

# How COVID-19 Disability Claims Have Defied Expectations

As COVID-19 began to spread across the country, insurers took notice and began making plans for a rapid increase in

disability claims, particularly short-term disability claims. At the same time, they began examining how the ongoing pandemic, economic downturn, and rising unemployment might influence the landscape of long-term disability claims. Meanwhile, healthcare workers and scientists learned more about the virus, and practical experience showed us how people were being affected. Insurers braced for impact. But the claims everyone was waiting for did not materialize, at least not in the way that was expected.

Short-term disability claims have, so far, been few and far between. One insurer has reported that short-term disability claims relating to COVID-19 were less than 5 percent of the company's disability claims for 2020. Another insurer has indicated that not only were disability claims based on COVID-19 far fewer than they had expected, but all other disability claims for 2020 were, as well. Insurers had internally prepared for a rush of claims with novel factual scenarios requiring complex analysis. Of course, some claims did appear, but the number of them was vastly fewer than anyone was expecting. As discussed below, there are several reasons why this may be the case. Additionally, insurers learned

that while some of the arguments and facts may be new, the analysis remains the same and, as always, depends on the exact terms and conditions providing coverage under the specific applicable plan and policy documents.

There has not yet been time for long-term disability claims to wind their way through the process, but as scientific knowledge of COVID-19 grows, and we become more aware of its lingering effects, we can make some predictions regarding where we expect the issues to lie. Medical advances and new testing may make it easier for insurers to make their determinations, but it is far from clear what the coming year will bring with respect to disability claims.

## Short-Term Disability Claims

In order to determine why the number of short-term disability claims was fewer than the industry was predicting, several factors must be examined. The physical and mental effects of COVID-19, the exact terms of most short-term disability plans, and other sources of income for people experiencing loss of income based on COVID-19 have all affected claims.

## Effects of COVID-19

What we have learned about COVID-19 over the past year is that the incubation period is usually five to six days from the date of exposure, and the CDC has recommended self-quarantine for seven to fourteen days post exposure. Infected persons can experience no symptoms at all, while others have severe reactions that may result in death. People with mild cases usually

recover within one to two weeks. For more severe cases (not resulting in death), recovery can take six weeks or more and may cause lasting damage to the heart, kidneys, lungs, and brain. Additionally, factors such as age and underlying conditions can leave certain individuals susceptible to more serious symptoms, including a higher risk of death. The one thing that is certain is that COVID-19 affects everyone differently. *See, generally*, Science and Research, Centers for Disease Control and Prevention, <https://www.cdc.gov>.

And, of course, this virus is highly contagious. As new strains of the virus have begun to spread, just how contagious continues to be debated and studied. The need to stop the spread of the virus has led to mandatory quarantine rules being put into place by governments at every level.

## Common Short-Term Disability Plan Provisions

Short-term disability benefits are meant to provide income replacement to employees who are unable to work. Every policy and plan is different, with different definitions of what constitutes a disability. Typically, after an elimination period, short-term disability plans and policies provide benefits if the covered individual has an injury or illness that renders him or her unable to do his or her job. The elimination period can be anywhere between zero and ninety days, with seven, fourteen, or thirty days being fairly common. Benefits are generally paid for illness or injury keeping the employee from work for between three and six months, and benefits are usually paid



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at between 60 to 100 percent of an employee's salary.

Traditionally, analysis of a claim centers around the exact definition of "disability" as it is defined in the relevant policy and whether this disability precludes the claimant from performing his or her actual job. While long-term disability policies can vary with respect to whether the disability must prevent the employee from doing the substantial duties of *any* occupation, or just his or her *own* occupation, short-term disability benefits are always based on whether the employee can perform the duties of his or her own job.

As COVID-19 began to spread, insurers naturally expected a rise in short-term disability claims as employees contracted the virus and were unable to work. Insurers also anticipated that mandatory quarantine rules would prompt additional claims from employees who were unable to work because the quarantine rules kept them at home. But employers stepped in and remote working became commonplace. Many employees who previously would have to come into an office or other place of business physically to work could now continue to perform most of the duties of their jobs from home—under quarantine or not. Additionally, the government stepped in, at national and local levels, to assist families struggling from the effects of COVID-19.

### State and Federal Mandates and Other Types of Coverage

Not everyone is covered under a disability policy, and once the magnitude of the pandemic became clear, both federal and state governments began to promulgate new regulations intended to assist families with any potential loss of income. These laws have created new paths for employees to make claims and made it easier get benefits. The federal government initiated the Families First Coronavirus Response Act, which provides for paid sick leave and expanded family and medical leave relating to COVID-19. *Families First Coronavirus Response Act, Public Law 116-127 (FFCRA)*. The act requires certain employers with fewer than 500 employees to provide employees with sick leave or expanded family and medical leave for reasons related to COVID-19. In brief, all employees of covered employers are

eligible for two weeks of paid sick time for specified reasons related to COVID-19 such as illness, quarantine, or care of a family member who is ill or quarantined. Employees employed for at least thirty days are eligible for up to an additional ten weeks of paid family leave to care for a child under certain circumstances related to COVID-19. *Id.*

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Additionally, some states have implemented similar protections for their own state's residents. For instance, the state of New York enacted a program expanding Paid Family Leave & Disability Benefits. Benefits vary, depending on the size of the employer, but the program provides for paid and unpaid sick leave in addition to temporary disability benefits. And like FFCRA, benefits are available for employees who test positive for COVID-19 and must undergo a quarantine in accordance with the state's mandatory quarantine guidelines. These benefits also cover employees who must stay home to care for a child or other family member who is sick or under quarantine.

Benefits such as these seem to have worked to provide many families with the income protection needed to weather peri-

ods of illness, quarantine, and family care. Additionally, some states have also implemented laws to make filing for other types of benefits easier. For instance, Illinois' Public Act 0633 creates a rebuttable presumption that the exposure to and contraction of COVID-19 by a first responder or front-line worker arises out of and is caused by the employee's employment. This allows employees who fall within these categories to obtain workers' compensation benefits more easily if they contract COVID-19.

All of these programs have worked together to provide many employees with exactly the safety net they needed: short-term assistance for any loss of income, while they battled with the effects of the pandemic. As these employees' needs were being met by other sources, short-term disability claims did not materialize. The general timing of the effects of the virus, and of mandatory quarantines, also likely played a role in keeping short-term disability claims down. The usual quarantine period is fourteen days, and while symptoms certainly vary, people with COVID-19 have generally recovered within seven to fourteen days. Many short-disability plans have elimination periods of this same length. As such, at the point that many plans might begin to provide coverage, many people affected by the virus were able to return to work.

### Sample Claims Scenarios

But that doesn't mean that there have been no claims at all. Short-term disability claims involving COVID-19 have been varied, and insurers are doing their best to resolve them. Some insurers have chosen to waive certain requirements, such as the elimination period, to extend coverage during the pandemic, while others have not. Plans and policies are different, and insurers must take many factors into account when waiving or expanding plan provisions. Examples of some short-term disability claims and decisions are described below.

*A covered individual contracted COVID-19 and is unable to perform his or her job because the symptoms are severe and incapacitating.*

This is one of the most straightforward scenarios of a claim involving COVID-19.

These types of claims have mostly been handled in the same manner that short-term disability claims have always been handled, with a focus on the elimination period and whether the claimant is unable to perform his or her job. One of the initial difficulties for what should have been a fairly uncomplicated claims process was the lack of access to testing or inability to receive face-to-face examinations or treatment from a physician. While this issue has mostly resolved itself, in the early stage of COVID-19 claims, most insurers allowed claimants to support their claims with proof of telehealth visits combined with statements attesting to known COVID-19 symptoms.

For example, an insurer received a claim from a 35-year-old woman, claiming that she was unable to work. She lived in a remote area in a state with few testing sites, and her doctor was not physically treating patients unless they were critical enough to be hospitalized. The claimant was able to present documents showing a telehealth visit with a doctor who diagnosed her with COVID-19 based on her reported symptoms. The insurer paid the claim. Tests are much more readily available at this point, and access to healthcare providers is also somewhat easier. Nonetheless, telehealth remains an important component in the evaluation of the claims that insurers see.

*A covered individual has been exposed to COVID-19, is required to quarantine for some period of time, and is unable to perform his or her job remotely during that period.*

Although not the norm, some plans do contain quarantine riders. These riders frequently cover employees if they are placed under a doctor-ordered quarantine and are unable to perform the major duties of their employment. Generally, the claimant must be suspected of carrying or having been exposed to an infectious and contagious condition, such as COVID-19. Many insurers have also extended benefits to claimants who were unable to work because they were told to quarantine by a healthcare provider—even where the policy did not contain a quarantine rider. Generally, however, this is when the quarantine was ordered by a medical provider for medical reasons.

Most plans do not provide benefits for the type of state-mandated quarantines that require quarantine after travel. Whether an employee can obtain benefits through other sources, such as New York's extended family leave and disability benefit program, depends on the exact provisions of the program. For instance, in New York,

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such benefits are only available for periods of quarantine if the travel was work related.

*A covered individual has an underlying condition that increases his or her risk of exposure, severe illness, or death, and his or her employment puts him or her at risk of contracting the virus.*

While the federal Families First program allows for eligibility if a healthcare provider directed or advised the claimant to stay home or quarantine because he or she is “particularly vulnerable to COVID-19,” most short-term disability plans do not provide this type of coverage. Having an underlying medical condition or working at a job where you have a higher risk of coming into contact with the virus does not make you eligible for disability under the terms of most plans.

For instance, one insurer received a short-term disability claim from a sixty-year-old man working as an ATM repair specialist. This man had been diagnosed with leukemia and was receiving treatment before the pandemic broke out, but was still able to perform his job. When COVID-19 became widespread, the claimant's treat-

ing physician indicated that the claimant was at very high risk due his leukemia diagnosis, and his ongoing treatment for same, and opined that the claimant was unable to do his job while the virus was at large as it could lead to his death.

In this example, while the insurer was originally concerned about the underlying leukemia diagnosis and treatment, the analysis of the claim relied, as it always has, on the terms of the plan and the definition of disability. In that case, it was determined that the claimant did not have COVID-19 and was not currently disabled from performing his job. The plan did not cover speculative disability, where a claimant might contract COVID-19 or might become disabled. Rather, a claimant must be unable to do his job at the time of the claim. It should be noted that for this example, after the insurer denied the claim, the claimant filed a complaint with the state department of insurance and the department confirmed the insurer's determination and denial of benefits.

### Long-Term Disability Claims

While long-term disability plans vary, most policies provide for an elimination period of between three months to a year. As such, it is still too early to determine the effects of COVID-19 on long-term disability claims. However, even though the expected short-term disability claims did not materialize, insurers are gearing up for long-term disability claims and attempting to anticipate the issues that may present themselves. According to the *New York Times*, there were nearly 30 million cases of COVID-19 in the United States at the time of writing this article. While many of those cases were mild, or even asymptomatic, somewhere between one in six or one in eight cases (depending on your source) has been classified as severe. Healthcare providers are still grappling with the long-term effects from severe cases COVID-19, but some information is already known.

Investigators from University of Washington reported that around 30 percent of 177 patients testing positive in one study still reported symptoms up to ten months later. Jennifer K. Logue, BS; Nicholas M. Franko, BS; Denise J. McCulloch, MD, MPH, *Sequelae in Adults at 6 Months After*

*COVID-19 Infection*, February 19, 2021. There are also reports from studies in Wuhan that certain patients who tested positive still reported at least one ongoing symptom six months later. Chaolin Huang, MD, Lixue Huand, MD, et al, *6-Month Consequences of COVID-19 in Patients Discharged From Hospital: A Cohort Study*. 397 *The Lancet* 10270, January 16, 2021, at 220–32. These long-term symptoms are so concerning that Mt. Sinai Health System in New York City has established a center to study them. They have estimated that more than 70,000 New Yorkers are suffering from Post-Acute COVID Syndrome, also known as “long-haul symptoms.” These include symptoms such as post-viral fatigue, inflammation in the lungs, tachycardia, migraines, dizziness, blurred vision, tremors, memory problems, heavy limbs, organ damage, circulatory impairment, and “brain fog.” While some of these symptoms can be diagnosed with testing, many are based on subjective complaints from patients that are difficult to diagnose or verify. See generally Center for Post-COVID Care, <https://www.mountsinai.org>.

According to Mt. Sinai, the average long-hauler is someone between 20 and 40-years-old who was relatively healthy before. For the most part, doctors are still struggling to determine what’s going on with their patients. Some doctors have compared the long-haul symptoms to the symptoms experienced by 9/11 survivors, except that the pool of patients experiencing long-haul symptoms from COVID-19 is much, much larger. The symptoms have also been compared to Myalgic Encephalomyelitis—or Chronic Fatigue Syndrome. Some experts claim that 10–15 percent of COVID patients will have these long-term symptoms. *Id.*

For those claimants who have measurable symptoms such as lung or other organ damage that can be observed through testing, claims should be relatively straightforward. Insurers have long struggled with claims for long-term disability benefits based on illnesses like Chronic Fatigue Syndrome as the complaints are almost all subjective in nature, and diagnosis through tests or other objective means has historically been unavailable.

However, continued medical advancements may make the job easier in the future. Researchers recently devised a blood-based test that seems to identify people suffering from Chronic Fatigue Syndrome accurately. While studies are ongoing, this could prove helpful to claimants and insurers alike, providing an objective basis to separate the sufferers from the malingerers. Perhaps tests will be devised that can accurately identify people with Post-Acute COVID Syndrome. In the meantime, however, insurers will be left with the task of determining whether claimants are eligible for benefits based on their subjective complaints.

While there is not yet any caselaw relating to COVID-19 and long-term disability claims, that does not mean cases are not winding their way through the process. A recent news article highlighted a claimant who fell ill in March of 2020. She was assumed to have had COVID-19, but she quickly recovered. She then experienced a relapse in April and another in May. She applied for and received short-term disability benefits in November and December of 2020, but requests for an extension of short-term disability beyond those months was denied by the insurer. Thereafter, she was diagnosed with Chronic Fatigue Syndrome. One ongoing theory is that Chronic Fatigue Syndrome can be triggered by viral infections. David Tuller, *For Covid ‘Long Haulers,’ Battling for Disability Benefits Adds Aggravation to Exhaustion*, California Healthline (March 9, 2021), <https://californiahealthline.org>.

The insurer based its denial for extended short-term disability benefits on the fact that the claimant’s complaints were all subjective—with no objective findings to correlate with any ongoing functional limitations. The claimant is appealing the determination for short-term disability benefits, but also is now planning to apply for long-term disability benefits based on her diagnosis of Chronic Fatigue Syndrome. We can expect to see more cases like this making their way through the claims and appeals process before too long.

Other issues may arise for long-term disability claims concerning Social Security Disability offsets. Social Security field offices have been closed since March of

2020. And while those federal employees did begin to work from home, they are still working with a hefty backlog. Most long-term disability plans require claimants to apply for Social Security benefits, as well; these benefits are then offset from what the insurer must pay. It has yet to be seen whether the Social Security Administration’s backlog and limitations due to field office closures will affect applicants’ abilities to comply with this portion of their plan requirements.

Additionally, questions regarding whether someone is able to work will now be affected by many employers allowing employees to continue to work from home. Symptoms or conditions that may have rendered an employee completely unable to work in the past, based on the mere fact that the employee was required to travel to and from work every day, will now be reviewed differently. Employees working from home have access to accommodations (being able to take frequent breaks, to lie down and rest, etc.) that were likely not available when they commuted to an office every day.

## Conclusion

Since the long-haul symptoms of COVID-19 are still being researched and studied, there is no concrete information about long-term recovery rates. Long-haulers will likely fall into two groups of patients. The first group includes those who have sustained some permanent damage to one or more of their organs, such as their lungs, heart, kidneys, or brain, that may affect their ability to function and lead to lasting illnesses. The other group is comprised of patients without detectable damage to an organ, but who continue to experience ongoing symptoms such as fatigue, brain fog, dizziness, or migraines, some of which can be debilitating. Plaintiffs’ disability attorneys are already gearing up for claims and appeals, instructing claimants to keep records of their symptoms and obtain affidavits from friends and family concerning their symptoms while insurers debate whether to increase staff, training, and reserves. It will be interesting to see what the next year brings. 