

THE COVID-19 WORKING GROUP'S DISABILITY RIGHTS HUB PRESENTS:

Disability Rights and Workplace Discrimination in the Time of COVID-19

FACILITATED BY PATRISHA DOMINGO AND TIMOTHY BOTT

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**BERKELEY CENTER ON
COMPARATIVE EQUALITY
& ANTI-DISCRIMINATION
LAW**



Disability Rights and Workplace Discrimination
in the Time of COVID-19:
COVID-19, Employment and People with Disabilities—
U.S. Experience to Date

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Berkeley Center on Comparative Equality

And Anti-Discrimination Law

Focus of My Comments

- Where the U.S. stands compared to other on impact of the virus on health and mortality
- Why we are concerned about people with disabilities and employment at this time
- What have been the most common questions to U.S. federal employment disability nondiscrimination authorities about people with disabilities, COVID and employment?
- Related references

Where the U.S. Stands in the Pandemic

- Country with the highest number of total infections to date world-wide
- First confirmed case, February 22, 2020
- Number daily infections currently -- 40,000+
- Confirmed cases to date -- 6,800,000+
- Total number of deaths 200,000

People with Disabilities in Economic Downturns

- People with disabilities are disproportionately impacted in economic downturns (often laid off earlier and last to be rehired in return process)
- People with disabilities are disproportionately represented in low paying jobs, which may put them at risk in several ways –
 - Health risk as workers in essential jobs
 - Economic risks in service industries with lay-offs
- Might afford benefits to those who can be advantaged by remote work, if accommodated

Questions Arising Around COVID-19 and Individuals with Disabilities

- What strategies can employers use to recruit, hire, and onboard new employees?
- What information may an employer request of an employee or job applicant?
- Are there reasonable accommodations that will ensure equal employment opportunities for individuals with disabilities that do not pose a direct threat to the health and safety of the individual or others?
- What steps must an employer take to maintain confidentiality of medical records?
- What are some considerations around reasonable accommodations and COVID-19

Related References

- Centers for Disease Control and Prevention (CDC) (2020). Coronavirus Disease 2019 and People with Disabilities. From: <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-disabilities.html>.
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- Kruse, D., & Schur, L. (2003). Employment of people with disabilities following the ADA. *Industrial Relations*, 42(1), 31–66.
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- U.S. Equal Employment Opportunity Commission (US-EEOC) (September 8, 2020). What You Should Know About COVID-19, and the ADA, the Rehabilitation Act, and Other EEO Laws. Washington, DC: U.S. Equal Employment Opportunity Commission. From: <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

Workplace Inequities and Mental Health

Amita Dhanda

Mental Health an Ubiquitous Concern

- Mental health as a concern has moved from the margins to the center
- The difficulties of working from home
- The tribulations of screen fatigue and internet access
- The travails of demanding and unreasonable superiors in times when losing a job is disastrous

Ubiquitous not Universal

- All the mental health concerns experienced by the non-disabled community
- Have been pre-Covid experiences of persons with disabilities
- Yet persons with disabilities who have intense understanding of mental distress caused by exclusion are not part of this conversation
- Cultivate empathy and solidarity with experience

Let Crisis be Opportunity

- Persons with psychosocial disability bring up the rear of the disability trail
- Even as they have continually signalled a connection between iniquitous working conditions and mental distress
- Their insight and experience has not been accorded credence hence has not guided policy
- When the same experience is validated by so many about time we start addressing root causes and not symptoms

The Impact of the Covid-19 on CJEU Disability Concept

Berkeley Comparative Equality and Anti-Discrimination Law Study Group
22 September 2020

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Content

1. Why CoVID-19 Could be Important for the Disability concept?
2. Research Question
3. How COVID-19 Could Affect European Disability Concept?
 - 3.1. Limitation of Capacity which Results from Physical, Mental or Psychological Impairments
 - 3.2. Long Term Character
 - 3.3. Hindering Full and Effective Participation in Professional Life on an Equal Basis with Other Workers

1. Why COVID-19 Could be Important for the Disability Concept?

A) HK Danmark Judgment connected sickness and disability for the purposes of protection against discrimination in employment.

B) Progressive expansion of CJEU disability configuration, covering diseases with a high impact on the population.

- MERS-CoV (2012):

Worldwide cumulative number of cases: **2494** Worldwide deaths: **858**

Case fatality ratio: **34 %**

Source: <https://www.who.int/emergencies/mers-cov/en/> - 14/09/2020

- SARS-CoV (2003):

Worldwide cumulative number of cases: **8096** Worldwide deaths: **774**

Case fatality ratio: **9,6 %** Source: Summary of probable SARS cases with onset of illness from 1 November 2002 to 31 July 2003 (Based on data as of the 31 December 2003) – http://who.int/csr/sars/country/table2004_04_21/en/ - 14/09/2020

- CoVID-19 (2019-2020)

Worldwide cumulative number of cases: **28.637.952** Worldwide deaths: **917.417**

Case fatality ratio: **3,20 %**

Source: <https://covid19.who.int/> [WHO Coronavirus Disease (COVID-19) Dashboard]

2. Main Research Question

Could Covid-19 be considered a disability in the light of the European configuration of the CJEU?

CJEU disability definition elements:

*Disability is based on a limitation resulting in particular from **long-term (1) physical, mental or psychological impairments (2)** which, in interaction with various barriers, may **hinder the full and effective participation of the person concerned in professional life (3)** on an equal basis with other workers (Judgment of 11 April 2013, HK Danmark, C-335/11 and C-337/11, EU:C:2013:222, paragraph 41)*

- a) Long Term physical, mental or psychological impairment
 - a.1) Long Term
 - a.2) Physical, mental or psychological impairment
- b) Limitation of capacity resulting from long term impairment that may hinder the full and effective participation in professional life on an equal basis with other workers

3. How COVID-19 Could Affect European Disability Concept?

Long term

Not defined in CRPD neither Directive 2000/78. Most important judgment is Daouidi (STJUE of 1 December 2016, Daouidi, C-395/15, ECLI: EU: C: 2016: 917, Par. 53-57), which has pointed out:

- Long term should be examined at the time of the alleged discriminatory act adopted (Par. 53).
- Long term envisaged situations in which participation in professional life is hindered over a long period of time (Par. 54). Specifically, impairment should not display a clearly defined prognosis as regards short-term progress (Par. 56).
- Judicial demonstration of long-term duration entails objective evidence such as documents and certificates relating to that person's condition, established on the basis of current medical and scientific knowledge and data (Par. 57).

In the case of COVID-19, World Health Organization(1) suggest that the median time from onset to clinical recovery for mild cases is approximately 2 weeks and is 3-6 weeks for patients with severe or critical disease.

This means that sequelae as **symptoms that develop after 6 weeks or persist beyond 6 weeks of COVID-19 symptom onset could be considered long term.**

(1) <https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf>

3. How COVID-19 Could Affect European Disability Concept?

Physical, mental or psychological impairment

Not defined in CRPD neither Directive 2000/78. Also, CJEU Judgments do not define what is an impairment. HK Danmark Judgment stated that illness, medically diagnosed as **curable or incurable**, can be assimilated to a disability and the origin of the disability is not relevant (Par. 40).

Cardiovascular, pulmonary and other neurological sequelae may be expected based on the pathophysiology of COVID-19. Additional long-term sequelae that may be anticipated based on knowledge of Severe Acute Respiratory Syndrome (SARS) and Middle East Respiratory Syndrome (MERS) include anxiety, cardiovascular system abnormalities, depression, glucose metabolism disorders, hyperlipidemia, lipid metabolism dysregulation, post-traumatic stress disorder and reduced lung capacity.

As far as they are long term symptoms, there is no obstacle to consider them as a disability.

In addition, the **psychological aspect** of CJEU and CRPD disability definition allows for the inclusion of indirect consequences resulting from public health measures with an impact on mental health

(i.e. impact of social distancing on mental health or the consequences of deferred health care on chronic disease management).

3. How COVID-19 Could Affect European Disability Concept?

Limitation of capacity resulting from long term impairment that may hinder the full and effective participation in professional life on an equal basis with other workers

Limitation of capacity requires a connection with professional life (HK Danmark Judgment 37-39). CJEU established a necessary link between the result of the impairment (limitation of capacity) and full and effective participation in professional life, requiring a broad negative impact on work (a difficulty to perform professional task is enough – Paragraph 44 HK Danmark).

From a COVID-19 perspective, it is required to examine how sequels affect the development of professional functions. However, a vision focused only on the task development is not enough to fit the social model of disability.

COVID-19 could be a great opportunity to extend the interpretation of the term “hindering” to issues not strictly related to task performance but connected with professional life.

(i.e. Medical licenses or temporary absences to work as a consequence of COVID-19 sequels, and even not attending work to care for affected relatives as a discrimination by association, etc.)

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