).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ 33 AM. JUR. PROOF OF FACTS 3d 1 (1995).

¹⁰⁰ 29 C.F.R. pt. 1630, app. § 1630.2(k) (2019).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 281 (1987) (emphasis added).

¹⁰⁴ 29 C.F.R. pt. 1630, app. § 1630.2(k).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

COVID-19 patients who were hospitalized with serious or critical illness can likely fulfill the “record of” prong based upon their hospital records,¹⁰⁸ and therefore, are likely to qualify as having a “disability” under the definitions of both the first and second prongs. But the other 81% of COVID-19 survivors are unlikely to qualify under the second prong for the same reasons that they did not qualify under the first prong—specifically, they will likely be unable to show substantial limitations of a major life activity where their disease was mild and resolved in a few weeks. Courts have generally not found a “record of” disability in such situations.¹⁰⁹

3. Regarded as Having a Disability Prong

In some cases of people with impairments—especially those involving infectious diseases—“the negative reactions of others are just as disabling as the actual impact of an impairment.”¹¹⁰ The Supreme Court noted, “Congress was as concerned about the effect of an impairment on others as it was about its effect on the individual,” so Congress “extended coverage . . . to those individuals who are simply ‘regarded as having’ a physical or mental impairment.”¹¹¹ The “regarded as” prong was intended to “express Congress’s understanding that ‘unfounded concerns, mistaken beliefs, fears, myths, or prejudice about disabilities are often just as disabling as actual impairments, and its corresponding desire to prohibit discrimination founded on such perceptions.’”¹¹²

An individual “meets the requirement of ‘being regarded as having such an impairment’ if the individual establishes that he or she has been subjected to [discriminatory] action . . . because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity”; but this

¹⁰⁸ See *Arline*, 480 U.S. at 281.

¹⁰⁹ See, e.g., *Corning v. LodgeNet Interactive Corp.*, 896 F. Supp. 2d 1138, 1147 (M.D. Fla. 2012) (finding that an employee must still show substantial limits of a major life activity, even though there was a record of his FMLA leave and his supervisor’s knowledge of his kidney failure and chronic heart failure); *Jenkins-Allen v. Powell Duffryn Terminals, Inc.*, 18 F. Supp. 2d 885, 892–93 (N.D. Ill. 1998) (finding that seven months of workers’ compensation leave for surgery on both hands for carpal tunnel syndrome alone did not provide a record of disability because the employee returned to work without restrictions and her continuing pain did not substantially limit a major life activity); *Maldonado v. Cooperativa de Ahorro*, 685 F. Supp. 2d 264, 274 (D.P.R. 2010) (finding a record of sleep apnea was not a record of impairment where it did not limit any major life activity).

¹¹⁰ 29 C.F.R. pt. 1630, app. § 1630.2(l) (2019).

¹¹¹ *Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 282 (1987).

¹¹² 29 C.F.R. pt. 1630, app. § 1630.2(l) (emphasis added).

“shall not apply to impairments that are transitory and minor,” which is defined as “an impairment with an actual or expected duration of six months or less.”¹¹³ Employers are prohibited from taking discriminatory actions such as “refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment,” among others.¹¹⁴ Liability on the part of an employer, however, often turns on whether an employer provides a valid defense, like direct threat (discussed below).¹¹⁵ Also, for liability to ensue, the plaintiff still must show causation—i.e., that the employer discriminated on the basis of disability.¹¹⁶

There is no functional test under the “regarded as” prong; in other words, the “concepts of ‘major life activities’ and ‘substantial limitation’ simply are not relevant” under this prong.¹¹⁷ The EEOC says that the application is “straightforward” and gives a couple of examples: (1) “if an employer refused to hire an applicant because of skin graft scars, the employer has regarded the applicant as an individual with a disability;”¹¹⁸ and (2) “if an employer terminates an employee because he has cancer, the employer has regarded the employee as an individual with a disability.”¹¹⁹

The Supreme Court provided that “a person who would be covered . . . [includes] a person with some kind of visible physical impairment which in fact does not substantially limit that person’s functioning.”¹²⁰ The Court noted that “[s]uch an impairment might not diminish a person’s physical or mental capabilities, but could nevertheless substantially limit the person’s ability to work *as a result of the negative reactions of others to the impairment.*”¹²¹ By including the “regarded as” prong, the Court observed that “Congress acknowledged that society’s accumulated myths and fears about disability and disease are as handicapping as the physical limitations that flow from actual impairment.”¹²²

¹¹³ 42 U.S.C. § 12102(3).

¹¹⁴ 29 C.F.R. pt. 1630, app. § 1630.2(l).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 282 (1987).

¹²¹ *Id.* at 283 (emphasis added).

¹²² *Id.* at 284.

Society's myths, fears, and negative reactions to disability are nowhere greater than for communicable diseases like COVID-19. The CDC describes public health emergencies as "stressful times for people and communities" where "[f]ear and anxiety about a disease can lead to social stigma . . . toward people, places, or things."¹²³ According to the CDC, "[s]igmatization is especially common in disease outbreaks," and stigmatized groups "may be subjected to social avoidance or rejection[, as well as] denial of health care . . . [and] employment."¹²⁴ The CDC and state departments of health also note that stigma can occur "after a person has recovered from COVID-19," even though they are no longer considered a risk for spreading the virus.¹²⁵

In *Arline*, the Supreme Court held that a school teacher with a history of an infectious disease, TB, was *regarded as* having a disability because "her employer perceived her to be contagious," and those fears "were grounded in the misperception that she was currently contagious."¹²⁶

More recently, a Minnesota court considered the case of an employee who was fired at the peak of the swine flu panic in 2009.¹²⁷ The plaintiff worked for fourteen years for a quarry in Minnesota as "a good employee with satisfactory performance reviews" when he left to go home to see his sister who was gravely ill and actually died before he could get there.¹²⁸ When he tried to return to work after his sister's funeral, the human resources director "told him that he was being fired because [his employer] feared that he had contracted the swine flu during his trip," and he was instructed that "due to health and safety concerns arising out of his trip . . . , he should not come on site without contacting the company."¹²⁹ The court conceded that "[l]ittle was known about swine flu [at the time of Valdez' firing], and medical authorities feared the worst."¹³⁰ The court observed that "Valdez was terminated at the height of . . . public hysteria" when "[s]wine flu was declared a public-health emergency[] and there was widespread panic

¹²³ CDC, *Reducing Stigma*, *supra* note 8.

¹²⁴ *Addressing Stigma*, CTR. FOR DISEASE CONTROL AND PREVENTION, https://emergency.cdc.gov/cerc/cerccorner/article_123016.asp (last visited Mar. 24, 2017).

¹²⁵ CDC, *Reducing Stigma*, *supra* note 8; *see also COVID-19: Stigma*, GEORGIA DEP'T OF PUB. HEALTH, <https://dph.georgia.gov/covid-19-stigma> (last updated June 11, 2020).

¹²⁶ *EEOC v. STME, LLC*, 309 F. Supp. 3d 1207, 1212–13 (M.D. Fla. 2018), *aff'd*, 938 F.3d 1305 (11th Cir. 2019) (citing *Arline*, 480 U.S. 273, at 284).

¹²⁷ *Valdez v. Minn. Quarries, Inc.*, No. 12-CV-0801, 2012 WL 6112846, at *1 (D. Minn. Dec. 10, 2012).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at *3.

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about the possibility of a deadly pandemic.”¹³¹ Even so, the Minnesota district court found that the plaintiff was not “regarded as” disabled in this case because swine flu objectively fell under the “transient and minor” exception to the “regarded as” prong.¹³²

The “regarded as” prong “shall not apply to impairments that are transitory and minor,” which is defined as “an impairment with an actual or expected duration of 6 months or less.”¹³³ This “transient and minor” exception does not apply to the other prongs.¹³⁴ “Transitory” is defined as “an impairment with an actual or expected duration of 6 months or less.”¹³⁵ “Minor” is not defined by the statute or the regulations.¹³⁶

According to the legislative history, the purpose of the “transitory and minor” exception is to exclude “‘common ailments like the cold or flu’ from being considered disabilities under the ‘regarded as’ prong.”¹³⁷ According to the EEOC, the transitory and minor exception to the “regarded as” prong “responds to concerns raised by employer organizations and is reasonable ... because individuals seeking coverage under this prong need not meet the functional limitation requirement contained in the first two prongs of the definition.”¹³⁸ The EEOC noted that the 2008 House Judiciary Committee explained that:

absent this exception, the third prong of the definition would have covered individuals who are regarded as having *common ailments like the cold or flu*, and this exception responds to concerns raised by members of the business community regarding potential abuse of this provision and misapplication of resources on individuals with minor ailments that last only a short period of time.¹³⁹

Transitory and minor are defined objectively; in other words, “what matters is whether the impairment *is*, in fact, transitory and minor”—not what the employer subjectively believed, so that the

¹³¹ *Id.*

¹³² *Id.*

¹³³ 42 U.S.C. § 12102(3)(B).

¹³⁴ *Id.*; Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as amended, 76 Fed. Reg. 16978-01 (Mar. 25, 2011) (to be codified at 29 C.F.R. pt. 1630).

¹³⁵ 42 U.S.C. § 12102(3)(B).

¹³⁶ *Valdez v. Minn. Quarries, Inc.*, No. 12-CV-0801, 2012 WL 6112846, at *2 (D. Minn. Dec. 10, 2012).

¹³⁷ *Id.* (citing 29 C.F.R. pt. 1630).

¹³⁸ 29 C.F.R. pt. 1630, app. §1630.2(l) (2019).

¹³⁹ *Id.* (emphasis added) (citing H.R. Rep. No. 110-730, pt. 2, at 18 (2008)).

employer cannot prevail by arguing it believed the ailment was only transitory and minor.¹⁴⁰

In the Minnesota swine flu case, the plaintiff conceded that the “swine flu is ‘transitory’ for purposes of the ADA.”¹⁴¹ By the time of oral arguments, the plaintiff also conceded—and the court agreed—“that swine flu *as it is now understood* is also ‘minor’ for purposes of the ADA, in the sense that it has not turned out to be more serious than the seasonal flu, and seasonal flu is undoubtedly ‘transitory and minor’ for purposes of the ADA.”¹⁴² In arriving at this conclusion, the *Valdez* court quoted an expert affidavit in 2012 as “estimating a total of 274,000 hospitalizations and 12,470 deaths in the United States due to swine flu from April 2009 to April 2010” and compared it to estimates from a CDC website stating that “each year in the United States more than 200,000 people are hospitalized for seasonal flu-related complications and that seasonal flu related deaths have ranged from a low of 3,000 to a high of 49,000 per year in the three decades preceding 2006.”¹⁴³

In determining that *Valdez* was not disabled under the “regarded as” prong, the court noted, “It is clear under the statute and the implementing regulations that the Court must decide whether an impairment is ‘transitory and minor’ on an objective basis,” and “from an objective standpoint, swine flu must be considered transitory and minor.”¹⁴⁴ In reaching this conclusion, the court relied on the fact that the swine flu “has a mortality and hospitalization profile similar to that of seasonal flu, and the legislative history cites seasonal flu as the paradigmatic example of a transitory and minor ailment.”¹⁴⁵ The court found that “because swine flu is objectively transitory and minor, it is not a disability under the ‘regarded as’ prong of the ADA.”¹⁴⁶ The court therefore granted the employer’s motion for summary judgment.¹⁴⁷

If other courts follow this example, disability discrimination against COVID-19 survivors may be difficult to prevent under the “regarded as” prong—depending upon the ultimate morbidity and

¹⁴⁰ *Valdez*, 2012 WL 6112846, at *2 (citing 29 C.F.R. pt. 1630, app. § 1630.15(f)).

¹⁴¹ *Id.* at *3.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at *3.

¹⁴⁵ *Id.*

¹⁴⁶ *Valdez*, 2012 WL 6112846, at *3 (concluding that swine flu is transitory and minor); EEOC, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act* (Oct. 9, 2009), http://www.eeoc.gov/facts/pandemic_flu.html (technical assistance document for employers indicating that swine flu is not a disability within the meaning of the ADA).

¹⁴⁷ *Valdez*, 2012 WL 6112846, at *3–4.

mortality of the disease compared to seasonal influenza. National and state emergencies and disasters have been declared, people are consistently behaving irrationally with panic (e.g., buying up all of the toilet paper), and the National Guard has even been called out in some states over the COVID-19 panic. But, according to the *Valdez* court, the ultimate determination of protection for COVID-19 survivors under the ADA's "regarded as" prong will depend upon how COVID-19's morbidity and mortality statistics stack up against seasonal influenza.

Strong arguments can already be made that COVID-19 is not objectively "mild" when compared to seasonal influenza, and the EEOC notes that the "transient and minor exception" to the "regarded as" prong "should be construed narrowly."¹⁴⁸ Whether or not courts consider individuals with mild, asymptomatic, or suspected COVID-19 cases to be "regarded as" disabled under the ADA may depend on a comparison of COVID-19 morbidity and mortality statistics to seasonal influenza statistics at the time, if they follow the Minnesota court's example.

Comparisons of COVID-19 to seasonal influenza can be misleading.¹⁴⁹ For example, by May 2020, approximately 65,000 deaths in the United States were attributed to COVID-19, which was very similar to the number of seasonal influenza deaths that the CDC reports annually.¹⁵⁰ Some have estimated that the ultimate case fatality rate may be similar to that of seasonal influenza.¹⁵¹ But researchers point out that the conditions on the frontline of clinical care for COVID-19 have been much different than for seasonal influenza because the "demand on hospital resources during the COVID-19 crisis has not occurred before in the US, even during the worst of influenza seasons."¹⁵² Weekly comparisons between COVID-19 and seasonal

¹⁴⁸ 29 C.F.R. pt. 1630, app. § 1630.2(l) (2019).

¹⁴⁹ Jeremy Samuel Faust & Carlos del Rio, *Assessment of Deaths From COVID-19 and From Seasonal Influenza*, 180(8) JAMA INTERNAL MED. 1045, 1045–46 (May 14, 2020), <https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2766121> (stating that comparisons of COVID-19 to seasonal influenza is not a valid comparison).

¹⁵⁰ *Id.* at 1045 (pointing out that by May 2020, there were around 65,000 deaths in the United States related to COVID-19, which was deceptively similar to the number of annual influenza deaths).

¹⁵¹ Fauci et al., *supra* note 31, at 1268 ("[T]he overall clinical consequences of COVID-19 may ultimately be more akin to those of severe seasonal influenza (which has a case fatality rate of approximately 0.1%).").

¹⁵² Faust & del Rio, *supra* note 149, at 1045 (explaining that "[t]his apparent equivalence of deaths from COVID-19 and seasonal influenza does not match frontline clinical conditions, especially in some hot zones of the pandemic where ventilators have been in short supply and many hospitals have been stretched beyond their limits" and pointing out that "[t]he demand on hospital resources during the COVID-19 crisis has not occurred before in the US, even during the worst of influenza seasons").

influenza deaths are more revealing. For example, the highest number of deaths during any peak week of seasonal influenza from 2013 to 2020 was 1,626 deaths during one week in 2018, compared to two weeks in April 2020 with 15,455 and 14,478 COVID-19 deaths.¹⁵³ In recent history, there have never been similar weekly totals of peak deaths from seasonal influenza, and the number of COVID-19 deaths during a possible peak week in 2020 were “9.5-fold to 44.1-fold greater than the peak week of counted influenza deaths during the past seven influenza seasons in the US, with a 20.5-fold mean increase.”¹⁵⁴ In addition, COVID-19 deaths “may be undercounted owing to ongoing limitations of test capacity or false-negative test results.”¹⁵⁵

Considering only the morbidity and mortality data, courts could conceivably decide that mild, asymptomatic, or suspected COVID-19 cases meet the transitory and minor exception. As noted above, by July 26, 2020, a total of 16,076,713 global cases were reported, accounting for 644,661 deaths for a possible case fatality rate of 4.0%.¹⁵⁶ In the United States, the CDC estimates that the case fatality rate is around 0.4%.¹⁵⁷ Seasonal influenza has a case fatality rate of approximately 0.1%, and some researchers suggest that COVID-19’s case fatality rate may be similar.¹⁵⁸ Although the mortality rate of 0.4% is four times higher than the 0.1% rate associated with seasonal influenza, some courts could still conceivably regard the 0.4% rate to be “minor”—even though the COVID-19 pandemic has been much more severe than any recent seasonal influenza outbreak based upon the weekly and total statistics noted above. Employers and employees will have to wait until more evidence is available to know whether COVID-19 will be considered objectively transitory and minor under the ADA or not, similar to the swine flu case. In the meantime, employers who take adverse actions against employees “regarded as” having COVID-19 may face liability under the ADA, and employees dealing with COVID-19 face uncertainty regarding their protected status.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* (noting that some cities, “such as New York City,” may include “some deaths that have been labeled as having been caused by COVID-19 [but] are not due to COVID-19”).

¹⁵⁶ COVID-19 Operations Dashboard, *supra* note 29.

¹⁵⁷ Azad, *supra* note 30; CDC, *Pandemic Planning*, *supra* note 30.

¹⁵⁸ Fauci et al., *supra* note 31, at 1268 (“[T]he overall clinical consequences of COVID-19 may ultimately be more akin to those of severe seasonal influenza (which has a case fatality rate of approximately 0.1%).”).

In contrast, employees who travel to places where COVID-19 is active will likely be unprotected by the ADA if their employer takes an adverse employment action based upon a 2019 Eleventh Circuit case where the EEOC alleged that the employer discriminated against the employee who planned travel to an area with Ebola because it regarded her as disabled.¹⁵⁹ The Eleventh Circuit declined “to expand the regarded as disabled definition in the ADA to cover cases, such as this one, in which an employer perceives an employee to be presently healthy with only the potential to become disabled in the future due to voluntary conduct.”¹⁶⁰ Similar logic will likely apply to employees who travel to COVID-19 “hotspots” without intervening quarantine time.

Finally, regardless of the above analysis, the “direct threat” affirmative defense, noted below in Section III.D., may eliminate the employee from being considered an individual with a disability under the ADA if the person is potentially contagious with COVID-19 and a danger to others.

C. Susceptibility to COVID-19 Complications and Death as a Disability

Individuals who are vulnerable to suffering complications or death from COVID-19 may form a new class of individuals with disabilities under the ADA because employers may be hesitant to hire them, treat them equally, or make accommodations to reduce their infection/death risks.¹⁶¹ Individuals with special susceptibilities are individuals with disabilities under the ADA in some circumstances.¹⁶² The CDC estimates that around 47% of U.S. adults have at least one of “five underlying medical conditions associated with increased risk for *severe* COVID-19-associated illness.”¹⁶³ The CDC also noted that the “[r]isk for severe

¹⁵⁹ EEOC v. STME, LLC, 309 F. Supp. 3d 1207, 1212–13 (M.D. Fla. 2018), *aff'd*, 938 F.3d 1305 (11th Cir. 2019).

¹⁶⁰ *Id.* at 1213.

¹⁶¹ 29 C.F.R. pt. 1630, app. § 1630.2(g) (2019) (providing that under the ADA, “[a]n individual is considered to have a ‘disability’ if that individual (1) has a physical or mental *impairment* that *substantially limits* one or more of that person’s *major life activities* (the ‘actual disability’ prong); (2) has a *record of* such an impairment (the ‘record of’ prong); or (3) is *regarded* by the covered entity as an individual with a disability as defined in § 1630.2(l) (the ‘regarded as’ prong)” and the definition is to be broadly construed) (emphasis added).

¹⁶² See, e.g., *Staron v. McDonald’s*, 51 F.3d 353, 354, 357 (2d Cir. 1995) (finding that individuals with special susceptibilities are entitled to an individualized assessment characterized as a “fact-specific, case-by-case inquiry” under the ADA).

¹⁶³ Hilda Razzaghi et al., *Estimated County-Level Prevalence of Selected Underlying Medical Conditions Associated with Increased Risk for Severe COVID-19 Illness—United States, 2018*, 69(29) CDC MORBIDITY AND MORTALITY WKLY. REP. 945, 947, 949 (July 24, 2020) (emphasis added), <https://www.cdc.gov/mmwr/volumes/69/wr/mm69>

[COVID-19]-associated illness (illness requiring hospitalization, intensive care unit admission, mechanical ventilation, or resulting in death) increases with increasing age.”¹⁶⁴

Depending upon an individualized analysis, many vulnerable individuals’ COVID-19-related risks could be found to substantially limit major life activities like “caring for oneself” (e.g., due to risk of going to places like the grocery store) and “working” (e.g., due to infectious risks in some public work environments); therefore, a new population of high-risk individuals may be considered disabled under the ADA by some courts.¹⁶⁵ Reasonable accommodations are required by the ADA for individuals who qualify as having a disability under the actual impairment or “record of” prong.¹⁶⁶

The CDC considers individuals at “high risk for severe illness from COVID-19” to include people age 65 years and older and “people of all ages with underlying medical conditions,” particularly if not well controlled—including chronic lung disease, diabetes, immunocompromise (e.g., transplant recipients, some cancer patients, HIV-positive individuals), severe obesity (i.e., BMI > 40), serious heart conditions, moderate to severe asthma, among others.¹⁶⁷ In a study of New York hospitalized patients, researchers found older age, obesity, diabetes, and high blood pressure to be significant risk factors for COVID-19 complications and death.¹⁶⁸ According to CDC data, the underlying medical conditions with the “strongest and most consistent evidence of association with higher risk for severe COVID-19-associated illness . . . included chronic obstructive pulmonary disease (COPD), heart conditions, diabetes mellitus, chronic kidney disease, and obesity (defined as body mass index [BMI] of ≥ 30 kg per m²).”¹⁶⁹ For patients

29a1.htm (observing “[t]he median model-based estimate of the prevalence of any of five underlying medical conditions [including chronic obstructive pulmonary disease, cardiovascular disease, diabetes, chronic kidney disease, and obesity] associated with increased risk for severe COVID-19-associated illness among U.S. adults was 47.2% among 3,142 U.S. counties” and “[t]he overall weighted prevalences of these conditions were 30.9% (obesity), 11.4% (diabetes), 6.9% (COPD), 6.8% (heart disease), and 3.1% (CKD)”).

¹⁶⁴ *Id.* at 945.

¹⁶⁵ 42 U.S.C. § 12102(2).

¹⁶⁶ 42 U.S.C. § 12102(1).

¹⁶⁷ *Frequently Asked Questions: People at Higher Risk for Severe Illness*, CENTERS FOR DISEASE CONTROL AND PREVENTION (August 4, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Higher-Risk> [hereinafter *CDC Higher Risk*].

¹⁶⁸ Richardson et al., *supra* note 22, at 2054 (reporting the most common comorbidities were hypertension (56.6%), obesity (41.7%), and diabetes (33.8%)); Zhou et al., *supra* note 15, at 1054 (noting older age and other comorbidities as significant risk factors).

¹⁶⁹ Razzaghi et al., *supra* note 163, at 946.

with one of these underlying medical conditions, “hospitalizations were six times higher, ICU admissions five times higher, and deaths 12 times higher” than for patients without underlying medical conditions.¹⁷⁰

Courts have already evaluated some of these potential disabilities, but the results may be different in the aftermath of COVID-19. First, people with diabetes may be more clearly viewed as individuals with disabilities under the ADA due to COVID-19-related risks. As one example of a substantially limiting impairment, EEOC regulations state that “diabetes substantially limits endocrine function,” implying that diabetes is a disability.¹⁷¹ While some courts have agreed,¹⁷² other courts find that diabetes alone is not a disability.¹⁷³ Second, high blood pressure (hypertension) may be considered a disability due to COVID-19-related risks in some people, although it has inconsistently been found to constitute a disability in the past.¹⁷⁴

To comply with CDC social distancing guidelines and other health measures, individuals with diabetes and/or high blood pressure may now be better classified as individuals with disabilities under the ADA where such conditions substantially limit major life activities like visiting stores (e.g., grocery stores), missing family outings, etc. Individuals with other high-risk comorbidities—such as cancer, kidney disease, heart disease, immunocompromise, among others—may be

¹⁷⁰ *Id.*

¹⁷¹ 29 C.F.R. § 1630.2(j) (2019).

¹⁷² *See, e.g.,* Carreras v. Sajo, Garcia & Partners, 596 F.3d 25, 30 (1st Cir. 2010) (finding that “insulin-dependent diabetes is a physical impairment” for purposes of determining “whether [plaintiff] is disabled within the meaning of ADA”); Rohr v. Salt River Project Agric Imp. & Power Dist., 555 F.3d 850 (9th Cir. 2009) (finding that “[d]iabetes is a ‘physical impairment,’” which could qualify as a disability under the ADA, “because it affects the digestive, hemic and endocrine systems, and eating is a ‘major life activity’”); Schreiner v. City of Gresham, 681 F. Supp. 2d 1270 (D. Or. 2010) (quoting Fraser v. Goodale, 342 F.3d 1032, 1038 (9th Cir. 2003)) (finding that under the ADA, “‘qualified individual with a disability’ is defined broadly and includes diabetics”).

¹⁷³ Griffin v. United Parcel Serv., Inc., 661 F.3d 216 (5th Cir. 2011) (finding that an “employee’s diabetic condition did not substantially limit his major life activity of eating and, thus, was not a disability under ADA”); Diaz Rivera v. Browning-Ferris Indus. of P.R., Inc., 626 F. Supp. 2d 244, 255 n.9 (D.P.R. 2009) (finding that “[d]iabetes by itself does not constitute a disability under the ADA unless it impairs an individual’s ability to work or engage in other major life activities”).

¹⁷⁴ 42 U.S.C.A. § 12102(4)(E) (providing, after a modification by Congress, that that the “determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as . . . [anti-hypertensive] medication [and] medical supplies”); Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 521 (1999) (holding hypertension controlled by medications was not a disability at the time of this decision); Williams v. Stark Cty. Bd. of Cty. Comm’rs., 7 F. App’x 441, 446 (6th Cir. 2001) (finding that “the activities affected by Plaintiff’s hypertension [can] constitute “major life activities” because of their significance in the human experience”).

more clearly covered by the ADA because these comorbidities substantially limit major life activities where high-risk individuals, in order to follow CDC guidance, may be forced to seek accommodations at work to avoid the disease and its potential complications.

Other more controversial groups might claim “disability” under the ADA due to COVID-19-related risks—such as for obesity and age. For example, individuals with obesity have been shown to be at high risk of COVID-19-related morbidity and mortality.¹⁷⁵ Traditionally, courts find that physical characteristics like “height, weight, and muscle tone” are not considered “impairments” unless they result from an “underlying physiological disorder.”¹⁷⁶ EEOC regulations state that “weight is merely a physical characteristic—not a physical impairment—unless it is both outside the normal range and the result of an underlying physiological disorder.”¹⁷⁷ But an individualized assessment of a case in the post-COVID-19 era could result in a different outcome due to the risks associated with COVID-19 in the severely obese.

Another example likely to garner some attention is advanced age, due to its association with COVID-19-related risks.¹⁷⁸ Researchers and the CDC find that advanced age alone is a significant risk factor for COVID-19 related complications—specifically for individuals older than 65.¹⁷⁹ Traditionally, advanced age alone is not considered an impairment under the ADA, but “various medical conditions commonly associated with age” can “constitute impairments” within the meaning

¹⁷⁵ Razzaghi et al., *supra* note 163, at 945.

¹⁷⁶ *Morriss v. BNSF Ry. Co.*, 817 F.3d 1104, 1109–13 (8th Cir. 2016) (explaining that “[a]s with the physical characteristics of height, weight, and muscle tone, ‘other conditions’ are not ‘impairments’ unless they are the result of an underlying physiological disorder”; also stating that “[t]aken as a whole, the relevant statutory and regulatory language makes it clear that for obesity to qualify as a physical impairment—and thus a disability—under the ADA, it must result from an underlying physiological disorder or condition”; and concluding that “for obesity, even morbid obesity, to be considered a physical impairment [under the ADA], it must result from an underlying physiological disorder or condition”); *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436, 442–43 (6th Cir.2006) (declining to “extend ADA protection to all ‘abnormal’ (whatever that term means) physical characteristics” because “[t]o do so ‘would make the central purpose of the statutes, to protect the disabled, incidental to the operation of the “regarded as” prong, which would become a catch-all cause of action for discrimination based on appearance, size, and any number of other things far removed from the reasons the statutes were passed” (citations omitted)).

¹⁷⁷ *Morriss*, 817 F.3d at 1112.

¹⁷⁸ Razzaghi et al., *supra* note 163, at 945; *see also CDC Higher Risk*, *supra* note 167.

¹⁷⁹ *Older Adults*, CTRS. FOR DISEASE CONTROL AND PREVENTION, (Sept. 1, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html>.

of the ADA's disability definition.¹⁸⁰ Therefore, age alone is unlikely to be recognized by courts as an "impairment." An exception may apply where courts consider people of advanced age who are confined to nursing homes because their presence in the nursing home may signify substantial limitations in the major life activity of "caring for oneself" and other similar independent living activities.

Whether or not courts consider risk factors as disabilities could have significant consequences. Under Title I of the ADA, employers may not discriminate "on the basis of disability in regard to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training, or other terms, conditions, and privileges of employment."¹⁸¹ EEOC regulations take a paternalistic

¹⁸⁰ 29 C.F.R. pt. 1630, app. § 1630.2(h) (2019); *see also* *Natarelli v. N.Y. State Off. of Vocational & Educ. Servs. for Individuals With Disabilities*, No. 607-CV-1130 GTS/GJD, 2009 WL 5204068, at *4 (N.D.N.Y. Dec. 21, 2009), *aff'd sub nom. Natarelli v. VESID Off.*, 420 F. App'x 53 (2d Cir. 2011) ("Advanced age, in and of itself, is not an impairment [for purposes of the ADA]."); *Lee v. Se. Pa. Transp. Auth.*, 418 F. Supp. 2d 675, 679 (E.D. Pa. 2005) ("Age alone . . . is not a disability for purposes of the ADA. Although many octogenarians do suffer from physical or mental impairments that limit one or more of their major life activities and are therefore 'individuals with disabilities' as defined by the ADA, others remain physically and mentally healthy well into their ninth or tenth decade."); *N.A.A.C.P. v. Phila. Bd. of Elections*, No. CIV. A. 97-7085, 1998 WL 321253, at *4 (E.D. Pa. June 16, 1998) ("Being over the age of 65 is not in and of itself an impairment, although medical conditions associated with age, such as osteoporosis, can be.").

¹⁸¹ 42 U.S.C. § 12112(a). *See* 42 U.S.C. § 12112(b), (d) (Defining discrimination to include "(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee; (2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee to the discrimination . . . ; (3) utilizing standards, criteria, or other methods of administration . . . that have the effect of discrimination on the basis of disability; or . . . that perpetuate the discrimination of others who are subject to common administrative control; (4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability; (5)(A) not making reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability . . . unless the covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the covered entity; (5)(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need . . . to make reasonable accommodation . . . ; (6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criterion . . . is shown to be job related for the position in question and is consistent with business necessity; and (7) failing to select an administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant . . .," and

approach and state that “employer[s] may require, as a qualification standard, that an individual not pose a *direct threat* to the health or safety of *himself/herself*” as long as the standard applies to “all applicants or employees and not just to individuals with disabilities.”¹⁸² Someone in a high-risk category may pose a risk to himself or herself simply by showing up to work.

The degree of risk will be important and will vary by job specifics. The employer cannot deny employment opportunities to individuals with disabilities “merely because of a slightly increased risk,” but instead the “risk can only be considered when it poses a significant risk, i.e., high probability, of substantial harm; a speculative or remote risk is insufficient.”¹⁸³ Employers are “permitted to require that an individual not pose a direct threat of harm to his or her own safety or health.”¹⁸⁴ A “case-by-case” inquiry is necessary.¹⁸⁵ “If performing the particular functions of a job would result in a high probability of substantial harm to the individual, the employer could reject or discharge the individual unless a reasonable accommodation that would not cause an undue hardship would avert the harm.”¹⁸⁶ In addition, the employer must “determine whether a reasonable modification would either eliminate the risk or reduce the risk to an acceptable level.”¹⁸⁷ A more thorough analysis of the direct threat issue is included below in Section III.D.

III. COVID-19 AND THE ADA IN THE WORKPLACE

Employers will face challenges balancing legitimate concerns of disease transmission and health risks with the individual rights of employees and avoiding discrimination based upon stereotypes and unfounded fear. The ADA will be important in sorting out these issues as the pandemic progresses and resolves for at least three reasons: (1) “the ADA regulates employers’ disability-related *inquiries and medical examinations* for all applicants and employees”; (2) “the ADA prohibits covered employers from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a ‘*direct threat*’

prohibiting covered entities from subjecting applicants or employees to prohibited medical inquiries or examinations).

¹⁸² 29 C.F.R. pt. 1630, app. § 1630.2(r) (2019) (emphasis added).

¹⁸³ *Id.* (emphasis omitted).

¹⁸⁴ *Id.*

¹⁸⁵ *See, e.g., Anderson v. Little League Baseball*, 794 F. Supp. 342, 345 (D. Ariz. 1992) (explaining that an “individualized assessment” is required to insure that “[t]he determination that a person poses a direct threat to the health or safety of others [is] not based on generalizations or stereotypes”).

¹⁸⁶ 29 C.F.R. pt. 1630, app. § 1630.2(r) (2019).

¹⁸⁷ *Id.*

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(i.e., a significant risk of substantial harm even with reasonable accommodation”); and (3) “the ADA requires *reasonable accommodations* for individuals with disabilities (absent undue hardship) during a pandemic.”¹⁸⁸

The EEOC provides guidance using established ADA principles to help answer questions during coronavirus-like events. This paper relies upon the EEOC’s guidance, although such guidance does not carry the force of law.¹⁸⁹ On March 21, 2020, the EEOC updated its 2009 guidance webpage “to address its application to . . . COVID-19.”¹⁹⁰ The EEOC’s statement says:

Employers and employees should follow guidance from the Centers for Disease Control and Prevention (CDC) as well as state/local public health authorities on how best to slow the spread of this disease and protect workers, customers, clients, and the general public. The ADA and the Rehabilitation Act do not interfere with employers following advice from the CDC and other public health authorities on appropriate steps to take relating to the workplace.¹⁹¹

As the COVID-19 pandemic evolves, EEOC guidance may change and readers should look to the appropriate government authorities for the latest recommendations.

A. *Inquiries and Medical Examinations during Hiring and Return to Work*

Under the ADA, employers are prohibited from making “disability-related inquiries” and requiring medical examinations of applicants and employees, except under limited circumstances.¹⁹² The ADA regulates disability-related inquiries and medical examinations at three stages: (1) *before an offer of employment*, the “ADA prohibits employers from making disability-related inquiries and conducting medical examinations of applicants”;¹⁹³ (2) *after a conditional offer* but before beginning employment, the “ADA permits employers to make disability-related inquiries and conduct medical examinations if all entering employees in the same job category are subject to the same inquiries

¹⁸⁸ EEOC, *Pandemic Preparedness*, *supra* note 11 (emphasis added).

¹⁸⁹ See generally EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* (June 17, 2020), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

¹⁹⁰ EEOC, *Pandemic Preparedness*, *supra* note 11.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* (emphasis omitted).

and examinations”;¹⁹⁴ and (3) *during employment*, “the ADA prohibits employee disability-related inquiries or medical examinations unless they are job-related and consistent with business necessity.”¹⁹⁵ During employment, “a disability-related inquiry or medical examination of an employee is job-related and consistent with business necessity when an employer has a reasonable belief, based on objective evidence, that: [a]n employee’s ability to perform essential job functions will be impaired by a medical condition; or [a]n employee will pose a direct threat due to a medical condition.”¹⁹⁶ The purpose of this provision is to prevent inquiries and medical tests that do not serve a legitimate business purpose; for example, “if an employee suddenly starts to use increased amounts of sick leave or starts to appear sickly, an employer could not require that employee to be tested for AIDS, HIV infection, or cancer unless the employer can demonstrate that such testing is job-related and consistent with business necessity.”¹⁹⁷ Information obtained about applicants or employees during any of the above disability-related inquiries or medical examinations must be “treated as a confidential medical record.”¹⁹⁸

1. Disability-Related Inquiries

According to the EEOC, “[a]n inquiry is ‘disability-related’ if it is likely to elicit information about a disability.”¹⁹⁹ Disability-related inquiries include asking employees (or their co-workers, family members, or doctors) about issues like (1) “whether they have or ever had a disability”; (2) “the kinds of prescription medications they are taking”; and (3) “the results of any genetic tests they have had.”²⁰⁰ The EEOC gives the example that “asking an individual if his immune system is compromised is a disability-related inquiry because a weak or compromised immune system can be closely associated with conditions such as cancer or HIV/AIDS,” which are clearly disabilities.²⁰¹ “Questions that are *not* likely to elicit information about a disability” are permitted and generally include “asking employees about their general well-being; whether they can perform job functions; and about their current illegal use of drugs.”²⁰² In *Conroy*, the Second Circuit found that

¹⁹⁴ *Id.* (emphasis omitted).

¹⁹⁵ EEOC, *Pandemic Preparedness*, *supra* note 11 (emphasis omitted).

¹⁹⁶ *Id.*

¹⁹⁷ 29 C.F.R. pt. 1630, app. § 1630.13(b) (2019).

¹⁹⁸ EEOC, *Pandemic Preparedness*, *supra* note 11.

¹⁹⁹ *Id.*

²⁰⁰ *Conroy v. N.Y. State Dep’t of Corr. Servs.*, 333 F.3d 88, 96 (2d Cir. 2003).

²⁰¹ EEOC, *Pandemic Preparedness*, *supra* note 11.

²⁰² *Conroy*, 333 F.3d at 96 (emphasis in original).

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an employer's practice of requiring employees to submit general diagnoses as part of a medical certification procedure after absences violated the ADA because it was a "disability-related" inquiry.²⁰³ Likewise, employers cannot use applications or forms that ask employees to check off impairments that are potentially disabling.²⁰⁴ Also, an employer cannot ask an applicant how often he will need leave due to incapacitation or need for treatments because of a disability, but can "state the attendance requirements of the job and inquire whether the applicant can meet them."²⁰⁵

Employers may want to identify employees with active COVID-19 symptoms. According to EEOC Guidance, "asking an individual about *symptoms* of a cold or the seasonal flu is not likely to elicit information about a disability," since colds and seasonal flu are not considered disabilities.²⁰⁶ So, asking employees whether they have fevers, coughs, chills, and other symptoms related to cold and seasonal flu is likely allowed according to the EEOC.²⁰⁷ But directly asking employees whether or not they have had a diagnosis of COVID-19 *might* be a disability-related inquiry depending upon the ultimate resolution of the "regarded as" issues noted above, as well as issues regarding "direct threats" discussed below; the answers to some of these questions are simply unknowable at this time and may not be known until litigated. On March 20, 2020, the EEOC added the following guidance to its webpage on pandemic influenza:

An employer may screen job applicants for *symptoms* of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job. This ADA rule allowing post-offer (but not pre-offer) medical inquiries and exams applies to all applicants, whether or not the applicant has a disability.²⁰⁸

Remember, however, that EEOC Guidance does not carry the force of law, as noted above.

During an influenza pandemic, an employer can send employees home who demonstrate influenza-like symptoms according to the EEOC, which notes that the "CDC states that employees who become ill with symptoms of influenza-like illness at work during a pandemic should

²⁰³ *Id.*

²⁰⁴ 29 C.F.R. pt. 1630, app. § 1630.14(a) (2019).

²⁰⁵ *Id.*

²⁰⁶ EEOC, *Pandemic Preparedness*, *supra* note 11 (emphasis added).

²⁰⁷ *Id.*

²⁰⁸ *Id.* (emphasis added).

leave the workplace.”²⁰⁹ The EEOC continues, “[a]dvising such workers to go home is not a disability-related action if the illness is akin to seasonal influenza or the 2009 spring/summer H1N1 virus,” and “the action would be permitted under the ADA if the illness were serious enough to pose a direct threat.”²¹⁰ The EEOC specifically notes that “an employer can send home an employee with COVID-19 or symptoms associated with [COVID-19].”²¹¹

In addition, the employer may ask employees who report feeling ill at work or those who call in sick “if they are experiencing influenza-like symptoms” and must maintain their responses in a confidential medical record.²¹² The EEOC notes that “these inquiries are not disability-related,” and “[i]f pandemic influenza becomes severe, the inquiries, even if disability-related, are justified by a reasonable belief based on objective evidence that the severe form of pandemic influenza poses a direct threat.”²¹³ The EEOC specifically notes that “employers may ask employees who report feeling ill at work, or who call in sick, questions about their symptoms to determine if they have or may have COVID-19,” and describes these symptoms as “fever, chills, cough, shortness of breath, or sore throat.”²¹⁴

Further, employers may want to identify employees at high risk of complications from COVID-19, such as those with compromised immune systems or chronic health conditions identified by the CDC. However, according to the EEOC, employers generally cannot ask “an employee to disclose a compromised immune system or a chronic health condition” under the ADA because this is a disability-related inquiry since the “response is likely to disclose the existence of a disability,” unless failure to ask the question “will cause a direct threat” (discussed below).²¹⁵ There are, however, ADA-compliant, non-disability-related inquiries that employers can use to identify employees that are more likely to be unavailable to work during a pandemic.²¹⁶

The EEOC says that an “inquiry is not disability-related if it is designed to identify potential non-medical reasons for absence during a pandemic (e.g., curtailed public transportation) on an equal footing with

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ EEOC, *Pandemic Preparedness*, *supra* note 11.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ EEOC, *Pandemic Preparedness*, *supra* note 11.

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medical reasons (e.g., chronic illnesses that increase the risk of complications).”²¹⁷ The EEOC suggests that such inquiries should be “structured so that the employee gives one answer of ‘yes’ or ‘no’ to the whole question without specifying the factor(s) that apply.”²¹⁸ As an example, the EEOC provides a pre-pandemic employee survey with the question being simply: “[i]n the event of a pandemic, would you be unable to come to work because of any one of the following reasons”; the survey then lists day-care center closures, care for dependents, public transportation disruptions, and/or high-risk medical conditions. The employee then answers simply “yes” or “no” without specifying which reason applies, so that the employer theoretically has not gathered any disability-related information.²¹⁹ If an employee voluntarily discloses medical conditions or disabilities that increase his or her risk of influenza complications, “[t]he employer may ask him to describe the type of assistance he thinks will be needed (e.g. telework or leave for a medical appointment)” and must “keep this information confidential.”²²⁰

In addition, as noted above, employers may be able to ask disability-related questions of an employee if the inquiry is job-related and consistent with business necessity; the employer also must have a reasonable belief based on objective evidence that the impairment will impede the employee’s ability to perform the job’s essential functions. In addition, the employer can ask disability-related questions if the employee may impose a direct threat (see below), as long as the information is kept confidential and maintained in a confidential medical record. Once an influenza pandemic becomes severe or serious (according to public health officials), the employer “may have sufficient objective information from public health advisories to reasonably conclude that employees will face a direct threat if they contract pandemic influenza,” and “[o]nly in this circumstance may . . . employers make disability-related inquiries or require medical examinations of asymptomatic employees to identify those at higher risk of influenza complications.”²²¹ The EEOC also notes that an inquiry about an employee’s exposure to pandemic influenza during travel is not a disability-related inquiry during an influenza pandemic.²²²

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ EEOC, *Pandemic Preparedness*, *supra* note 11.

²²² *Id.*

2. Medical Examinations

The ADA permits examination of employees under certain circumstances. Employers may require medical examinations as “fitness for duty exams” (or periodic physicals) “when there is a need to determine whether an employee is still able to perform the essential functions of his or her job,” so long as the physicals are job-related and consistent with business necessity.²²³ This provision allows employers to make determinations necessary to the reasonable accommodation process described below.²²⁴ The information gathered “is to be treated as a confidential medical record.”²²⁵

According to the EEOC, “a ‘medical examination’ is a procedure or test that seeks information about an individual’s physical or mental impairments or health.”²²⁶ Factors such as “whether the test involves the use of medical equipment,” “whether it is invasive,” “whether it is designed to reveal the existence of a physical or mental impairment,” and “whether it is given or interpreted by a medical professional” are used to determine whether the procedure is a “medical examination.”²²⁷

Employment entrance examinations are permitted after a conditional offer of employment and before the employee starts work, and the “employer may condition the offer of employment upon the results of the examination[,]” as long as all entering employees in the same job category get the same exam and the confidentiality requirements are met.²²⁸ “[E]xclusionary criteria must not . . . tend to screen out an individual with a disability[,] . . . or they must be job-related and consistent with business necessity.”²²⁹ In addition, for exclusionary criteria, the “employer must also demonstrate that there is no reasonable accommodation [(discussed below)] that will enable the individual with a disability to perform the essential functions of the job.”²³⁰

For example, “an employer in the international shipping industry” with much of its business in areas affected by an influenza pandemic could conduct “post-offer medical examinations for all entering international pilots and flight crew” that “include procedures to identify medical conditions that the CDC associates with an increased risk of

²²³ 29 C.F.R. pt. 1630, app. § 1630.14(c) (2019).

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ EEOC, *Pandemic Preparedness*, *supra* note 11.

²²⁷ *Id.*

²²⁸ 29 C.F.R. pt. 1630, app. § 1630.14(b) (2018).

²²⁹ *Id.*

²³⁰ *Id.*

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complications from influenza[.]” as long as these medical examinations are given to “all entering employees in the same job categories.”²³¹ Based on the EEOC example, similar post-offer medical examinations on those same terms could likely be performed to screen for risk factors for COVID-19 complications if the job poses the risk of COVID-19 exposure. If the examination reveals that the “applicant would pose a direct threat” to himself or others “within the meaning of the ADA” and a reasonable accommodation cannot be made without undue hardship, then the job offer may possibly be rescinded.²³² Direct threats are discussed at length below.

Measuring employees’ body temperatures will be considered a medical examination under the ADA. The EEOC notes that if pandemic influenza becomes more severe or more widespread, “then employers may measure employees’ body temperature” (presumably with the least invasive method).²³³ On March 20, 2020, the EEOC stated that “[b]ecause the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions[.] . . . employers may measure employees’ body temperature[s]” and added that “[a]s with all medical information, the fact that an employee had a fever or other symptoms would be subject to ADA confidentiality requirements.”²³⁴

The EEOC also notes that during a pandemic, employers, under the ADA, can (1) “encourage employees to telework . . . as an infection control strategy” (and employees at risk can request telework as a reasonable accommodation); (2) require “employees to adopt infection-control practices” like regular handwashing at the workplace; and (3) require “employees to wear personal protective equipment” like face masks and gloves.²³⁵ The EEOC notes, however, that employers during a pandemic cannot require all employees to take a vaccine regardless of their medical condition or religious beliefs—unless this reasonable accommodation would cause undue hardship.²³⁶ Employers can also ask why an individual did not report to work because this is “not a disability-related inquiry,” and employers are “always entitled to know why an employee has not reported for work.”²³⁷ Employers may require employees who have been away from the workplace to provide a

²³¹ EEOC, *Pandemic Preparedness*, *supra* note 11.

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ EEOC, *Pandemic Preparedness*, *supra* note 11.

²³⁷ *Id.*

doctor's note certifying fitness to return to work; the EEOC notes that such inquiries are either not disability related or, if the pandemic is severe, justified under ADA standards.²³⁸

Some inquiries and examinations will be necessary for employers to follow CDC recommendations for COVID-19. The CDC has recommended that employers (1) actively encourage sick employees to stay home by using flexible sick leave policies and not requiring a doctor's note, among other things; (2) separate sick employees upon arrival to work and send them home immediately; (3) "encourage hand hygiene"; (4) "advise employees if they must travel to take additional precautions" like checking for CDC guidance online, staying home if sick, and seeking appropriate medical care; and (5) discuss family situations with a supervisor to conduct a risk assessment if they have a family member with COVID-19.²³⁹ The CDC also recommends that the employer inform fellow employees of their possible exposure to COVID-19, "but *maintain confidentiality* as required by the [ADA]."²⁴⁰ The EEOC has said that "[t]he ADA... do[es] not interfere with employers following advice from the CDC and public health authorities," and "[e]mployers and employees should follow [such] guidance," for what it is worth.²⁴¹

B. "Qualified" and "Essential Functions"

To be eligible for relief under the ADA, the individual must also show that they are "qualified"—in addition to fulfilling one of the three prongs defining "disability." With respect to an individual with a disability, "qualified" "means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position."²⁴² Importantly for COVID-19, during the pandemic, a person "is not otherwise qualified if he poses a direct threat

²³⁸ *Id.*

²³⁹ *Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19)* (May 2020), CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>.

²⁴⁰ *Id.* (emphasis added).

²⁴¹ EEOC, *Pandemic Preparedness*, *supra* note 11.

²⁴² 29 C.F.R. § 1630.2(m) (2018) (see § 1630.3 for exceptions to this definition).

to the health or safety of others that cannot be eliminated by reasonable accommodation.”²⁴³ Direct threats are discussed below.

The ADA “prohibits discrimination on the basis of disability against a qualified individual.”²⁴⁴ Two steps are necessary to determine whether an individual with a disability is “qualified.”²⁴⁵ First, the individual must satisfy the prerequisites for the position, “such as possessing the appropriate educational background, employment experience, skills, licenses, etc.”²⁴⁶ Second, the individual must be able to perform the essential functions of the job held or desired, with or without reasonable accommodation.²⁴⁷ The determination of whether an individual is qualified should be “based on the capabilities of the individual with a disability *at the time of the employment decision*, and should not be based on speculation that the employee may become unable in the future or may cause increased health insurance premiums or workers compensation costs.”²⁴⁸

The *essential functions* of a job are “those functions that the individual who holds the position must be able to perform unaided or with the assistance of a reasonable accommodation.”²⁴⁹ A non-exhaustive list of factors considered in analyzing whether a function is essential include: (1) “whether the employer actually requires employees in the position to perform the function,” (2) “whether the position exists to perform a particular function,” (3) “the number of other employees available to perform that job function or among whom the performance of that job function can be distributed,” (4) “the degree of expertise or skill required to perform the function,” (5) “[t]he time spent performing the particular function,” and (6) “[t]he consequences of failing to require the employee to perform the function.”²⁵⁰ “Written job descriptions prepared before advertising or interviewing applicants for the job” are evidence to be considered, as are collective bargaining agreements and work experience of prior employees in that job.²⁵¹ As long as the employer can proffer legitimate, nondiscriminatory reasons for requiring particular levels of function (e.g., typing seventy-five

²⁴³ Mauro v. Borgess Med. Ctr., 886 F. Supp. 1349, 1352–54 (W.D. Mich. 1995), *aff’d sub nom.*, Estate of Mauro By & Through Mauro v. Borgess Med. Ctr., 137 F.3d 398 (6th Cir. 1998). See 42 U.S.C. §§ 12111(3), 12113(a)–(b).

²⁴⁴ 29 C.F.R. pt. 1630, app. § 1630.2(m).

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.* (emphasis added).

²⁴⁹ 29 C.F.R. pt. 1630, app. § 1630.2(n) (2019).

²⁵⁰ *Id.*

²⁵¹ *Id.*

words per minute), the courts' job is not to second guess those requirements.²⁵² For COVID-19, the direct threat provision will have a lot to do with whether the individual is "qualified." See direct threat discussion below.

C. Reasonable Accommodations

Under the ADA, employers are required to provide reasonable accommodation, absent undue hardship, to otherwise qualified individuals who are actually impaired or have a record of a disability but not to individuals "regarded as" disabled.²⁵³

Generally, "an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities."²⁵⁴ According to the EEOC, the three categories of reasonable accommodations are "(1) accommodations that are required to ensure equal opportunity in the application process; (2) accommodations that enable the employer's employees with disabilities to perform the essential functions of the position held or desired; and (3) accommodations that enable the employer's employees with disabilities to enjoy equal benefits and privileges of employment as are enjoyed by employees without disabilities."²⁵⁵

Examples of reasonable accommodations include, but are not limited to:

- (i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
- (ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.²⁵⁶

Other non-listed accommodations might include "use of accrued paid leave or providing additional unpaid leave for necessary treatment, making employer-provided transportation accessible, and providing reserved parking spaces."²⁵⁷

²⁵² *Id.*

²⁵³ 29 C.F.R. § 1630.2(k); 29 C.F.R. pt. 1630, app. §1630.2(o) (2019).

²⁵⁴ 29 C.F.R. pt. 1630, app. §1630.2(o) (2019).

²⁵⁵ *Id.*

²⁵⁶ 29 C.F.R. § 1630.2(o) (2019).

²⁵⁷ 29 C.F.R. pt. 1630, app. § 1630.2(o) (2019).

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Employers should employ an “informal, interactive process with the individual with a disability” to “identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.”²⁵⁸ Employers are not required to reallocate essential job functions to accommodate the employee.²⁵⁹ Employers are also “not required to provide an accommodation that will impose an undue hardship on the operation” of the employer’s business.²⁶⁰ Undue hardship is defined as “significant difficulty or expense in, or resulting from, the provision of the accommodation” and includes “any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business.”²⁶¹ If one accommodation causes undue hardship, it just means that the “employer is not required to provide that accommodation”; however, the employer must still provide another accommodation that will not create undue hardship, if such an accommodation can be found.²⁶²

For COVID-19, the EEOC has given at least one specific example of a reasonable accommodation: simply delaying the start date for an applicant who is found to have COVID-19 or symptoms of COVID-19 after a conditional employment offer has been made.²⁶³ In another example, a reasonable accommodation for an employee with a “record of” a disability, like hospitalization for COVID-19, might be to grant “leave or a schedule change to permit him or her to attend follow-up or ‘monitoring’ appointments from a health care provider.”²⁶⁴ Given the panic surrounding COVID-19, reasonable accommodations might include working from home due to fear of co-workers, leave time for fulfilling quarantine requirements, time off for follow-up medical appointments, and health department monitoring requirements. The EEOC has added the following note to its website regarding reasonable accommodations during the COVID-19 pandemic:

The rapid spread of COVID-19 has disrupted normal work routines and may have resulted in unexpected or increased requests for reasonable accommodation. Although employers and employees should address these requests as soon as possible, the extraordinary circumstances of the COVID-19 pandemic may result in delay in discussing requests and in

²⁵⁸ 29 C.F.R. § 1630.2(o)(3) (2019).

²⁵⁹ 29 C.F.R. pt. 1630, app. § 1630.2(o) (2019).

²⁶⁰ 29 C.F.R. pt. 1630, app. § 1630.2(p) (2019).

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ EEOC, *Pandemic Preparedness*, *supra* note 11.

²⁶⁴ *See* 29 C.F.R. pt. 1630, app. § 1630.2(k) (2019).

providing accommodation where warranted. Employers and employees are encouraged to use interim solutions to enable employees to keep working as much as possible.²⁶⁵

Given the circumstances of the COVID-19 pandemic and the EEOC's statement, it could be argued that some reasonable accommodations may create undue hardship during this particular timeframe.

The CDC makes several recommendations for people who are at higher risk of severe illness from COVID-19 that may impact work and accommodation requests.²⁶⁶ For example, the CDC recommends that high-risk individuals "keep away from others who are sick," "limit close contact and wash your hands often," "avoid crowds," "stay home as much as possible," and avoid non-essential travel.²⁶⁷ To follow these CDC guidelines, high-risk employees may seek modifications to office space to allow for social distancing, the option of working from home, travel avoidance, and excuse from in-person meetings, among other accommodations.

In contrast, employers are not required to provide "adjustments or modifications that are primarily for the personal benefit of the individual with a disability."²⁶⁸ Job-related modifications "specifically assist[] the individual in performing the duties of a particular job" and are therefore considered reasonable accommodations.²⁶⁹ Adjustments or modifications that assist the individual "throughout his or her daily activities, on and off the job," are considered personal items that the employer is not required to provide.²⁷⁰ So, an employer "would generally not be required to provide an employee with a disability with a prosthetic limb, wheelchair, or eyeglasses."²⁷¹

D. *Direct Threat*

Under the ADA, "an individual is not otherwise qualified if he poses a *direct threat* to the health or safety of others that cannot be eliminated by reasonable accommodation."²⁷² The Supreme Court in *Arline* created

²⁶⁵ EEOC, *Pandemic Preparedness*, *supra* note 11.

²⁶⁶ See CDC *Higher Risk*, *supra* note 167.

²⁶⁷ *Id.*

²⁶⁸ 29 C.F.R. pt. 1630, app. § 1630.9 (2019).

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Mauro v. Borgess Med. Ctr.*, 886 F. Supp. 1349, 1352–54 (W.D. Mich. 1995), *aff'd sub nom. Estate of Mauro By & Through Mauro v. Borgess Med. Ctr.*, 137 F.3d 398 (6th Cir. 1998); see 42 U.S.C. §§ 12111(3), 12113(a)–(b) (42 U.S.C. § 12111(3) stating, "The term 'direct threat' means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."); 29 U.S.C. § 706(8)(D).

the direct threat exception, and “[f]ollowing that case, Congress amended the disability discrimination statutes to include the Court’s direct threat language.”²⁷³ The EEOC’s guidelines state that the “risk can only be considered when it poses a significant risk, i.e., high probability, of substantial harm; a speculative or remote risk is insufficient.”²⁷⁴ The well-established “basic factors to be considered in conducting this inquiry” in the context of employing a person with a contagious disease are (1) “the nature of the risk (how the disease is transmitted),” (2) “the duration of the risk (how long is the carrier infectious),” (3) “the severity of the risk (what is the potential harm to third parties),” and (4) “the probabilities the disease will be transmitted and will cause varying degrees of harm.”²⁷⁵ According to the Supreme Court, the reasonable judgments of public health officials are given special deference.²⁷⁶ “If no accommodation exists that would either eliminate or reduce the risk, the employer may refuse to hire an applicant or may discharge an employee who poses a direct threat.”²⁷⁷

One contagious infection, HIV, has gotten significant attention in the courts under the ADA with variable results. Some courts follow a “cautious rule” that “a showing of a specific and theoretically sound means of possible transmission was enough” to constitute a “significant risk.”²⁷⁸

For example, the *Mauro* court found “as a matter of law, that [an HIV-infected surgical technician] has a contagious infection that poses a direct threat to the health and safety of others that cannot be eliminated by reasonable accommodation” and granted the hospital summary

²⁷³ *Doe v. Cty. of Ctr., Pa.*, 242 F.3d 437, 447 n.6 (3d Cir. 2001).

²⁷⁴ 29 C.F.R. pt. 1630, app. § 1630.2(r) (2019).

²⁷⁵ *Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 280–89 (1987) (citing an amicus brief of the AMA).

²⁷⁶ *Id.* (“In making these findings, courts normally should defer to the reasonable medical judgments of public health officials.”); *Bragdon v. Abbott*, 524 U.S. 624, 650 (1998) (noting, “the views of public health authorities, such as the U.S. Public Health Service, CDC, and the National Institutes of Health, are of special weight and authority”).

²⁷⁷ 29 C.F.R. pt. 1630, app. § 1630.2(r) (2019).

²⁷⁸ *Onishea v. Hopper*, 171 F.3d 1289, 1297 (11th Cir. 1999) (stating, “On one hand, the Fourth, Fifth, and Sixth Circuits have implicitly followed a cautious rule,” and explaining that in the “cautious circuits” small risks of HIV infection are considered significant where “a showing of a specific and theoretically sound means of possible transmission was enough to justify summary judgment against an HIV-positive plaintiff on the ground that the infection posed a ‘significant risk’ to others in the workplace, even though reported incidents of transmission were few or nonexistent, and the odds of transmission were admittedly small.”).

judgment.²⁷⁹ “Because there is a real possibility of transmission, however small, and because the consequence of transmission is invariably death, the threat to patient safety posed by the plaintiff’s presence in the operating room performing the functions of a surgical technician is direct and significant.”²⁸⁰ The court cited two other cases with nearly identical facts where an HIV surgeon and surgical tech were found to be direct threats and therefore not otherwise qualified.²⁸¹

The *Mauro* court analyzed the four factors as follows. The court observed that an HIV-infected surgical technician whose essential duties required him to “place his hands upon and into the patient’s surgical incision” and “was always exposed during surgery to the possibility of sustaining a needle stick or minor laceration” (and had sustained two such injuries in his two years on the job) was a “direct threat”; the court reasoned that HIV “is a blood-borne pathogen that can be transmitted person-to-person by contact of infected blood with an open wound of another,” and HIV “causes AIDS, which is fatal, and for which there is no known cure.”²⁸² The court added, further, “under the present state of medical knowledge, a person once infected with HIV remains infected for the rest of his or her life.”²⁸³ The surgical tech unsuccessfully argued that “the probability of transmission is so slight as to overwhelm the first three factors.”²⁸⁴

Similarly, a different court found that an orthopedic surgeon posed “a ‘direct threat’ to the health of his patients” as a result of his HIV-positive status, and so the defendant hospitals did not violate the ADA by prohibiting performance of surgery without patients’ informed consent; the surgeon was “not ‘otherwise qualified’ to perform as an orthopedic surgeon” due to his HIV-infected status.²⁸⁵ The court analyzed the four factors and determined that while the other *Arline* factors were more certain, the exact probability of HIV transmission surgeon to patient reflected a “great deal of uncertainty” and was estimated at 1/40,000 to 1/400,000 by the plaintiff and 1/40,000 to 1/150,000 by the defendant.²⁸⁶ The duration of the risk was permanent

²⁷⁹ *Mauro v. Borgess Med. Ctr.*, 886 F. Supp. 1349, 1352–54 (W.D. Mich. 1995), *aff’d sub nom*, *Estate of Mauro By & Through Mauro v. Borgess Med. Ctr.*, 137 F.3d 398, 400, 407 (6th Cir. 1998).

²⁸⁰ *Mauro*, 886 F. Supp. at 1353.

²⁸¹ *Id.*

²⁸² *Id.* at 1352.

²⁸³ *Id.*

²⁸⁴ *Id.* at 1353; *Estate of Mauro By & Through Mauro v. Borgess Med. Ctr.*, 137 F.3d 398, 400–01 (6th Cir. 1998).

²⁸⁵ *Scoles v. Mercy Health Corp. of Se. Pa.*, 887 F. Supp. 765, 771–72 (E.D. Pa. 1994).

²⁸⁶ *Id.*

where there was no known cure to HIV; the severity of the harm was fatal in most cases.²⁸⁷ Using this analysis, the court found that the HIV-positive orthopedic surgeon posed a direct threat.

Similarly, a twelve-year-old boy's HIV infection was found to pose a direct threat to other students in a traditional Japanese style martial arts school, justifying the school's denial of admission where students engaged in "combat activity fighting," sustained "consistently scratched skin, scratches, gouges, bloody lips, bloody noses, things of that nature," and "no reasonable modification could sufficiently reduce the risk without fundamentally altering the nature of the program."²⁸⁸

In contrast, some courts approached HIV differently. For example, the First Circuit found that the mere possibility of HIV transmission was not a significant risk and that a dentist "is not entitled to demand absolute safety."²⁸⁹ Likewise, the Ninth Circuit found that "[i]t was an error to require that every theoretical possibility of harm be disproved" in another HIV case.²⁹⁰

For COVID-19, based on the conflicting HIV cases, courts may deliver inconsistent findings across circuits where the risks associated with COVID-19 may be viewed differently. For example, a 0.4% mortality risk may be viewed as "significant" in some courts, but not "significant" in others—especially given the politicization of the disease.

The EEOC issued guidance on March 20, 2020, that says, "[b]ased on guidance of the CDC and public health authorities as of March 2020, the COVID-19 pandemic meets the direct threat standard."²⁹¹ The ADA does not define "COVID-19" the disease as a direct threat. Instead, the ADA requires an individualized assessment to determine whether that particular person in that particular environment poses a direct threat based on current medical knowledge and the best available fact-specific, objective evidence.²⁹²

The EEOC Guidance cites CDC and public health authorities' acknowledgment of community spread of COVID-19 and their issuance of significant restrictions of public gatherings as reasons supporting its

²⁸⁷ *Id.*

²⁸⁸ *Montalvo v. Radcliffe*, 167 F.3d 873, 874–79 (4th Cir. 1999).

²⁸⁹ *Abbott v. Bragdon*, 107 F.3d 934, 948 (1st Cir. 1997).

²⁹⁰ *Chalk v. U.S. Dist. Court Cent. Dist. of Cal.*, 840 F.2d 701, 709 (9th Cir. 1988).

²⁹¹ EEOC, *Pandemic Preparedness*, *supra* note 11.

²⁹² *Anderson v. Little League Baseball, Inc.*, 794 F. Supp. 342, 345 (D. Ariz. 1992) (citing *Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273 (1987)) (explaining that in order to protect "disabled individuals from discrimination based on prejudice, stereotypes, or unfounded fear," an "individualized assessment" is required to insure that "the determination that a person poses a direct threat to the health or safety of others [is] not . . . based on generalizations or stereotypes").

determination that the pandemic meets the direct threat standard, along with the fact that “numerous state and local authorities have issued closure orders for people together in close quarters due to the risk of contagion.”²⁹³ The EEOC then says, “These facts manifestly support a finding that a significant risk of substantial harm would be posed by having someone with COVID-19, or symptoms of it, present in the workplace at the current time.”²⁹⁴ Courts will similarly use public health authorities as preferred sources for current medical knowledge.²⁹⁵ The EEOC’s guidance also notes:

The contents of this document *do not have the force and effect of law* and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.²⁹⁶

EEOC also notes that an employer may withdraw a job offer when an applicant needs to start immediately if the individual has COVID-19 because “[b]ased on current CDC guidance, this individual cannot safely enter the workplace.”²⁹⁷

But what if the job is a remote job working from home? What about reasonable accommodations? Even food handlers with diseases listed specifically as potential direct threats are entitled to consideration for reasonable accommodations. HHS has a list of communicable diseases that are transmitted through food handling, and “[i]f an individual with a disability has one of the listed diseases and works in or applies for a position in food handling, the employer must determine whether there is a reasonable accommodation that will eliminate the risk of transmitting the disease through the handling of food.”²⁹⁸ Further, “[i]f there is an accommodation that will not pose an undue hardship, and that will prevent the transmission of the disease through the handling of food, the employer must provide the accommodation to the individual.”²⁹⁹ While the EEOC’s COVID-19 guidance will undoubtedly be influential, overly generalized policies based on COVID-19 generalizations will likely be found unlawful by courts.

²⁹³ EEOC, *Pandemic Preparedness*, *supra* note 11.

²⁹⁴ *Id.*

²⁹⁵ *Bragdon v. Abbott*, 524 U.S. 624, 650 (1998) (noting, “the views of public health authorities, such as the U.S. Public Health Service, CDC, and the National Institutes of Health, are of special weight and authority”).

²⁹⁶ EEOC, *Pandemic Preparedness*, *supra* note 11 (emphasis added).

²⁹⁷ *Id.*

²⁹⁸ 29 C.F.R. § 1630.16(e) (2019).

²⁹⁹ *Id.*

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In fact, the Supreme Court has noted that the Rehabilitation Act (after which the ADA was modeled) “is carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments.”³⁰⁰ The Supreme Court adds that

The fact that *some* persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding from the coverage of the Act *all* persons with actual or perceived contagious diseases. Such exclusion would mean that those accused of being contagious would never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they were “otherwise qualified.” Rather, they would be vulnerable to discrimination on the basis of mythology—precisely the type of injury Congress sought to prevent.³⁰¹

Interestingly, the EEOC guidance failed to analyze the COVID-19 direct threat issue using the four factors outlined by the Supreme Court in *Arline*. Again, those well-established basic factors are (1) “the nature of the risk (how the disease is transmitted),” (2) “the duration of the risk (how long is the carrier infectious),” (3) “the severity of the risk (what is the potential harm to third parties),” and (4) “the probabilities the disease will be transmitted and will cause varying degrees of harm.”³⁰²

First, for COVID-19, the nature of the risk is mostly believed to be airborne transmission through person-to-person spread through close contact (within six feet) with an infected person (including those who are without symptoms).³⁰³ Second, the duration of the risk is likely related to the length of prolonged contact with another individual for more than ten minutes.³⁰⁴ Third, depending upon the details, the nature

³⁰⁰ Sch. Bd. of Nassau Cty. v. Arline, 480 U.S. 273, 284–85 (1987).

³⁰¹ *Id.* at 285 (emphasis added).

³⁰² *Id.* at 287–88 (citing an amicus brief of the AMA).

³⁰³ *How It Spreads*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (hereinafter *How It Spreads*) (explaining that the virus is spread “between people who are in close contact with one another (within about 6 feet)” and “through respiratory droplets produced when an infected person coughs, sneezes or talks”); Monica Gandhi, et al., *Asymptomatic Transmission, the Achilles’ Heel of Current Strategies to Control COVID-19*, 382 NEW ENG. J. MED. 2158, 2158 (2020), <https://www.nejm.org/doi/full/10.1056/NEJMe2009758> (noting that a “key factor in the transmissibility of Covid-19 is the high level of SARS-CoV-2 shedding in the upper respiratory tract, even among presymptomatic patients”).

³⁰⁴ Michael Klompas, et al., *Universal Masking in Hospitals in the COVID-19 Era*, 382 NEW ENG. J. MED. e63(1), e63(1) (2020), <https://www.nejm.org/doi/full/10.1056/NEJM2006372> (noting that “public health authorities define a significant exposure to

and duration of the risk may be considered small in many situations. The severity of the risk, however, might be considered high in some courts. For example, the Eleventh Circuit noted that “it is the potential gravity of the harm that imbues certain odds of an event with significance.”³⁰⁵ The court has explained that “when the adverse event is the contraction of a fatal disease, the risk of transmission can be significant even if the probability of transmission is low: death itself makes the risk ‘significant.’”³⁰⁶ Fourth, the probability that the disease will be transmitted will also be considered, which will include an analysis of whether reasonable accommodations can mitigate the risks. Aboard the contained cruise ship environment, *Diamond Princess*, approximately 19% became infected over a few weeks.³⁰⁷ A cruise ship, however, is a contained environment with potential for prolonged exposure, potential unique ventilation issues, etc. that will not apply to most work environments. In addition, the probability of transmission may be significantly altered by following CDC guidelines, such as social distancing, frequent handwashing, minimizing prolonged contact, placing barriers between workers and patrons, and disinfecting surfaces regularly.³⁰⁸

Using the four factors, COVID-19 may very well be a direct threat depending upon the individualized job circumstances. As discussed earlier, the nature of the risk is one of close contact allowing transmission, with current recommendations to maintain “social distancing” of at least six feet. The duration of the risk is not known for certain, but viral shedding was present in some of the patients for up to thirty-seven days in one study.³⁰⁹ The CDC, however, currently describes two durational strategies for return to work. In its “test-based strategy” the CDC excludes workers until fever has resolved without medications, respiratory symptoms have improved (e.g., cough, shortness of breath), and two consecutive negative COVID-19 tests are

Covid-19 as face-to-face contact within 6 feet with a patient with symptomatic Covid-19 that is sustained for at least a few minutes (and some say more than 10 minutes or even 30 minutes)” and that the “chance of catching Covid-19 from a passing interaction in a public space is therefore minimal”).

³⁰⁵ *Onishea v. Hopper*, 171 F.3d 1289, 1297 (11th Cir. 1999).

³⁰⁶ *Id.*

³⁰⁷ Tina Saey, *Cruise Ship Outbreak Helps Pin Down How Deadly the New Coronavirus Is*, SCIENCE NEWS (March 12, 2020), <https://www.sciencenews.org/article/coronavirus-outbreak-diamond-princess-cruise-ship-death-rate> (noting that there were 3711 people on *Diamond Princess*); Faust & del Rio, *supra* note 149, at 1046 (noting 712 positive COVID-19 cases on the *Diamond Princess*). Doing the math: 712 positive cases/3711 passengers = 19.2%.

³⁰⁸ CDC, *How It Spreads*, *supra* note 303.

³⁰⁹ Zhou et al., *supra* note 15, at 1054.

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completed.³¹⁰ The CDC's "non-test-based strategy" excludes workers until at least 3 days (72 hours) "have passed since last fever without the use of fever-reducing medications," "improvement in respiratory symptoms (e.g., cough, shortness of breath)," and "at least 7 days have passed since symptoms first appeared."³¹¹ The potential harm to third parties is death since COVID-19 has a significant mortality rate discussed above depending upon age and comorbidities. The probability that COVID-19 will be transmitted also appears to be fairly high given its rapid worldwide spread. Therefore, based on the four-factor analysis, good arguments can be made that COVID-19 in many employees and applicants *will* pose a direct threat to others—however, a fact-sensitive and individualized analysis may find that is not always the case depending upon the details of the situation and further medical developments.

The fact that EEOC is calling COVID-19 the disease a "direct threat" does not alter the traditional individualized analysis of a plaintiff's situation including the possibility of reasonable accommodation. EEOC even notes, "[a]t such time as the CDC and state/local public health authorities revise their assessment of the spread and severity of COVID-19, that could affect whether a direct threat still exists."³¹²

IV. CONCLUSION

The ADA will play a key role as Americans go back to work during and after the COVID-19 pandemic. Fear, apprehension, and hysteria will likely affect employment decisions in the immediate aftermath of the COVID-19 outbreak. COVID-19 has caused massive workplace disruptions with millions of Americans working from home, being laid-off from work, not being hired, and otherwise disrupting the workplace. Most prior pandemics preceded the ADA, but the more recent SARS and swine flu pandemics help provide some insight. In addition, cases related to communicable diseases like HIV and tuberculosis help provide some additional insight into how the courts will interpret the ADA for COVID-19.

Some COVID-19 survivors will be considered "actually disabled" or having a "record of" disability due to the severity of their disease and physical sequelae. But whether COVID-19 survivors with mild or

³¹⁰ *Criteria for Return to Work for Healthcare Personnel with Confirmed or Suspected COVID-19 (Interim Guidance)*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/healthcare-facilities/hcp-return-work.html>.

³¹¹ *Id.*

³¹² EEOC, *Pandemic Preparedness*, *supra* note 11.

asymptomatic cases will receive protections under the ADA will depend upon how the morbidity and mortality of the disease compare with those of the common cold and seasonal flu and whether the “transitory and minor” exception of the “regarded as” prong applies.

Balancing legitimate concerns of disease transmission and health risks with individual employee rights while avoiding discrimination based upon stereotypes or unfounded fears will be a challenge for employers as the COVID-19 outbreak resolves. Employers will have to negotiate areas covered by the ADA including (1) inquiries and medical exams regarding COVID-19 during the hiring process and return to work, (2) reasonable accommodations for COVID-19 survivors, (3) evaluating the presence of a direct threat from a COVID-19 infected employee, and (4) accommodations for employees with special susceptibilities to severe COVID-19 complications.

These issues are explored at length above with attention to EEOC, public health authority guidance, and relevant underlying statutory and case law. In addition to the ADA, other laws and regulations ranging from OSHA³¹³ to National Labor Relations Board regulations to state laws will also come into play. As we learn more about COVID-19, the analysis will continue to evolve, but the ADA will play a key role for the next few years as employment discrimination allegations are likely to emerge from the pandemic COVID-19 outbreak in the United States.

³¹³ *Guidance on Preparing Workplaces for COVID-19*, U.S. DEP'T OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMIN., <https://www.osha.gov/Publications/OSHA3990.pdf>.