WHO IS DISABLED?: HOW COURTS INVOKE THE "TOTALITY OF THE CIRCUMSTANCES" ANALYSIS TO MAKE ADA DISABILITY DETERMINATIONS DURING PANDEMICS

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INTRODUCTION

As one of the most comprehensive laws addressing employment and workplace rights,[1] the Americans with Disabilities Act ("ADA") plays a critical role in protecting persons with disabilities in the workplace. To assert the protections of the ADA, employees must show they are disabled within the meaning of the law. While Congress intended for the ADA to be broadly construed "to the maximum extent permitted,"[2] the emergence of modern pandemics raises new questions regarding exactly how far the ADA's protections extend. Specifically, recent pandemic-related ADA cases have posed three major questions: (1) whether an individual that has contracted a pandemic disease is disabled; (2) whether employers who take adverse employment actions in response to an employee's exposure to the pandemic disease violate the ADA; and (3) whether the risk of severe illness and/or death associated with a pandemic disease for employees with underlying conditions constitutes a disability.

How courts interpret the ADA during a pandemic is exceedingly consequential to the protection of workers' health and employment status, especially for those with underlying medical conditions. For example, during the COVID-19 pandemic, an estimated 27 million workers under the age of sixty-five were at an increased risk of complications or death from COVID-19 due to underlying medical conditions.[3] In 2020, the unemployment rate for disabled individuals was higher than those without disabilities across all age groups and education levels.[4] As of February 5, 2021, almost a year after COVID-19 was declared a global pandemic, approximately 400 disability

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[1] *Introduction to the ADA*, ADA.GOV, https://www.ada.gov/ada_intro.htm [https://perma.cc/65GM-UTU3] (last visited Jan. 24, 2021).

[2] 42 U.S.C. § 12102(4)(A).

[3] Alex Ellerbeck, *Looming Fight: Millions of Disabled Workers Could Ask for Covid-19 Protections Under ADA*, CTR. FOR PUB. INTEGRITY (Aug. 28, 2020), https://publicintegrity.org/health/coronavirus-and-inequality/disabled-workers-covid-protections-ada/ [https://perma.cc/U7VV-ZENV].

[4] *Persons With a Disability: Labor Force Characteristics—2020*, U.S. BUREAU OF LAB. STATS. 1–2 (Feb. 24, 2021), https://www.bls.gov/news.release/pdf/disabl.pdf [https://perma.cc/FZ3G-2MTE]; *see* Andy Newman, *'I Really Loved My Job': Why the Pandemic Has Hit These Workers Harder*, N.Y. TIMES (Mar. 5, 2021), https://www.nytimes.com/2021/03/05/nyregion/workers-disabilities-unemployment-covid.html [https://perma.cc/Z9XP-HBAK] ("People with disabilities are disproportionately employed in industries that have suffered in the pandemic.").

discrimination lawsuits have been filed.[5] In addition to COVID-19 related claims, disability discrimination has been the fifth most filed claim after retaliation, wrongful termination, workplace safety, and other civil litigation matters.[6] The industries most targeted by COVID-19 filings include healthcare, manufacturing, public administration, retail, and hospitality[7]—all industries where telework accommodations are likely unavailable for employees given the nature of the work. Among the top industries most targeted (except for hospitality), disability discrimination claims were within the top claims filed against employers.[8]

Some employers and defendants have argued that the ADA does not apply to individuals with pandemic-related impairments because their limitations are either situational or a result of their own personal choices.[9] However, some courts in early COVID-19-related ADA cases have relied on a "totality of the circumstances" analysis to factor "the totality of [one's] health circumstances in conjunction with one's social circumstances."[10] While new in name, this standard actually reflects how courts have previously considered the nature and severity of pandemic diseases in ADA cases. This "totality of the circumstances" analysis has been particularly beneficial to individuals with underlying conditions that typically may not constitute a disability under the ADA but are associated with increased risk for severe illness and death from pandemic diseases.

The purpose of this article is to evaluate how courts have addressed ADA discrimination claims within the context of modern pandemics through the totality of the circumstances analysis (either expressly or inherently). First, this article discusses the history and purpose of the ADA. Second, this article discusses the nature and severity of the two pandemics that have emerged following the enactment of the ADA. Third, this article analyzes how trial courts have used the "totality of the circumstances" analysis in H1N1 and COVID-19-related ADA cases to determine whether an individual is disabled in specific situations.

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[5] *COVID-19 Labor & Employment Litigation Tracker Report*, LITTLER MENDELSON (Feb. 5, 2021) (on file with author).

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *See infra* notes 230, 244 and accompanying text.

[10] Silver v. City of Alexandria, 470 F. Supp. 3d 616, 622 (W.D. La. 2020).

I. THE HISTORY OF THE AMERICANS WITH DISABILITIES ACT

A. The Original Americans with Disabilities Act of 1990

The Americans with Disabilities Act, originally signed into law by President George H.W. Bush in 1990, is a landmark piece of civil rights legislation designed to give disabled Americans legal protections against discrimination in employment, public services, and public accommodations.[11] Modeled after the Civil Rights Act of 1964, Congress passed the ADA in response to the inadequacies of the Rehabilitation Act to protect individuals with disabilities from discrimination.[12] Disability discrimination "denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity."[13] To address this "serious and pervasive social problem," the ADA's purpose, in part, is "to provide a clear and comprehensive national mandate . . . [and] clear, strong, consistent, enforceable standards" to address and eliminate disability discrimination.[14]

Title I of the ADA prohibits employers from discriminating against qualified individuals because of a 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."[15] A "qualified individual" is one with a disability "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[16] The ADA as originally enacted defined "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a

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[11] Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. § 12101); *History of the ADA*, ADA.GOV, https://beta.ada.gov/ [https://perma.cc/JM8M-QNWP] (last visited Aug. 25, 2021).

[12] Amelia Michele Joiner, *The ADAAA: Opening the Floodgates*, 47 SAN DIEGO L. REV. 331, 337 (2010). The purpose of the Rehabilitation Act was to address disability discrimination; however, it failed to protect most disabled individuals because it only prohibited discrimination under any programs receiving federal assistance. *Id.* at n.23.

[13] Americans with Disabilities Act of 1990 § 2(a)(9)

[14] *Id.* at § 2(a)(2), (b)(1)–(2).

[15] *Id.* at § 102(a) (codified as amended at 42 U.S.C. § 12112(a)). Prohibited forms of discrimination include "not making reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability" absent undue hardship and denying employment opportunities to qualified applicants or employees based on the need for reasonable accommodations. *Id.* at § 102(b).

[16] *Id.* at § 101(8) (codified as amended at 42 U.S.C § 12111(8)).

record of such impairment; or (C) being regarded as having such an impairment."[17] If a qualified individual has an "actual disability" or a "record of" such disability, employers are obligated to provide necessary reasonable accommodations.[18] Identifying a reasonable accommodation should be an interactive process between the employee and the employer to "identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."[19]

Equal Employment Opportunity Commission ("EEOC") guidelines issued in 1991 provided more specific definitions for the key terms of "physical or mental impairment,"[20] "major life activities,"[21] and "substantially limits"[22] under the first prong of the disability definition.[23] The initial factors that "determin[ed] whether an individual

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[17] *Id.* at § 3(2) (codified as amended at 42 U.S.C. § 12102).

[18] 29 C.F.R. § 1630.9(d) (2020). Individuals who are only "regarded as" having a disability are not entitled to a reasonable accommodation. *Id.* Reasonable accommodations may include actions such as making facilities more accessible or "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification 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." 42 U.S.C. § 12111(9).

[19] 29 C.F.R. § 1630.2(o)(3) (2020).

[20] *See* 29 C.F.R. § 1630.2(h)(1)–(2) (1992). "Physical or mental impairment" was initially defined by the EEOC as:

> 1. Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or
> 2. Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Id.

[21] *See* 29 C.F.R. § 1630.2(i) (1992). "Major life activities" was defined to include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Id.*

[22] *See* 29 C.F.R. § 1630.2(j)(1)(i)–(ii) (1992). The phrase "substantially limits" was initially defined as:

> 1. Unable to perform a major life activity that the average person in the general population can perform; or
> *2.* Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

Id.

[23] Joiner, *supra* note 12, at 340.

[was] substantially limited in a major life activity" included "[1] [t]he nature and severity of the impairment; [2] [t]he duration or expected duration of the impairment; and [3] [t]he permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment."[24] As for the major life activity of working, individuals were deemed to be substantially limited when they were "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities."[25]

Most notably, EEOC guidelines stressed that whether an individual is substantially limited in a major life activity should be determined on "a case by case basis, *without regard to mitigating measures* such as medicines, or assistive or prosthetic devices."[26] The purpose of this provision was to "ensure the ADA protects individuals who rely upon assistive devices or medications to perform a major life activity."[27] However, some courts still considered the ameliorative effects of mitigating measures in disability determinations.[28]

1. The Supreme Court Limits the Original ADA's Application

Even with the supplemental definitions provided by the EEOC, the ADA's original disability definition has been criticized as being "notoriously vague." [29] In the years following the ADA's enactment, courts were "consistently inconsistent" in their interpretations of which impairments constituted a disability, especially with regard to the impacts of mitigating measures.[30] This inconsistency led to a split among the United States Courts of Appeals over the construction of the term "disability."[31] Courts that applied a narrow construction of "disability"

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[24] 29 C.F.R. § 1630.2(j)(2)(i)–(iii) (1992).

[25] 29 C.F.R. § 1630.2(j)(3)(i) (1992).

[26] 29 C.F.R. app. § 1630(j) (1992) (emphasis added).

[27] Joiner, *supra* note 12, at 341 (quoting Barbara Hoffman, *Reports of Its Death Were Greatly Exaggerated: The EEOC Regulations That Define 'Disability' Under the ADA After* Sutton v. United Air Lines, 9 TEMP. POL. & C.R. L. REV. 253, 264 (2000)).

[28] *Id.*

[29] *Id.* at 339 (quoting Michael C. Falk, *Lost in the Language: The Conflict Between the Congressional Purpose and Statutory Language of Federal Employment Discrimination Legislation*, 35 RUTGERS L. J. 1179, 1211 (2004)).

[30] *Id.* at 343.

[31] *Id.* at 343–49; *compare* Washington v. HCA Health Servs. of Tex., Inc., 152 F.3d 464, 471 (5th Cir. 1998) (holding mitigating measures must be considered on a case-by-case basis), *vacated*, 527 U.S. 1032 (1999), *with* Bartlett v. N.Y. State Bd. of Exam'rs, 156 F.3d 321, 329 (2d Cir. 1998) (holding an individual must be evaluated in an unmitigated state),

found the ADA only covered "individuals who by virtue of their condition are incapable of living an independent, economically productive life."[32] Based on this narrow construction, individuals who controlled their impairments through medication or assistive devices were considered to have "overcome" their impairment and thus not disabled.[33] In contrast, courts that applied a broader construction of the term "disability" did not consider the ameliorative effects of mitigating measures to mean an individual no longer had a disability.[34]

The circuit court split over the construction of the term "disability" led to the Supreme Court's consequential decision in *Sutton v. United Airlines, Inc.* that sharply narrowed the scope of the ADA.[35] The plaintiffs in S*utton* were twin sisters who both suffered from severe myopia and wore corrective lenses that allowed them to see with 20/20 vision.[36] The plaintiffs could not perform many daily activities without these corrective lenses, including driving a vehicle.[37] Both plaintiffs applied for positions with United Air Lines as commercial airline pilots and were selected for interviews.[38] However, United terminated their interviews when the plaintiffs failed to meet their uncorrected vision requirements.[39] The plaintiffs filed suit alleging that United discriminated against them because of their disabilities in violation of the ADA.[40] Both the district court and the United States Court of Appeals for the Tenth Circuit reasoned that the plaintiffs were not disabled because they controlled their visual impairments by wearing corrective lenses.[41]

The Supreme Court agreed with the lower courts and held that a determination of whether an impairment substantially limits a major life activity should consider the ameliorative effects of mitigating

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vacated sub nom N.Y. State Bd. of Exam'rs v. Bartlett, 527 U.S. 1031 (1999), *and* Baert v. Euclid Beverage, Ltd., 149 F.3d 626, 630 (7th Cir. 1998) (holding an individual's impairment must be analyzed "without regard to . . . mitigating measures").

[32] Joiner, *supra* note 12, at 342 (quoting Wendy E. Parmet, *Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability*, 21 BERKELEY J. EMP. & LAB. L. 53, 62 (2000)).

[33] *Id.* at 342 n.58.

[34] *Id.* at 342.

[35] *Id.* at 349; Sutton v. United Air Lines, Inc. 527 U.S. 471, 475, 476 (1999), *superseded by statute*, 42 U.S.C. § 12102(4)(E).

[36] *Sutton*, 527 U.S. at 475.

[37] *Id.*

[38] *Id.* at 476.

[39] *Id.*

[40] *Id.*

[41] *Id.* at 476–77.

measures.[42] Specifically, the Court reasoned that the phrase "substantially limits" indicates that "[a] disability exists only where an impairment 'substantially limits' a major life activity, not where it 'might,' 'could,' or 'would' be . . . if mitigating measures were not taken."[43] The Court in *Sutton* also restricted the application of the "regarded as" prong:

> [A]n employer is free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment . . . are preferable to others, just as it is free to decide that some limiting, but not *substantially* limiting, impairments make individuals less than ideally suited for the job.[44]

Three years later, the Court in *Toyota Motor Manufacturing, Kentucky., Inc. v. Williams* further limited the ADA's disability definition when it held the terms "substantially" and "major" should be narrowly construed as "to create a demanding standard for qualifying as disabled."[45] The Court additionally held that, to qualify as substantially limited, "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."[46] These Supreme Court decisions, especially *Sutton*, highlighted the failure of the ADA as originally enacted to fulfill its intended purpose.[47] The ineffectiveness of the original ADA was further reflected by the American Bar Association's findings that during the 1990s, "employers prevailed in 91.6% of cases brought under the ADA."[48]

B. ADA Amendments Act of 2008

In direct response to *Sutton*, Congress passed the ADA Amendments Act of 2008 ("ADAAA") for the primary purpose of making it easier for disabled individuals to be protected under the ADA.[49] The express purpose of the ADAAA included the following:

> (2) to reject the requirement enunciated by the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life

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[42] *Sutton*, 527 U.S. at 476–77; *see also* Joiner, *supra* note 12, at 350–51.

[43] *Sutton*, 527 U.S. at 482.

[44] *Id.* at 490–91.

[45] Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 197 (2002), *superseded by statute*, 42 U.S.C. § 12102.

[46] *Id.* at 198.

[47] Joiner, *supra* note 12, at 358.

[48] *Id.*

[49] *See* ADA Amendments Act of 2008, Pub. L. 110-325, 122 Stat. 3553 (codified at 42 U.S.C. 12101).

> activity is to be determined with reference to the ameliorative effects of mitigating measures;
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> (3) to reject the Supreme Court's reasoning in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in School Board of Nassau County v. Arline, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973.[50]

The ADAAA directs that "the definition of 'disability' . . . shall be constructed in favor of *broad coverage* of individuals under this Act, to the maximum extent permitted by the terms of this Act."[51] Congress expressly mandated that "[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures[.]"[52] Furthermore, "the question of whether an individual has a disability . . . 'should not demand extensive analysis.'"[53] With these amendments, Congress made it clear that the primary inquiry in ADA cases should be whether employers have complied with or violated statutory requirements, not whether an individual is disabled.[54]

Based on this broadened coverage, EEOC regulations provide that certain factors should be considered when assessing whether a particular impairment substantially limits a major life activity, such as "the condition under which the individual performs the major life activity; the manner in which the individual performs the major life activity; and/or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity."[55] EEOC regulations further provide:

> Consideration of facts such as condition, manner, or duration [of a major life activity] may include, among other things, consideration of the difficulty, effort, or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; and/or the way an impairment affects the operation of a major bodily function. In addition, the non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular

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[50] ADA Amendments Act of 2008 § 2(b)(2)–(3).

[51] *Id.* at § 4(a) (emphasis added).

[52] *Id.*; *see also* Joiner, *supra* note 12, at 360.

[53] ADA Amendments Act of 2008 § 2(b)(5).

[54] 29 C.F.R. app. § 1630.1(c) (2020) ("The ADAAA and the EEOC's regulations also make clear that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, not whether the individual meets the definition of disability.").

[55] 29 C.F.R. § 1630.2(j)(4)(i) (2020).

> treatment regimen, may be considered when determining whether an individual's impairment substantially limits a major life activity.[56]

While the EEOC regulations detail some factors that should be considered, the "ADAAA provides . . . that '[t]he term 'substantially limits' shall be interpreted consistently with the findings and purposes of' the ADAAA."[57]

Not all underlying conditions are protected by the ADA even under this broad coverage. While some impairments will "virtually always" be substantially limiting given their inherent nature—such as deafness, blindness, autism, cancer, diabetes, HIV, multiple sclerosis, etc.[58]—courts have come to varying conclusions for other types underlying conditions.[59] This is likely because the limiting effects of certain underlying conditions are more varied on an individual basis, such as asthma,[60] high blood pressure,[61] and obesity.[62] Thus, although the

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[56] *Id.* at § 1630.2(j)(4)(ii).

[57] Doe v. Samuel Merritt Univ., 921 F. Supp. 2d 958, 965 (N.D. Cal. 2013) (quoting 42 U.S.C. § 12102(4)).

[58] 29 C.F.R. §§ 1630.2(j)(3)(ii)–(iii) (2020).

[59] *See* sources cited *infra* notes 60–62.

[60] *See* Burke v. Niagara Mohawk Power Corp., 142 Fed. App'x 527, 529 (2d Cir. 2005) (stating that "asthma does not invariably impair a major life activity"); *compare* Hudson v. Tyson Farms, Inc., 769 Fed. App'x. 911, 917 (11th Cir. 2019) (holding that the plaintiff's asthma was not a disability under the ADA because she failed to show how her asthma substantially limited a major life activity), *and* Lochridge v. City of Winston-Salem, 388 F. Supp. 2d 618, 626 (M.D. N.C. 2005) (holding that the plaintiff was not disabled under the ADA because there was no evidence her asthma substantially limited a major life activity), *with* Jordan v. City of Baton Rouge, No. 98-30989, 1999 WL 683794, at *3 (5th Cir. Aug. 3, 1999) (finding the plaintiff was disabled under the ADA because his asthma substantially affected a major life activity), *and* Bazert v. La. Dep't of Pub. Safety and Corrs., 768 So. 2d 279, 283–84 (La. Ct. App. 2000) (applying federal law, holding that the plaintiff was disabled under the ADA because his asthma substantially limited the major life activity of breathing).

[61] *Compare* Gogos v. AMS Med. Sys., Inc., 737 F.3d 1170, 1173 (7th Cir. 2013) (finding the plaintiff's high blood pressure could qualify as a disability), *with* Hendrix v. Pactiv LLC, 488 F. Supp. 3d 43, 53 (W.D.N.Y. 2020) (finding the plaintiff's alleged facts did not show his high blood pressure amounted to a disability under the ADA).

[62] *Compare* Richardson v. Chicago Transit Auth., 926 F.3d 881, 887–88 (7th Cir. 2019) (holding that extreme obesity, without evidence of an underlying physiological condition, is not a physical impairment under the ADA), *and* Morriss v. BNSF Ry. Co., 817 F.3d 1104, 1108 (8th Cir. 2016) ("Under the plain language of this definition, obesity is not a physical impairment unless it is a physiological disorder or condition and it affects a major body system."), and E.E.O.C. v. Watkins Motor Lines, Inc., 463 F.3d 436, 441 (6th Cir. 2006), *and* Francis v. City of Meriden, 129 F.3d 281, 286 (2d Cir. 1997), *with* Velez v. Cloghan Concepts, LLC, 387 F. Supp. 3d 1072, 1076 (S.D. Cal. 2019) ("[W]eight may be an impairment when it falls outside the normal range *or* occurs as the result of a physiological disorder."), *and* E.E.O.C. v. Res. for Hum. Dev., Inc., 827 F. Supp. 2d 688, 694 (E.D. La. 2011) ("A careful reading of the EEOC guidelines and the ADA reveals that the requirement for a physiological cause is only required when a charging party's weight is

primary concern in ADA cases should be employer compliance,[63] a finding of disability is not automatic and still "requires an individualized assessment."[64]

Furthermore, the ADA limits protections with respect to individuals "regarded as" disabled.[65] Specifically, Congress excluded individuals with impairments that are "transitory and minor" from being regarded as disabled within the meaning of the ADA.[66] Transitory impairments are those "with an actual or expected duration of [six] months or less."[67] The statute does not define "minor" impairments, but these generally include conditions such as the common cold and seasonal flu.[68] The lack of statutory guidance about what conditions are "minor" creates a grey area for whether an individual is disabled and entitled to accommodations, especially since "transitory and minor" impairments are analyzed under an objective test.[69]

The emergence of modern pandemics has created even more uncertainty regarding whether certain impairments constitute a disability. For example, while an individual's underlying condition (like asthma or high blood pressure) may not substantially limit a major life activity absent a pandemic, this medical condition may place them at a higher risk for severe illness and death from a pandemic disease.[70] Additionally, a pandemic disease may affect certain individuals more severely or for longer periods of time compared to average cases.[71] Thus, while

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within the normal range. However, if a charging party's weight is outside the normal range—that is, if the charging party is severely obese—there is no explicit requirement that obesity be based on a physiological impairment.").

[63] Scott Johnson, *The ADAAA: Congress Breathes New Life into the Americans with Disabilities Act*, 81 J. KAN. BAR ASS'N 22, 28 (2012) (internal quotation marks omitted) (quoting 29 C.F.R. § 1630.2(j)(1)(iii)).

[64] 29 C.F.R. § 1630.2(j)(1)(iv) (2020).

[65] *See* 42 U.S.C. § 12102(1)(C), (2)(B)(3).

[66] 42 U.S.C. § 12102(3)(B).

[67] *Id.*

[68] Frank Griffin, *COVID-19 and the Americans with Disabilities Act: Balancing Fear, Safety, and Risk as America Goes Back to Work*, 51 SETON HALL L. REV. 383, 394 (2020).

[69] Kevin Barry et al., *Pleading Disability After the ADAAA*, 31 HOFSTRA LAB. & EMP. L. J. 1, 21 (2013). Employers cannot rely on their subjective belief that an impairment is "transitory and minor." *Id.* Rather, employers using this defense must prove objectively the impairment is both transitory and minor. *Id.*

[70] *People with Certain Medical Conditions*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-condtions.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fgroups-at-higher-risk.html [https://perma.cc/DVH8-YM7D] (Aug. 20, 2021).

[71] Erika Edwards, *Long-Term Covid Can Affect Multiple Organ Systems, Highlighting Treatment Challenges*, NBC NEWS (Mar. 22, 2021, 2:15 PM),

the ADAAA has made it easier for individuals to prove they are part of the protected disabled class, modern pandemics have tested whether the amended ADA protect those infected with a pandemic disease and those most at-risk for pandemic related complications and death due to underlying conditions.

III. MODERN PANDEMICS IN THE UNITED STATES

A pandemic is "an epidemic occurring worldwide, or over a very wide area, crossing international boundaries and usually affecting a large number of people."[72] Thus, pandemics are classified not based on the severity of the disease, but rather by geographic scale.[73] This distinction is critical in understanding why each pandemic poses its own distinct threat to public health:

> The variety of pandemic threats is driven by the great diversity of pathogens and their interactions with humans. Pathogens vary across multiple dimensions, including the mechanism and dynamics of disease transmission, severity, and differentiability of associated morbidities. These and other factors determine whether cases will be identified as contained rapidly or whether an outbreak will spread. As a result, pathogens with pandemic potential also vary widely in the scale of their pandemic health, economic, and sociopolitical impacts . . . .[74]

Pandemics pose a threat to society—regardless of severity—because there is "little to no immunity[,]" which allows the disease to spread quickly, cause widespread deaths, and potentially result in social and economic disruption.[75]

Epidemics and pandemics are not uncommon. In the last century, the United States has faced numerous epidemics and pandemics, including the 1918 H1N1 influenza flu ("Spanish flu"),[76] the 1957 H2N2

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https://www.nbcnews.com/health/health-news/long-term-covid-can-affect-multiple-organ-systems-highlighting-treatment-n1261733 [https://perma.cc/DL6U-MGQ2].

[72] Heath Kelly, *The Classical Definition of a Pandemic is Not Elusive*, 89 BULL. WORLD HEALTH ORG. 540, 540 (quoting A DICTIONARY OF EPIDEMIOLOGY 131 (John M. Last ed., 4th ed. 2002)).

[73] Nita Madhav et. al., *Pandemics: Risks, Impacts, and Mitigation*, *in* 9 DISEASE CONTROL PRIORITIES: IMPROVING HEALTH AND REDUCING POVERTY 315, 317 (Dean T. Jamison et al., eds., 3d ed. 2018), https://www.ncbi.nlm.nih.gov/books/NBK525302/ [https://perma.cc/F9US-N37F].

[74] *Id.* (citation omitted).

[75] *Pandemic vs. Epidemic: What's the Difference?*, HEALTH HIVE (Mar. 27, 2020), https://hive.rochesterregional.org/2020/03/pandemic-vs-epidemic [https://perma.cc/223V-NQLV].

[76] *1918 Pandemic (H1N1 Virus)*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/flu/pandemic-resources/1918-pandemic-h1n1.html [https://perma.cc/T8A3-3UM9] (last visited Aug. 27, 2021); *Douglas Jordan, The Deadliest Flu: The Complete Store of the Discovery and Reconstruction of the 1918 Pandemic*

influenza ("Asian flu"),[77] and the 1968 H3N2 influenza.[78] Since the ADA was passed and amended, the United States has faced two additional novel pandemics: the 2009 H1N1 influenza ("swine flu"),[79] and the 2020 COVID-19 coronavirus.[80] Understanding the nature and severity of these modern pandemics is key to understanding the full extent of ADA protections.

A. 2009 H1N1 Influenza A Pandemic

The novel H1N1 flu, first discovered in the United States in April 2009, posed a significant threat because it "contained a unique combination of influenza genes not previously identified in animals or people[,]" to which vaccinations could not offer effective protection.[81] The World Health Organization ("WHO") first indicated the emergence of an H1N1 influenza pandemic in June 2009 and classified the pandemic as "moderately severe."[82] Individual infections "rang[ed] from 'mild,' . . . requir[ing] no treatment, to 'very severe,' causing hospitalization and even death."[83] The CDC estimated there were approximately 60.8

Virus, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 17, 2019), https://www.cdc.gov/flu/pandemic-resources/reconstruction-1918-virus.html [https://perma.cc/7GK5-LTSQ]. The 1918 pandemic, until now, was the most severe pandemic in recent United States history. *1918 Pandemic (H1N1 Virus), supra.* It is estimated at least 500 million deaths occurred worldwide, including about 675,000 deaths in the United States. *Id.*

[77] *1957-1958 Pandemic (H2N2 Virus)*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/flu/pandemic-resources/1957-1958-pandemic.html [https://perma.cc/49YM-9S5B] (last visited Aug. 27, 2021). An estimated 116,000 deaths occurred in the United States, with 1.1 million deaths occurring worldwide. *Id.*

[78] *1968 Pandemic (H3N2 Virus)*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/flu/pandemic-resources/1968-pandemic.html [https://perma.cc/E6U3-2B9V] (last visited Aug. 27, 2021). An estimated 1 million deaths occurred worldwide, including 100,000 Americans, with most deaths occurring in people 65 years and older. *Id.*

[79] *2009 H1N1 Pandemic (H1N1pdm09 Virus)*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/flu/pandemic-resources/2009-h1n1-pandemic.html [https://perma.cc/S9A9-HUBT] (last visited Aug. 27, 2021). According to the CDC, an estimated 151,700 – 575,400 deaths occurred worldwide, including 12,469 deaths in the United States. *Id.*

[80] *CDC 2020 in Review*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/media/releases/2020/p1229-cdc-2020-review.html [https://perma.cc/72VN-WEHY] (last updated Dec. 29, 2020).

[81] *2009 H1N1 Pandemic (H1N1pdm09 Virus)*, *supra* note 79.

[82] Ethan Zelizer, *"I'm Not Coming In Today" Preparing for Unprecedented Absenteeism in the Wake of H1N1*, 23 CBA REC., Sept. 2009, at 46, 46; MyLinda K. Sims, *When Pigs Fly: Does The ADA Cover Individuals With Communicable Diseases Such As Novel H1N1 Influenza, "Swine Flu"?*, 37 N. KY. L. REV. 463, 471 (2010).

[83] Sims, *supra* note 82, at 471.

million reported cases of H1N1 in the United States between April 2009 and April 2010, resulting in 274,304 hospitalizations, and 12,469 deaths.[84]

The 2009 H1N1 flu spread in a similar manner as the seasonal flu, primarily through infected persons coughing or sneezing or by touching a surface with virus droplets and then touching the nose or mouth.[85] Symptoms also closely mirrored that of the seasonal flu, including fever, cough, sore throat, runny nose, body aches, fatigue, diarrhea, and nausea.[86] Individuals most at-risk included "children, young adults, and [those] with underlying chronic medical conditions."[87] Potential complications from the H1N1 virus included "worsening of chronic conditions, . . . pneumonia, neurological . . . symptoms, . . . and respiratory failure."[88] The average incubation period for most individuals was two days, but ranged anywhere between one to seven days.[89] An adult infected with H1N1 was contagious from approximately one day before the onset of symptoms to about five to seven days after symptoms developed.[90] Although public health experts were concerned about transmission, everyday precautionary measures—such as handwashing, avoiding touching the nose and mouth, and staying home if ill—were generally all that was necessary and recommended to prevent the spread of the virus.[91]

B. 2020 COVID-19 Coronavirus Pandemic

The novel COVID-19 virus, first discovered in Wuhan, China in December 2019, causes respiratory illness that is primarily transmitted through droplets released when an infected individual "sneezes,

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[84] *2009 H1N1 Pandemic (H1N1pdm09 Virus)*, *supra* note 79.

[85] Zelizer, *supra* note 82, at 46.

[86] *H1N1 Flu (Swine Flu)*, MAYO CLINIC, https://www.mayoclinic.org/diseases-conditions/swine-flu/symptoms-causes/syc-20378103 [https://perma.cc/4P22-ZGR7] (last visited Aug. 27, 2021).

[87] *2009 H1N1: Overview of a Pandemic*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/h1n1flu/yearinreview/yir5.htm [https://perma.cc/XMB7-D3CA] (last visited Aug. 27, 2021). These chronic conditions included "lung [and] heart disease, immunosuppression, and neurological and neurodevelopment diseases." *Id.*

[88] *H1N1 Flu (Swine Flu)*, *supra* note 86.

[89] Talha N. Jilani et al., *H1N1 Influenza*, NAT'L CTR. FOR BIOTECHNOLOGY INFO., https://www.ncbi.nlm.nih.gov/books/NBK513241/ [https://perma.cc/J83N-EDDW] (last updated July 20, 2021).

[90] *Id.*

[91] Sims, *supra* note 82, at 472; *Questions & Answers: 2009 H1N1 Flu ("Swine Flu") and You*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 10, 2010), https://www.cdc.gov/h1n1flu/qa.htm, [https://perma.cc/3C8S-BMKV].

coughs, or talks."[92] The first confirmed case in the United States was reported on January 21, 2019.[93] The WHO declared the COVID-19 virus to be a global pandemic on March 11, 2020.[94]

As of August 26, 2021, the CDC reported over 37 million cases of COVID-19 and 623,000 related deaths have occurred in the United States.[95] Most COVID-19 cases are mild, and most patients recover with some supportive care.[96] However, over 2,000,000 COVID-19 cases resulted in hospitalizations.[97] Furthermore, individuals with underlying medical conditions are at a higher risk for developing severe complications.[98] The presence of comorbidity and underlying conditions is high amongst those hospitalized with COVID-19, common conditions including "influenza and pneumonia, respiratory failure, hypertension, [and] diabetes," among others.[99] Of the COVID-19 related deaths, the CDC reports approximately 94% had other underlying medical conditions.[100]

Individuals with COVID-19 have experienced a wide range of symptoms, including fever or chills, cough, shortness of breath or difficulty breathing, fatigue, headache, nasal congestion, body aches, sore

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[92] *COVID-19 Overview and Infection Prevention and Control Priorities in Non-US Healthcare Settings*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/hcp/non-us-settings/overview/index.html#background [https://perma.cc/4KX2-T6UW] (last updated Feb. 26, 2021).

[93] Derrick Bryson Taylor, *A Timeline of the Coronavirus Pandemic*, N.Y. TIMES (Mar. 17, 2021), https://www.nytimes.com/article/coronavirus-timeline.html [https://perma.cc/FR6R-2MAP].

[94] *New ICD-10-CM Code for the 2019 Novel Coronavirus (COVID-19)*, *April 1, 2020,* CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 18, 2020), https://www.cdc.gov/nchs/data/icd/Announcement-New-ICD-code-for-coronavirus-3-18-2020.pdf [https://perma.cc/WFA9-4EQE].

[95] *COVID Data Tracker Weekly Review*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html [https://perma.cc/62MM-875N] (last visited Aug. 26, 2021).

[96] *See Long-Term Effects of COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects.html [https://perma.cc/KU6P-D2AD] (last updated July 12, 2021).

[97] *COVID Data Tracker Weekly Review*, *supra* note 95.

[98] *People with Certain Medical Conditions*, *supra* note 70.

[99] Vavaldo Gomes da Costa et al., *Comparative Epidemiology Between the 2009 H1N1 Influenza and COVID-19 Pandemics*, 13 J. INFECTION & PUB. HEALTH 1797, 1800 (2020) [hereinafter *Comparative Epidemiology*], https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7553061/pdf/main.pdf [https://perma.cc/U4WT-CZD4].

[100] *CDC Report Finds Underlying Conditions in 94 Percent of COVID-19 Deaths*, J. EMERGENCY MED. SERVS. (Aug 31, 2020), https://www.jems.com/coronavirus/cdc-report-underlying-conditions-94-percent-covid-19-deaths/ [https://perma.cc/XW7D-BVKY].

throat, loss of smell and/or taste, nausea, and diarrhea.[101] The median incubation period is five days but can last anywhere from two to fourteen days.[102] Some individuals infected with COVID-19 may also be asymptomatic,[103] which has been a major driver behind the rapid spread of the virus as asymptomatic individuals may not even know they are infected and contagious.

To stop the spread and reduce the threat of the COVID-19 pandemic, CDC guidelines recommend that all individuals wear a face mask to protect themselves and others, stay six feet apart from others, and avoid large crowds.[104] Additionally, the CDC warns that people at an increased risk for severe illness should take extra precautions.[105] Adults with certain underlying medial conditions are advised to limit their interactions with other people by staying home and considering their risk factors before deciding leave their home.[106] Further, the CDC recommends employers help protect high-risk employees by encouraging telework, changing duties to minimize contact with others, and ensuring that everyone in the workplace is following CDC guidelines.[107]

C. Pandemic Severity Assessment Framework

Since the impact of a pandemic largely depends on its severity, the CDC created the Pandemic Severity Assessment Framework ("PSAF") to compare disease severity to anticipate possible impacts of future pandemics.[108] This assessment is not only helpful for public health officials to plan for pandemic impacts and responses but also can provide context for why courts have come to differing conclusions on pandemic-related ADA cases given the nature and severity of a pandemic.

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[101] *COVID-19 Overview and Infection Prevention and Control Priorities in Non-US Healthcare Settings*, *supra* note 92.

[102] *Id.*

[103] *Id.*

[104] *How to Protect Yourself and Others*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html [https://perma.cc/ECJ9-Q2GQ] (last updated Aug. 13, 2021).

[105] *People with Certain Medical Conditions*, *supra* note 70.

[106] *See, e.g. Transcript – CDC Media Telebriefing: Update on COVID-19,* CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 10, 2020), https://www.cdc.gov/media/releases/2020/t0309-covid-19-update.html [https://perma.cc/949L-VCN3].

[107] *Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19*), CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html [https://perma.cc/J4DE-QFT9] (last updated Mar. 8, 2021).

[108] *Pandemic Severity Assessment Framework (PSAF)*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/flu/pandemic-resources/national-strategy/severity-assessment-framework.html [https://perma.cc/64GU-P7N3] (last visited Aug. 27, 2021).

The PSAF analyzes two factors to determine the impact of a pandemic: clinical severity and transmissibility.[109] Using the PSAF, public health officials conduct an initial assessment to identify the pandemic's potential impact and later a more pointed assessment to provide a "more refined and accurate picture of pandemic impact."[110] Not only are these assessments used to anticipate "how 'bad' the pandemic will be[,]" but also these results "can be compared to past pandemics (or even seasonal influenza epidemics), creating a quick comparative snapshot of the potential impact of [a] pandemic."[111] For example, using the PSAF, the CDC has characterized the 1918 pandemic as one of "very high transmissibility and very high clinical severity[,]" in contrast to the 2009 H1N1 pandemic, which was as one of "moderate transmissibility and clinical severity."[112]

Based on the PSAF, the 2009 H1N1 pandemic was one of the least severe pandemics in the last century in terms of both transmissibility and clinical severity.[113] One reason for this is that existing seasonal flu vaccines only needed small adjustments to be effective against the new strain.[114] Additionally, antiviral treatments used against the seasonal flu and other influenza strains proved safe and effective in treating H1N1, which helped reduce the "risk of disease progression to a severe clinical condition and reducing the rate of contagion."[115]

In comparison, the estimated COVID-19 transmissibility and clinical severity varies among age groups and individuals with underlying conditions.[116] For example, for individuals ages fifty-nine and younger, the transmissibility rate of COVID-19 is slightly below that of the 2009 H1N1 virus.[117] However, for those ages sixty and older or with underlying medical conditions, the transmissibility rate falls between that of the 2009 and 1918 pandemics.[118] Notably, the clinical severity of the COVID-19 virus ranges from "moderate severity" to "very high severity" for those aged between twenty and fifty-nine,

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[109] *Id.* Clinical severity is the seriousness of the illness associated with infection; transmissibility refers to how easily the virus spreads between people. *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.; see also COVID-19 Pandemic Severity Assessment Framework by Age*, PREVENT EPIDEMICS (Mar. 10, 2020), https://preventepidemics.org/covid19/science/insights/covid-19-pandemic-severity-assessment-framework-by-age/ [https://perma.cc/EH57-S7QJ].

[113] *See COVID-19 Pandemic Severity Assessment Framework by Age*, *supra* note 112.

[114] *Comparative Epidemiology*, *supra* note 99.

[115] *Id.*

[116] *See COVID-19 Pandemic Severity Assessment Framework by Age*, *supra* note 112.

[117] *Id.*

[118] *Id.*

whereas the clinical severity for those aged sixty years or older or with underlying medical conditions is similar to the "very high severity" of the 1918 pandemic.[119] Thus, for individuals below the age of sixty with no underlying conditions, the severity of the COVID-19 virus will vary on an individual basis. However, the severity of COVID-19 is much greater for those sixty and older and for those with underlying medical conditions, with characteristics comparable the "most severe pandemic in recent history."[120]

Understanding the nature of a particular pandemic in comparison with past pandemics is useful in understanding why some courts have found the risks associated with more severe pandemics, such as the COVID-19 virus, may constitute a disability within the meaning of the ADA but not necessarily with less severe pandemics, such as the H1N1 flu.

IV. JUDICIAL INTERPRETATIONS OF THE ADA DURING MODERN PANDEMICS

The Supreme Court has previously held that certain infectious and communicable diseases constituted disabilities because allowing discrimination based on these diseases is inconsistent with the basic purpose of the ADA.[121] For example, in *School Board of Nassau City v. Arline*, the Court recognized tuberculosis as a disability because the "impairment was serious enough to require hospitalization, a fact more than sufficient to establish that one or more of her major life activities were substantially limited[.]"[122] Additionally, in *Bragdon v. Abbott*, the Court held that HIV constitutes a disability under the ADA, even before the onset of symptoms, because it substantially limits the major life activity of reproduction.[123]

The emergence of the H1N1 and COVID-19 pandemics have raised new questions regarding how far the ADA's protections extend in the workplace. Specifically, courts have faced three major questions: (1) whether an individual that has contracted a pandemic disease is disabled; (2) whether employers who take adverse employment

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[119] *Id.*

[120] *See id.*; *cf. 1918 Pandemic (H1N1 Virus)*, *supra* note 76.

[121] *See* Griffin, *supra* note 61, at 389; *See also* Sch. Bd. of Nassau City v. Arline, 480 U.S. 273, 284 (1987) ("Allowing discrimination based on the contagious effects of a physical impairment would be 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.").

[122] *Arline*, 480 U.S. at 281.

[123] Bragdon v. Abbott, 524 U.S. 624, 639 (1998) (rejecting the argument that the meaning of "major life activities" should be limited to public activities).

actions in response to an employee's exposure to the pandemic disease violates the ADA; and (3) whether the risk of severe illness and death associated with pandemic diseases elevates underlying conditions to constitute disabilities.

Trial courts have not automatically ruled that pandemic diseases constitute a disability under the ADA but rather have factored the disease severity in their individual analysis either expressly or inherently using the "totality of the circumstances" evaluation.[124] Notably, based on the severity of the COVID-19 pandemic, courts recently have also considered an individual's susceptibility to COVID-19 complications and death to determine whether the individual is disabled within the meaning of the ADA—an issue not considered by the courts during the H1N1 pandemic.[125] Thus, based on the "totality of the circumstances" analysis, the severity of a pandemic and associated risks to those with underlying medical conditions are a key factor in whether an impairment gives rise to a disability.[126]

Notably, there have been a higher number of early COVID-19-related ADA court decisions than there are H1N1-related ADA cases total. The lack of H1N1-related ADA cases is likely due to the fact that the H1N1 virus, while a global pandemic, was in reality not any more severe than the seasonal flu.[127] There were no government mandated quarantines or mask mandates issued in response to the spread of the H1N1 virus.[128] It could also be inferred that the lack of H1N1-related ADA cases illustrates that there were not a substantial amount of employee accommodation requests in response to the threat of the virus.[129]

As of February 5, 2021, almost a year after COVID-19 was declared a global pandemic, approximately 400 disability discrimination lawsuits have been filed.[130] Of the top COVID-19 related filings, disability discrimination was one of the fifth most filed claims after retaliation, wrongful termination, workplace safety, and other civil

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[124] *See* discussion *infra* Section IV.C.

[125] *See* discussion *infra* Section IV.C.

[126] *See* discussion *infra* Section IV.C.

[127] *See* Valdez v. Minnesota Quarries, Inc., No. 12-CV-0801 (PJS/TNL), 2012 WL 6112846, at *1 (D. Minn. Dec. 10, 2012).

[128] *See The 2009 H1N1 Pandemic: Summary Highlights, April 2009-April 2010*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/h1n1flu/cdcresponse.htm [https://perma.cc/2VMA-NJMH] (last updated June 16, 2010).

[129] *See Just the Facts: Americans with Disabilities Act*, U.S. CTS. (July 12, 2018), https://www.uscourts.gov/news/2018/07/12/just-facts-americans-disabilities-act#fig1 [https://perma.cc/LRA9-SF5X].

[130] *COVID-19 Labor & Employment Litigation Tracker Report*, *supra* note 5.

litigation.[131] The industries most targeted by COVID-19 filings include healthcare, manufacturing, public administration, retail, and hospitality[132]—all industries where telework accommodations are likely not available for employees given the nature of the work. Of the top most targeted industries (except for hospitality), disability discrimination claims were within the top claims filed against employers.[133]

It is important to note that one potential reason why there have not been as many Title I ADA cases before the courts during the COVID-19 pandemic is because individuals filing an ADA disability discrimination claim must first file a charge with the EEOC.[134] An average EEOC investigation can take up to approximately ten months, and the earliest an individual can obtain a Notice of a Right to Sue is 180 days.[135] This process could be one reason why more COVID-19-related ADA cases have not been filed or decided as of the writing of this article. However, attorneys anticipate that the number of ADA charges filed against employers will increase in the coming future, especially "retaliation claims by employees who allege they expressed COVID-19 concerns to an employer and were punished for it."[136] In fiscal year 2020, over one-third of all charges filed with the EEOC were disability-related.[137] Since COVID-19 was not declared a pandemic until more than five months into the 2020 fiscal year, it is likely that the "agency's 2020 numbers [do not] tell the whole story, particularly when it comes to the pandemic."[138] With the number of COVID-19 related ADA cases anticipated to increase, early court decisions, compared to H1N1-related ADA cases, indicate the outcome of those cases will hinge on the severity risk for the individual plaintiff.

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131 *Id.*

132 *Id.*

133 *Id.*

134 *Filing a Complaint with the Equal Employment Opportunity Commission,* ADA.GOV, https://www.ada.gov/filing_eeoc_complaint.htm [https://perma.cc/VRZ8-UJ23] (last visited Aug. 27, 2021).

135 *What You Can Expect After You File A Charge*, EEOC, https://www.eeoc.gov/what-you-can-expect-after-you-file-charge [https://perma.cc/A3G4-ZNHH] (last visited Aug. 27, 2021).

136 Amanda Ottaway, *EEOC Charges Steady, But Virus Fallout May Shake Up 2021*, LAW360 (Feb. 26, 2021, 8:38 PM), https://www.law360.com/employment-authority/articles/1359398 [https://perma.cc/C8VZ-H9GL].

137 *Id.*

138 *Id.*

A. Is an individual who contracts a pandemic disease either actually disabled or regarded as disabled under the ADA?

Per CDC and EEOC guidelines, employers may exclude employees diagnosed with a pandemic disease or who have associated symptoms from the workplace since they "would pose a direct threat to the health and safety of others."[139] Additionally, during the COVID-19 pandemic, employers are permitted to ask employees who work on-site that felt ill or called in sick questions about their symptoms to screen for the disease.[140] However, whether the pandemic disease itself is a disability for purposes of the ADA largely depends on the severity of the virus, which varies on an individual basis. The limited precedent of ADA cases related to an employee diagnosed with or regarded as having the H1N1 virus illustrates that pandemic diseases with moderate transmissibility and clinical severity likely will not be considered disabling because they are "transitory and minor."[141] In a similar vein, since the symptoms and severity of the COVID-19 virus can widely vary, the ADA may not cover individuals diagnosed with or regarded as having the COVID-19 virus if they are unable to show how the particular illness was a disabling impairment within the meaning of the ADA.[142] Thus, the key to whether a pandemic disease constitutes a disability turns on whether the impairments are "sufficiently severe," even if short in duration.[143]

In *Lewis v. Florida Default Law Group, P.L.*, the United States District Court for the Middle District of Florida addressed whether an individual was actually disabled or perceived as disabled when exhibiting H1N1 flu like symptoms.[144] The defendant employer, Florida Default Law Group, P.L. ("Florida Default") employed the plaintiff,

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[139] *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEOC Laws*, EEOC, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws [https://perma.cc/K5RR-X8LN] (last updated May 28, 2021).

[140] *Id.*

[141] *Cf. infra* notes 144–168, 191–206 and accompanying text.

[142] *See* Payne v. Woods Servs., Inc., 520 F. Supp. 3d 670, 679 (E.D. Pa. 2021) ("Plaintiff has not alleged any facts regarding his symptoms or impairments as a result of his COVID-19 diagnosis, and has not alleged what 'major life activity' or activities he was unable to perform as a result. While Plaintiff is correct that, given the lack of details regarding his disability in the Complaint, the Court could not determine whether his diagnosis is transitory and minor, he has not sufficiently alleged facts supporting the conclusion that he was 'regarded as' disabled.").

[143] *See* Lewis v. Fla. Default L. Grp., P.L., No. 8:10-cv-1182-T-27EAJ, 2011 WL 4527456, at *4 (M.D. Fla. Sept. 16, 2011) (citation omitted)

[144] *Id.* at *1.

Priscilla Lewis ("Lewis"), as a Foreclosure Specialist.[145] In October 2009, Lewis informed her supervisor that she needed to "leave work early the [next] day for a doctor's appointment."[146] By this time, Lewis "had already missed six days of work" within a three-month span.[147] Lewis's supervisor approved her request but advised her to avoid "excessive absenteeism."[148] However, Lewis left work that same afternoon and went to the emergency room where she was diagnosed with Influenza A with symptoms including "low grade temperature, cough . . . sore throat . . . [and] history of diverticulosis."[149] Although the H1N1 pandemic flu fell under "the class of viruses" labeled as Influenza A, the attending physician did not expressly diagnose her with H1N1 but rather described Lewis's case as the "seasonal flu."[150] However, Lewis "*understood* that she was diagnosed as having the H1N1 virus."[151]

During her illness, Lewis claimed she was "bedridden . . . physically drained, dizzy, had shortness of breath, was vomiting, and had diarrhea[,]" and was unable "to take care of her children, cook, run errands, and perform tasks around her house such as laundry and dishes."[152] While she was recovering, Lewis also suffered from bronchitis, causing difficulty "breath[ing], eat[ing], and swallow[ing]."[153]

Lewis missed four workdays following her diagnosis.[154] Before returning to work, Lewis requested she be permitted to work from home as she claimed she was "highly contagious" with the H1N1 virus, even though she had a doctor's note clearing her to return to work.[155] Florida Default executives encouraged Lewis to get a second opinion regarding her H1N1 diagnosis and to focus on her recovery.[156] Additionally, the executives indicated that other employees absent with the H1N1 flu did not work from home, and that they "did not want" Lewis working in the office if her doctor believed she was "highly contagious."[157] A few days later, Lewis's primary care physician provided

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145 *Id.*
146 *Id.*
147 *Id.*
148 *Lewis*, 2011 WL 4527456, at *1.
149 *Id.*
150 *Id.*
151 *Id.* at *2.
152 *Id.* at *3.
153 *Id.*
154 *Lewis*, 2011 WL 4527456, at *2–3.
155 *Id.* at *2.
156 *Id.*
157 *Id.* at *2.

her with a medical excuse from work covering all her days of absenteeism but "did not perform any tests to determine whether Lewis had the H1N1 virus" rather than the "seasonal flu."[158] Lewis was fired for excessive absenteeism upon her return to work.[159] However, "Lewis [claimed] she was terminated because she had or was perceived as having been infected with the H1N1 virus."[160]

The court determined that Lewis was neither actually disabled nor "regarded as" disabled under the ADA due to her diagnosis.[161] The court noted that under the ADA, "[i]mpairments that last only for a short period of time are typically not covered, although they may be covered if sufficiently severe."[162] Lewis argued her impairments constituted a disability because she was "substantially limited" from performing "major life activities" including "cooking, running errands," and caring for her children.[163] The court offered the following reasoning for why these limitations did not constitute an actual disability:

> To be certain, taking care of one's children, cooking, running errands, and preforming tasks around the house such as laundry and dishes, may in most circumstances be "major life activities," but the fact that Lewis could not perform those functions for a period of one to two weeks does not mean her symptoms "substantially limited" those activities.[164]

Additionally, the court held that Lewis was not "regarded as" being disabled because her impairment was "transitory and minor."[165] Lewis argued her illness was not "minor" because the illness was "serious and potentially life threatening" and that her employer "viewed the illness (and the fact that it was contagious) as a serious health condition."[166] However, the court stated that whether an actual or perceived impairment is "transitory and minor" is determined objectively and not on the employer's subjective beliefs.[167] Since the symptoms and duration of the H1N1 flu were objectively similar to the seasonal flu, the court found Lewis was not "regarded as" disabled since her actual or perceived impairment was transitory and minor.[168]

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[158] *Id.*
[159] *See id.* at *3.
[160] *Lewis*, 2011 WL 4527456, at *3.
[161] *Id.* at *4.
[162] *Id.* (emphasis omitted).
[163] *Id.* at *3.
[164] *Id.* at *5.
[165] *Id.* at *7.
[166] *Lewis*, 2011 WL 4527456, at *5–6.
[167] *Id.* at *6.
[168] *Id.*

In *Payne v. Woods Services, Inc*., the United States District Court for the Eastern District of Pennsylvania dismissed a plaintiff's ADA discrimination claim because he did not sufficiently allege facts that showed his employer regarded him as disabled.[169] The plaintiff, Anthony Payne ("Payne"), worked at health care facility and came in direct contact with six patients who tested positive for COVID-19.[170] Following his doctor's recommendation, Payne received a COVID-19 test at work, which was positive, and quarantined for fourteen days.[171] However, only six days after receiving a positive result, his supervisor, Abraham Kamara ("Kamara"), told Payne he had been cleared to return to work.[172] Although Payne told Kamara that "he had not completed his quarantine" and therefore "could not return to work[,]" Kamara responded that Payne's absence from work "would be considered a 'call-out.'"[173] Payne reiterated the advice he received from health-care professionals and CDC guidance and did not show up to work the following day.[174] Kamara fired Payne for this absence, and Payne subsequently filed a complaint alleging, among other things, he was terminated for an actual or perceived disability in violation of the ADA.[175]

The defendant employer moved to dismiss this claim because Payne's complaint "[had] not alleged that his COVID-19 diagnosis limited any major life activities, that he had a history of disability, or that he had any limitation that went beyond being transitory and minor."[176] In his complaint, Payne alleged that "[a]s a result of his COVID-19 diagnosis, Plaintiff was disabled within the meaning of the ADA . . . [or] [i]n the alternative, Plaintiff was perceived as disabled by the defendants and/or the defendants held perceptions of, or regarding, Plaintiff's disability and/or his continued utility as an employee."[177] The court was not convinced that Payne met any prong of the disability definition at the complaint stage even under the ADAAA's broadened coverage.[178] Rather, the court dismissed Payne's ADA discrimination claim because Payne failed to provide factual allegations "regarding his symptoms or impairments as a result of his

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[169] *See* Payne v. Woods Servs., Inc., 520 F. Supp. 3d 670, 679 (E.D. Pa. 2021).
[170] *Id.* at 673.
[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] *Payne*, 520 F. Supp. 3d at 673.
[176] *Id.* at 679.
[177] *Id.*
[178] *Id.*

COVID-19 diagnosis, and ha[d] not alleged what 'major life activity' or activities he was unable to perform as a result . . . [and] he ha[d] not sufficiently alleged facts supporting the conclusion that he was 'regarded as' disabled."[179]

Based on the outcomes in *Lewis* and *Payne*, it is likely contracting a pandemic disease alone will not constitute a disability in contrast to other inherently disabling conditions.[180] Thus, courts will still conduct an individual analysis to determine whether an individual is disabled even if a pandemic disease is highly severe and highly transmissible. For example, even though COVID-19 is a severe disease, a COVID-19 diagnosis alone will not automatically constitute a disability.[181] As evidenced by the court's decision in *Payne*, whether a pandemic disease constitutes a disability—even if it is generally considered to be severe—will depend on how the disease substantially limits that individual.[182]

Furthermore, it is possible that more mild or moderate pandemic diseases will never constitute a disability—even when it substantially limits major life activities—if the disease mirrors illnesses widely considered to be "transitory and minor." Although the plaintiff in *Lewis* adequately identified major life activities that she was unable to perform, the court determined her possible H1N1 diagnosis was not an actual disability because these limitations lasted for a short period of time and because the H1N1 virus was considered transitory and minor.[183] Thus, the ADA does not automatically protect to those diagnosed with a pandemic disease without evidence of how the disease substantially limited major life activities. It is also likely that evidence of substantial limitations may be insufficient to constitute a disability for pandemic diseases that generally mirror the seasonal flu or the common cold.

B. Do adverse employment actions in response to employee exposure or perceived exposure to a pandemic disease violate the ADA?

During a pandemic, CDC and EEOC guidelines allow employers to ask any employee who is physically coming into the workplace if

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[179] *Id.*

[180] *See* discussion *supra* notes 58–64.

[181] *See id.* at *679.

[182] *See id.*

[183] Lewis v. Fla. Default L. Grp., P.L., No. 8:10-cv-1182-T-27EAJ, 2011 WL 4527456, at *4, *7 (M.D. Fla. Sept. 16, 2011).

they have known exposure to the disease.[184] Additionally, if an employee travels during a pandemic, EEOC guidelines permit employers to ask the employee questions about where they traveled.[185] "If the CDC or state or local health public officials recommend that people who visited specified locations remain at home for a certain period of time, an employer may ask whether employees are returning home from these locations, even if the travel was personal."[186] At the beginning of the H1N1 pandemic, the CDC issued a travel warning "recommending that all United States travelers postpone all non-essential travel to Mexico."[187] The CDC has also issued more stringent travel guidelines during the COVID-19 pandemic, assigning various risk levels to all countries[188] and, in some instances, mandating quarantines when returning from high risk locations.[189] While the ADA prohibits discrimination against individuals with disabilities, courts have found that an employer's fear of an employee's perceived exposure alone is not a disability.[190]

In *Valdez v. Minnesota Quarries, Inc*., the United State District Court for Minnesota considered whether an individual is disabled under the ADA where he was believed to have an impairment that was

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[184] *See Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19*), *supra* note 107; *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEOC Laws*, *supra* note 139.

[185] *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEOC Laws*, *supra* note 139.

[186] *Id.*

[187] *The 2009 H1N1 Pandemic: Summary Highlights, April 2009-April 2010*, *supra* note 128.

[188] *See, e.g., COVID-19 Travel Recommendations by Destination*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/travelers/map-and-travel-notices.html [https://perma.cc/LA9W-Z2DP] (last updated Aug. 23, 2021).

[189] *See Executive Order on Promoting COVID-19 Safety in Domestic and International Travel*, THE WHITE HOUSE, (Jan. 21, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/21/executive-order-promoting-covid-19-safety-in-domestic-and-international-travel/ [https://perma.cc/QL5B-HEFB] ("It is the policy of my Administration that, to the extent feasible, travelers seeking to enter the United States from a foreign country shall be . . . required to comply with other CDC guidelines concerning international travel, including recommended periods of self-quarantine or self-isolation after entry into the United States."); *After International Travel*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/travelers/after-travel-precautions.html [https://perma.cc/5LBJ-9JD7] (last updated Aug. 25, 2021).

[190] *Compare* Valdez v. Minnesota Quarries, Inc., No. 12-CV-0801 (PJS/TNL), 2012 WL 6112846, at *1 (D. Minn. Dec. 10, 2012), *and* Parker v. Cenlar FSB, No. 20-02175, 2020 WL 22828, at *6 (E.D. Pa. Jan. 4, 2021), *with* Equal Emp. Opportunity Comm'n v. STME, LLC, 938 F.3d 1305, 1315 (11th Cir. 2019) (holding that the possibility of contracting Ebola while visiting a different country is not an impairment that is a disability under the ADA).

perceived as, but is not *in fact*, more dangerous than the seasonal flu.[191] The plaintiff, Francisco Valdez ("Valdez"), worked for the defendant employer, Minnesota Quarries, Inc., for fourteen years before his employer terminated him in April 2009 out of fear that Valdez was exposed to the H1N1 virus. [192] Valdez, originally born in Mexico, had traveled to Mexico prior to his termination after learning that his sister was ill and not expected to live.[193] Valdez's son left a message with Valdez's managers describing the situation and to "call him with and questions or concerns."[194] After Valdez returned from Mexico—which at the time was the epicenter of the H1N1 pandemic—he reached out to his supervisor to discuss returning to work.[195] Valdez was told by the human-resources director that "he was being fired because [the employer] feared that he had contracted swine flu during his trip to Mexico[,]" and because he violated the company's absence policy.[196] Yet, the official termination letter only indicated Valdez was fired for violating the company's absence policy and instructed him not to come on site "due to health and safety concerns arising out of his trip to Mexico[.]"[197]

Valdez argued that his employer "regarded him" as being disabled because the employer believed that Valdez contracted the H1N1 virus.[198] The employer conceded that "a jury could find that Valdez was terminated because [the employer] feared that he had contracted swine flu while in Mexico[;]" however, the court determined his termination did not violate the ADA.[199] Valdez conceded that, in hindsight, the H1N1 virus is "transitory" and "*as it is now understood* is also 'minor' . . . in the sense that it has not turned out to be more serious than [the] seasonal flu[.]"[200] However, Valdez argued the determination for whether his perceived impairment is "transitory and minor" should not look "to how serious swine flu *is*, but to how serious swine flu was *perceived* to be at the time[.]"[201] Since he was "terminated at the height of . . . public hysteria" over the H1N1 virus, Valdez claimed "giving him a remedy . . . would be consistent with both the overall purpose of

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[191] *Valdez*, 2012 WL 6112846, at *1.
[192] *Id.*
[193] *Id.*
[194] *Id.*
[195] *Id.*
[196] *Valdez*, 2012 WL 6112846, at *1.
[197] *Id.*
[198] *Id.* at *2.
[199] *Id.*
[200] *Id.* at *3.
[201] *Id.*

the ADA to combat unfounded fears about medical conditions and with the 2008 amendments that were intended to broaden the scope of coverage under the ADA."[202]

The court found Valdez's argument reasonable, but explained that whether an impairment is "transitory and minor" should be objectively determined "not on perception, but on reality."[203] Citing *Lewis*, the court relied on mortality and hospitalization rates to determine that the H1N1 virus was objectively similar to the seasonal flu.[204] Therefore, Valdez was not regarded as disabled since his perceived impairment was "transitory and minor."[205] As a result, the defendant employer was not liable for terminating Valdez because the employer feared that Valdez was exposed to the virus.[206]

Additionally, in *Parker v. Cenlar FSB*, United States District Court for the Eastern District of Pennsylvania held than an employer's fear that an employee was possibly exposed to COVID-19 did not constitute an actual disability.[207] The plaintiff, Jarvis Parker ("Parker"), worked part-time with the defendant employer, Cenlar, as a Technical Project Manager.[208] Parker had an "outstanding" job performance and was in discussions about accepting a full-time position.[209] In March 2020, Parker informed his supervisors that a professor at his university tested positive for COVID-19 but assured them that he had not attended classes in-person.[210] Parker's supervisor told him to work remotely due to his possible exposure, but Parker was prevented from working remotely because "his supervisor asked him to return his laptop[.]"[211] Cenlar then terminated Parker just a few days later "citing a lack of work."[212]

Parker brought multiple discrimination claims against Cenlar, including allegations that he was terminated "based on a perceived disability—exposure to COVID-19" in violation of the ADA.[213] The court found that Parker failed to state a disability discrimination claim under

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[202] *Valdez*, 2012 WL 6112846, at *3.
[203] *Id.*
[204] *Id.* (citing Lewis v. Fla. Default L. Grp., P.L., No. 8:10-cv-1182-T-27EAJ, 2011 WL 4527456, at *5–6 (M.D. Fla. Sept. 16, 2011).
[205] *Id.*
[206] *Id.*
[207] Parker v. Cenlar FSB, CV No. 20-02175, 2021 WL 22828 at *6 (E.D. Pa. Jan. 4, 2021).
[208] *Id.* at *1.
[209] *Id.*
[210] *Id.*
[211] *Parker*, 2021 WL 22828, at *1.
[212] *Id.* at *2.
[213] *Id.*

the ADA because "possible *exposure* to COVID-19 is not 'a physical or mental impairment that substantially limits one or more major life activities.'"[214]

Although the amendments to the ADA expanded coverage to individuals "regarded as" having an impairment to prevent discrimination based on "'unfounded concerns, mistaken beliefs, fears, myths, or prejudice about disabilities[,]'"[215] the *Valdez* and *Parker* decisions demonstrate that this protection does not extend to an employer's fears that an employee was exposed to pandemic diseases. Notably, an interesting development has occurred in early COVID-19 ADA cases where the reverse is true, as discussed below.

C. Does the threat of exposure to a pandemic disease for certain at-risk employees, including those with underlying conditions, constitute a disability under the ADA?

According to EEOC guidelines, employees who have an underlying condition that is considered by the CDC to put them at a higher risk for severe illness from COVID-19 may request a reasonable accommodation from their employer.[216] An employer "may ask questions or seek medical documentation to help decide if the individual has a disability and if there is a reasonable accommodation, barring undue hardship, that can be provided."[217] Although the EEOC guidelines do not claim that these underlying medical conditions identified by the CDC constitute disabilities, the CDC guidelines have heavily influenced courts in early COVID-19 ADA cases to find that individuals with these identified underlying conditions are disabled within the meaning of the ADA during the pandemic.

Although the issue in *Silver v. City of Alexandria*[218] emerges under Title II of the ADA,[219] the court's coined "totality of the circumstances"

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[214] *Id.* at *6 (citing 42 U.S.C. § 12102(2)(A)). Notably, the court did not analyze whether Parker was "regarded as" being disabled under 42 U.S.C. § 12102(3)(A) although he claimed he was discriminated against based on a perceived disability. *See Parker*, 2021 WL 22828, at *6. It is not known why the court did not discuss whether Parker was "regarded as" using a § 12102(3)(A) analysis.

[215] Griffin, *supra* note 68, at 398 (citation omitted).

[216] *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEOC Laws*, *supra* note 139.

[217] *Id.*

[218] Silver v. City of Alexandria, 470 F. Supp. 3d 616 (W.D. La. 2020).

[219] Title II of the ADA prohibits the discrimination of "qualified individuals with disabilities . . . in services, programs, and activities provided by State and local government entities." *State and Local Governments (Title II)*, ADA.GOV, https://www.ada.gov/ada_title_II.htm#:~:text=Title%20II%20applies%20to%20State,State%20and%20local%20government%20entities [https://perma.cc/N2U6-DR5X] (last visited Aug. 27, 2021). The

analysis has been influential in early COVID-19 ADA cases.[220] In *Silver*, the plaintiff, Harry Silver ("Silver"), was a 98-year-old city council member for Alexandria, Louisiana that "suffer[ed] from significant, inoperable, aortic valve disease, and systolic heart failure . . . which substantially limit the operation of his cardiovascular system[.]"[221] Silver argued he was disabled under the ADA due to his medical conditions and related COVID-19 risks:

> The extent of Mr. Silver's disability became apparent this year when the world was introduced to COVID-19. It is well known that the elderly and/or those who suffer from underlying medical conditions are particularly susceptible to contracting COVID-19 and succumbing to the virus. Mr. Silver is no exception. His physicians have directed and continue to direct him to avoid contact with the public.[222]

Due to his underlying conditions and doctor's directions, Silver requested to attend city council meetings by phone.[223] These requests went without response.[224] The city attorney "strongly recommend[ed]" to the City Council President that "Mr. Silver be allowed to attend meetings by telephone as 'the Americans with Disabilities Act could usurp state law, especially during the national public health emergency.'"[225] However, the City Council President ignored this urge, arguing state law required physical attendance to council meetings.[226] Silver subsequently filed suit against the city and the City Council President under the ADA.[227]

The first element of a prima facie case under Title II is that the individual show "he is a qualified individual within the meaning of the ADA[.]"[228] The court "easily" found Silver had a qualifying disability "in substantial part, from the existence of the COVID-19 pandemic in

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definition of "disability" in cases brought under Title II of the ADA is analyzed in the same manner as those brought under Title I. *See Silver*, 470 F. Supp. 3d at 621 (citing 42 U.S.C. § 12102(1)).

220 *See* People First of Ala. v. Merrill, 491 F. Supp. 3d 1076, 1158 (N.D. Ala. 2020) ("Put differently, as Judge Dee Drell aptly stated, '[t]he determination of a qualifying disability in this case cannot be looked at in a vacuum.'") (alteration in original); Peeples v. Clinical Support Options, Inc., 487 F. Supp. 3d 56, 63 (D. Mass. 2020) ("The court finds persuasive this limited precedent addressing the standard for determining whether an individual has an impairment that substantially limits a major life activity, thus rising to the level of a disability, during this pandemic.").

221 *Silver*, 470 F. Supp. 3d at 618.

222 *Id.*

223 *Id.* at 619.

224 *Id.*

225 *Id.*

226 *Id.*

227 *Silver*, 470 F. Supp. 3d at 619.

228 *Id.* at 621.

our nation, and the existence of his obvious comorbidities."[229] Yet, the defendants argued that "he is not entitled to claim those disabilities *because* they are only COVID-related. In other words, because his disabilities are only situational[.]"[230] The court rejected the defendants' argument under a "totality of the circumstances" theory, reasoning that "any application of [the ADA] to these facts *must be based upon a factual analysis that considers the totality of Mr. Silver's health circumstances in conjunction with one's social circumstances*."[231] Therefore, the court reasoned that the "proper way to make a disability determination" is to consider the medical condition in light of the existence of a pandemic.[232]

Other courts subsequently adopted this "totality of the circumstances" analysis by name in COVID-19 ADA cases. In another Title II case, *People First of Alabama v. Merrill*, the United States District Court for the Northern District of Alabama determined that the individual plaintiffs' physical impairments—which included cerebral palsy, asthma, Parkinson's Disease, diabetes, and hypertension—were disabilities under the ADA within the context of the COVID-19 pandemic.[233] In *People First*, registered voters who were at a higher risk for COVID-19 complications due to their underlying medical conditions filed suit against the Alabama Secretary of State and other government officials for violating the ADA by *de facto* banning curbside voting, among other claims.[234] The defendants did not contest that the plaintiffs suffered from impairments, but rather argued the plaintiffs were not disabled under the ADA because the "[p]laintiffs' own choices—not a 'physical or mental impairment'—limit their major life activities."[235]

Relying both on *Silver* and CDC guidelines, the court rejected the defendants' arguments:

> To be disabling under the ADA, the plaintiffs' impairments must substantially limit a major life activity. The State defendants contend that the plaintiffs are not disabled under the ADA because the "[p]laintiffs' own choices—not a 'physical or mental impairment'—limit their

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[229] *Id.* at 622.

[230] *Id.*

[231] *Id.* (emphasis added).

[232] *Id.*

[233] People First of Ala. v. Merrill, 491 F. Supp. 3d 1076, 1157–58 (N.D. Ala. 2020).

[234] *Id*. at 1091–92, 1151. The plaintiffs were also at an increased risk due to their age as they were over 65 years old. *Id.* at 1092.

[235] *Id.* at 1158 (internal quotation marks omitted) (alteration in original). The individual plaintiffs each had a recognized physical impairment, including cerebral palsy, asthma, Parkinson's Disease, hypertension, and diabetes. *Id.* at 1157.

> major life activities." . . . *But, this blithe assertion ignores the stark reality of the COVID-19 pandemic and downplays the risks exposure to the deadly virus present to the plaintiffs.* Indeed, based on the risks from exposure to COVID-19, the CDC advises people with underlying conditions, like the plaintiffs, to limit interactions with people outside of their households as much as possible and to avoid others who are not wearing masks. . . . This CDC guidance supports a finding that it is the plaintiffs' or their members' underlying medical conditions, not their personal choices, that impact their ability to interact with others or work during the COVID-19 pandemic. And, because the ADA must be broadly construed . . . *the court must consider the circumstances and impact of the State's current public health emergency when determining whether the plaintiffs' physical impairments substantially limit a major life activity.* Put differently, as Judge Dee Drell aptly stated, "[t]he determination of a qualifying disability in this case cannot be looked at in a vacuum." Thus, the court concludes that in the context of the COVID-19 pandemic, the plaintiffs' or their members' physical impairments are a qualifying disability under the ADA because their impairments substantially limit the major life activities of interacting with others or working.[236]

Thus, considering the totality of the circumstances, the court concluded that the plaintiffs' impairments constituted a disability under the ADA in light of the COVID-19 pandemic since their underlying conditions limited the major life activities, such as working and interacting with others.[237]

Peeples v. Clinical Support Options is a noteworthy Title I ADA case that likewise adopted this "totality of the circumstances" analysis.[238] The plaintiff, Gabriel Peeples, had an increased vulnerability for COVID-19 due to moderate asthma.[239] On March 2, 2020, Peeples started working for the defendant employer, Clinical Support Operations, Inc. ("CSO") as an assistant manager for its Center for Community Resilience after Trauma program.[240] Just a few days later on March 10, 2020, the Governor of Massachusetts "declared a state of emergency based on the coronavirus outbreak."[241] Due to their asthma, Peeples' was advised by doctors to telework to avoid exposure in accordance with CDC guidelines.[242] Peeples successfully performed

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[236] *Id.* at 1158 (emphasis added) (quoting *Silver*, 470 F. Supp. 3d at 622).

[237] *Id.*

[238] *See* Peeples v. Clinical Support Options, Inc., 487 F. Supp. 3d 56, 63 (D. Mass. 2020) (citing *Silver*, 470 F. Supp. 3d at 621–22).

[239] *Id.* at 59. The court's opinion references the individual plaintiff using "they," "them," and "their" pronouns.

[240] *Id.* at 60.

[241] *Id.*

[242] *Id.*

their essential duties while teleworking for almost two months before CSO indicated that all managers were expected to return to the office.[243] Peeples was initially allowed to continue to work from home to accommodate their doctor's advisement.[244] However, approximately one month later on June 19, 2020, CSO denied Peeples' telework request because CSO was "not approving work from home for managers since [it] need managers in the building and supporting operations."[245]

After CSO denied additional subsequent telework requests, Peeples returned to the office on July 6, 2020 but requested numerous protective items due to the heightened COVID-19 risks associated with asthma.[246] However, CSO only provided Peeples with an air purifier KN95 face masks for protection.[247] Peeples submitted another reasonable accommodation request after returning to the workplace and included a letter from their allergist asking Peeples be allowed to telework.[248] After CSO denied this request, Peeples filed an ADA disability discrimination claim against CSO for its failure to provide a reasonable accommodation for Peeples' increased vulnerability to COVID-19.[249]

In determining whether Peeples' asthma qualified as a disability, the court recognized that asthma does not *always* impair major life activities.[250] However, the court relied on *Silver*'s "totality of the circumstances" analysis to declare that "the standard for determining whether an individual has an impairment that substantially limits a major life activity, thus rising to the level of a disability, during this pandemic" is to consider the plaintiff's condition and elevated risk for serious illness from COVID-19.[251] Following this standard, the court found that the plaintiff's asthma was substantially limiting as it limited both their ability to breathe and put them at a higher risk for COVID-19 complications and death.[252] The court found that Peeples was disabled within the meaning of the ADA, had demonstrated telework to be

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[243] *Id.*

[244] *Peeples*, 487 F. Supp. 3d at 60.

[245] *Id.*

[246] *Id.* Peeples specifically requested items including an air purifier, "personal protective equipment ("PPE"), masks, hand sanitizer, and wipes[.]" *Id.*

[247] *Id.*

[248] *Id.*

[249] *Peeples*, 487 F. Supp. 3d at 60–61.

[250] *See id.* at 63 (citing Burke v. Niagara Mohawk Power Corp., 142 F. App'x 527, 529 (2d Cir. 2005)).

[251] *Id.*

[252] *Id.*

a reasonable accommodation, and that CSO failed to engage in an interactive process to determine a necessary accommodation.[253] Thus, the court issued a preliminary injunction against CSO to grant Peeples a reasonable accommodation of teleworking.[254]

The "totality of the circumstances" analysis first coined in *Silver* and adopted in *People First* and *Peeples* is significant for two reasons. First, it named the standard courts implicitly use in ADA cases to determine whether an individual is disabled. For example, court's analysis in *Lewis* demonstrates that the "totality of the circumstances" analysis is not necessarily a new theory as the court considered the nature and severity of the pandemic to determine that the plaintiff's possible H1N1 diagnosis did not constitute a disability.[255] The differences between the pandemics at issue in *Lewis* and *Silver* also demonstrate that the extent of the ADA's protections is highly dependent upon the severity and transmissibility of the pandemic disease.[256] Second, and most importantly, these early COVID-19 ADA cases demonstrate that the "totality of the circumstances" analysis has the potential to expand the ADA protections during a pandemic to those whose underlying conditions may not normally be debilitating.[257] Thus, CDC recommendations and guidelines—although not binding—are likely to heavily influence employers' obligations under the ADA during a pandemic.

V. CONCLUSION

Epidemiologists and public health experts have warned us that the frequency of pandemics is expected to increase and intensify over time.[258] This increase and intensification is largely based on factors such as "increased global travel and integration, urbanization, changes in land use, and greater exploitation of the natural environment."[259] The severity of the COVID-19 pandemic is evidence of this threat. While the nature and severity of future pandemics is uncertain, using

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[253] *Id.* at 63–64.

[254] *Id*. at 66.

[255] *See supra* notes 144–168 and accompanying text.

[256] *See supra* notes 108–120 and accompanying text; *compare* Lewis v. Fla. Default L. Grp., P.L., No. 8:10-cv-1182-T-27EAJ, 2011 WL 4527456 (M.D. Fla. Sept. 16, 2011) (holding that the H1N1 virus was not a disability under the ADA), *with* Silver v. City of Alexandria, 470 F. Supp. 3d 616 (W.D. La. 2020) (holding that the plaintiff was disabled within the meaning of the ADA due to the existence of the COVID-19 pandemic and his underlying conditions).

[257] *See* People First of Ala. v. Merrill, 491 F. Supp. 3d 1076, 1157–58 (N.D. Ala. 2020); Peeples v. Clinical Support Options, Inc., 487 F. Supp. 3d 56, 59 (D. Mass. 2020).

[258] Madhav et al., *supra* note 73, at 315.

[259] *Id.* (citation omitted).

the PSAF we can anticipate the impact of future pandemics based on where they fall on the severity scale—from "moderate transmissibility and severity" like the 2009 H1N1 pandemic flu to the "very high transmissibility and clinical severity" of the COVID-19 pandemic virus for specific groups.[260]

Understanding the differences between the H1N1 flu and the COVID-19 virus provides context for how courts will factor a pandemic's clinical severity and transmissibility in ADA disability determinations using the "totality of the circumstances" analysis. As evidenced by H1N1 ADA cases like *Lewis* and COVID-19 cases like *Silver* and *Peeples*, CDC guidelines and recommendations will play a heavily influential role in defining the parameters of ADA protections during a pandemic even though these guidelines themselves are not legally binding on employers.[261]

While every case will require an individualized assessment, the "totality of the circumstances" analysis has potential to expand the group of individuals protected by the ADA within the context of a pandemic. Based on the differences between the H1N1 and COVID-19 pandemics, it is likely that more individuals will be considered disabled under the ADA during future pandemics with higher transmissibility and clinical severity based on their underlying conditions. However, pandemics of more moderate transmissibility and clinical severity may not necessarily expand the ADA's protections depending on the potential complications from contracting the disease and which groups are most at-risk.

There is one important takeaway from the ADA cases that have emerged during the H1N1 and COVID-19 pandemics: diagnosis with a pandemic disease or fear of exposure to a pandemic disease alone do not constitute a disability.[262] Rather, using the "totality of the circumstances" analysis, courts will consider factors such as the clinical severity and transmissibly of the pandemic, the individual substantially limiting effects of the disease, and potential risks associated with exposure to the disease (especially for those with underlying conditions).

Without reasonable accommodations, those most at-risk for pandemic-related complications are forced to make the impossible

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[260] *See supra* notes 108–120 and accompanying text.

[261] *Cf.* Lewis v. Fla. Default L. Grp., P.L., No. 8:10-cv-1182-T-27EAJ, 2011 WL 4527456, at *6 (M.D. Fla. Sept. 16, 2011); Silver v. City of Alexandria, 470 F. Supp. 3d 616, 622 (W.D. La. 2020) ("The determination of a qualifying disability in this case cannot be looked at in a vacuum."); Peeples v. Clinical Support Options, Inc., 487 F. Supp. 3d 56, 60, 63 (D. Mass. 2020).

[262] *See* discussion *supra* Section IV.A.

decision between their health and financial livelihood.[263] Thus, this "totality of the circumstances" analysis is critical to the ADA's effectiveness of offering protections for disabled persons in the workplace during a pandemic. Furthermore, employers should pay special attention to CDC guidelines and recommendations not only to avoid potential legal liability, but also to ensure the safety of their employees' health as new pandemic risks emerge.

[263] *See Persons With a Disability: Labor Force Characteristics Summary*, U.S. BUREAU OF LAB. STATS. (Feb. 24, 2021), https://www.bls.gov/news.release/pdf/disabl.pdf [https://perma.cc/FZ3G-2MTE]; Andy Newman, *'I Really Loved My Job': Why the Pandemic Has Hit These Workers Harder*, N.Y. TIMES (Mar. 5, 2021), https://www.nytimes.com/2021/03/05/nyregion/workers-disabilities-unemployment-covid.html [https://perma.cc/Z9XP-HBAK] ("People with disabilities are disproportionately employed in industries that have suffered in the pandemic."). *See generally* GENE FALK ET AL., CONG. RSCH. SERV., UNEMPLOYMENT RATES DURING THE COVID-19 PANDEMIC https://fas.org/sgp/crs/misc/R46554.pdf [https://perma.cc/BZ5U-V42E] (last updated Aug. 20, 2021) (discussing the increased unemployment trends resulting from the COVID-19 pandemic).